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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–10–0079; NOP–09–02FR]

RIN 0581–AD06

National Organic Program (NOP); Amendments to the National List of Allowed and Prohibited Substances (Crops and Processing)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List) to enact six recommendations submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) on May 22, 2008, November 19, 2008, and May 6, 2009. This final rule adds one substance, microcrystalline cheesewax, along with any restrictive annotations, for use in organic mushroom production; and adds three substances, acidified sodium chlorite, dried orange pulp, and Pacific kombu seaweed, with any restrictive annotations, for use in organic handling. This final rule also amends the annotation for one substance used in organic handling, unbleached lecithin, and removes bleached lecithin from the National List.

DATES: *Effective Date:* This rule becomes effective March 15, 2012.

FOR FURTHER INFORMATION CONTACT: Melissa Bailey, Ph.D., Director, Standards Division, National Organic Program, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, the Secretary established within the NOP [7 CFR part 205] the National List regulations §§ 205.600 through 205.607. The National List identifies synthetic substances that may be used and the nonsynthetic (natural) substances that may not be used in organic production. The National List also identifies nonagricultural synthetic, nonsynthetic nonagricultural and nonorganic agricultural substances that may be used in organic handling. The Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501 *et seq.*), and NOP regulations, in § 205.105, specifically prohibit the use of any synthetic substance in organic production and handling unless the synthetic substance is on the National List. Section 205.105 also requires that any nonorganic agricultural and any nonsynthetic, nonagricultural substance used in organic handling must also be on the National List.

Under the authority of the OFPA, the National List can be amended by the Secretary based on proposed amendments developed by the NOSB. Since established, the NOP has published multiple amendments to the National List: October 31, 2003 (68 FR 61987); November 3, 2003 (68 FR 62215); October 21, 2005 (70 FR 61217); June 7, 2006 (71 FR 32803); September 11, 2006 (71 FR 53299); June 27, 2007 (72 FR 35137); October 16, 2007 (72 FR 58469); December 10, 2007 (72 FR 69569); December 12, 2007 (72 FR 70479); September 18, 2008 (73 FR 54057); October 9, 2008 (73 FR 59479); July 6, 2010 (75 FR 38693); August 24, 2010 (75 FR 51919); December 13, 2010 (75 FR 77521) and March 14, 2011 (76 FR 13501). Additionally, a proposed amendment to the National List was published on May 5, 2011 (76 FR 25612).

This final rule amends the National list to enact six recommendations submitted to the Secretary by the NOSB on May 22, 2008, November 19, 2008, and May 6, 2009.

II. Overview of Amendments

The following provides an overview of the amendments made to designated sections of the National List regulations:

Section 205.601 Synthetic Substances Allowed for Use in Organic Crop Production

This final rule amends § 205.601 of the National List regulations by adding new paragraph (o) for the addition of one substance as follows: As production aids. Microcrystalline cheesewax (CAS #s 64742– 42–3, 8009–03–08, and 8002–74–2)—for use in log grown mushroom production. Must be made without either ethylene-propylene co-polymer or synthetic colors.

The proposed rule to add microcrystalline cheesewax included an annotation specifying that the substance be ''for use in log grown mushroom culture.'' The NOP determined that the substance's use annotation should be modified ''for use in log grown mushroom *production''* (emphasis added) in this final rule. This language change is consistent with terminology that will be utilized in a forthcoming proposed rule on organic mushroom standards.

Section 205.605 Nonagricultural (Nonorganic) Substances Allowed as Ingredients in or on Processed Products Labeled as ''Organic'' or ''Made With Organic (Specified Ingredients or Food Groups(s))''

This final rule amends § 205.605(b) of the National List regulations by removing Lecithin—bleached, and adding acidified sodium chlorite in alphabetical order as follows: Acidified sodium chlorite—Secondary direct antimicrobial food treatment and indirect food contact surface sanitizing. Acidified with citric acid only.

Section 205.606 Nonorganically Produced Agricultural Products Allowed as Ingredients in or on Processed Products Labeled as ''Organic''

This final rule amends § 205.606 of the National List regulations by revising paragraph (p) to read as follows: (p) Lecithin—de-oiled. Further, this final rule redesignates paragraphs (r) through (t) and paragraphs (u) through (y) as paragraphs (s) through (u) and (w) through (aa) respectively; and adds new paragraphs (r) and (v) for the addition of two substances as follows: (r) Orange pulp, dried, and (v) Seaweed, Pacific kombu.

III. Related Documents

Three notices were published regarding the meetings of the NOSB and its deliberations on recommendations and substances petitioned for amending the National List. Substances and recommendations included in this proposed rule were announced for NOSB deliberation in the following **Federal Register** notices: (1) 74 FR 11904, March 20, 2009 (bleached lecithin, acidified sodium chlorite, unbleached fluid lecithin); (2) 73 FR 54781, September 23, 2008 (dried orange pulp, acidified sodium chlorite); and (3) 73 FR 18491, April 4, 2008 (microcrystalline cheesewax, acidified sodium chlorite, Pacific kombu seaweed). The proposal to allow the use of the four substances in this final rule, along with the deletion of one substance and the revised annotation of one substance, was published as a proposed rule on November 8, 2010 (75 FR 68505).

IV. Statutory and Regulatory Authority

The OFPA, as amended (7 U.S.C. 6501–6522), authorizes the Secretary to make amendments to the National List based on proposed amendments developed by the NOSB. Sections 6518(k)(2) and 6518(n) of the OFPA authorize the NOSB to develop proposed amendments to the National List for submission to the Secretary and establish a petition process by which persons may petition the NOSB for the purpose of having substances evaluated for inclusion or deletion from the National List. The National List petition process is implemented under § 205.607 of the NOP regulations. The current petition process (72 FR 2167, January 18, 2007) can be accessed through the NOP Web site at *http://www.ams.usda.gov/nop.*

A. Executive Order 12866

This action has been determined not significant for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB).

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This final rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in § 2115(b) of the OFPA (7 U.S.C. 6514(b)). States are also preempted under §§ 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to § 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to § 2120(f) of the OFPA (7 U.S.C. 6519(f)), this final rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601–624), the Poultry Products Inspection Act (21 U.S.C. 451–471), or the Egg Products Inspection Act (21 U.S.C. 1031–1056), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). AMS has also considered the economic impact of this action on small entities. The impact on entities affected by this final rule would not be significant. The effect of this final rule would be to allow the use of additional substances and clarify the use of one substance in agricultural production and handling. This action will modify the regulations published in the final rule and will provide small entities with more tools to use in day-to-day farming and handling operations. AMS concludes that the economic impact of this addition of allowed substances, if any, will be minimal and beneficial to small agricultural service firms. Accordingly, USDA certifies that this rule will not have a significant impact on a substantial number of small entities.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

According to USDA Economic Research Service (ERS) data based upon information from USDA-accredited certifying agents, the number of certified U.S. organic crop and livestock operations totaled nearly 13,000 and certified organic acreage exceeded 4.8 million acres in 2008.[1] ERS, based upon the list of certified operations maintained by the National Organic Program, estimated the number of certified handling operations was 3,225 in 2007.[2] The AMS believes that most of

[1] U.S. Department of Agriculture, Economic Research Service. 2009. *Data Sets: U.S. Certified Organic Farmland Acreage, Livestock Numbers and Farm Operations, 1992–2008. http://www.ers.usda.gov/Data/Organic/.*

[2] U.S. Department of Agriculture, Economic Research Service, 2009. *Data Sets: Procurement and Contracting by Organic Handlers: Documentation.*

these entities would be considered to be small entities under the criteria established by the SBA.

The U.S. sales of organic food and beverages grew from $3.6 billion in 1997 to nearly $21.1 billion in 2008.[3] Between 1990 and 2008, organic food sales demonstrated an historic growth rate between 15 to 24 percent each year. In 2010, organic food sales grew 7.7%.[4]

In addition, USDA has 93 accredited certifying agents (ACA) who provide certification services to producers and handlers under the NOP. A complete list of names and addresses of ACAs may be found on the AMS NOP Web site, at *http://www.ams.usda.gov/nop.* The AMS believes that most of these accredited certifying agents would be considered small entities under the criteria established by the SBA.

D. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this final rule. Accordingly, OMB clearance is not required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, Chapter 35.

E. Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

F. Comments Received on Proposed Rule NOP–09–02

AMS received 11 comments on the proposed rule AMS–NOP–10–0079; NOP–09–02PR. Comments were received from specialty food ingredient processors and distributors, specialty food products manufacturers, an industrial sanitation supply firm, an organic consultant, a coalition of foreign governments and a private citizen. Comments were submitted in support of the proposed additions to the National List for all four of the proposed new use exemptions and the deletion of one substance. Comments in favor of the addition of acidified sodium chlorite to § 205.605(b) stated that it will increase the intervention options available for maintaining high sanitation standards in organic food processing and thereby further improve food safety for consumers of organic processed foods. While one comment expressed concern about the proposed exemption for the secondary direct antimicrobial food treatment use of acidified sodium chlorite, the commenter did not take a position for or against the specific proposal. A comment endorsing the addition of dried orange pulp to § 205.606 stated that its use is consistent with organic principles, since an insufficient volume of organic oranges are grown and processed to produce organic orange pulp, which is a byproduct of extraction orange juice processing.

Many comments addressed the proposed change in the lecithin annotation from unbleached to de-oiled on § 205.606. Nonorganic forms of the substances listed under § 205.606 are allowed as ingredients in or on processed products labeled as organic only when the nonorganic substance is not commercially available in organic form and only in accordance with any specified restrictions. Most comments submitted in support of the lecithin annotation change stated that the listing of de-oiled lecithin on § 205.606 would prevent disruption in the availability or quality of a broad range of organic food products such as ice cream, pasta, bakery goods, cereals, sauces, soups and frozen desserts. They indicated that de-oiled is the appropriate annotation because this form of lecithin has a unique function and blander flavor in comparison to fluid or dry lecithin. The comments mentioned de-oiled lecithin's superiority in maintaining stability of water and oil emulsions. Furthermore, the comments informed that de-oiled lecithin is not available as organic.

Comments in support of removing bleached lecithin from § 205.605(b) indicated that this action will encourage the increased production and use of organic ingredients needed for organic food processing. They also argued that unbleached lecithin is now commercially available in organic forms, so the exemption for these substances is no longer crucial. Commenters stated that the use of nonorganic de-oiled lecithin on § 205.606, instead of the nonorganic unbleached form previously allowed, would be subject to the determination of commercial availability of any organic form—once developed—in the processor's organic system plan and other specific restrictions. Commenters in favor of the amendment expressed frustration with discrepant use of organic unbleached lecithin and less expensive conventional unbleached lecithin in comparably priced multiple brands of the same processed organic products on retail shelves. These commenters conveyed expectations that this rule change will result in the replacement of nonorganic bleached lecithin with the organic form and thus encourage increased use and availability of organic ingredients.

A few comments opposing the change in the unbleached lecithin annotation at § 205.606 explained that the only current source of organic lecithin is soy, which is a food allergen. They cited a lack of availability of organic forms of lecithin from sunflower or canola and predicted that consumers with a soy allergy would not be able to eat organic products containing soy lecithin. These commenters noted that soy is identified in the U.S. Food Allergen Labeling and Consumer Protection Act of 2004 (Pub. L. 108–282, Title II) (21 U.S.C. 301) as one of 8 major food groups which account for 90 percent of life-threatening food allergies. This legislation established mandatory disclosure requirements on labels for processed food containing any amounts of the eight named foods (milk, eggs, fish, shellfish, tree nuts, peanuts, wheat, and soybeans) listed in the 2004 Act. Food processors have become more aware of soy's allergenic potential and the federal labeling requirements when soy-based ingredients are used since passage of the 2004 Act. The opposing comments expressed concern that the annotation change would result in higher levels of soy lecithin being used in processed organic foods because it is more commonly available in organic form, but did not provide specific evidence to support this statement. Nonorganic lecithin from sunflower, rapeseed and canola is widely available commercially, and NOP believes that there is potential that any increased demand for non-soy lecithin will stimulate increased production of organic forms of bleached and unbleached lecithin from these alternative sources.

A comment criticized the NOSB for omitting food allergies from the discussion in considering the lecithin petition. The NOSB did address this issue several times during its deliberation, as captured in the May 2009 NOSB meeting transcripts. The Board concluded that its recommended change to unbleached lecithin would still avail manufacturers with the option to use nonorganic, non-soy forms of de-oiled lecithin. Commenters conveyed a preference to have non-allergenic, nonorganic forms of lecithin available under § 205.606. The change in

http://www.ers.usda.gov/Data/OrganicHandlers/Documentation.htm.

[3] Dimitri, C., and L. Oberholtzer. 2009. Marketing U.S. Organic Foods: Recent Trends from Farms to Consumers, Economic Information Information bulletin No. 58, U.S. Department of Agriculture, Economic Research Service, *http://www.ers.suda.gov/PublicationsE1B58.*

[4] Organic Trade Association's *2011 Organic Industry Survey, http://www.ota.com.*

annotation does not specify the plant source of lecithin and, therefore, nonorganic de-oiled lecithin from non-soy and nonorganic sources may be used when organic equivalents are not available. A substance is considered commercially available if it is available in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent in the course of reviewing the organic plan. In summary, this annotation change would not limit the use of lecithin to organic de-oiled soy lecithin. Non-soy sources that are non-GMO and nonorganic would remain acceptable under § 205.606, and accredited certifying agents would continue to require any nonorganic de-oiled lecithin to be sourced from non-GMO sources as long as de-oiled lecithin is not commercially available in organic form.

Changes Requested But Not Made

Commenters requested that the proposed action be amended for § 205.606 to allow the use of non-GMO, non-allergenic lecithin. We have not made that change because we believe this request is mostly accommodated by the proposed action. Nonorganic forms of de-oiled lecithin can be used when the organic version is not commercially available. The NOP regulations define commercially available as a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent in the course of reviewing the organic plan. Therefore, if a processor intends to make a soy-free product containing lecithin, in which de-oiled is the appropriate form, the processor may use nonorganic de-oiled lecithin from sunflower, canola or other sources if lecithin from the preferred sources is not available in organic form. If a product requires a form of lecithin other than de-oiled, such as fluid or powered, the lecithin must be sourced organically. The NOSB recommendation was finalized in May 2009. We believe that processors have had adequate notice to pursue the procurement of non-soy forms of organic lecithin if their products are intended to be soy free.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

For the reasons set forth in the preamble, 7 CFR part 205, subpart G is amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

■ 1. The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

■ 2. In § 205.601 add new paragraph (o) to read as follows:

§ 205.601 Synthetic substances allowed for use in organic crop production.

* * * * *

(o) As production aids. Microcrystalline cheesewax (CAS #'s 64742–42–3, 8009–03–08, and 8002–74–2)–for use in log grown mushroom production. Must be made without either ethylene-propylene co-polymer or synthetic colors.

* * * * *

■ 3. Section 205.605 is amended by:

■ A. Removing ''Lecithin-bleached'' from paragraph (b); and

■ B. Adding one new substance ''Acidified sodium chlorite'', in alphabetical order, to paragraph (b) to read as follows:

§ 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).''

* * * * *

(b) * * *

Acidified sodium chlorite—Secondary direct antimicrobial food treatment and indirect food contact surface sanitizing. Acidified with citric acid only.

* * * * *

■ 4. Section 205.606 is amended by:

■ A. Revising paragraph (p);

■ B. Redesignating paragraphs (r) through (t) and paragraphs (u) through (y) as paragraphs (s) through (u) and (w) through (aa) respectively; and

■ C. Adding new paragraphs (r) and (v).

The revisions read as follows:

§ 205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as ''organic.''

* * * * *

(p) Lecithin—de-oiled.

* * * * *

(r) Orange pulp, dried.

* * * * *

(v) Seaweed, Pacific kombu.

* * * * *

Dated: February 3, 2012.

Robert C. Keeney,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2012–2938 Filed 2–13–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0889; Directorate Identifier 2009–NE–35–AD; Amendment 39–16953; AD 2012–03–11]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all Turbomeca S.A. Arriel 2B and 2B1 turboshaft engines. That AD currently requires checking the transmissible torque between the low-pressure (LP) pump impeller and the high-pressure (HP) pump shaft on high-pressure/low-pressure (HP/LP) pump hydro-mechanical metering units (HMUs) that do not incorporate Modification TU 147. This new AD requires inspection and possible replacement of the HMU. This AD was prompted by three additional cases of uncoupling of the HP/LP pump HMU LP fuel pump impeller and the HP fuel pump shaft, since the existing AD was issued. We are issuing this AD to prevent an uncommanded in-flight shutdown, which can result in a forced autorotation landing or accident.

DATES: This AD is effective March 20, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 20, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of March 11, 2010 (75 FR 5689, February 4, 2010).

ADDRESSES: For service information identified in this AD, contact Turbomeca S.A., 40220 Tarnos, France; phone: 33–05–59–74–40–00, fax: 33–05–59–74–45–15. 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: Rose Len, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *rose.len@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2010–03–06, Amendment 39–16189 (75 FR 5689, February 4, 2010). That AD applies to the specified products. The NPRM published in the **Federal Register** on November 7, 2011 (76 FR 68661). That NPRM proposed to require inspection and possible replacement of the HMU.

Comments

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

Claim That the Shop Rate Is Too Low

One commenter, Advanced Helicopter Services, claimed that our shop rate in the proposed AD was too low.

We do not agree. We used the hourly labor rate determined by the Office of Management and Budget. We did not change the AD.

Clarification of Paragraph (e)(1)(ii)

Since we issued the NPRM (76 FR 68661, November 7, 2011), we determined that paragraph (e)(1)(ii) was unclear and made changes to clarify the population affected. We also reformatted the compliance instruction in this paragraph for clarity.

Conclusion

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

Costs of Compliance

Based on the service information, we estimate that this AD will affect about 540 engines installed on helicopters of U.S. registry. We also estimate that it will take about 2.5 work-hours per engine to comply with this AD. The average labor rate is $85 per work-hour. Replacement HMUs will cost about $12,000 per engine. Based on these figures, if all of the HMUs were to fail the check, we estimate the cost of the AD on U.S. operators to be $6,594,750.

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) 2010–03–06, Amendment 39–16189 (75 FR 5689, February 4, 2010), and adding the following new AD:

2012–03–11 Turbomeca S.A.: Amendment 39–16953; Docket No. FAA–2009–0889; Directorate Identifier 2009–NE–35–AD.

(a) Effective Date

This airworthiness directive (AD) is effective March 20, 2012.

(b) Affected ADs

This AD supersedes AD 2010–03–06, Amendment 39–16189 (75 FR 5689, February 4, 2010).

(c) Applicability

This AD applies to all Turbomeca S.A. Arriel 2B and 2B1 turboshaft engines.

(d) Unsafe Condition

This AD was prompted by three additional cases of uncoupling of the high-pressure/low-pressure (HP/LP) pump hydro-mechanical metering unit (HMU) low-pressure (LP) fuel pump impeller and the high-pressure (HP) fuel pump shaft, since AD 2010–03–06 (75 FR 5689, February 4, 2010) was issued. However, these failures were in HMUs that were modified to post-TU 147 configuration HMUs. The investigation indicates that these HMUs may also need to be replaced. We are issuing this AD to prevent an uncommanded in-flight shutdown, which can result in a forced autorotation landing or accident.

(e) Compliance

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

(1) Check the transmissible torque between the LP fuel pump impeller and the HP fuel pump shaft as follows:

(i) For HMUs that do not incorporate Modification TU 147, check the torque before accumulating 500 engine flight hours (EFH) since March 11, 2010 (the effective date of AD 2010–03–06 (75 FR 5689, February 4, 2010)). Use Paragraph 2 of Turbomeca Alert Mandatory Service Bulletin (MSB) No. A292 73 2830, Version B, dated July 10, 2009, to do the check.

(ii) For HMUs that incorporated Modification TU 147 on or before March 31, 2010 and those HMUs that are not listed in Figures 2 or 3 of Turbomeca Alert MSB No. A292 73 2836, Version A, dated August 17, 2010:

(A) Check the torque within 750 EFH from the effective date of this AD, but no later than 14 months after the effective date of this AD.

(B) Use Paragraph 2 of Turbomeca Alert MSB No. A292 73 2836, Version A, dated August 17, 2010, to do the check.

(2) If the HMU does not pass the torque check, then replace the HMU with an HMU that is eligible for installation.

(f) HMU Reinstallation

Do not install any HMU removed from service by this AD until it has been checked in accordance with Paragraph 2 of Turbomeca Alert MSB No. A292 73 2836, Version A, dated August 17, 2010, or checked in accordance with Paragraph 2 of Turbomeca Alert MSB No. A292 73 2830, Version B, dated July 10, 2009, and found eligible for installation.

(g) 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.

(h) Related Information

For more information about this AD, contact Rose Len, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *rose.len@faa.gov.*

(i) Material Incorporated by Reference

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

(1) Turbomeca Alert Mandatory Service Bulletin No. A292 73 2836, Version A, dated August 17, 2010 approved for IBR on March 20, 2012.

(2) Turbomeca Alert Mandatory Service Bulletin No. A292 73 2830, Version B, dated July 10, 2009 approved for IBR on March 11, 2010.

(3) For service information identified in this AD, contact Turbomeca S.A., 40220 Tarnos, France; phone: 33–05–59–74–40–00, fax: 33–05–59–74–45–15.

(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 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 February 6, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–3255 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–66355]

Reporting Line for the Commission's Inspector General

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending its rules to conform them to amendments made to the Inspector General Act of 1978 that require the Commission's Inspector General to report to and be under the general supervision of the full Commission.

DATES: *Effective Date:* February 14, 2012.

FOR FURTHER INFORMATION CONTACT: Mary Beth Sullivan, Counsel, Office of the Inspector General, at (202) 551–6039, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Discussion

Section 8G(d)(1) of the Inspector General Act of 1978 (''IG Act'') [1] provides: ''Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity.'' Prior to the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''),[2] section 8G(a)(4) of the IG Act defined the ''head of the designated Federal entity'' to mean, unless specifically designated by statute, the chief policymaking officer or board of the designated Federal entity as identified in a list published annually by the Director of the Office of Management and Budget (''OMB''). OMB's annual lists identified the ''Chairperson'' as the head of the SEC. Section 989B of the Dodd-Frank Act amended the IG Act to provide that the ''head of the designated Federal entity'' with a board or commission (such as the SEC) means ''the board or commission of the designated Federal entity * * *.'' Accordingly, the Inspector General must now report to, and be under the general supervision of, the full Commission.

These amendments conform the Commission's rules that address the reporting line of the Commission's Inspector General to the amendments made by the Dodd-Frank Act to the IG Act by replacing references to the ''Chairman'' in these rules with references to the ''Commission''.

II. Related Matters

A. Administrative Procedure Act and Other Administrative Laws

The Commission has determined that these amendments to its rules relate solely to the agency's organization, procedure, or practice. Accordingly, the provisions of the Administrative Procedure Act regarding notice of proposed rulemaking and opportunity for public participation are not applicable.[3] The Regulatory Flexibility Act, therefore, does not apply.[4] Because these rules relate solely to the agency's organization, procedure, or practice and do not substantially affect the rights or obligations of non-agency parties, they are not subject to the Small Business Regulatory Enforcement Fairness Act.[5] Finally, these amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[6]

B. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The amendments adopted today are procedural in nature and will produce the benefit of conforming the Commission's rules to amendments made to the IG Act that require the Commission's Inspector General to report to and be under the general supervision of the full Commission. The Commission also believes that these amendments will not impose any costs on non-agency parties, or that if there are any such costs, they are negligible.

C. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other

[1] Public Law 95–452; 92 Stat. 1101 (1978), as amended.

[2] Public Law 111–203; 124 Stat. 1376 (2010).

[3] 5 U.S.C. 553(b).

[4] 5 U.S.C. 601–612.

[5] 5 U.S.C. 804.

[6] 44 U.S.C. 3501–3520.

matters the impact any such rule would have on competition. The Commission does not believe that the amendments that the Commission is adopting today will have any impact on competition.

Statutory Authority: The amendments to the Commission's rules are adopted pursuant to 15 U.S.C. 77s, 78d, 78d–1, 78d–2, 78w, 78mm, 80a–37, 80b–11, and 7202; 5 U.S.C. App. (Inspector General Act of 1978) § 8G; and § 989B of Pub. L. 111–203 (2010).

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

Text of Amendments

In accordance with the preamble, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A—Organization and Program Management

■ 1. The authority citation for Part 200, Subpart A, is amended by adding the following citation, in numerical order, to read as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 80a–37, 80b–11, and 7202, unless otherwise noted.

Section 200.16a is also issued under Sec. 989B of Pub. L. 111–203 (2010), 124 Stat. 1376; and 5 U.S.C. App. (Inspector General Act of 1978) Sec. 8G.

* * * * *

■ 2. § 200.16a is amended by removing the word ''Chairman'' and adding in its place the word ''Commission'' in paragraphs (b) and (c) wherever it appears.

Dated: February 8, 2012.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–3312 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 2

[Docket No. RM11–30–000; Order No. 756]

Technical Corrections to Commission Regulations

Issued February 8, 2012.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule: correcting amendment.

SUMMARY: This document adds sections that were inadvertently removed from the Final Rule that the Federal Energy Regulatory Commission published in the **Federal Register** on February 1, 2012. The Final Rule revised a number of references in Commission regulations that had become outdated for various reasons or contain typographical errors. The changes contained in this amendment add or delete language in current Commission regulations by eliminating obsolete information and correcting clerical mistakes. The revisions are intended to be ministerial and/or informational in nature.

DATES: *Effective date:* February 14, 2012.

FOR FURTHER INFORMATION CONTACT: Kenneth Yu, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8482.

SUPPLEMENTARY INFORMATION: This document corrects a document published in the **Federal Register** on February 1, 2012 (77 FR 4891), in which sections that were inadvertently removed.

List of Subjects in 18 CFR Part 2

Administrative practice and procedure, Electric power, Natural gas, Pipelines, Reporting and recordkeeping requirements.

Therefore, 18 CFR part 2 is amended by the following correcting amendments:

PART 2—GENERAL POLICY AND INTERPRETATIONS

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

Authority: 5 U.S.C. 601; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 792–828c, 2601–2645; 42 U.S.C. 4321–4370h, 7101–7352.

§ 2.13 [Removed]

■ 2. Remove the first paragraph (b) in § 2.13 including the footnote.

§ 2.55 [Corrected]

■ 3. In § 2.55(a)(2)(iii), revise the phrase ''On and at the same time as'' to read ''On, or at the same time as,''.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3317 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

18 CFR Part 806

Review and Approval of Projects

AGENCY: Susquehanna River Basin Commission.

ACTION: Final rule.

SUMMARY: This document contains final rules that would amend the project review regulations of the Susquehanna River Basin Commission (Commission) to include definitions for new terms and an amended definition; provide for administrative approval of interbasin transfers of flowback and production fluids between drilling pad sites that are isolated from the waters of the basin; provide for administrative approval of out-of-basin transfers of flowback or produced fluids from a Commission approved hydrocarbon development project to an out-of-basin treatment or disposal facility; insert language authorizing renewal of expiring approvals, including Approvals by Rule (ABRs); delete specific references to geologic formations that may be the subject of natural gas development using hydrofracture stimulation and replace with a generic category—''unconventional natural gas development;'' broaden the scope of ABRs issued to include hydrocarbon development of any kind utilizing the waters of the basin, not just unconventional natural gas well development; memorialize the current practice of requiring post-hydrofracture reporting; and provide further procedures for the approval of water sources utilized at projects subject to the ABR process.

DATES: Effective April 1, 2012.

ADDRESSES: Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102–2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: 717–238–0423, ext. 306; fax: 717–238–2436; email: *rcairo@srbc.net.* Also, for further information on the proposed rulemaking, visit the Commission's Web site at *www.srbc.net.*

SUPPLEMENTARY INFORMATION:

Comments and Responses to Proposed Rulemaking

Notice of proposed rulemaking was published in the **Federal Register** on July 13, 2011; the New York Register on July 27, 2011; the Pennsylvania Bulletin on July 23, 2011; and the Maryland Register on July 29, 2011. The Commission convened public hearings on August 2, 2011, in Harrisburg, Pennsylvania and on August 4, 2011, in Binghamton, New York. Public information meetings were also held on October 25, 2011 in Williamsport, Pennsylvania, and on October 27, 2011, in Camp Hill, Pennsylvania. The original 60-day comment period first established on June 23, 2011, was extended until November 10, 2011, pursuant to an action taken by the Commission on September 15, 2011. Comments on the proposed rulemaking were received at both the hearings and during the comment period. The comments can be divided into two categories: (1) General Comments—These comments are not directed to specific language of the proposed rulemaking, but rather address perceived environmental and policy impacts; and (2) Comments by Section—These comments are directed at the specific language of the proposed rulemaking, often offering further revisions to this language. A summary of both categories of comments and the Commission's responses thereto follows.

General Comments

Comment: The Commission should more clearly explain the scientific basis for the proposed rulemaking. Also, the Commission should conduct a full life cycle cumulative impact study of the basinwide impacts of unconventional natural gas extraction prior to issuing this rulemaking.

Response: The proposed rulemaking is administrative in nature and involves no substantive change in the review standards applied to projects. Therefore, the basis of the rulemaking does not involve the analysis, evaluation or re-evaluation of scientific principals. On the whole, it is an attempt to codify within the rules certain definitions, existing practices and policies, and to establish certain procedures related to implementation of the Commission's regulatory authority.

Comment: The more extensive use of the Approval by Rule (ABR) process in this proposed rulemaking will weaken the Commission's regulatory oversight and will simply make it easier for gas well developers using hydrofracture stimulation methods to withdraw the waters of the basin.

Response: The Commission believes that this comment indicates a basic misunderstanding of the scope of the ABR process and the fact that all withdrawal projects will continue to be docketed and acted on by the full Commission. Through the docketing process, the Commission actively manages the use of the basin's waters and mitigates impacts on surface and ground waters through appropriate conditions limiting use. The ABR process then provides an efficient monitoring system for waters that are consumptively used. The Commission applies the same approval standards to all approvals, no matter the form they take. It exercises continuing jurisdiction and oversight to ensure compliance, and can reopen approvals and issue new orders or conditions if warranted.

Comment: Use of the ABR process to oversee the interbasin transfer of flowback and produced fluids and for the out of basin diversion of such fluids for treatment poses a danger to the waters of the basin due to its toxic content and the potential for spillage. The ABR process also bypasses the usual analysis given to proposed diversions of water.

Response: The proposed rules simply formalize practices that are already in place for the transfer of such fluids. These procedures will provide a net benefit to the basin by encouraging the use and reuse of lesser quality water instead of unimpaired water from streams or ground water sources. Furthermore, unlike the typical diversion of water out of the basin where the consumptive loss occurs and is evaluated in the context of the proposed diversion activity, the consumptive loss in this situation is considered to have occurred at the time of the initial withdrawal from the system, before its first use within the basin and prior to being diverted out of the basin. For into-basin diversions, the existing standards are focused on limiting any introduction of contaminated sources into the waters of the basin. The final rulemaking, as structured, provides that same standard. What it changes is the form of the approval, not the standard that should be applied.

Comment: The Commission places too much reliance on allegedly inadequate state water quality laws relating to wastewater disposal and residual waste. For example, the Commission cannot rely on such state laws and regulations to isolate from the waters of the basin the flowback and production fluids whose interbasin transfer the Commission proposes to approve administratively. Therefore, it is incumbent on the Commission to invoke its own water quality regulatory authority and ensure that wastewater is indeed handled in a manner that isolates it from the waters of the basin.

Response: The Susquehanna River Basin Compact, Public Law 91–575, Section 5.2(b) gives specific emphasis to the primary role of the states in water quality management and control. Member states are already exercising or preparing to exercise their water quality authority with respect to gas drilling activity and are also strengthening their laws and regulations. At this stage, there appears to be no justification for the Commission to assume water quality jurisdiction. As noted in response to a comment below, the Commission is taking steps to replace the term ''isolate from the waters of the basin'' with language that references the standards and requirements of member jurisdictions.

Comment: The Commission's refusal to promulgate water quality regulations relating to gas well development will allow the non-uniform treatment of water users throughout the basin and therefore not conform to the purposes of the Susquehanna River Basin Compact.

Response: The compact purpose of ''uniform treatment of water users'' does not require that the Commission exclusively regulate all aspects of water resources in the basin. If state regulations and standards are compatible with the Commission's Comprehensive Plan and do an adequate job of fulfilling the purposes of the plan, the Commission will not attempt to duplicate those regulations and standards. Where it does act, it does so in a manner that provides for uniform treatment of all water users.

Comment: The expanded use of the ABR process lessens the opportunity for public input and scrutiny on project approvals.

Response: The Commission disagrees. The ABR applications must be noticed by applicants and there is an opportunity for interested citizens to comment on these applications before an approval is issued. ABRs are also subject to the same approval standards as docketed approvals, and may be reopened and modified by the Executive Director should unforeseen problems arise. Furthermore, notice of issuance of an ABR is published in the **Federal Register** and any such approval is subject to appeal pursuant to § 808.2.

Comment: The Commission should not be extending the scope of the ABR program to include other forms of hydrocarbon development without first determining if the ABR program is

suitable for these other forms of development.

Response: The ABR process has proven to be a valuable tool for monitoring consumptive use related activity on pad sites. This rulemaking, which as noted above is administrative in nature, would extend the use of this valuable tracking tool to other forms of hydrocarbon development. Water withdrawals by any water user, including that undertaken for use in other forms of hydrocarbon development, will still undergo the full docket approval process, and be subject to all applicable Commission standards and requirements.

Comment: The Commission is a federal agency under the Susquehanna River Basin Compact and is subject to the National Environmental Policy Act (NEPA). It must therefore complete all NEPA requirements in connection with this proposed rulemaking action.

Response: The Commission categorically rejects any suggestion that it is subject to NEPA. This is consistent with the position the Commission has taken on NEPA since the 1980s. Instead of a federal agency, the Commission is a federal-interstate compact agency representing all four of its member jurisdictions. The federal government is only one voting member of the Commission and any action of the Commission requires the vote of a majority of the members. Therefore, the actions of the Commission are not the actions of the federal government, but the joint actions of the member jurisdictions. Also, Congress has specifically exempted the Commission from the provisions of the federal Administrative Procedures Act (APA). Federal court decisions have taken a consistent view, namely that agencies not subject to the APA are not federal agencies in the conventional sense and are therefore not subject to NEPA or similar laws imposing requirements on ''federal agencies.''

Comments by Section, Part 806

Section 806.3—Definitions

Comment: The 30-day rule in the proposed definition of flowback means that fluid produced from the well bore from the 31st day until the well is placed in production is neither flowback or production fluid within the definition (unless the well is placed into production during the initial 30-day period).

Response: Agreed. The proposed definition is modified to remove the 30-day reference and to make clear that return flow recovered post-hydrofracture and pre-production is defined as flowback.

Comment: The word ''siting'' in the definitions of ''hydrocarbon development'' and ''unconventional natural gas development'' is inconsistent with the ''initiation of construction'' standard in the Commission's project review regulations. The regulations specify the ''spudding of the well'' to be the initiation of a well project.

Response: Agreed. The word ''siting'' is deleted from this definition to avoid the inconsistency.

Comment: The definition of ''project'' does not make clear that ''unconventional natural gas development'' is a subset of ''hydrocarbon development activity.''

Response: Language is inserted in the definition to clarify that the term is a sub-category of hydrocarbon development.

Comment: Several comments expressed disagreement with the proposed definition of ''tophole water,'' with one suggesting use of Pennsylvania's definition instead and another claiming that the definition is too vague.

Response: The tophole water definition is replaced with a modified version of the Pennsylvania definition. The modification, notably removing the reference to surface water, makes it generally consistent with New York's interpretation of the term and allows for more basinwide consistency.

Section 806.4—Projects Requiring Review and Approval

Paragraphs 806.4(a)(3)(v) & (vi)

Comment: The phrase ''in such manner as to isolate it from the waters of the basin'' is too vague and should be replaced with a reference to the actual controls exercised by the member states. Also, because the industry may mix the waters of the basin withdrawn from surface and ground water sources with flowback or production fluids in preparation for hydrofracture use, it is not possible to isolate it from the waters of the basin if read strictly.

Response: The ''isolate'' terminology is replaced with ''provided it is handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdictions.'' The same language has also been inserted in Paragraph 806.4(a)(3)(vi), which similarly addresses diversions of flowback or production fluids, and is substituted in Paragraph 806.22(f)(11)(iii) for the same reason.

Comment: There is no clear requirement that project sponsors keep track of interbasin transfers of flowback and production fluids.

Response: Language is added to paragraphs 806.4(a)(3)(v) and (vi) reinforcing the requirement that all monitoring and reporting requirements applicable to the pad site ABR must be met. Similar language is added to paragraph 806.22(f)(11) to meet the same concerns about tracking.

Paragraph 806.4(3)(vi)

Comment: The use of the phrase ''the same'' implies that each tank load of flowback or production fluid would require separate approval.

Response: The language is replaced with ''flowback or production fluids'' to remove any uncertainty.

Section 806.13—Submission of Application

Comment: The phrase ''Project sponsors of projects subject to review and approval'' should properly be changed to read ''Sponsors of projects subject to review and approval.''

Response: Agreed. The suggested change is incorporated into the final rulemaking.

Section 806.14—Contents of Application

Paragraph 806.14(a)

Comment: With respect to renewal applications, there is no clear indication that they will be made subject to any approval standards.

Response: To remove any ambiguity, and to further clarify the original intent concerning renewal standards, the phrase ''shall be subject to the standards set forth in Subpart C—Standards for Review and Approval of this Part'' is added to this paragraph.

Section 806.15—Notice of Application

Paragraph 806.15(e)

Comment: The requirement for a newspaper notice in areas where a wastewater discharge source is to be used is unworkable where such water is mixed with other water sources at the initial destination and is then redistributed, oftentimes to other locations not contemplated at the time notice is given.

Response: The word ''initially'' is added before the phrase ''used for natural gas development'' to limit this requirement to the initial location(s) where this water is contemplated for use at the time of application.

Section 806.22—Standards for Consumptive Use of Water

Paragraph 806.22(f)(10)

Comment: Extension of ABR approval terms to 15 years will essentially lessen or weaken the oversight that the Commission exercises over gas drilling activities.

Response: Though the Commission feels that there is a fundamental misunderstanding by some who commented about the ongoing oversight that it exercises over approved projects, and the ability of the Commission to reopen approvals, it is willing to retain the current approval term with the addition of procedures for renewal of ABRs. Therefore, the proposed change is removed from the final rulemaking.

Paragraph 806.22(f)(11)

Comment: Need to make clear that this paragraph applies to the use of sources in addition to those sources approved for use by the project sponsor pursuant to § 806.4.

Response: Wording is added to the beginning of this paragraph to make the suggested clarification.

Paragraph 806.22(f)(11)(i), (ii), and (iv)

Comment: Tophole water, precipitation and storm water collected on the pad site or water obtained from a hydrocarbon storage facility can be contaminated, so there is a need to appropriately limit its use.

Response: Language is added limiting the use of this water to drilling or hydrofracture stimulation only, or in the case of paragraph 806.22(f)(11)(iv), limiting the use to that provided for in the approval.

Paragraph 806.22(f)(11)(iii)

Comment: As defined, flowback and production fluids do not cover all fluids encountered in the drilling process that serve as a water source under current practice. For example, water can be recovered from drilling muds. Also, such fluids can be recovered from production well sites, in addition to drilling pad sites or hydrocarbon water storage facilities. Current Commission policy allows for the reuse of such fluids.

Response: Drilling fluids and formation fluids are added to this paragraph to cover all fluids recovered during the drilling process and used under current practice for hydrofracture stimulation. The term ''production well site'' is also added to clarify the sites from which such fluids can be recovered. The word ''only'' is also added to this paragraph to make clear that these fluids may only be used for hydrofracture stimulation. Language is also added clarifying that all such fluids must be handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdiction.

Paragraph 806.22(f)(14)

Comment: The provisions of the proposed paragraph 806.22(f)(13) pertaining to hydrocarbon water storage facilities need to be separated from provisions relating to public water supply and wastewater sources because of the possible application of the terms to third party water purveyors building hydrocarbon water storage facilities that may not be associated with ABRs.

Response: The changes incorporated into the final rule break out a separate paragraph 806.22(f)(14), clarifying the scope and intent, but make no substantive changes to the provisions contained in the proposed rulemaking. The rule is intended to provide for the approval of such facilities (not otherwise associated with an ABR) to provide a mechanism for monitoring, reporting and tracking associated with such facilities, and to allow for the industry to efficiently register such sources for use.

Paragraph 806.22(f)(15)

Comment: The language in paragraphs 806.22(f)(12)(i) and (ii) relating to providing a copy of any registration or source approval to the appropriate agency of a member state, etc., is repetitive.

Response: Language related to registrations and source approvals that is repetitive is removed and restated once in new paragraph 806.22(f)(15).

List of Subjects in 18 CFR Part 806

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission amends 18 CFR part 806 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

■ 1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91–575, 84 Stat. 1509 *et seq.*

Subpart A—General Provisions

■ 2. Amend § 806.3 by adding definitions for ''Flowback'', ''Formation fluids'', ''Hydrocarbon development'', ''Hydrocarbon water storage facility'', ''Production fluids'', ''Tophole water'', and ''Unconventional natural gas development,'' and revising the definition of ''Project'' to read as follows:

§ 806.3 Definitions.

* * * * *

Flowback. The return flow of water and formation fluids recovered from the wellbore of an unconventional natural gas or hydrocarbon development well following the release of pressures induced as part of the hydraulic fracture stimulation of a target geologic formation, and until the well is placed into production.

Formation fluids. Fluids in a liquid or gaseous physical state, present within the pore spaces, fractures, faults, vugs, caverns, or any other spaces of formations, whether or not naturally occurring or injected therein.

* * * * *

Hydrocarbon development. Activity associated with the drilling, casing, cementing, stimulation and completion of wells, including but not limited to unconventional natural gas development wells, undertaken for the purpose of extraction of liquid or gaseous hydrocarbons from geologic formations.

Hydrocarbon water storage facility. An engineered barrier or structure, including but not limited to tanks, pits or impoundments, constructed for the purpose of storing water, flowback or production fluids for use in hydrocarbon development.

* * * * *

Production fluids. Water or formation fluids recovered at the wellhead of a producing hydrocarbon well as a by-product of the production activity.

Project. Any work, service, activity, or facility undertaken, which is separately planned, financed or identified by the Commission, or any separate facility undertaken or to be undertaken by the Commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources, which can be established and utilized independently, or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation. For purposes of hydrocarbon development activity, including that related to unconventional natural gas development, the project shall be considered to be the drilling pad upon which one or more exploratory or production wells are undertaken, and all water-related appurtenant facilities and activities related thereto.

* * * * *

Tophole water. Water that is brought to the surface while drilling through the

strata containing fresh groundwater. Tophole water may contain drill cuttings typical of the formation being penetrated but may not be polluted or contaminated by additives, brine, oil or man induced conditions.

Unconventional natural gas development. Activity associated with the drilling, casing, cementing, stimulation and completion of wells undertaken for the purpose of extraction of gaseous hydrocarbons from low permeability geologic formations utilizing enhanced drilling, stimulation or recovery techniques.

* * * * *

■ 3. In § 806.4, revise paragraph (a)(3) introductory text, add paragraphs (a)(3)(v) and (a)(3)(vi), and revise paragraph (a)(8), as follows:

§ 806.4 Projects requiring review and approval.

(a) * * *

(3) *Diversions.* Except with respect to agricultural water use projects not subject to the requirements of paragraph (a)(1) of this section, the projects described in paragraphs (a)(3)(i) through (a)(3)(iv) of this section shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in § 806.24. The project sponsors of out-of-basin diversions shall also comply with all applicable requirements of this part relating to consumptive uses and withdrawals. The projects identified in paragraphs (a)(3)(v) and (a)(3)(vi) of this section shall be subject to regulation pursuant to § 806.22(f).

* * * * *

(v) The interbasin diversion of any flowback or production fluids from hydrocarbon development projects from one drilling pad site to another drilling pad site for use in hydrofracture stimulation, provided it is handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdiction, shall not be subject to separate review and approval as a diversion under this paragraph if the generating or receiving pad site is subject to an Approval by Rule issued pursuant to § 806.22(f) and provided all monitoring and reporting requirements applicable to such approval are met.

(vi) The diversion of flowback or production fluids from a hydrocarbon development project for which an Approval by Rule has been issued pursuant to § 806.22(f), to an out-of-basin treatment or disposal facility authorized under separate governmental approval to accept flowback or production fluids, shall not be subject to separate review and approval as a diversion under this paragraph, provided all monitoring and reporting requirements applicable to the Approval by Rule are met and it is handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdiction.

* * * * *

(8) Any unconventional natural gas development project in the basin involving a withdrawal, diversion or consumptive use, regardless of the quantity.

* * * * *

Subpart B—Application Procedure

■ 4. Revise § 806.13 to read as follows:

§ 806.13 Submission of application.

Sponsors of projects subject to review and approval of the Commission under §§ 806.4, 806.5 or 806.6, or project sponsors seeking renewal of an existing approval of the Commission, shall submit an application and applicable fee to the Commission, in accordance with this subpart.

■ 5. In § 806.14, revise paragraph (a) introductory text to read as follows:

§ 806.14 Contents of application.

(a) Except with respect to applications to renew an existing Commission approval, applications shall include, but not be limited to, the following information and, where applicable, shall be submitted on forms and in the manner prescribed by the Commission. Renewal applications shall include such information that the Commission determines to be necessary for the review of same, shall be subject to the standards set forth in Subpart C—Standards for Review and Approval of this part, and shall likewise be submitted on forms and in the manner prescribed by the Commission.

* * * * *

■ 6. In § 806.15, revise paragraphs (d), (e) and (f) and add paragraph (g), as follows:

§ 806.15 Notice of application.

* * * * *

(d) For applications submitted under § 806.22(f)(13) for a public water supply source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in the area served by the public water supply.

(e) For applications submitted under § 806.22(f)(13) for a wastewater discharge source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in each area within which the water obtained from such source will initially be used for natural gas development.

(f) For applications submitted under § 806.22(f)(14) for a hydrocarbon water storage facility, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in the area in which the facility is located.

(g) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt for the notifications to agencies of member States, municipalities and county planning agencies required under paragraph (a) of this section. The project sponsor shall also provide certification on a form provided by the Commission that it has published the newspaper notice(s) required by this section and made the landowner notifications as required under paragraph (b) of this section, if applicable. Until these items are provided to the Commission, processing of the application will not proceed. The project sponsor shall maintain all proofs of notice required hereunder for the duration of the approval related to such notices.

Subpart C—Standards for Review and Approval

■ 7. In § 806.22, revise paragraphs (e)(1), (e)(6), (f) introductory text, (f)(1), (f)(4), (f)(6), (f)(8), (f)(9), (f)(11), and (f)(12), and add paragraphs (f)(13), (f)(14) and (f)(15), to read as follows:

§ 806.22 Standards for consumptive uses of water.

* * * * *

(e) * * *

(1) Except with respect to projects involving hydrocarbon development subject to the provisions of paragraph (f) of this section, any project whose sole source of water for consumptive use is a public water supply, may be approved by the Executive Director under this paragraph (e) in accordance with the following, unless the Executive Director determines that the project cannot be adequately regulated under this approval by rule.

* * * * *

(6) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule, or renew an existing approval by rule previously granted hereunder, and will notify the project sponsor of such determination,

including the quantity of consumptive use approved.

* * * * *

(f) Approval by rule for consumptive use related to unconventional natural gas and other hydrocarbon development.

(1) Any unconventional natural gas development project, or any hydrocarbon development project subject to review and approval under §§ 806.4, 806.5, or 806.6 of this part, shall be subject to review and approval by the Executive Director under this paragraph (f) regardless of the source or sources of water being used consumptively.

* * * * *

(4) The project sponsor shall comply with metering, daily use monitoring and quarterly reporting as specified in § 806.30, or as otherwise required by the approval by rule. Daily use monitoring shall include amounts delivered or withdrawn per source, per day, and amounts used per gas well, per day, for well drilling, hydrofracture stimulation, hydrostatic testing, and dust control. The foregoing shall apply to all water, including stimulation additives, flowback, drilling fluids, formation fluids and production fluids, utilized by the project. The project sponsor shall also submit a post-hydrofracture report in a form and manner as prescribed by the Commission.

* * * * *

(6) Any flowback or production fluids utilized by the project sponsor for hydrofracture stimulation undertaken at the project shall be separately accounted for, but shall not be included in the daily consumptive use amount calculated for the project, or be subject to the mitigation requirements of § 806.22(b).

* * * * *

(8) The project sponsor shall certify to the Commission that all flowback and production fluids have been re-used or treated and disposed of in accordance with applicable state and federal law.

(9) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule, or renew an existing approval by rule granted hereunder, and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved. The issuance of any approval hereunder shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review pursuant to § 806.4(a). Any sources of water approved pursuant to this section shall be further subject to any approval or authorization required by the member jurisdiction.

* * * * *

(11) In addition to water sources approved for use by the project sponsor pursuant to § 806.4 or this section, for unconventional natural gas development or hydrocarbon development, whichever is applicable, a project sponsor issued an approval by rule pursuant to paragraph (f) (9) of this section may utilize any of the following water sources at the drilling pad site, subject to such monitoring and reporting requirements as the Commission may prescribe:

(i) Tophole water encountered during the drilling process, provided it is used only for drilling or hydrofracture stimulation.

(ii) Precipitation or stormwater collected on the drilling pad site, provided it is used only for drilling or hydrofracture stimulation.

(iii) Drilling fluids, formation fluids, flowback or production fluids obtained from a drilling pad site, production well site or hydrocarbon water storage facility, provided it is used only for hydrofracture stimulation, and is handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdiction.

(iv) Water obtained from a hydrocarbon water storage facility associated with an approval issued by the Commission pursuant to § 806.4(a) or by the Executive Director pursuant to this section, provided it is used only for the purposes authorized therein, and in compliance with all standards and requirements of the applicable member jurisdiction.

(12) A project sponsor issued an approval by rule pursuant to paragraph (f)(9) of this section may utilize a source of water approved by the Commission pursuant to § 806.4(a), or by the Executive Director pursuant to paragraph (f)(14) of this section, and issued to persons other than the project sponsor, provided any such source is approved for use in unconventional natural gas development, or hydrocarbon development, whichever is applicable, the project sponsor has an agreement for its use, and at least 10 days prior to use, the project sponsor registers such source with the Commission on a form and in the manner prescribed by the Commission.

(13) A project sponsor issued an approval by rule pursuant to paragraph (f)(9) of this section may also utilize other sources of water, including but not limited to, public water supply or wastewater discharge not otherwise associated with an approval issued by the Commission pursuant to § 806.4(a) or an approval by rule issued pursuant to paragraph (f)(9) of this section, provided such sources are first approved by the Executive Director. Any request for approval shall be submitted on a form and in the manner prescribed by the Commission, shall satisfy the notice requirements set forth in § 806.15, and shall be subject to review pursuant to the standards set forth in subpart C of this part.

(14) A project sponsor issued an approval by rule pursuant to paragraph (f)(9) of this section may utilize water obtained from a hydrocarbon water storage facility that is not otherwise associated with an approval issued by the Commission pursuant to § 806.4(a), or an approval by rule issued pursuant to paragraph (f)(9) of this section, provided such sources are first approved by the Executive Director and are constructed and maintained in compliance with all standards and requirements of the applicable member jurisdiction. The owner or operator of any such facility shall submit a request for approval on a form and in the manner prescribed by the Commission, shall satisfy the notice requirements set forth in § 806.15, and shall be subject to review pursuant to the standards set forth in subpart C of this part.

(15) The project sponsor shall provide a copy of any registration or source approval issued pursuant to this section to the appropriate agency of the applicable member jurisdiction. The project sponsor shall record on a daily basis, and report quarterly on a form and in a manner prescribed by the Commission, the quantity of water obtained from any source registered or approved hereunder. Any source approval issued hereunder shall also be subject to such monitoring and reporting requirements as may be contained in such approval or otherwise required by this part.

Dated: January 27, 2012.

Thomas W. Beauduy,

Deputy Executive Director.

[FR Doc. 2012–2504 Filed 2–13–12; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 101130598–2109–03]

RIN 0625–AA87

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final rule; Final Modification.

SUMMARY: The Department of Commerce (''the Department'') is modifying its methodology regarding the calculation of the weighted-average dumping margins and antidumping duty assessment rate in certain segments of antidumping duty proceedings *(hereinafter, ''Final Modification for Reviews'').* Currently, in a review of an antidumping duty order conducted under 19 CFR 351.213 (administrative review), 351.214 (new shipper review), and 351.215 (expedited antidumping review) (collectively ''reviews''), the Department usually makes comparisons between transaction-specific export prices and average normal values and does not offset the amount of dumping that is found with the results of comparisons for which the transaction-specific export price, or constructed export price, exceeds normal value. Several World Trade Organization (''WTO'') dispute settlement reports have found that the United States' application of these methodologies was inconsistent with its WTO obligations. Under this *Final Modification for Reviews,* the Department will calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average (''A–A'') comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations. The Department is also modifying its practice in five-year (''sunset'') reviews, such that it will not rely on weighted-average dumping margins that were calculated using the methodology found to be WTO-inconsistent. The schedule for implementing these changes is set forth in the ''Timetable'' section in **SUPPLEMENTARY INFORMATION.**

DATES: This Final Rule and *Final Modification for Reviews* are effective April 16, 2012. The modification in the methodology will apply to preliminary determinations issued after April 16, 2012.

FOR FURTHER INFORMATION CONTACT: Rachael Nimmo, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–0836.

SUPPLEMENTARY INFORMATION:

Background

In antidumping duty proceedings, the Department determines margins of dumping by comparing normal value with the export price [1] of comparable merchandise. Prior to this Final Rule and *Final Modification for Reviews,* the Department typically has compared normal value and export price using the average-to-transaction (''A–T'') method, which involved a comparison of the weighted-average normal value [2] to the export price of individual transactions for comparable merchandise. When aggregating the results of these comparisons to determine the weighted-average margin of dumping in a review, the Department did not offset the results of the comparisons for which export price was less than normal value by the results of comparisons for which export price exceeded normal value.[3] When determining importer-specific assessment rates in a review, the Department similarly aggregated the results of importer-specific comparison results and did not offset the comparison results for which export price was less than normal value by the comparison results for which export price exceeded normal value.

This methodology was challenged as being inconsistent with the WTO General Agreement on Tariffs and Trade 1994 (''GATT 1994'') and the Agreement on Implementation of Article VI of the GATT 1994 (''Antidumping Agreement'') in several disputes.[4] The WTO Appellate Body in *US—Zeroing (EC), US—Zeroing (Japan), US—Stainless Steel (Mexico),* and *US—Continued Zeroing (EC)* found the denial of offsets for non-dumped comparisons in antidumping duty reviews to be inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994, either ''as such,'' or ''as applied'' in certain reviews, or both.[5] The WTO Dispute Settlement Body has adopted the dispute settlement panel reports, as modified by the WTO Appellate Body, which found the denial of offsets for non-dumped comparisons in reviews to be inconsistent with the United States' WTO obligations.

Additionally, in *US—Zeroing (EC), US—Zeroing (Japan),* and *US—Continued Zeroing (EC),* the WTO Appellate Body found that the reliance on weighted-average margins of dumping calculated without granting offsets for non-dumped comparisons as the basis for determinations made in certain sunset reviews was inconsistent with Article 11.3 of the Antidumping Agreement.[6] In *US—Zeroing (Japan),* the WTO Appellate Body also found that the denial of offsets for non-dumped comparisons in original antidumping duty investigations using transaction-to-transaction (''T–T'') comparisons [7] was inconsistent with

[1] The Department may also use constructed export prices, if appropriate. Because the use of export prices or constructed export prices is not relevant to the substance of this notice, the Department refers only to export prices hereafter.

[2] In addition to weighted-average comparison market prices, the Department may base normal value on constructed value or appropriately valued factors of production, where required by law or regulation.

[3] Section 771(35)(A) of the Tariff Act of 1930 (''the Act'') defines the dumping margin as the amount by which normal value ''exceeds'' export price (or constructed export price). Section 771(35)(B) defines the weighted-average dumping margin as the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export or constructed export price of that exporter or producer.

[4] *United States-Laws, Regulations and Methodology for Calculating Dumping Margins (''Zeroing'')* (''*US—Zeroing (EC)*''), WT/DS294/R, WT/DS294/AB/R, adopted May 9, 2006; *United States-Measures Related to Zeroing and Sunset Reviews* (''*US—Zeroing (Japan)*''), WT/DS322/R, WT/DS322/AB/R, adopted Jan. 23, 2007; *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico* (''*US—Stainless Steel (Mexico)*''), WT/DS344/R, WT/DS344/AB/R, adopted May 20, 2008; *United States-Continued Existence and Application of Zeroing Methodology* (''*US—Continued Zeroing (EC)*''), WT/DS350/R, WR/DS350/AB/R, adopted Feb. 19, 2009.

[5] *US—Zeroing (EC),* WT/DS294/R, WT/DS294/AB/R, para. 263(a)(i); *US—Zeroing (Japan),* WT/DS322/R, WT/DS322/AB/R, para. 190(c) & 190(e); *US—Stainless Steel (Mexico),* WT/DS344/R, WT/DS344/AB/R, paras. 165(a) & 165(b); *US—Continued Zeroing (EC),* WT/DS350/R, para. 8.1(e), WT/DS350/AB/R, paras. 395(a)(v), 395(d) & 395(e)(ii).

[6] *US—Zeroing (EC),* WT/DS294/AB/RW, para. 469(h)(iv) & (vi); *US—Zeroing (Japan),* WT/DS322/AB/R, para. 190(f); *US—Continued Zeroing (EC),* WT/DS350/R, para. 8.1(f), WT/DS350/AB/R, para. 395 (f).

[7] Pursuant to section 777A(d)(1)(A) of the Act, in an investigation, the Department may determine whether the subject merchandise is being sold at less than fair value by comparing normal values of individual transactions to the export prices of individual transactions for comparable merchandise (the transaction-to-transaction comparison method). The Department's regulations state that the Department will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made. 19 CFR 351.414(c)(1).

Articles 2.4 and 2.4.2 of the Antidumping Agreement.[8] The WTO Appellate Body, in *US—Zeroing (Japan),* further found that the denial of offsets for non-dumped comparisons in antidumping duty new shipper reviews was inconsistent with Articles 2.4 and 9.5 of the Antidumping Agreement.[9]

Following these adverse findings, the United States Trade Representative (''USTR''), informed the WTO Dispute Settlement Body (DSB), that the United States intended to comply with its WTO obligations in these disputes.[10] Pursuant to section 123(f) of the Uruguay Round Agreements Act (''URAA''), the USTR notified the House Ways and Means and Senate Finance Committees of the adverse findings, and further consulted with these committees concerning implementation.

Pursuant to section 123(g)(1) of the URAA, on December 28, 2010, the Department published a notice in the **Federal Register** proposing to modify its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons while using monthly A–A comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings,* 75 FR 81533 (December 28, 2010) (''*Proposed Modification for Reviews*''). In that notice, the Department solicited comments on its proposal. On February 1, 2011, the Department extended the period of time for the submission of comments. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings,* 76 FR 5518 (Feb. 1, 2011).

In September, 2011, pursuant to section 123(g)(1)(D) of the URAA, the USTR submitted a report to the House Ways and Means and Senate Finance Committees describing the proposed modification, the reasons for the modification, and a summary of the advice USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(1)(B) of the URAA. Also in September, 2011, pursuant to section 123(g)(1)(E) of URAA, the USTR, working with the Department of Commerce, began consultations with both congressional committees concerning the proposed contents of the final rule and final modification. This notice is published pursuant to section 123(g)(1)(F) of the URAA.

Final Modification for Calculating the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings

After considering all of the comments submitted, the Department is adopting the proposed changes to its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons when using monthly A–A comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations. In reviews, except where the Department determines that application of a different comparison method is more appropriate, the Department will compare monthly weighted-average export prices with monthly weighted-average normal values, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rate. Where the weighted-average margin of dumping for the exporter is determined to be zero or *de minimis,* no antidumping duties will be assessed.

In adopting this *Final Modification for Reviews,* the Department's intention is to apply a comparison methodology in reviews that parallels the WTO-consistent methodology the Department currently applies in original investigations,[11] which will necessarily include any exceptional or alternative comparison methods that are determined appropriate to address case-specific circumstances. Accordingly, similar to the conduct of original investigations, when conducting reviews under the modified methodology, the Department will determine on a case-by-case basis whether it is appropriate to use an alternative comparison methodology by examining the same criteria that the Department examines in original investigations pursuant to section 777A(d)(1)(A) and (B) of the Act.

The Department has rarely applied the transaction-to-transaction method in original antidumping duty investigations. In the most recent original investigation in which the Department calculated the weighted-average margins of dumping using T-T comparisons, the Department did not grant offsets for non-dumped comparisons.[12] The WTO Appellate Body has found the denial of offsets for non-dumped comparisons in original investigations using T-T comparisons to be inconsistent with the WTO obligations of the United States. To the extent that any prior original antidumping duty investigations using T-T comparisons could be construed as establishing a practice of the Department with respect to the granting or denial of offsets for non-dumped comparisons when calculating the weighted-average margin of dumping, the Department hereby withdraws any such practice. Specifically, if the Department applies the T-T comparison methodology in a future antidumping duty proceeding, it will do so without reference to, or reliance on, any prior practice with regard to the issue of offsets because any such practice has been withdrawn.

In order to implement the revised methodology, it is necessary to modify certain provisions of the Department's regulations. In particular, 19 CFR 351.414(a) and (c) indicate a preference for making A-T comparisons in reviews. These provisions will be modified to permit application of A-A comparisons in reviews in a manner that parallels the comparison methods used in original investigations. In addition, sections 351.414(d)(3) and (e) of the Department's regulations set forth the time periods over which weighted averages are calculated. Section 351.414(d)(3) provides that when applying the A-A method, the weighted averages will normally be calculated over the entire period of investigation or review, unless another averaging period is deemed appropriate. Section 351.414 (e) provides that when applying the A-T method in a review, the Department will calculate weighted-average normal values on a monthly basis.[13] The

[8] *US—Zeroing (Japan),* WT/DS322/AB/R, para. 190(b).

[9] *Id.,* para. 190(d).

[10] *See* WT/DSB/M/213 at para. 2 (minutes of U.S. statement at May 30, 2006 DSB meeting), WT/DSB/M/226 at para. 34 (minutes of U.S. statement at Feb. 20, 2007 DSB meeting), WT/DSB/M/251 at para. 9 (minutes of U.S. statement at June 2, 2008 DSB meeting), WT/DSB/M/266 at para. 57 (minutes of U.S. statement at March 20, 2009 DSB meeting).

[11] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification,* 71 FR 77722 (Dec. 27, 2006) (''*Final Modification for Investigations*'').

[12] *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products from Canada,* 70 FR 22, 636 (May 2, 2005).

[13] The Department recognizes that the Statement of Administrative Action (''SAA'') states that ''the preferred methodology in reviews will be to compare average to individual export prices''

Department currently relies on monthly weighted-average normal values when calculating dumping margins in reviews, and departing from monthly averaging is not necessary to comply with the WTO findings. Accordingly, the Department is modifying section 351.414(d)(3) to permit weighted averages normally to be calculated on a monthly basis in reviews, regardless of the comparison method used. Conforming changes to section 351.414(e) will ensure sections 351.414(d)(3) and (e) do not contain redundant language. The language for the modified provisions is set forth at the end of this notice.

With respect to the findings of inconsistency in certain of the Department's sunset reviews,[14] the Department notes that the underlying issue is the methodology for calculating weighted-average dumping margins in original investigations and reviews, which is addressed by the modifications the Department has made with respect to investigations and is making herein with respect to reviews. When making a sunset determination, the statute requires administrative review margins to be ''considered'' but does not require that the Department rely on such margins exclusively or in a particular manner in making its determination whether dumping will continue or recur if the antidumping order were to be revoked.[15] Notwithstanding the Department's prior practice of relying on margins determined in the original investigation and subsequent reviews when determining whether dumping is likely to continue in the absence of an antidumping order,[16] the Department will modify its practice in five-year sunset reviews, such that it will not rely on weighted-average dumping margins that were calculated using the methodology determined by the Appellate Body to be WTO-inconsistent in *US—Zeroing (EC), US—Zeroing (Japan),* and *US—Continued Zeroing (EC).* However, only in the most extraordinary circumstances will the Department rely on margins other than those calculated and published in prior determinations, pursuant to 19 CFR 351.218(e)(2).

The Department does not anticipate that it will need to recalculate the dumping margins in the vast majority of future sunset determinations to avoid WTO inconsistency, apart from the ''most extraordinary circumstances'' provided for in its regulations. Instead, the Department will limit its reliance to margins determined or applied during the five-year sunset period that were not determined in a manner found to be WTO-inconsistent in these disputes. Future dumping margins in reviews will be determined in accordance with this *Final Modification for Reviews.* The Department may also rely on past dumping margins that were not affected by the WTO-inconsistent methodology, such as dumping margins recalculated pursuant to Section 129 proceedings, dumping margins determined based on the use of adverse facts available, and dumping margins where no offsets were denied because all comparison results were positive. If the dumping margins determined in a manner not found to be WTO-inconsistent in these disputes indicate that dumping continued with the discipline of the order in place, those dumping margins alone can form the basis for a determination that dumping will continue or recur if the order were to be revoked. Additionally, if dumping margins decline over the five-year sunset period, or if there are no dumping margins during the five-year sunset period, decreased volumes may provide another basis to determine that dumping is likely to continue or recur if the discipline of the order is removed.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b), the Department will determine, and U.S. Customs and Border Protection (CBP) will assess, antidumping duties on all appropriate entries. When an administrative review is conducted, and where the weighted-average margin of dumping for the exporter or producer is determined to be greater than *de minimis,* the Department will calculate an importer-specific *ad valorem* assessment rate for each importer of subject merchandise covered by the review. 19 CFR 351.212(b)(1). Importer-specific assessment rates will be calculated in the same manner as the exporter's dumping margin, on the basis of average-to-average comparisons using only the transactions associated with that importer with offsets being provided for non-dumped comparisons. Where the weighted-average margin of dumping for the exporter or producer is determined to be zero or *de minimis,* no assessment rates will be calculated and the Department will instruct CBP to liquidate all imports from the exporter or producer without regard to antidumping duties.

Analysis of Comments Received

Numerous comments and rebuttal comments were submitted in response to the *Proposed Modification for Reviews.* The Department has carefully considered each of the comments submitted. It has grouped and summarized the comments according to common themes and has responded accordingly.

Average-to-Average Comparison Methodology in Reviews

Several commentators argue that the proposal to move to an A-A comparison methodology in reviews is unnecessarily complex. These commentators suggest that compliance can be achieved by simply eliminating the use of zeroing in the A-T comparison methodology. They note that this would only require the elimination of one line of programming.

One commentator is concerned that the Department has not adequately explained why it is necessary to alter its current dumping calculation methodology in reviews from an A-T methodology to one using monthly weighted averages in both markets. Some request that the Department clarify whether it will grant offsets for negative dumping margins only against positive dumping margins found in the same month or apply negative dumping margins to offset positive dumping margins across the entire period of review (POR). Some argue that only a complete POR-wide offset will be consistent with the Department's current offset methodology applied in original antidumping duty investigations and with WTO obligations.

Many are not in favor of relying on the A-A comparison methodology as the preferred method for reviews because of its potential to mask dumping. Some commentators argue that using the A-A methodology in reviews would not be in compliance with the statute and the SAA, and thus would not withstand judicial scrutiny. Eliminating entry-specific antidumping duty assessments would violate sections 751(a)(2)(A) and (C) of the Act, which require the Department to make entry-specific assessments. The preference for a

(Statement of Administrative Action, p, 843, H. Doc. No. 103–316, vol. 1 (1994)); however, in order to implement the findings in the WTO dispute settlement reports, the Department will restrict the use of that preferred methodology to situations in which the Department, on the basis of the facts of the specific administrative review, determines that average-to-transaction comparisons are more appropriate than average-to-average comparisons.

[14] *US—Zeroing (EC),* WT/DS294/AB/RW, para. 469(h)(iv) & (vi), *US—Zeroing (Japan),* WT/DS322/AB/R, para. 190(f); *US—Continued Zeroing (EC),* WT/DS350/R, para. 8.1(f), WT/DS350/AB/R, para. 395 (f).

[15] *See* section 752(c)(1) of the Act.

[16] *See e.g., Certain Circular Welded Carbon Steel Pipes and Tubes From India, Thailand, and Turkey; Final Results of Expedited Five-Year (''Sunset'') Reviews of Antidumping Duty Orders,* 76 FR 66893 (Oct. 28, 2011), and accompanying Issues and Decision Memorandum, at Cmt. 1.

transaction-specific approach is confirmed by the SAA, and is supported by the statutory language, which indicates the Department will determine normal value and export price for ''each entry.''

A few argue that nothing in the statute provides discretion for the Department to use either A-A or T-T in reviews, and that the statutory construction would make no sense if Congress intended for any of the three methods to be used in both investigations and reviews. Congress envisioned and required the Department to determine an individual margin of dumping for each U.S. entry, and nowhere indicated that margins should be calculated for averaging groups.

Several commentators note that nothing in the WTO Appellate Body (AB) rulings or the WTO Antidumping Agreement requires the Department to adopt an A-A approach in reviews. They argue that the Department should not confine itself to a single ''one size-fits all'' approach, but instead, leave open the option of selecting the comparison method (A-A, T-T, or A-T) on a case-specific basis to capture the maximum amount of dumping. Some commentators argue that given that the preferred method as cited in the SAA is A-T, the Department should keep this option open. Some commentators also argue that the T-T method would be a good option in many instances, asserting that advancements in computer technology have eliminated much of the administrative burden associated with the use of the T-T method.

Department Position: As previously indicated, the Department is adopting a methodology that parallels the WTO-consistent methodology it adopted earlier in connection with original antidumping duty investigations. The Department disagrees that adopting a methodology with which it is already familiar and experienced in administering is an unnecessarily complex approach. In addition, while the Department has previously adopted an interpretation of section 771(35) of the Act such that non-dumped A-A comparison results offset the aggregate amount of dumping in the numerator of the weighted-average dumping margin, the Department has not adopted such an interpretation for the results of A-T comparisons. The Department finds that this approach preserves the A-T comparison methodology as a distinct comparison method that is an alternative to the A-A comparison method.

Previous to this modification, the Department has generally used A-T comparisons in reviews, with monthly average normal values as required by section 777A(d)(2) of the Act. The Department did not find that it was necessary to depart from the use of monthly average normal values to adopt the A-A comparison method in reviews. To facilitate contemporaneous comparisons, the Department will utilize monthly average export prices in making A-A comparisons in reviews. The monthly averages will be compared to monthly average normal values and the results will be aggregated with offsets being provided for non-dumped comparisons. Those offsets will be provided regardless of the month, model, level of trade, etc. for the other comparison(s) found to have been dumped.

With respect to the potential for masked dumping as a reason not to prefer the use of A-A comparisons in reviews, the Department does not agree that the potential for masked dumping means that A-A comparisons are unsuitable as the default basis for determining the weighted-average dumping margins and antidumping duty assessment rates in reviews. Similar to the conduct of original investigations, when conducting reviews under the modified methodology, the Department will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.

With respect to the question of consistency with existing U.S. law, the Department does not interpret the Act to prohibit A-A comparisons from being utilized as a basis to determine weighted-average dumping margins and assessment rates in reviews. Nor does any provision of the Act articulate a mandate to use A-T comparisons in reviews. Section 777A(d)(2) simply directs how A-T comparisons should be made when such comparisons are used. This provision differs markedly from section 777A(d)(1), which specifically provides criteria for selecting a comparison methodology in original antidumping duty investigations. The Department interprets this statutory structure as mandating certain criteria for selecting a comparison methodology in original antidumping duty investigations, but leaving the Department considerable discretion in selecting an appropriate comparison methodology in reviews. It is, therefore, within the Department's discretion to establish criteria for the selection of an appropriate comparison methodology in reviews, including criteria that differ from, or are similar to, the criteria mandated for use in original antidumping duty investigations.

The Department disagrees with comments suggesting that sections 751(a)(2)(A) and (C) of the Act preclude the use of A-A comparisons in reviews. Section 777A(d) of the Act provides for three distinct comparison methodologies by which dumping margins may be determined. Section 751(a)(2), in contrast, does not make reference to any specific comparison methodology to be used in reviews. Accordingly, the Department considers that any of the three comparison methodologies satisfies the requirements of section 751(a)(2). Moreover, section 751(a)(2) does not make reference to either the weighted-average dumping margin or the importer-specific antidumping duty assessment rate that is the specific subject of this modification. These particular results of reviews are not specifically mandated by section 751(a)(2), but are instead features of the Department's long-standing practice in reviews. Both the weighted-average dumping margin and the importer-specific antidumping duty assessment rate are the product of aggregating comparison results obtained using one of the three comparison methodologies. While calculation of these rates depends on transaction-specific data, and these rates are applied to entries at the time of entry or upon liquidation, they do not involve entry-by-entry determinations of dumping or antidumping duty assessment. The courts have affirmed these features of the Department's practice, confirming that section 751(a)(2) does not mandate an entry-by-entry determination of dumping and antidumping duties.[17]

With respect to the language of the SAA [18], this language does not clarify the meaning of any statutory provision to the effect that A-T comparisons are mandatory or that A-A comparisons are prohibited in reviews. Instead, the SAA makes the point that, in contrast to the situation with regard to original antidumping duty investigations, a

[17] *See e.g.,Timken Co.* v. *United States,* 354 F.3d 1334, 1341–42 (Fed. Cir. 2004), *cert den'd* 543 U.S. 976 (Nov. 1, 2004); *Corus Staal BV* v. *DOC,* 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied,* 126 S.Ct. 1023 (Jan. 9, 2006).

[18] *Statement of Administrative Action,* at p. 843, H. Doc. No. 103–316, vol. 1 (1994) (''The Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the ''investigation phase'' of an antidumping proceeding. Therefore, as permitted by Artcle 2.4.2, the preferred methodology in reviews will be to compare average to individual export prices.'')

preference for A-T comparisons is not inconsistent with Article 2.4.2 of the AD Agreement. Whereas it has been the Department's long-standing practice to prefer A-T comparisons in reviews, this practice has not been codified in the statute and it remains within the Department's discretion to alter this practice upon providing a reasoned explanation. The Department finds adopting a methodology that parallels the WTO-consistent methodology it adopted earlier in original investigations using A-A comparisons will facilitate the administration of a change to comply with WTO dispute settlement findings on zeroing.

Continued Effectiveness of the Antidumping Remedy

Several commentators argue that allowing offsets for non-dumped comparisons will reduce the effectiveness of U.S. trade laws because it would reduce or eliminate the amount of dumping that would otherwise be fully captured in the absence of any offsets. In so doing, the proposal would go against the current law's mandate that 100 percent of the dumping be fully captured. To illustrate this point, some draw on the ''speeding ticket'' analogy, whereby a driver caught exceeding the speed limit could nevertheless avoid the fine by submitting evidence that he or she drove below the speed limit on another occasion. One commentator noted that the EU and Japan have acknowledged that dumping can be masked completely through the provision of offsets by asserting that dumping would not exist but for the denial of offsets. These commentators also argue that, if the Department decides to provide offsets, it should allow itself the greatest flexibility to account for the maximum amount of dumping.

Several commentators suggest that the Department should consider all three possible comparison methodologies when conducting reviews, and select whichever method captures the maximum amount of dumping. Some argue that the T–T method would capture the greatest amount of dumping, and that recent technology permits greater use of this comparison methodology. Several further suggest that the Department should indicate a willingness to use averaging for whichever time period captures the most dumping (e.g., daily, weekly, monthly, or period-wide). One commentator notes that because many agricultural products are perishable, and domestic producers can be harmed via short-term (i.e., daily or weekly) price suppression, maximum flexibility should be maintained.

Some commentators suggest that, in addition to maintaining flexibility in comparison methodologies, the Department should also implement additional changes unrelated to the revised comparison methodology on zeroing, to antidumping policies and practices that preserve the full effectiveness of the antidumping laws. One commentator suggests the Department should give renewed focus to the use of provisions addressing fictitious markets and sales that are outside the ordinary course of trade, should consider shortening the range of months from which the contemporaneous month may be selected, and should revise its model match criteria. These commentators argue that despite their suggested alternatives, there is no way to come into compliance with the WTO findings without seriously compromising the effectiveness of the trade remedy laws.

One commentator argues that while it may be appropriate to invoke section 123(g) of the URAA for purposes of modifying the Department's regulations, the use of zeroing can be abandoned without the Department invoking its authority under section 123 because the Department can choose not to apply the zeroing method on a case-by-case basis. This party argues that Congress has purposefully imposed section 123 procedures only on amendments or modifications of regulations and written policy guidance. Because application of the zeroing method is not pursuant to written policy guidance, U.S. obligations with respect to adopted WTO reports, and changes pursuant thereto, have no bearing on domestic procedures. Because section 123 imposes certain procedural obligations that are not required in order for the Department to abandon zeroing, this party urges the Department to clarify that any changes undertaken are made pursuant to the agency's general legal authority to administer the antidumping laws, and that the Department did not rely upon or invoke the procedures called for under section 123.

Department Position: The Department has carefully considered all of the comments provided in this section 123 proceeding, particularly those comments addressing the need to maintain the effectiveness of the antidumping remedy, and has determined to adopt this *Final Modification for Reviews.* The Department is not taking this step lightly, and it stands to reason that the adoption of this *Final Modification for Reviews* will have some impact on the weighted-average dumping margins determined in reviews. Nevertheless, the Department, after fully considering the issue, and consulting with USTR and the relevant congressional committees, has determined to adopt this *Final Modification for Reviews* in order to address the findings of several WTO dispute settlement reports and to bring its practice into conformity with the WTO obligations of the United States as determined in those reports. The Department considers, moreover, that it has adopted a reasoned and balanced approach to implementation that is consistent with existing U.S. law and administrable by the agency.

With respect to the *Final Modification for Reviews* being a reasoned and balanced approach, the Department is adopting a methodology that parallels the WTO-consistent methodology the Department previously adopted in response to WTO dispute settlement reports relating to investigations. This new methodology for reviews will be the default methodology in all reviews for which this *Final Modification for Reviews* is effective; however, the Department does retain the discretion, on a case-by-case basis, to apply an alternative methodology, when appropriate. The Department retained similar discretion in investigations and has only needed to exercise it in a limited number of investigations since the adoption of the *Final Modification for Investigations.*[19]

With respect to this *Final Modification for Reviews* being consistent with existing U.S. law, the courts have held, in more than thirty cases, that while zeroing is a reasonable interpretation of the statute, it is a reasonable interpretation of an ambiguous provision of the statute. The ambiguity recognized by the Court of Appeals for the Federal Circuit means that it is within the Department's discretion to alter or abandon its zeroing methodology upon providing a reasoned explanation.[20] The Department is hereby altering that methodology, by adopting an A–A comparison methodology in reviews that parallels the WTO-consistent methodology adopted in investigations, and providing offsets when it aggregates the results of

[19] *See Final Modification for Investigations,* 71 FR 77722 (Dec. 27, 2006).

[20] *Timken Company Ltd.* v. *United States,* 354 F.3d 1334, 1342 (Fed. Cir. 2004) (''* * * while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's constructions. Basically, one number 'exceeds' another if it is 'greater than' the other, meaning it falls to the right of it on the number line.''); *see also Corus Staal BV* v. *Dept. of Commerce,* 395 F.3d 1343, 1347 (Fed. Cir. 2005).

those comparisons. Consistent with this interpretation of the statute and application of this methodology, the Department disagrees with those comments that suggest it is not capturing 100 percent of the dumping. The Department will capture 100 percent of the dumping that is determined to exist pursuant to this methodology. Moreover, alternative methodologies will remain available when determined to be appropriate on a case-by-case basis.

With respect to this *Final Modification for Reviews* being administrable by the Department, as previously indicated, the Department is adopting a methodology that parallels the WTO-consistent methodology it adopted earlier in original antidumping duty investigations using A–A comparisons. In so doing, the Department has adopted a methodology with which it is already familiar and experienced in administering. This will facilitate the administration of a change impacting the 188 reviews the Department conducts in an average year. The Department is not adopting the comments suggesting that it calculate dumping margins on the basis of A–A, T–T, and A–T comparison methodologies, and rely on the methodology providing the highest weighted-average margin of dumping. Such a proposal would entail substantial additional work in every case which is not administratively feasible given the statutory time constraints present in every proceeding and the Department's limited resources. Moreover, while such alternative methodologies remain available to the Department on a case-by-case basis, the Department expects to use the A–A comparison methodology, with offsets, in most reviews.

With regard to comments suggesting that the Department alter other aspects of its methodology having nothing to do with the issue of zeroing, the Department notes that the purpose of this proposal is to bring the United States into conformity with its WTO obligations as articulated in the dispute settlement reports cited above. These suggestions are beyond the scope of this section 123 proceeding. When these issues arise in a particular review, parties are free to suggest that the Department reconsider them in the context of that particular proceeding, as appropriate.

With regard to comments suggesting that the Department need not utilize a section 123 proceeding in order to adopt changes to its methodologies to address the findings in the above-cited WTO dispute settlement reports, these comments are inapposite. As is clear from the on-going proceeding in which the comments were submitted, the Department has determined to utilize the procedures of section 123 to adopt these changes. Whether the Department could have made these changes outside of section 123 is irrelevant. The Department has determined that, in this case, it was appropriate to undertake a section 123 proceeding, with all of its attendant comment and consultation processes, in order to complete the adoption of these significant changes in its practice.

Explicit Total Prohibition of Zeroing

A number of commentators argue that the Department should state explicitly that it will grant offsets when the export price exceeds the normal value, and specifically eliminate the zeroing methodology. Some of these commentators suggest that the Department should clearly state that it will grant offsets equal to the full difference between normal value and export price when calculating dumping margins using the A–A comparison methodology in reviews. These commentators note that the proposed regulations do not explicitly state that the Department will provide offsets when calculating the dumping margin. Some commentators suggest that the Department include explicit text in the *Final Modification for Reviews,* the regulations, or both, that unequivocally eliminates zeroing regardless of the comparison methodology employed, and regardless of any case-specific circumstances. Some assert that any elimination of a subset of comparisons (i.e., denial of offsets) is a violation of the United States' WTO obligations. In their view, an explicit prohibition of zeroing in all instances is necessary to ensure full compliance with WTO rulings and encourage other countries to comply with their commitments.

Department Position: With this *Final Modification for Reviews,* the Department is taking all steps necessary to address the findings of the WTO dispute settlement reports at issue and to come into compliance with its WTO obligations. As a result of this modification, the new, normal comparison methodology to be used in reviews will be the A–A comparison methodology (on a monthly basis) and offsets will be provided when the results of those comparisons are aggregated for purposes of determining the weighted-average dumping margin. This new methodology will parallel the WTO-consistent methodology the Department currently uses in original investigations.

It is not necessary, appropriate or desirable for the Department, in this *Final Modification for Reviews,* to go beyond the findings made in the WTO dispute settlement reports at issue by adopting a total prohibition of zeroing regardless of comparison method or case-specific circumstance. The dispute settlement reports at issue address only certain types of comparisons in particular circumstances, such that a total prohibition of zeroing is not necessary to come into compliance. With respect to the findings regarding the calculation of weighted-average dumping margins and antidumping duty assessment rates in reviews, the *Final Modification for Reviews* achieves compliance with the dispute settlement findings in that it adopts a methodology for these reviews that parallels the WTO-consistent methodology that is currently being applied in original investigations. The methodologies and interpretations set forth and adopted in the *Final Modification for Reviews* fully address the findings of WTO inconsistency.

Clarification on the Application of an Alternative Comparison Methodology

Several parties request clarification as to which circumstances would trigger the use of an alternative comparison methodology, and whether zeroing would be used in the alternative calculation methodology. These commentators also encourage the Department to narrowly tailor the circumstances under which an alternative comparison methodology is used. One commentator notes its concern that the reference to an alternative methodology in the *Proposed Modification for Reviews* is ambiguous, and will lead to parties manipulating the system for a certain preferred comparison methodology.

Some commentators remind the Department that if it is considering the use of the targeted dumping methodology as an alternative methodology, this methodology is to be employed as an exception, in very limited circumstances. One commentator suggests the Department should develop an overall final rule with regard to targeted dumping that is explicitly consistent with Article 2.4.2 of the Antidumping Agreement.

Some commentators state that the targeted dumping methodology was not intended to apply to reviews, and request that the Department explicitly state that it will not employ targeted dumping in this context.

Department Position: In its *Final Modification for Reviews,* the Department provides additional

clarification of the circumstances that could trigger the use of an alternative comparison methodology. The *Proposed Modification for Reviews* indicated that the Department would use monthly A–A comparisons, except where it determines that application of an alternative comparison method is more appropriate. The Department also indicated its intent to apply the methodology in a manner that parallels the WTO-consistent methodology the Department currently applies in investigations.[21]

In this *Final Modification for Reviews,* the Department clarifies that because the methodology being applied will parallel the WTO-consistent methodology that the Department currently applies in original investigations, it will necessarily include any exceptional or alternative comparison methods determined appropriate to address case-specific circumstances. The Department's regulations specifically describe three types of comparison methodologies that might be used to determine margins of dumping and antidumping duty assessment rates. Although the *Final Modification for Reviews* adopts the A–A method as the default method in reviews, the Department may determine to use any of the alternative comparison methodologies when deemed appropriate in a particular case.

The Department determines that it would be inappropriate to further speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed. These determinations would be highly dependent on the facts of the individual proceeding. However, as is the case with all administrative proceedings, interested parties will have the opportunity to comment on whether an alternative comparison method is warranted during the normal course of the review.

Assessment Rate Calculations

Some commentators request clarification as to how the Department intends to calculate antidumping duty assessment rates. A few request that the Department specifically clarify that it will continue to calculate importer-specific antidumping duty assessment rates. Some commentators argue the *Proposed Modification for Reviews* raises the possibility that antidumping duty assessment rates could be impacted by the level of dumping on other importers' entries, which contravenes the current statutory and regulatory requirements that the Department determine the level of dumping required for each entry during the review period and that it determine the assessment rate on an importer-specific basis. Some commentators suggest that the Department state that it will calculate antidumping duty assessment rates for individual importers without the zeroing method.

A few commentators suggest that before issuing a final section 123 determination, the Department should consider issuing a separate notice identifying any proposed changes in its calculation of importer-specific assessment rates necessitated by the proposed change in the Department's methodology to permit additional public comments. It is further suggested that the Department release for public comment the standard calculation program that it intends to use in reviews.

Department position: For purposes of this *Final Modification for Reviews,* the Department is providing additional explanation about the antidumping duty assessment methodology being adopted. The Department has determined that a further or separate comment period is not justified. The calculation program language, including any antidumping duty assessment determinations, particular to any specific review, will be available to parties through the Department's usual disclosure process and parties are free to comment on it during the course of the individual review.

With respect to the issue of assessment rates, when a review is conducted applying the A–A comparison methodology, and the weighted-average margin of dumping for the exporter or producer is determined to be zero or *de minimis,* no assessment rates will be calculated and the Department will instruct CBP to liquidate all imports from the exporter or producer without regard to antidumping duties, regardless of importer.

When the weighted-average margin of dumping for the exporter or producer is determined to be greater than *de minimis,* based on the A–A comparison methodology, the Department will perform an additional calculation to determine the assessment rate for each individual importer that purchases from the exporter or producer in question. This additional calculation will effectively repeat the first calculation performed at the exporter or producer level; however, in this case, the export transactions involved in the calculation will be limited to those involving merchandise imported by the individual importer. The monthly, weighted-average export prices of those transactions will be compared to monthly normal values, and the results will be aggregated with offsets being provided for non-dumped comparisons. Those offsets will be provided on an importer-specific basis in the aggregation, regardless of the month, model, level of trade, etc. for the other comparison(s) found to have been dumped.

Comments on the Proposed Regulations

Several commentators note that the proposed rule at § 351.414(c)(1) does not provide sufficient clarification of what constitutes ''*a particular case*.'' The commentators argue that without further clarification of the term, the investigating authority would have excessive discretion in interpreting and implementing the regulation. Therefore, the commentators request the Department to specify, in the final regulations, the exceptional circumstances that would allow the use of an alternative comparison methodology. These commentators suggest that the language of § 351.414(c)(1) regarding choice of method should be clarified to indicate when and how the Secretary might choose an alternative comparison methodology by making clear the circumstances in which it may find it ''more appropriate'' to deviate from its proposed methodology and use a ''different comparison method'' to calculate dumping margins and antidumping duty assessment rates in a review. One commentator goes further and suggests that the Department specify not only the specific circumstances that make it appropriate to deviate from the preferred methodology, but also which alternative comparison methodology would be used in particular circumstances.

Several commentators note that the proposed rules do not specify that zeroing will not be used. Therefore, these commentators request that the final rule specifically include a provision for granting offsets for non-dumped sales in all comparison methodologies. One commentator suggests clarification of the language of § 351.414(d)(3), with respect to the comparison of weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month. Specifically, the commentator suggests that it be made clear that while aggregating the comparisons of different months covered in a review, the

[21] *Proposed Modification for Reviews,* 75 FR at 81534.

Secretary will provide offsets for those comparisons which result in negative dumping margins.

Department Position: The Department disagrees that additional clarification of the regulations is necessary or appropriate. The revised regulations describe three types of comparison methodologies that might be used to determine margins of dumping and antidumping duty assessment rates. The overarching purpose of 19 CFR 351.414 is to implement section 777A(d) of the Act and to set forth the three statutory methodologies for establishing and measuring dumping margins.[22] Section 351.414(c), as revised by this Final Rule and *Final Modification for Reviews,* sets forth the default comparison methodology to be used in different contexts, and § 351.414(d) describes generally how the A–A method will be applied. The revised regulation makes clear that the A–A comparison methodology will be the default methodology in all reviews for which the Final Rule and *Final Modification for Reviews* applies. The Department has also explained that because the methodology being adopted will parallel the WTO-consistent methodology the Department currently applies in original investigations, it will necessarily include any exceptional or alternative comparison methodologies determined appropriate to address case-specific circumstances. The Final Rule allows sufficient flexibility for the Department to apply alternative comparison methodologies when necessary.

The Department has always retained discretion under its regulations to apply any of the three comparison methodologies in any context, and has exercised this discretion only in a limited number of circumstances. It would be inappropriate to further speculate as to which case-specific circumstances might warrant the use of an alternative comparison methodology in future reviews as this determination would be highly dependent on the facts of the individual proceeding. Because any description of such circumstances would be speculative, at best, the revised regulations do not specify the exceptional circumstances that might trigger the use of an alternative comparison methodology. Such questions are best addressed in the context of individual proceedings. As is the case with all proceedings, interested parties would have the opportunity to comment on whether an alternative comparison methodology is warranted during the normal course of the proceeding.

The Department further disagrees that the revised regulations must specifically indicate that offsets will be provided. The purpose of the regulation is to describe in general terms the comparison methodologies available, and the default methodology to be employed in different contexts. Greater specificity as to when offsets will be provided under each comparison methodology is beyond the intended purpose of the regulation, and is unnecessary for purposes of adopting a methodology that is WTO-consistent. The Department has already made clear that its revised methodology for reviews will parallel the WTO-consistent methodology the Department currently applies in original investigations, and that offsets will be provided when using this methodology. The Department has been granting offsets in original investigations since 2007 without specific regulatory language directing it to do so. The Department has further explained, above, how assessment rates will be determined for individual importers. The revised regulations coupled with the descriptions contained in this *Final Modification for Reviews* and the Department's responses to comments are sufficient. The Department does not consider that the revised regulations require further elaboration. Furthermore, as more fully explained in the Explicit Total Prohibition of Zeroing section of this notice, above, the Department disagrees that it is either necessary or appropriate to adopt a total prohibition—either explicit or implicit—of zeroing, regardless of the comparison methodology or case-specific circumstance. The methodologies and preferences set forth in this *Final Modification for Reviews* and the revised regulations, fully address the findings of WTO inconsistency.

Sunset Determinations

Many commentators welcome the United States' recognition that it should not rely on dumping margins based on the zeroing methodology when conducting sunset reviews. These commentators agree that international obligations prohibit the use of dumping margins calculated with zeroing for purposes of sunset determinations. One commentator argues that the Supreme Court's decision in *Murray* v. *Charming Betsy,* 6 U.S. (2 Cranch.) 64, 118 (1804) (*Charming Betsy*), compels the Department to terminate its use of zeroing in sunset reviews immediately in order to avoid violating the United States' international obligations. See *Fed.-Mogul Corp.* v. *United States,* 63 F.3d 1572, 1581 (Fed. Cir. 1995) (citing *Charming Betsy,* 6 U.S. (2 Cranch.) at 118). Several commentators argue that failure to recalculate dumping margins would result in costly and unnecessary litigation in light of the ruling in *US—Zeroing (Japan),* in which the Appellate Body found that reliance on dumping margins based on the zeroing methodology in sunset reviews is inconsistent with U.S. WTO obligations.

Some commentators argue that the *Proposed Modification for Reviews* does not sufficiently account for the many sunset reviews currently pending where past dumping margins were based on zeroing. Many suggest that the Department should recalculate all dumping margins relied upon in sunset reviews using the new WTO-consistent methodology. These commentators point out that dumping margin calculations and, hence, zeroing are relevant to determining both whether revocation of an order would be likely to lead to a continuation or recurrence of dumping and the magnitude of the dumping margin likely to prevail if the antidumping order were revoked. Another commentator goes on to observe that the Department must evaluate the change in dumping margins over time to ascertain changes in the exporters' pricing behavior as part of its sunset determinations. To conduct a trends analysis of this sort, it is necessary that the dumping margins be calculated in a consistent manner over time, which can only be done by eliminating the zeroing methodology from all calculations.

Certain commentators argue that the Department correctly recognized in the *Proposed Modification for Reviews* that it is not precluded from recalculating dumping margins from prior proceedings to eliminate zeroing for sunset reviews. One commentator points out that sections 752(c)(1) & (3) of the Act direct the Department to consider the prior rates it has calculated, not simply to adopt them wholesale, and that the Department may consider such other price, cost, market, or economic factors it deems relevant (*See* § 752(c)(2) of the Act). Another commentator argues that, regardless of whether certain dumping margins form the basis for the sunset determination, the statute (section 751(c) of the Act) requires the Department to consider all dumping margins determined during the five-year period, and therefore, recalculation cannot be avoided. A few other commentators request that the Department add clarifying language to 19 CFR 351.414 to clearly state that it will not rely on dumping margins that

[22] *See Antidumping Duties Countervailing Duties,* 62 FR 27296, 27374 (May 19, 1997) (*Preamble, Final Rule*).

contain zeroing in future sunset reviews, that it will recalculate dumping margins that contain zeroing in future sunset reviews, or both.

Several commentators urge that the Department should stop relying on dumping margins that contain zeroing in sunset reviews immediately. One commentator argues that, for sunset reviews, there is no reason to delay implementation until 60 business days after the date of publication of the *Final Modification for Reviews* because the proposed change is only to the Department's practice, and no change is proposed to its regulation.

Other commentators make more specific proposals for implementing the new practice in sunset reviews. One such proposal is for the Department to recalculate dumping margins without zeroing upon a showing by a respondent company that its individual dumping margin or the ''all others'' dumping margin would be zero or *de minimis.* Another commentator proposes that the Department conduct a changed circumstances review to determine whether dumping would be likely to continue or recur if the order were revoked upon a showing that the dumping margins without zeroing in three reviews completed after January 23, 2007, are zero or *de minimis.* One other commentator requests that the Department both recalculate dumping margins in a sunset review to eliminate zeroing, effective immediately, and then transmit to the ITC the non-zeroed dumping margins that are likely to exist if an order were revoked effective for sunset reviews initiated after the publication of the proposed rules. One commentator concerned about sunset reviews contends that the Department only suggests it will use section 129 to implement the DSB's recommendations and rulings in *US—Continued Zeroing (EC),* WT/DS350/R, para. 8.1(f), WT/DS350/AB/R (DS 350), but does not commit to do so. This commentator asks the Department to state clearly that it will implement DS 350 under section 129 when making its determination. This commentator also contends that there is no impediment to reopening prior sunset determinations under section 129.

Department Position: In response to comments from several parties, in the *Final Modification for Reviews,* the Department clarified that when making sunset determinations, it will modify its practice such that it will not rely on dumping margins determined in a manner found to be WTO-inconsistent in *US—Zeroing (EC), US—Zeroing (Japan), US—Stainless Steel (Mexico),* and in *US—Continued Zeroing (EC).* While it is possible that in some instances, dumping margins will need to be recalculated to avoid reliance on such dumping margins, the Department finds that those situations can be addressed on a case-specific basis.

When determining whether revocation of an antidumping order would be likely to lead to continuation or recurrence of dumping, section 752(c)(1) of the Act directs the Department to consider dumping margins determined during the original investigation and in subsequent reviews, and import volumes of the subject merchandise. The Department's regulations further provide that only in the most extraordinary circumstances will the Department rely on dumping margins other than those calculated and published during prior determinations. 19 CFR 351.218(e)(2)(i). The Department expects that in the vast majority of cases, it will have a sufficient number of dumping margins, determined in a manner not found to be WTO-inconsistent in these disputes, and sufficient information pertaining to import volumes, upon which to base its sunset determinations. Future dumping margins in reviews will be calculated in accordance with this *Final Modification for Reviews.* Furthermore, the Department may also rely on past dumping margins determined in a manner not found to be WTO-inconsistent in these disputes, such as dumping margins recalculated pursuant to section 129 proceedings, dumping margins determined on the basis of adverse facts available and dumping margins where no offsets were denied because all comparison results were positive. Additionally, if dumping margins declined over the five-year period, or if there are no dumping margins, decreased volumes provide another basis that indicates whether dumping is likely to continue or recur if the discipline of the order is removed.

Although the Department will evaluate each sunset determination on a case-by-case basis to determine whether recalculations are needed, the Department does not anticipate that, apart from the ''most extraordinary circumstances'' already provided for in its regulations, it will need to rely on dumping margins other than those published in prior determinations in order to avoid reliance on margins determined in a manner found to be WTO-inconsistent in these disputes. For these reasons, the Department disagrees that it is necessary to adopt a practice or methodology which assumes that previously determined dumping margins will always need to be recalculated in the context of sunset reviews.

The Department disagrees that it is required to recalculate dumping margins determined in a manner found to be WTO-inconsistent in these disputes that were calculated during the five-year period so that it may examine dumping margin trends over time. When determining whether dumping is likely to continue in the absence of an antidumping duty order during a five-year sunset review, the Department looks to whether dumping continued *at any level* after the issuance of the order.[23] While section 752(c)(1) of the Act directs the Department to ''consider'' previously determined dumping margins as the basis for its likelihood determination, there is no requirement that all dumping margins determined during that period form the basis for deciding whether the order should be continued. Accordingly, the Department does not agree that all dumping margins calculated during the five-year sunset period must be recalculated as a matter of course in order for the U.S. to be compliant with the statute.

The Department further disagrees with the suggestion that it should modify section 351.414(d) of its regulations to indicate that the Department will recalculate dumping margins in sunset determinations using the A–A comparison methodology. The Department has already indicated that it does not anticipate that it will need to recalculate dumping margins other than in the most extraordinary circumstances, and such circumstances are already provided for in its regulations. *See* 19 CFR 351.218(e)(2)(i). Accordingly, those instances where the Department may need to rely on dumping margins other than those previously determined can be addressed pursuant to 19 CFR 351.218(e)(2)(i) on a case-specific basis.

The Department has further clarified that this *Final Modification for Reviews* will apply to all sunset reviews pending before the Department for which either preliminary results of sunset review, or expedited final results of sunset review are issued more than 60 days after the date of publication of the Department's *Final Modification for Reviews.* The 60-day period will allow sufficient time

[23] *See Certain Circular Welded Carbon Steel Pipes and Tubes From India, Thailand, and Turkey; Final Results of Expedited Five-Year (''Sunset'') Reviews of Antidumping Duty Orders,* 76 FR 66893 (Oct. 28, 2011), and accompanying Issues and Decision Memorandum, at Cmt. 1; *see also Statement of Administrative Action,* at 889 and 890, H. Doc. No. 103–316, vol. 1 (1994); the House Report, H. Rep. No. 103–826, pt. 1, at 63–64 (1994).

prior to issuance of a preliminary sunset determination, or a final expedited sunset determination, for parties to provide comments within the context of each individual proceeding. For reasons fully set forth in response to comments on the Effective Date of Implementation section of this notice, the Department finds this to be an adequate amount of time to permit parties and the Department to respond to novel and complex issues that arise as a result of implementing the modified regulations. The Department does not find that a separate notice and comment period is necessary.

The Department finds the commentator's request that it commit to implementing ''as applied'' findings of inconsistency through a section 129 proceeding in certain sunset reviews to be beyond the scope of this section 123 determination. *See* Implementation through Section 129 Proceedings and Application to Completed Reviews section of this notice. The purpose of this *Final Modification for Reviews* is not to address or fix how the *Final Modification for Reviews* is to be applied in the specific proceedings that were challenged, but rather is to address the broad elements of the prior practice that were found WTO-inconsistent. The Department has addressed the inconsistencies found with respect to sunset reviews by including a modification of the methodology that will be applied in future sunset reviews. Whether any particular section 129 proceeding will be requested by the Office of the USTR for certain sunset reviews is beyond the scope of this *Final Modification for Reviews*.

Transaction-to-Transaction Comparisons in Investigations

A few commentators requested clarification concerning the Department's use of the T–T comparison methodology in original antidumping duty investigations. One commentator interpreted the Department's statement to signify that the Department would provide offsets for non-dumped transactions when applying the T–T methodology. Others requested confirmation that it will provide offsets for non-dumped sales when using this comparison methodology.

Department Position: In its *Proposed Modification for Reviews,* the Department stated that ''to the extent that any prior original antidumping duty investigations using T–T comparisons could be considered as establishing a practice of the Department with respect to the granting or denial of offsets for non-dumped comparisons when calculating the weighted average margin of dumping * * *, the Department proposes to withdraw any such practice.'' 76 FR 81534. In its *Final Modification for Reviews,* the Department has now clarified that to the extent that any prior original antidumping duty investigations using T–T comparisons could be considered an established practice of the Department with respect to the denial of offsets for non-dumped comparisons when calculating the weighted average margin of dumping, the Department withdraws any such practice. Specifically, when the Department applies the T–T comparison methodology in a future proceeding—regardless of whether offsets are provided—it will do so without reference to or reliance on any prior practice because, such practice has been withdrawn.

Effective Date of Implementation

A number of commentators propose that the Department implement the new methodology in reviews initiated 60 days or later after the date of the publication of the *Final Modification for Reviews.* Some of these parties explain that applying the new method to reviews that are pending as of the effective date would confuse interested parties in several different ways. These parties argue that, due to the complicated nature of this new policy, the Department is likely to face many complex and novel issues concerning its case-specific application.

Some commentators claim that implementing the new methodology in reviews that have already been initiated would be unfair to all parties who base decisions on whether to request and/or participate in reviews on the application of certain standard methodologies. Some commentators argue that because the date of the preliminary results of review for a proceeding can be subject to circumstances in the individual proceeding, the methodology applied could differ among proceedings that were initiated on the same day, which they claim would result in arbitrary treatment. One party argues that the arbitrariness of the effective date would provide an incentive for respondents to create complexity to slow the process or for domestic parties to neglect inadequacies to expedite the process. They contend that the statute intends for neither scenario and many of these concerns can be mitigated by applying the final rules to newly initiated reviews.

Other commentators argue that the Department's proposed effective date is too long and takes unnecessary time to implement the new policy. Some commentators cite to the *Final Modification for Investigations* (71 FR 77722), as precedent, and note that in that instance, the Department applied the new methodology to all investigations that were pending before the Department. Other commentators suggest that the Department apply the new method to all reviews where the final results are scheduled to be issued more than 60 days after the date of publication.

Some commentators argue that, because it only takes a simple programming modification to implement the final rule, the 60-day implementation period is too long even for a review for which the preliminary results have been issued. Several of these commentators argue that faster implementation will pose less litigation risk to the United States and result in a reduced litigation burden for all parties. Some parties argue that because the provision of offsets is an entirely administrative practice, the modification can be applied immediately, and there is no need for further delay.

Several commentators suggest that the effective date should be the date of the publication of the notice of the final rule. Some commentators suggest that the Department implement the final rule and modification for all reviews where the final results are expected to be issued 30 business days or later after the publication date. Some other commentators contend that, in accordance with section 123(g)(2) of the URAA, the 60-day period should begin when the Department begins its consultation with Congress unless the President determines an earlier effective date. One commentator argues that the effective date should be either the date of the publication of the final rules or 60 days after the Department begins its consultation, whichever is later. Some other commentators request that the Department implement this new policy immediately but do not suggest any specific date as the effective date.

Some commentators in favor of an earlier effective date argue that an earlier date would not impose a greater administrative burden because applying the necessary changes would not require new factual information. These parties further argue that the Department's *Proposed Modification for Reviews* methodology has afforded adequate notice to the public that the methodology might change.

One commentator requests that the Department conduct all sunset reviews using dumping margins calculated without zeroing no later than the by the effective date adopted for reviews.

Department Position: After careful consideration of the arguments presented by the commentators and of the information needed to implement this change, and weighing the administrative burdens, the Department determines that it will apply the *Final Modification for Reviews* in reviews pending before the Department for which the preliminary results are issued more than 60 days after the date of publication of the Department's Final Rule and *Final Modification for Reviews.* Additionally, the *Final Modification for Reviews* will apply in all sunset reviews pending before the Department for which either the preliminary results of sunset review, or expedited final results of sunset review, are issued more than 60 days after the date of publication of the Department's Final Rule and *Final Modification for Reviews.* In the *Proposed Modification for Reviews,* the Department indicated that the new methodology would be effective in reviews pending before the Department for which the preliminary results are issued more than 60 business days after the date of publication of the Department's final rule and modification. As further explained below, the Department finds 60 days to be an adequate amount of time for implementation. Therefore, in this *Final Modification for Reviews,* the Department has eliminated the requirement that preliminary results be issued more than 60 business days after the *Final Modification for Reviews* in order for the new method to apply.

This timetable for applying the new methodology is legally permissible and appropriate. The Department is adopting this *Final Modification for Reviews* in response to several WTO dispute settlement findings, pursuant to section 123(g)(1) of the URAA. Section 123(g)(2) of the URAA provides that a final rule or modification may not go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. While the statute establishes the manner of determining the effective date of any final rule or modification adopted pursuant to section 123, the statute does not specify whether the final rule or modification must apply only to new segments of proceedings initiated after the effective date, or may apply to any segments pending as of the effective date.

Similarly, the SAA provides no more specific guidance regarding the application of any final rule or modification adopted pursuant to section 123. The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date.[24] However, the SAA makes no such statement with respect to section 123 modifications. The SAA merely states, ''A final rule may not go into effect before the end of the 60-day consultation period unless the President determines that an earlier date is in the national interest.'' [25]

The applicable date for previous section 123 determinations has been determined by the Department on a case-by-case basis. In four prior section 123 proceedings, the Department has applied the final modification or final rule to segments initiated after the effective date.[26] On other occasions, the Department has adopted and applied a change in policy involving a statutory interpretation to all segments pending as of the date of the change.[27]

The Department disagrees with commentators that it is in a position to adopt a more expedient implementation date because this *Final Modification for Reviews* does not entail a statutory change. When considering changes or modifications to a longstanding methodology in an individual determination, the Department is required, at a minimum, to provide parties with adequate notice and opportunity to comment within the context of each proceeding, prior to making its final determination. Section 782(g) of the Tariff Act of 1930; *see also Koyo Seiko Co., Ltd* v. *United States,* 516 F. Supp. 2d 1323, 1333–34 (CIT 2007), *aff'd* 551 F.3d 1286 (Fed. Cir. 2008).

This *Final Modification for Reviews* entails a modification to the averaging methodology applied in reviews that was longstanding. Therefore, in transitioning to the new methodology, the Department will need to ensure that sufficient time is provided within the context of individual proceedings to allow parties to submit any new data that may be necessary, if desired. The Department will then need time to examine and analyze any additional data, and will need to permit parties to provide comments on any new data that is submitted. Additionally, applying the new methodology prior to issuance of the preliminary results is appropriate because the Department will need to allow sufficient time for parties to comment on the application of the new methodology as it applies in the context of individual proceedings.

The Department is not persuaded that it should adopt a shorter timetable simply because it was able to do so when it modified its methodology to provide offsets in investigations. In that instance, the Department found it appropriate to apply the modification to all pending proceedings at the time of the effective date, but only after ensuring the feasibility of such an expedited implementation, and concluding that such a timeframe would not unfairly prejudice any of the parties to those proceedings.[28] With respect to this *Final Modification for Reviews,* the Department determines that the modified methodology must apply only in proceedings where the preliminary results have not yet been issued in order to ensure that all parties have ample time to submit any new data and provide comment, and that the Department has adequate time to consider any new data and comments. For all of these reasons, the Department is not persuaded by arguments that it could apply the new method more expeditiously without compromising principles of accuracy, fairness, and due process.

Conversely, the Department also disagrees with commentators who argue that a longer timetable is necessary. The Department agrees that the new policy represents a substantive shift in methodology, and the Department expects to encounter novel issues as it begins to apply this methodology. The timetable already allows parties the opportunity to submit any new data, and to provide comment prior to the preliminary results. Parties will then have an additional opportunity to comment on the methodology prior to the final results, after it is applied. The Department finds this to be an adequate

[24] *See Statement of Administrative Action,* p. 1026, H. Doc. No. 103–316, vol. 1 (1994).

[25] *See Statement of Administrative Action,* p. 1021, H. Doc. No. 103–316, vol. 1 (1994).

[26] *See e.g. Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders,* 70 FR 62062 (Oct. 28, 2005) (applying amended regulations to sunset reviews initiated after the effective date); *Notice of Final Modification for Reviews of Agency Practice Under Section 123 of the Uruguay Round Agreements Act,* 68 FR 37125, 37138 (June 23, 2003) (applying new privatization methodology to investigations and reviews initiated on or after the effective date); *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade,* 67 FR 69186, 69197 (Nov. 15, 2002) (*''Arms Length Test''*) (applying new methodology to investigations and reviews initiated on or after the effective date); *Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders,* 64 FR 51236 (Sept. 22, 1999).

[27] *See Basis for Normal Value When Foreign Market Sales Are Below Cost,* Policy Bulletin 98.1 (Feb. 23, 1998); *Treatment of Inventory Carrying Cost in Constructed Value,* Policy Bulletin *94.1* (Mar. 24, 1994); *Final Modification for Investigations,* 71 FR 77722 (Dec. 27, 2006) (eliminating zeroing in investigations pending before the Department as of the effective date of the Final Rule.)

[28] *See Final Modification for Investigations,* 71 FR at 77725.

amount of time that will permit parties and the Department to respond to any novel or complex issues that arise in any particular case as a result of the new method.

The Department does not agree that to maintain fairness and non-arbitrary application of methodology, it must only apply the new methodology to reviews initiated after the effective date. Uncertainty of methodology is an insufficient justification for prolonging the application of a new methodology. The United States uses a ''retrospective'' assessment system under which final liability for antidumping duties is determined after the merchandise is imported. 19 CFR 351.212(a). While the Department must abide by notice provisions of the statute, changes in methodology like all other antidumping review determinations, permissibly involve retroactive effect. *SKF USA Inc.* v. *United States,* 537 F.3d 1373, 1381 (Fed. Cir. 2008). Requiring changes to be applied only to future entries would hinder the Department's ability to give timely effect to any changes in its own practices. *Koyo Seiko Co.,* 516 F. Supp. 2d at 1334, *aff'd* 551 F.3d at 1286. Moreover, the public has now been on notice of an impending change in methodology because the *Proposed Modification for Reviews* has been in the public realm since December 28, 2010, providing more than ample time for parties to consider their options with respect to upcoming review periods.

Implementation Through Section 129 Proceedings and Application to Completed Reviews

Many commentators agree that implementation of the adverse WTO dispute settlement findings listed in the *Proposed Modification for Reviews* should occur pursuant to section 129 of the URAA and many further agree that pursuant to section 129, any changes must be prospective only. Relying on section 129(c)(1), these commentators further argue that the changes should apply only to entries that remain unliquidated on or after the date USTR directs the Department to implement. Several commentators claim that the Department has consistently applied section 129 in this manner.

Numerous other commentators argue that the calculation and assessment of antidumping duties using zeroing should have ceased when the reasonable period of time (''RPT'') for compliance ended for the various WTO rulings. These commentators claim that dumping margins should be recalculated for the reviews involved in each of the WTO proceedings as well as any determinations or antidumping duty assessments arrived at using zeroing after the end of the applicable RPT. According to some other commentators, this means that the United States must immediately cease to apply cash deposit or antidumping duty assessment rates calculated using zeroing and replace them with non-zeroed rates, must reliquidate any entries that were liquidated after the end of the RPT at assessment rates calculated with zeroing, must recalculate cash deposit rates relying on zeroing and release excess cash deposits made after the RPT, and must not use zeroing in any ongoing reviews. One commentator emphasizes that this must occur regardless of the dates of entry. Other commentators argue that any excess duties collected should be refunded with interest.

Some commentators urge the Department not to interpret section 129(c)(1) as precluding the agency from taking action that affects imports that entered before the date on which USTR directs the Department to implement. Instead, consistent with past representations to the WTO, the Department should find that section 129(c)(1) is ambiguous with respect to the treatment of such entries.

Some commentators argue that Commerce might use one or more of several alternatives to come into compliance with respect to past entries, including the use of a changed circumstances review, voluntary remands for any reviews subject to litigation, use of the Department's broad authority under 19 U.S.C. 1617 to settle antidumping claims, or legislation requiring CBP to reliquidate entries that were liquidated after the end of the RPT at assessment rates using zeroing.

Other commentators urge the Department to apply the final rule to unliquidated entries in all pending reviews, *i.e.,* not just those subject to section 129 proceedings. They contend that treating imports from different countries and under different orders differently will prompt new and unnecessary litigation in the WTO. Other commentators argue that the final rule should be effective retrospectively to any entries in a completed review that remain unliquidated as of 60 days after the publication of the *Final Modification for Reviews.* Some commentators claim that the Department should apply the new methodology to entries that have not been liquidated due to pending litigation. One commentator contends implementing in this manner would be prospective to the future liquidation, and would not constitute retroactive implementation. Some other commentators argue that any dumping margins with present effects should be revised and applied prospectively from the effective date.

Another commentator points out that when the *Proposed Modification for Reviews* speaks of applying the new methodology pursuant to section 129, it only references disputes brought by the European Union, Japan and Mexico. This commentator contends, however, the Appellate Body's finding in *US-Zeroing (EC)* makes clear that the United States' obligations to remedy zeroing extend to reviews even though a Member may only have challenged the Department's use of zeroing in the antidumping investigation. Thus, the Department must recalculate dumping margins and antidumping duty assessment rates for subsequent reviews of those orders. Other commentators urge the Department to apply the new methodology to reviews subject to all ongoing and future WTO proceedings in which zeroing is an issue before a panel or the Appellate Body.

Other commentators argue that the statute prohibits the Department from implementing this new policy on entries covered by completed reviews because they all entered the United States before the effective date. The statute only permits the Department to abandon zeroing with respect to entries occurring on or after the date that USTR directs implementation, and which remain unliquidated at the time the Department implements its determination. Because entries covered by completed reviews entered prior to the effective date, the Department is prohibited from recalculating dumping margins for entries covered by those reviews. This commentator argues the Department should clarify that it will not recalculate dumping margins for completed reviews.

Department Position: The Department is adopting this *Final Modification for Reviews* pursuant to section 123 of the URAA to put in place for future reviews and certain pending reviews a methodology that responds to the WTO findings of inconsistency. The Department finds that comments addressing how the new methodology should apply to specific ''as applied'' findings of inconsistency are beyond the scope of this section 123 determination because section 129 determinations are separate from section 123 determinations under the URAA. The purpose of this *Final Modification for Reviews* is to address the broad elements of the prior practice that was found to be WTO-inconsistent. It is not intended to address how that practice was applied in the specific proceedings that

were challenged. The *Final Modification for Reviews* makes clear that the new WTO-consistent methodology will be applicable to any determinations made pursuant to section 129 of the URAA in connection with the relevant WTO disputes. Whether any particular section 129 proceeding will be requested by USTR is beyond the scope of this *Final Modification for Reviews.* Accordingly, the *Final Modification for Reviews* does not further specify the particular proceedings to which the new methodology will apply.

With regard to the various arguments that suggest the new methodology should apply prior to the announced effective date, such as to entries subject to reviews that were completed or ongoing prior to the effective date, for reasons fully set forth in the Effective Date of Implementation section of this notice, the Department disagrees. The WTO-consistent methodology adopted will be applied in all reviews that are pending before the Department for which the preliminary results are issued 60 days after the publication of the *Final Modification for Reviews.*

Adopting a Final Modification for Reviews During the Negotiation of the Doha Round

Some commentators suggest that the Department should delay this *Final Modification for Reviews* until the United States resolves this issue at the WTO through the Doha Development Agenda (Doha) negotiations. These commentators question whether these implementation efforts will weaken the U.S. negotiating position in the Doha Rules negotiations. They suggest the Department should hold off until the Doha negotiations are concluded, as this may obviate the need to implement at all. Nonetheless, if the Department chooses to implement, these commentators support U.S. efforts to seek correction, through the Doha Rules negotiations, of the Appellate Body decisions, which they view as ''extraordinarily flawed.''

Department Position: The Department disagrees with commentators that it should wait until the Doha negotiations are concluded before adopting the *Final Modification for Reviews.* The Department is conducting this exercise pursuant to the procedures provided for in section 123 of the URAA. This modification is necessary to implement the DSB's rulings and recommendations in the four, previously identified disputes—all of which necessarily dealt with the interpretation and application of existing WTO rules. Notwithstanding this *Final Modification for Reviews,* the Department will continue to work closely and actively with USTR with a view towards clarifying that the AD Agreement should not be read to require WTO Members to provide offsets for non-dumped comparisons.

Application of the Final Modification for Reviews to Subject Merchandise From Non-Member Countries

Two commentators representing interests or products from the Russian Federation note that Russia is in the process of joining the WTO, but is not yet a Member. These commentators argue that notwithstanding Russia's non-Member status, the Department's new methodology adopted in the *Final Modification for Reviews* should apply equally to subject merchandise from Russia.

Department Position: As the Department has stated in its *Final Modification for Reviews,* the revised methodology will apply in reviews pending before the Department for which a preliminary results are issued more than 60 days after the date of publication of the Department's Final Rule and *Final Modification for Reviews.* This includes reviews of antidumping orders without regard to whether the subject merchandise is from a WTO Member.

Comments Unrelated to the Final Modification for Reviews

One commentator argues that the 2008 rescission of the targeted dumping regulation violates the Administrative Procedures Act (''APA'') because it was repealed without notice and comment. The commentator requests that the targeted dumping regulation be restored in the final rule. Another commentator suggests that the Department should take this opportunity to address and clarify several aspects of the targeted dumping methodology it claims are deficient.

A few commentators request that the Department clarify that the new averaging groups will still be based on CONNUMs. One commentator points out that in stating that ''an averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the US at the same level of trade,'' the Department does not define the term ''identical or virtually identical in all physical characteristics.'' Based on this, the commenter argues, it is unclear whether the proposal refers to merchandise that comprises individual CONNUMs. Other commentators note that the *Proposed Modification for Reviews* does not state how the Department will distinguish price averaging groups (e.g., by importer, manufacturer, level of trade, sale type, or CONNUM). A few commentators also seek clarification that the Department is not proposing to change how it identifies merchandise for the purposes of model match methodology.

Department Position: These comments are beyond the scope of this action. The Department reiterates that the purpose of this exercise is to bring the United States into conformity with its WTO obligations as articulated in the dispute settlement reports cited above. The Department has proposed no changes to these other aspects of its dumping calculations, and thus finds these suggestions to be beyond the scope of this section 123 proceeding. Parties are free to suggest that the Department consider these comments in the context of a particular proceeding, as appropriate.

Timetable

The Final Rule and *Final Modification for Reviews* will be effective and applicable to all reviews pending before the Department for which the preliminary results are issued after April 16, 2012. The Department will further apply the Final Rule and *Final Modification of Reviews* to all sunset reviews pending before the Department for which either the preliminary results or expedited final results of sunset review are issued after April 16, 2012. This methodology will be used in implementing the findings of the WTO panels in *US-Zeroing (EC), US-Zeroing (Japan), US-Stainless Steel (Mexico),* and *US-Continued Zeroing (EC),* with respect to any antidumping duty proceedings conducted pursuant to section 129 of the URAA. This methodology will also be applicable to any reviews currently discontinued by the Department if such reviews are continued after April 16, 2012 by reason of a final and conclusive judgment of a U.S. Court.

Classification

Executive Order 12866

The Final Rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration (''SBA''), under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this action would not have a significant economic impact on a substantial number of small entities. Parties for whom the

Department determines a weighted-average margin of dumping or antidumping duty assessment rate include foreign exporters and manufacturers, some of whom are affiliated with U.S. companies and U.S. importers. Some of these entities affected by the rule may be considered small entities under the SBA standard. The Department has determined that this action will not have a substantial economic impact on a significant number of small entities because the costs associated with antidumping duty liability generally will not increase as a result of the proposed rule. No comments were received regarding the economic impact of this rule. As a result, a final regulatory flexibility analysis is not required and one was not prepared.

Paperwork Reduction Act

This action does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: February 7, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

For the reasons stated, 19 CFR part 351 is amended as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 et seq.; and 19 U.S.C. 3538.

Subpart B—Antidumping and Countervailing Duty Procedures

■ 2. Section 351.414 is revised to read as follows:

§ 351.414 Comparison of normal value with export price (constructed export price).

(a) *Introduction.* This section explains when and how the Secretary will average prices in making comparisons of export price or constructed export price with normal value. (*See* section 777A(d) of the Act.)

(b) *Description of methods of comparison*—(1) *Average-to-average method.* The ''average-to-average'' method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) *Transaction-to-transaction method.* The ''transaction-to-transaction'' method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) *Average-to-transaction method.* The ''average-to-transaction'' method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(c) *Choice of method.* (1) In an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.

(2) The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

(d) *Application of the average-to-average method*—(1) *In general.* In applying the average-to-average method, the Secretary will identify those sales of the subject merchandise to the United States that are comparable, and will include such sales in an ''averaging group.'' The Secretary will calculate a weighted average of the export prices and the constructed export prices of the sales included in the averaging group, and will compare this weighted average to the weighted average of the normal values of such sales.

(2) *Identification of the averaging group.* An averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. In identifying sales to be included in an averaging group, the Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as the Secretary considers relevant.

(3) *Time period over which weighted average is calculated.* When applying the average-to-average method in an investigation, the Secretary normally will calculate weighted averages for the entire period of investigation. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate. When applying the average-to-average method in a review, the Secretary normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month.

(e) *Application of the average-to-transaction method*—In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.

(f) *Contemporaneous Month.* Normally, the Secretary will select as the contemporaneous month the first of the following months which applies:

(1) The month during which the particular U.S. sales under consideration were made;

(2) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sales in which there was a sale of the foreign like product.

(3) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sales in which there was a sale of the foreign like product.

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INTERNATIONAL TRADE COMMISSION

19 CFR Chapter II

Plan for Retrospective Analysis of Existing Rules

AGENCY: International Trade Commission.

ACTION: Policy statement.

SUMMARY: The United States International Trade Commission (Commission) gives notice of the adoption of a plan for the retrospective analysis of its existing regulations.

FOR FURTHER INFORMATION CONTACT: Peter L. Sultan, Office of the General Counsel, United States International Trade Commission, telephone 202–205–3094. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at 202–

205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: Executive Order 13579 of July 11, 2011, calls on each independent regulatory agency to develop and release to the public, within 120 days of the date of the Executive Order, a plan under which the agency will periodically review its significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives.

The Commission sought public comments on its Preliminary Plan for Retrospective Analysis of Existing Rules. 76 FR 66004 (Oct. 25, 2011). It received one comment on the preliminary plan from the law firm of Hughes Hubbard & Reed. Hughes Hubbard & Reed endorsed the preliminary plan and urged the Commission in particular to review 19 CFR Part 201. It stated its belief that certain modifications should be made to this regulation to render the Commission's investigations more effective. For example, Hughes Hubbard & Reed advocated broadening the language of 19 CFR 201.12 to clarify that the Commission will accept requests from parties to take action between an investigation's enumerated briefing periods. The Commission will take these comments into account when conducting its retrospective review of its rules.

The Commission has decided to adopt the Plan for Retrospective Analysis of Existing Rules without significant changes from the version that was preliminarily proposed. Accordingly, the Commission adopts the following Plan for Retrospective Analysis of Existing Rules.

United States International Trade Commission

Plan for Retrospective Analysis of Existing Rules

February 2012

I. Executive Summary of Plan

Executive Orders 13579 and 13563 recognize the importance of maintaining a consistent culture of retrospective review and analysis throughout the federal government. Executive Order 13579 calls on each independent regulatory agency to develop and release to the public a plan, consistent with law and reflecting the agency's resources and regulatory priorities and processes, under which the agency will periodically review its significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Pursuant to Executive Order 13579, the U.S. International Trade Commission developed this plan for retrospective analysis of its regulations. The plan is designed to create a defined method and schedule for identifying and reconsidering certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Its review processes are intended to facilitate the identification of rules that warrant repeal or modification, or the strengthening, complementing, or modernizing of rules where necessary or appropriate.

II. Background

The Commission is an independent, quasi-judicial federal agency with broad investigative responsibilities on matters of trade. It investigates the effects of dumped and subsidized imports on domestic industries, conducts global safeguard investigations, and adjudicates cases involving imports that allegedly infringe intellectual property rights. The Commission also serves as a federal resource where trade data and other trade policy-related information are gathered and analyzed. The information and analysis are provided to the President, the Office of the United States Trade Representative (USTR), and Congress to facilitate the development of sound and informed U.S. trade policy. The Commission makes most of its information and analysis available to the public to promote understanding of international trade issues. The Commission also maintains the Harmonized Tariff Schedule of the United States (HTS).

Thus, the Commission is not primarily a regulatory agency, and its regulations generally serve to govern the process of its statutory investigative responsibilities. In carrying out its mission, the Commission issues rules of practice and procedure relating to the conduct of its investigations. The Commission's rules are codified in Title 19 of the Code of Federal Regulations.

- Part 201 of the Commission's rules are rules of general application relating to the functions and activities of the Commission.
- Part 202 sets out rules pertaining to investigations of costs of production under section 336 of the Tariff Act of 1930, as amended (19 U.S.C. 1336).
- Part 204 contains rules pertaining to investigations of effects of imports on agricultural programs under section 22 of the Agricultural Adjustment Act, as amended (7 U.S.C. 624).
- Part 205 covers rules pertaining to investigations to determine the probable economic effect on the economy of the United States of proposed modifications of duties or any other barrier to (or other distortion of) international trade or of taking retaliatory actions to obtain the elimination of unjustifiable or unreasonable foreign acts or policies which restrict U.S. commerce.
- Part 206 pertains to investigations relating to global and bilateral safeguard actions, market disruption, trade diversion, and review of relief actions.
- Part 207 sets out rules for the conduct of antidumping and countervailing duty investigations conducted under title VII of the Tariff Act of 1930, as amended (19 U.S.C. 1671 et seq.).
- Part 208 contains rules pertaining to investigations with respect to the commercial availability of textile fabric and yarn in Sub-Saharan African countries.
- Part 210 sets out rules for the conduct of investigations of unfair practices in import trade under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 337).
- Part 212 establishes rules for the implementation of the Equal Access to Justice Act (5 U.S.C. 504).

In the course of its investigations, the Commission generally issues questionnaires seeking business and financial information from domestic and foreign firms. These questionnaires are frequently revised and adapted, with the input of affected parties wherever possible.

The Commission also maintains several documents that provide guidance to parties involved in its investigations, including its ''Antidumping and Countervailing Duty Handbook,'' ''An Introduction to Administrative Protective Order Practice in Import Injury Investigations,'' and the ''Handbook on Electronic Filing Procedures.'' These documents are maintained in electronic form on the Commission's Web site and are reviewed and updated periodically.

III. Scope of Plan

This plan covers existing regulations, existing information collections, and significant guidance documents.

IV. Elements of the Plan

Fostering a Culture of Retrospective Analysis. The Commission intends to strengthen its culture of retrospective analysis by informing all of its employees of the plan and periodically seeking input from them.

Prioritization. The Commission has identified selection criteria for the rules it will review retrospectively. It will endeavor to review rules that:

- Have been affected by subsequent legal developments;
- Overlap, duplicate, or conflict with other federal rules;
- Are the subject of public comments, from individuals and entities that appear before the Commission, and from Congressional and Executive Branch sources;
- Require outdated reporting practices; or
- Have been in place for a long time, so that updating may be appropriate.

Structure and Staffing. The following Commission official will be responsible for overseeing the retrospective review of existing rules: James R. Holbein, Secretary, email: *secretary@usitc.gov*.

Process for Retrospective Review. Every two years, the Commission's General Counsel will send a memorandum to the Commission's Secretary, office directors, and administrative law judges asking them for input on rules suitable for modification or elimination. The Commission will also seek input from the public at that time. Based on responses to this memorandum and comments from the public, and in consultation with Commissioners, the General Counsel's office will make recommendations to the Commission regarding the possible modification or elimination of existing regulations. Once an appropriate rule change has been identified, the Commission will publish a notice of proposed rulemaking and solicit public comment on the proposed change.

IV. Public Access and Participation

On October 25, 2011, the Commission published a notice in the **Federal Register** and posted it on the homepage of its Web site seeking public comment on the design of this plan and the identification of specific rules to be included in the plan. 76 FR 66004 (Oct. 25, 2011) and *http://www.usitc.gov/secretary/fed_reg_notices/rules/eRuling_notice10182011sgl.pdf*.

The Commission received one comment on the preliminary plan from a law firm. This firm endorsed the preliminary plan and urged the Commission to review 19 CFR part 201, and in particular 19 CFR 201.12, to clarify that the Commission will accept requests from parties to take action between an investigation's enumerated briefing periods. The Commission will take these comments into account when conducting its retrospective review of its rules.

VI. Current Agency Efforts Already Underway Independent of Executive Order 13579

Even before the issuance of Executive Order 13579, Commission staff periodically reviewed existing regulations with a view to updating and improving them, and eliminating redundant or unnecessary regulations. For example, in October 2011, after notice and comment, the Commission amended its rules to provide that most documents filed with the agency will be filed by electronic means. *See* 76 FR 61937 (Oct. 6, 2011). The Commission also amended its rules to gather more information on public interest issues arising out of section 337 complaints. *See* 76 FR 64803 (Oct. 19, 2011). The Commission's 337 practice has an active and independent bar association that promotes an ongoing exchange of ideas on rules updates and improvements. In addition, the Commission staff constantly adapts the questionnaires that it issues in Title VII investigations to reflect the specific circumstances of each investigation. Wherever possible, the staff seek preliminary input from firms that will be asked to complete these questionnaires. In light of these efforts, the Commission is well-positioned to implement a more systematic plan for retrospective review of its regulations.

VII. Examples of Rules for Retrospective Review

The Commission has preliminarily identified the following aspects of its existing rules for review over the next two years:

1. General review of existing regulations in 19 CFR parts 201, 207, and 210. The Commission will seek to determine whether any such regulations shall be modified, streamlined, expanded or repealed so as to make the agency's regulations more effective or less burdensome.

2. Employee Responsibilities and Conduct, 19 CFR part 200. The Commission intends to review its regulations addressing employee responsibilities and conduct, to assess whether these regulations can be modified or repealed, in light of the issuance of similar regulations by the Office of Government Ethics.

3. National Security Information, 19 CFR part 201, Subpart F. The Commission intends to review its regulations addressing national security information, to assess whether these regulations should be modified, in light of Executive Order 13526 (Dec. 29, 2009).

4. Investigations With Respect to Commercial Availability of Textile Fabric and Yarn in Sub-Saharan African Countries, 19 CFR part 208. The Commission intends to review its regulations addressing investigations with respect to the commercial availability of textile fabric and yarn in Sub-Saharan African countries, to assess whether these regulations can be repealed, in light of the repeal of section 112(c)(2) of the African Growth and Opportunity Act (AGOA), which required the Commission to make determinations with respect to the commercial availability and use of regional textile fabric or yarn in lesser developed beneficiary sub-Saharan African countries in the production of apparel articles receiving U.S. preferential treatment under AGOA (see section 3(a)(2)(B) of Pub. L. 110–436, October 16, 2008, 122 Stat. 4980).

This list is non-exhaustive and the Commission will consider whether other parts of its regulations should also be subject to review within the next two years.

VIII. Publishing the Plan Online

The Commission will publish this plan in the **Federal Register** and on the agency's Web site, at www.usitc.gov. The Web site includes a page on the Commission's Rules of Practice and Procedure, at *http://www.usitc.gov/secretary/fed_reg_notices/rules/*. This Rules page will include a link to the plan. Members of the public will be able to post comments about the plan via a link on the page. Commenters may also choose to file comments in paper form to the Secretary to the Commission, Room 112, 500 E Street SW., Washington, DC 20436.

By Order of the Commission.

Issued: February 8, 2012.

James Holbein,

Secretary to the Commission.

[FR Doc. 2012–3267 Filed 2–13–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 870

[Docket No. FDA–2012–N–0091]

Medical Devices; Cardiovascular Devices; Classification of the Endovascular Suturing System

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the endovascular suturing system into class II (special controls). The Agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

DATES: This rule is effective March 15, 2012. The classification was effective on November 21, 2011.

FOR FURTHER INFORMATION CONTACT: Robert Gill, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1547, Silver Spring, MD, 20993–0002, 301–796–6373.

SUPPLEMENTARY INFORMATION:

I. Background

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

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

In accordance with section 513(f)(1) of the FD&C Act, FDA issued an order on November 12, 2010, classifying the EndoStapling System into class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On December 10, 2010, Aptus Endosystems, Inc. submitted a petition requesting classification of the EndoStapling System under section 513(f)(2) of the FD&C Act. The manufacturer recommended that the device be classified into class II (Ref. 1).

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

The device is assigned the generic name endovascular suturing system, and it is identified as a medical device intended to provide fixation and sealing between an endovascular graft and the native artery. The system is comprised of the implant device and an endovascular delivery device used to implant the endovascular suture.

FDA has identified the following risks to health associated with this type of device and the measures required to mitigate these risks:

IDENTIFIED RISKS AND PROPOSED MITIGATION MEASURES

Identified risk	Recommended mitigation measures
Adverse tissue reaction	Biocompatibility Labeling
Infection	Sterility and Shelf Life Testing
Incompatibility with endograft	Bench testing
Migration or fracture of the endovascular suture	Bench testing Animal testing Clinical evaluation
Imaging Incompatibility	Bench testing Labeling
Electromagnetic incompatibility	Electromagnetic Compatibility Labeling
Electrical safety issues	Electrical Safety Testing Labeling
Corrosion	Bench testing
Improper deployment or inability to deploy	Bench testing Animal testing Clinical evaluation Software validation
Failure to prevent endograft migration or Type I endoleak	Bench testing Clinical evaluation Cadaver testing

FDA believes that the following special controls address the risks to health and provide reasonable assurance of the safety and effectiveness of the device: (1) The device should be demonstrated to be biocompatible; (2) sterility and shelf life testing should demonstrate the sterility of patient-contacting components and the shelf-life of these components; (3) non-clinical and clinical performance testing should demonstrate substantial equivalence in safety and effectiveness, including durability, compatibility, migration resistance, corrosion resistance, and delivery and deployment; (4) non-clinical testing should evaluate the compatibility of the device in an magnetic resonance (MR) environment; (5) appropriate analysis and non-clinical testing should validate electromagnetic compatibility (EMC) and electrical safety; (6) the sale, distribution, and use of the device are restricted to prescription use in accordance with 21 CFR 801.109 (§ 801.109); and (7) labeling must bear all information required for the safe and effective use of the device as outlined in § 801.109(c), including a detailed summary of the non-clinical and clinical evaluations pertinent to use of the device; in addition to general controls, address the risks to health and provide reasonable assurance of the safety and effectiveness of the device. Therefore, on November 21, 2011, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying the classification of the device by adding § 870.3460.

Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for an endovascular suturing system will need to comply with the special controls named in the regulation.

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

II. Environmental Impact

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

III. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this final rule is not a significant regulatory action under Executive Order 12866. The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because reclassification of this device from class III to class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the FD&C Act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $136 million, using the most current (2010) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Federal law includes an express preemption provision that preempts certain state requirements ''different from or in addition to'' certain Federal requirements applicable to devices. (See 21 U.S.C. 360(k); See *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470 (1996); *Riegel* v. *Medtronic, Inc.,* 552 U.S. 312 (2008)). The special controls established by this final rule create ''requirements'' to address each identified risk to health presented by these specific medical devices under 21 U.S.C. 360(k), even though product sponsors may have flexibility in how they meet those requirements (See *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–42 (9th Cir. 1997)).

V. Paperwork Reduction Act of 1995

This final rule establishes special controls that refer to currently approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 32501–3520). The collections of information in part 807 subpart E, regarding premarket notification submissions, have been approved under OMB control no. 0910–0120; the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control no. 0910–0485.

VI. Reference

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

1. Petition: Request for Evaluation of Automatic Class III Designation under § 513(f)(2) of the Food, Drug, and Cosmetic Act from Aptus Endosystems, Inc., December 10, 2010.

List of Subjects in 21 CFR Part 870

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under

authority delegated to the Commissioner of Food and Drugs, 21 CFR part 870 is amended as follows:

PART 870—CARDIOVASCULAR DEVICES

■ 1. The authority citation for 21 CFR part 870 continues to read as follows:

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

■ 2 Section 870.3460 is added to subpart D to read as follows:

§ 870.3460 Endovascular Suturing System.

(a) *Identification.* An endovascular suturing system is a medical device intended to provide fixation and sealing between an endovascular graft and the native artery. The system is comprised of the implant device and an endovascular delivery device used to implant the endovascular suture.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) The device should be demonstrated to be biocompatible;

(2) Sterility and shelf life testing should demonstrate the sterility of patient-contacting components and the shelf-life of these components;

(3) Non-clinical and clinical performance testing should demonstrate substantial equivalence in safety and effectiveness, including durability, compatibility, migration resistance, corrosion resistance, and delivery and deployment;

(4) Non-clinical testing should evaluate the compatibility of the device in an magnetic resonance (MR) environment;

(5) Appropriate analysis and non-clinical testing should validate electromagnetic compatibility (EMC) and electrical safety;

(6) The sale, distribution, and use of the device are restricted to prescription use in accordance with 21 CFR 801.109 of this chapter; and

(7) Labeling must bear all information required for the safe and effective use of the device as outlined in § 801.109(c) of this chapter, including a detailed summary of the non-clinical and clinical evaluations pertinent to use of the device.

Dated: February 9, 2012.

Nancy K. Stade,

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

[FR Doc. 2012–3398 Filed 2–13–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF STATE

22 CFR Part 41

[Public Notice 7796]

Visas: Issuance of Full Validity L Visas to Qualified Applicants

AGENCY: State Department.

ACTION: Final rule.

SUMMARY: This rule permits the issuance of L visas with validity periods based on the visa reciprocity schedule; whereas the current rule limits L visas to the petition validity period, which is determined by the Department of Homeland Security.

DATES: This rule is effective February 14, 2012.

FOR FURTHER INFORMATION CONTACT: Lauren A. Prosnik, Legislation and Regulations Division, Visa Services, Department of State, 2401 E Street NW., Room L–603D, Washington, DC 20520–0106, (202) 663–1260.

SUPPLEMENTARY INFORMATION:

Why is the department promulgating this rule?

Current Department regulations require that L visa duration be limited to the validity period of the petition, which, under Department of Homeland Security (DHS) regulations, cannot exceed three years. Petitioners may apply to U.S. Citizenship and Immigration Services (USCIS) for extension of petition validity in increments of up to two years, but the total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity, or seven years for aliens employed in a managerial or executive capacity. The Department is changing this regulation to delink visa and petition validity periods, as currently required by 22 CFR 41.54(c), ''Validity of visa''. As a result, L visa validity will be governed by 22 CFR 41.112, which provides that, except as provided in paragraphs (c) and (d) of that section, a nonimmigrant visa shall have the validity prescribed in schedules provided to consular officers by the Department, which reflect the reciprocal treatment the applicant's country accords U.S. nationals, U.S. permanent residents, or aliens granted refugee status in the United States. The change would assist beneficiaries of petitions for L status who are nationals of countries for which the reciprocity schedule prescribes visa validity for a longer period of time than the initial validity indicated in the petition approved by DHS and who have extended their L stay while in the United States. Subject to 22 CFR 41.112(c), such individuals generally would not need to apply again for an L visa at a U.S. Embassy or Consulate overseas if they were to travel outside the United States during the period indicated in the applicable reciprocity schedule, as is currently required when petition validity has been extended. Under 8 CFR 214.2(l)(11), an alien may apply for admission in L status only while the individual or blanket petition is valid.

Regulatory Findings

Administrative Procedure Act

This regulation involves a foreign affairs function of the United States and, therefore, in accordance with 5 U.S.C. 553(a)(1), is not subject to the rule making procedures set forth at 5 U.S.C. 553.

Regulatory Flexibility Act/Executive Order 13272: Small Business

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth at sections 603 and 604 of the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, consistent with section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. This regulates individual aliens applying for visas under INA § 101(A)(15)(L) and does not affect any small entities, as defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or adverse effects on competition,

employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

Executive Order 12866

The Department of State has reviewed this proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and has determined that the benefits of this final regulation justify its costs. The Department does not consider this final rule to be an economically significant action within the scope of section 3(f)(1) of the Executive Order since it is not likely to have an annual effect on the economy of $100 million or more or to adversely affect in a material way the economy, a sector of the economy, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

Executive Orders 12372 and 13132: Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13563: Improving Regulation and Regulatory Review

The Department has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Paperwork Reduction Act

This rule does not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 41

Documentation of nonimmigrants.

For the reasons stated in the preamble, the Department of State amends 22 CFR part 41 to read as follows:

PART 41—[AMENDED]

■ 1. The authority citation for part 41 continues to read as follows:

Authority: 8 U.S.C. 1104; Pub. L. 105–277, 112 Stat. 2681–795 through 2681–801; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295).

■ 2. Section 41.54 is revised to read as follows:

§ 41.54 Intracompany transferees (executives, managers, and specialized knowledge employees)

(a) *Requirements for L classification.* An alien shall be classifiable under the provisions of INA section 101(a)(15)(L) if:

(1) The consular officer is satisfied that the alien qualifies under that section; and either

(2) In the case of an individual petition, the consular officer has received official evidence of the approval by DHS of a petition to accord such classification or of the extension by DHS of the period of authorized stay in such classification; or

(3) In the case of a blanket petition,

(i) The alien has presented to the consular officer official evidence of the approval by DHS of a blanket petition listing only those intracompany relationships and positions found to qualify under INA section 101(a)(15)(L);

(ii) The alien is otherwise eligible for L–1 classification pursuant to the blanket petition; and,

(iii) The alien requests that he or she be accorded such classification for the purpose of being transferred to, or remaining in, qualifying positions identified in such blanket petition; or

(4) The consular officer is satisfied the alien is the spouse or child of an alien so classified and is accompanying or following to join the principal alien.

(b) *Petition approval.* The approval of a petition by DHS does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Alien not entitled to L–1 classification under individual petition.* The consular officer must suspend action on the alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien applying for a visa as the beneficiary of an approved individual petition under INA section 101(a)(15)(L) is not entitled to such classification as approved.

(d) *Labor disputes.* Citizens of Canada or Mexico shall not be entitled to classification under this section if the Secretary of Homeland Security and the Secretary of Labor have certified that:

(1) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and,

(2) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

(e) *Alien not entitled to L–1 classification under blanket petition.* The consular officer shall deny L classification based on a blanket petition if the documentation presented by the alien claiming to be a beneficiary thereof does not establish to the satisfaction of the consular officer that

(1) The alien has been continuously employed by the same employer, an affiliate or a subsidiary thereof, for one year within the three years immediately preceding the application for the L visa;

(2) The alien was rendering services in a capacity that is managerial, executive, or involves specialized knowledge throughout that year; or

(3) The alien is destined to render services in such a capacity, as identified in the petition and in an organization listed in the petition.

(f) *Former exchange visitor.* Former exchange visitors who are subject to the two-year foreign residence requirement of INA section 212(e) are ineligible to apply for visas under INA section 101(a)(15)(L) until they have fulfilled the residence requirement or obtained a waiver of the requirement.

Dated: January 31, 2012.

Janice L. Jacobs,

Assistant Secretary for Consular Affairs, Department of State.

[FR Doc. 2012–3455 Filed 2–13–12; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9576]

RIN 1545–BF73

Definition of a Taxpayer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations which provide guidance relating to the determination of who is considered to pay a foreign income tax for purposes of the foreign tax credit. These regulations provide rules for identifying the person with legal liability to pay the foreign income

tax in certain circumstances. These regulations affect taxpayers claiming foreign tax credits.

DATES: *Effective Date:* These regulations are effective on February 14, 2012.

Applicability Dates: For dates of applicability, see § 1.901–2(h)(4).

FOR FURTHER INFORMATION CONTACT: Suzanne M. Walsh, (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

I. Section 901 Regulations

On August 4, 2006, the **Federal Register** published proposed regulations (71 FR 44240) under section 901 of the Internal Revenue Code concerning the determination of the person who paid a foreign income tax for foreign tax credit purposes (2006 proposed regulations). The 2006 proposed regulations would address the inappropriate separation of foreign income taxes from the income on which the tax was imposed in certain circumstances. In particular, the 2006 proposed regulations would provide guidance under § 1.901–2(f) relating to the person on whom foreign law imposes legal liability for tax, including in the case of taxes imposed on the income of foreign consolidated groups and entities that have different classifications for U.S. and foreign tax law purposes.

The Treasury Department and the IRS received written comments on the 2006 proposed regulations and held a public hearing on October 13, 2006. All comments are available at *www.regulations.gov* or upon request. In Notice 2007–95 (2007–2 CB 1091 (December 3, 2007)), the Treasury Department and the IRS announced that when issued, the final regulations will be effective for taxable years beginning after the final regulations are published in the **Federal Register**. This Treasury decision adopts, in part, the 2006 proposed regulations with the changes discussed in this preamble.

II. Section 909 and Notice 2010–92

Section 909 was enacted as part of legislation commonly referred to as the Education Jobs and Medicaid Assistance Act (EJMAA) on August 10, 2010 (Pub. L. 111–226, 124 Stat. 2389 (2010)). Section 909 was enacted to address concerns about the inappropriate separation of foreign income taxes and related income.

Section 909 provides that there is a foreign tax credit splitting event if a foreign income tax is paid or accrued by a taxpayer or section 902 corporation and the related income is, or will be, taken into account by a covered person with respect to such taxpayer or section 902 corporation. In such a case, the tax is suspended until the taxable year in which the related income is taken into account by the payor of the tax or, if the payor is a section 902 corporation, by a section 902 shareholder of the section 902 corporation.

On December 6, 2010, the Treasury Department and the IRS issued Notice 2010–92 (2010–2 CB 916 (December 6, 2010)), which primarily addresses the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in taxable years beginning on or before December 31, 2010 (pre-2011 taxable years). The notice provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years (pre-2011 taxes) are suspended under section 909 in taxable years beginning after December 31, 2010 (post-2010 taxable years) of a section 902 corporation. It also identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre-2011 taxable years (pre-2011 splitter arrangements) and provides guidance on determining the amount of related income and pre-2011 taxes paid or accrued with respect to pre-2011 splitter arrangements. The pre-2011 splitter arrangements are reverse hybrid structures, certain foreign consolidated groups, disregarded debt structures in the context of group relief and other loss-sharing regimes, and two classes of hybrid instruments. The notice states that future guidance will provide that foreign tax credit splitting events in post-2010 taxable years will at least include all of the pre-2011 splitter arrangements. The notice also states that the Treasury Department and the IRS do not intend to finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse hybrid. See Prop. § 1.901–2(f)(2)(iii). Temporary regulations under section 909 are published elsewhere in this issue of the **Federal Register**.

Summary of Comments and Explanation of Revisions

I. In General

In response to written comments on the 2006 proposed regulations and in light of the enactment of section 909, the Treasury Department and the IRS have determined that it is appropriate to finalize certain portions of the 2006 proposed regulations. These final regulations revise several of the proposed rules to take into account comments received. Other portions of those regulations are adopted without amendment. The Treasury Department and the IRS have also determined that the remaining portions of the 2006 proposed regulations should be withdrawn. The Treasury Department and the IRS, however, are continuing to consider whether and to what extent to revise or clarify the general rule that tax is considered paid by the person who has legal liability under foreign law for the tax. For example, the Treasury Department and the IRS are continuing to study whether it is appropriate to provide a special rule for determining who has legal liability in the case of a withholding tax imposed on an amount of income that is considered received by different persons for U.S. and foreign tax purposes, as in the case of certain sale-repurchase transactions.

II. Taxes Imposed on Combined Income

Section 1.901–2(f)(2) of the 2006 proposed regulations addresses the application of the legal liability rule to foreign consolidated groups and other combined income regimes, including those in which the regime imposes joint and several liability in the U.S. sense, those in which the regime treats subsidiaries as branches of the parent corporation (or otherwise attributes income of subsidiaries to the parent corporation), and those in which some of the group members have limited obligations, or even no obligation, to pay the consolidated tax. Section 1.901–2(f)(2)(i) of the 2006 proposed regulations provides that the foreign tax must be apportioned among the persons whose income is included in the combined base pro rata based on each person's portion of the combined income, as computed under foreign law. Because failure to allocate appropriately the consolidated tax among the members of the group may result in the separation of foreign income tax from the related income as described in section 909, comments recommended that the proposed rules be finalized in lieu of treating these arrangements as foreign tax credit splitting events under section 909, which would require suspension of split tax until the related income is taken into account. The Treasury Department and the IRS agree with the comments, and accordingly, § 1.901–2(f)(3)(i) of the final regulations adopts with minor modifications Prop. § 1.901–2(f)(2)(i). As these regulations are generally effective for foreign taxes paid or accrued during taxable years beginning after February 14, 2012, a foreign tax credit splitting event will not occur with respect to foreign taxes paid or accrued on combined income in such

years. However, with respect to foreign income taxes paid or accrued on combined income during taxable years beginning after December 31, 2010, and on or before February 14, 2012, temporary regulations under section 909 provide that a foreign tax credit splitting event occurs to the extent that a taxpayer does not allocate the foreign consolidated tax liability among the members of the foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of § 1.901–2(f)(3) prior to its amendment by this Treasury decision.

One comment recommended that combined income subject to preferential tax rates should be allocated only to group members with that type of income, in order to more closely match the tax with the related income. The Treasury Department and the IRS agree with this comment, and § 1.901–2(f)(3)(i) of the final regulations provides that combined income with respect to each foreign tax that is imposed on a combined basis, and combined income subject to tax exemption or preferential tax rates, is computed separately, and the tax on that combined income base is allocated separately.

Section 1.901–2(f)(2)(ii) of the 2006 proposed regulations provides that for purposes of § 1.901–2(f)(2) of the 2006 proposed regulations, foreign tax is imposed on the combined income of two or more persons if such persons compute their taxable income on a combined basis under foreign law. Foreign tax is considered to be imposed on the combined income of two or more persons even if the combined income is computed under foreign law by attributing to one such person (for example, the foreign parent of a foreign consolidated group) the income of other such persons. However, foreign tax is not considered to be imposed on the combined income of two or more persons solely because foreign law: (1) Permits one person to surrender a net loss to another person pursuant to a group relief or similar regime; (2) requires a shareholder of a corporation to include in income amounts attributable to taxes imposed on the corporation with respect to distributed earnings, pursuant to an integrated tax system that allows the shareholder a credit for such taxes; or (3) requires a shareholder to include, pursuant to an anti-deferral regime (similar to subpart F of the Internal Revenue Code (sections 951 through 965)), income attributable to the shareholder's interest in the corporation.

The final regulations adopt § 1.901–2(f)(2)(ii) of the 2006 proposed regulations with several modifications in response to comments. Section 1.901–2(f)(3)(ii) of the final regulations provides that tax is considered to be computed on a combined basis if two or more persons that would otherwise be subject to foreign tax on their separate taxable incomes add their items of income, gain, deduction, and loss to compute a single consolidated taxable income amount for foreign tax purposes. In addition, foreign tax is not considered to be imposed on the combined income of two or more persons if, because one or more of such persons is a fiscally transparent entity under foreign law, only one of such persons is subject to tax under foreign law (even if two or more of such persons are corporations for U.S. tax purposes). The regulations include additional illustrations clarifying that foreign tax is not considered to be imposed on combined income solely because foreign law: (1) Reallocates income from one person to a related person under foreign transfer pricing provisions; (2) requires a person to take into account a distributive share of taxable income of an entity that is a partnership or other fiscally transparent entity for foreign tax law purposes; or (3) requires a person to take all or part of the income of an entity that is a corporation for U.S. tax purposes into account because foreign law treats the entity as a branch or fiscally transparent entity (a reverse hybrid). A reverse hybrid does not include an entity that is treated under foreign law as a branch or fiscally transparent entity solely for purposes of calculating combined income of a foreign consolidated group.

One comment requested clarification that the exclusions from the definition of a combined income base (for example, foreign integration and anti-deferral regimes) apply solely for purposes of determining whether a foreign income tax is imposed on combined income, and do not apply for purposes of determining each person's ratable share of the combined income base. The Treasury Department and the IRS agree that these exclusions from the definition of a combined income base do not exclude any amount of income otherwise subject to tax on a combined basis from the operation of the combined income rule. However, since nothing in the list of exclusions affects the amount of income in the combined income base, which is computed under foreign law, the Treasury Department and the IRS believe a change is unnecessary.

Section 1.901–2(f)(2)(iii) of the 2006 proposed regulations provides that a reverse hybrid is considered to have legal liability under foreign law for foreign taxes imposed on the owners of the reverse hybrid in respect of each owner's share of the reverse hybrid's income. As stated in Notice 2010–92, the Treasury Department and the IRS will not finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse hybrid. Notice 2010–92 identifies reverse hybrids as pre-2011 splitter arrangements, and the temporary regulations under section 909 also identify reverse hybrids as splitter arrangements.

Section 1.901–2(f)(2)(iv) of the 2006 proposed regulations provides rules for determining each person's share of the combined income tax base, generally relying on foreign tax reporting of separate taxable income or books maintained for that purpose. The 2006 proposed regulations provide that payments between group members that result in a deduction under both U.S. and foreign tax law will be given effect in determining each person's share of the combined income. The 2006 proposed regulations, however, explicitly reserve with respect to the effect of hybrid instruments and disregarded payments between related parties, which the preamble to the proposed regulations describes as a matter to be addressed in subsequent published guidance. Section 1.901–2(f)(2)(iv) of the 2006 proposed regulations also provides special rules addressing the effect of dividends (and deemed dividends) and net losses of group members on the determination of separate taxable income.

Section 1.901–2(f)(3)(iii) of the final regulations adopts Prop. § 1.901–2(f)(2)(iv) with modifications reflecting that certain hybrid instruments and certain disregarded payments are treated as splitter arrangements subject to section 909. In particular, the final regulations provide that in determining separate taxable income of members of a combined income group, effect will be given to intercompany payments that are deductible under foreign law, even if such payments are not deductible (or are disregarded) for purposes of U.S. tax law. Thus, for example, interest accrued by one group member with respect to an instrument held by another member that is treated as debt for foreign tax purposes but as equity for U.S. tax purposes would be considered income of the holder and would reduce the taxable income of the issuer. The final regulations, however, include a cross-

reference to § 1.909–2T(b)(3)(i) for rules requiring suspension of foreign income taxes paid or accrued by the owner of a U.S. equity hybrid instrument.

Section 1.901–2(f)(2)(v) of the 2006 proposed regulations provides that U.S. tax principles apply to determine the tax consequences if one person remits a tax that is the legal liability of another person. For example, a payment of tax for which a corporation has legal liability by a shareholder of that corporation (including an owner of a reverse hybrid), will ordinarily result in a deemed capital contribution and deemed payment of tax by the corporation. Prop. § 1.901–2(f)(2)(v) also provides that if the corporation reimburses the shareholder for the tax payment, such reimbursement would ordinarily be treated as a distribution for U.S. tax purposes. The Treasury Department and the IRS received several comments regarding Prop. § 1.901–2(f)(2)(v) noting that a shareholder's payment of a corporation's tax and a corporation's reimbursement of a shareholder for paying its tax liability will not result in deemed capital contribution and deemed dividend treatment if arrangements are in place that treat the shareholder's payment of the tax as pursuant to a lending or agency arrangement. In response to these comments, the second and third sentences of § 1.901–2(f)(2)(v) of the 2006 proposed regulations are not included in § 1.901–2(f)(3)(iv) of the final regulations, and the final regulations simply provide that U.S. tax principles apply to determine the tax consequences if one person remits a tax that is the legal liability of another person.

III. Taxes Imposed on Partnerships and Disregarded Entities

Section 1.901–2(f)(3) of the 2006 proposed regulations provides rules regarding the treatment of two types of hybrid entities. First, in the case of an entity that is treated as a partnership for U.S. income tax purposes but is taxable at the entity level under foreign law (which the 2006 proposed regulations define as a hybrid partnership), such entity is considered to have legal liability under foreign law for foreign income tax imposed on the income of the entity. The 2006 proposed regulations also provide rules for allocating foreign tax paid or accrued by a hybrid partnership if the partnership's U.S. taxable year closes with respect to one or more (or all) partners or if there is a change in ownership of the hybrid partnership. See Prop. § 1.901–2(f)(3)(i).

Second, in the case of an entity that is disregarded as separate from its owner for U.S. federal income tax purposes, the person that is treated as owning the assets of such entity for U.S. tax purposes is considered to have legal liability under foreign law for tax imposed on the income of the entity. The 2006 proposed regulations provide rules for allocating foreign tax between the old owner and the new owner of a disregarded entity if there is a change in the ownership of the disregarded entity during the entity's foreign taxable year and such change does not result in a closing of the entity's foreign taxable year. See Prop. § 1.901–2(f)(3)(ii). The 2006 proposed regulations generally provide that for hybrid partnerships and disregarded entities, allocations of tax will be made under the principles of § 1.1502–76(b) based on the respective portions of the taxable income of the hybrid entity (as determined under foreign law) for the foreign taxable year that are attributable to the period ending on the date of the ownership change (or the last day of the terminating partnership's U.S. taxable year) and the period ending after such date. This approach is consistent with the rule provided in § 1.338–9(d) for apportioning foreign tax paid by a target corporation that is acquired in a transaction that is treated as an asset acquisition pursuant to an election under section 338, if the foreign taxable year of the target does not close at the end of the acquisition date.

A change in the ownership of a hybrid partnership or disregarded entity during the entity's foreign taxable year that does not result in the closing of the hybrid entity's foreign taxable year may result in the separation of income from the associated foreign income taxes. A change in the ownership occurs if there is a disposition of all or a portion of the owner's interest. A separation of income from the associated foreign income taxes could occur if the foreign tax paid or accrued with respect to such foreign taxable year has not been allocated appropriately between the old owner and the new owner. Certain changes of ownership involving related parties could be treated as a foreign tax credit splitting event under section 909. Comments recommended that the proposed legal liability rules addressing the treatment of hybrid entities be finalized in lieu of treating the above-described case of a change in the ownership of a hybrid entity as a foreign tax credit splitting event under section 909. The Treasury Department and the IRS agree, and accordingly, the final regulations adopt the proposed rules with modifications in response to comments.

One comment recommended that, if a termination under section 708(b)(1)(B) requires a closing of the books to allocate U.S. taxable income between the old partnership and new partnership but the foreign taxable year does not close, or if a change in a partner's interest results in a closing of the partnership's taxable year with respect to the partner and an allocation of partnership items based on a closing of the books under section 706, foreign tax for the year of change should similarly be allocated under the principles of sections 706 and 708 and the regulations under those sections based on a closing of the books, rather than under the principles of § 1.1502–76(b), which permits ratable allocation of the foreign tax with an exception for extraordinary items. The comment noted that apportioning the foreign tax using the same methodology as is used to apportion U.S. taxable income between the terminating partnership and the new partnership, or between the partner whose interest changes and the other partners, would lead to better matching of foreign tax and the associated income. The Treasury Department and the IRS are concerned about the increased administrative and compliance burdens associated with requiring a closing of the foreign tax books in order to apportion foreign tax for the year of change. Accordingly, this comment was not adopted.

In response to a comment, the final regulations apply the same foreign tax allocation rules to section 708 terminations that arise under section 708(b)(1)(A) in the case of a partnership that has ceased its operations, including a change in ownership in which a partnership becomes a disregarded entity. The final regulations also apply the same allocation rules if there are multiple ownership changes within a single foreign taxable year.

Finally, § 1.901–2(f)(3)(i) of the 2006 proposed regulations defines a hybrid partnership as an entity that is treated as a partnership for U.S. income tax purposes but is taxable at the entity level under foreign law. Because the Treasury Department and the IRS believe that a special definition of the term hybrid partnership is unnecessary and could cause confusion, references to the term hybrid partnership are replaced in the final regulations with references to the term partnership. No substantive change is intended by this revision.

IV. Effective/Applicability Date

The 2006 proposed regulations would generally apply to foreign taxes paid or accrued during taxable years beginning on or after January 1, 2007. However,

consistent with Notice 2007–95, § 1.901–2(h)(4) provides that these final regulations are generally effective for foreign taxes paid or accrued in taxable years beginning after February 14, 2012.

A comment raised several transition-related questions arising in situations where applying the final regulations changes the person who is considered the taxpayer with respect to a particular foreign income tax. First, the comment stated it is unclear what happens to the carryover under section 904(c) of foreign taxes paid or accrued in a taxable year beginning before the effective date of the final regulations (pre-effective date year) to a taxable year beginning on or after the effective date of the final regulations (post-effective date year). The comment recommended that the regulations clarify the treatment of foreign tax credit carryovers from pre-effective date years and foreign tax credit carrybacks from post-effective date years, and that the regulations provide that taxes paid or accrued in a pre-effective date year that are carried forward to a post-effective date year be assigned to the taxpayer that paid or accrued the foreign taxes in the pre-effective date year. Similarly, the comment recommended that taxes paid or accrued in a post-effective date year that are carried back to the last pre-effective date year should be treated in the carryback year as paid or accrued by the taxpayer that paid or accrued the taxes in the post-effective date year.

The Treasury Department and the IRS believe it is clear under current law that the person who paid or accrued foreign income taxes in a pre-effective date year is the person who is eligible under section 904(c) to carry forward such taxes to a post-effective date year, notwithstanding that such person may not be considered the taxpayer under these final regulations had the taxes been paid or accrued in the post-effective date carryover year. Similarly, the Treasury Department and the IRS believe it is clear that the person who paid or accrued foreign income taxes in a post-effective date year is the person who is eligible under section 904(c) to carry back such taxes to the last pre-effective date year. Therefore, the Treasury Department and the IRS believe that revision of the final regulations to reflect this comment is unnecessary.

The comment also recommended that taxpayers be permitted to apply the final regulations retroactively, but that taxpayers should not be permitted to take inconsistent positions with respect to the incidence of the foreign tax. The comment recommended that a duty of consistency be imposed on related parties, or parties that were related at the time the foreign tax was imposed. If parties that were related but are now unrelated do not agree on an election to apply the regulations retroactively, the comment stated no election should be permitted.

In response to the comment, the final regulations permit taxpayers to apply the combined income rules of § 1.901–2(f)(3) of the final regulations to taxable years beginning after December 31, 2010, and on or before February 14, 2012. This provision will permit taxpayers to avoid uncertainty regarding the application of section 909 to foreign taxes paid or accrued by foreign consolidated groups in pre-effective date taxable years beginning in 2011 and 2012. No inference is intended as to the determination of the person who paid the foreign tax under the rules in effect prior to the amendment of the regulations by this Treasury decision. To the extent that a taxpayer did not allocate foreign consolidated tax liability among the members of a foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of § 1.901–2(f)(3), the foreign consolidated group is a foreign tax credit splitting event under section 909. See Section 4.03 of Notice 2010–92 and § 1.909–5T.

The Treasury Department and the IRS have concerns about the administrative complexity and burden on taxpayers associated with requirements to elect to apply § 1.901–2(f)(4) retroactively that would be necessary to prevent potential whipsaws from two unrelated persons claiming a foreign tax credit for a single payment of foreign income tax, in cases where different persons are considered to pay the tax under the final regulations and under prior law. Although taxpayers may not elect to apply § 1.901–2(f)(4) retroactively, certain portions of that provision, specifically with respect to the person that has legal liability for a foreign tax paid by a disregarded entity or a partnership in the absence of a change in ownership, were consistent with the rules in effect under the final regulations prior to amendment by this Treasury decision. In addition, to prevent treating more than one person as paying a single amount of tax, § 1.901–2(f)(4) of the final regulations will not apply to any amount of tax paid or accrued in a post-effective date year of any person, if such tax would be treated as paid or accrued by a different person in a pre-effective date year under the prior regulations.

Availability of IRS Documents

IRS notices cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Effect on Other Documents

The following publication is obsolete in part as of February 14, 2012.

Notice 2007–95 (2007–2 CB 1091).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation and because the regulation does not impose a collection of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Suzanne M. Walsh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.706–1 is amended by adding paragraph (c)(6) to read as follows:

§ 1.706–1 Taxable years of partner and partnership.

* * * * *

(c) * * *

(6) *Foreign taxes.* For rules relating to the treatment of foreign taxes paid or

accrued by a partnership, see § 1.901–2(f)(4)(i) and (f)(4)(ii).

* * * * *

■ **Par. 3.** Section 1.901–2 is amended by revising paragraph (f)(3) and adding paragraphs (f)(4), (f)(5), and (h)(4) to read as follows:

§ 1.901–2 Income, war profits, or excess profits tax paid or accrued.

* * * * *

(f) * * *

(3) *Taxes imposed on combined income of two or more persons*—(i) *In general.* If foreign tax is imposed on the combined income of two or more persons (for example, a husband and wife or a corporation and one or more of its subsidiaries), foreign law is considered to impose legal liability on each such person for the amount of the tax that is attributable to such person's portion of the base of the tax. Therefore, if foreign tax is imposed on the combined income of two or more persons, such tax is allocated among, and considered paid by, such persons on a pro rata basis in proportion to each person's portion of the combined income, as determined under foreign law and paragraph (f)(3)(iii) of this section. Combined income with respect to each foreign tax that is imposed on a combined basis is computed separately, and the tax on that combined income is allocated separately under this paragraph (f)(3)(i). If foreign law exempts from tax, or provides for specific rates of tax with respect to, certain types of income, or if certain expenses, deductions or credits are taken into account only with respect to a particular type of income, combined income with respect to such portions of the combined income is also computed separately, and the tax on that combined income is allocated separately under this paragraph (f)(3)(i). The rules of this paragraph (f)(3) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. For purposes of this paragraph (f)(3), the term *person* means an individual or an entity (including a disregarded entity described in § 301.7701–2(c)(2)(i) of this chapter) that is subject to tax in a foreign country as a corporation (or otherwise at the entity level). In determining the amount of tax paid by an owner of a partnership or a disregarded entity, this paragraph (f)(3) first applies to determine the amount of tax paid by the partnership or disregarded entity, and then paragraph (f)(4) of this section applies to allocate the amount of such tax to the owner.

(ii) *Combined income.* For purposes of this paragraph (f)(3), foreign tax is imposed on the combined income of two or more persons if such persons compute their taxable income on a combined basis under foreign law and foreign tax would otherwise be imposed on each such person on its separate taxable income. For example, income is computed on a combined basis if two or more persons add their items of income, gain, deduction, and loss to compute a single consolidated taxable income amount for foreign tax purposes. Foreign tax is considered to be imposed on the combined income of two or more persons even if the combined income is computed under foreign law by attributing to one such person (for example, the foreign parent of a foreign consolidated group) the income of other such persons or by treating persons that would otherwise be subject to tax as separate entities as unincorporated branches of a single corporation for purposes of computing the foreign tax on the combined income of the group. However, foreign tax is not considered to be imposed on the combined income of two or more persons if, because one or more persons is a fiscally transparent entity (under the principles of § 1.894–1(d)(3)) under foreign law, only one of such persons is subject to tax under foreign law (even if two or more of such persons are corporations for U.S. Federal income tax purposes). Therefore, foreign tax is not considered to be imposed on the combined income of two or more persons solely because foreign law:

(A) Permits one person to surrender a loss to another person pursuant to a group relief or other loss-sharing regime described in § 1.909–2T(b)(2)(vi);

(B) Requires a shareholder of a corporation to include in income amounts attributable to taxes imposed on the corporation with respect to distributed earnings, pursuant to an integrated tax system that allows the shareholder a credit for such taxes;

(C) Requires a shareholder to include, pursuant to an anti-deferral regime (similar to subpart F of the Internal Revenue Code (sections 951 through 965)), income attributable to the shareholder's interest in the corporation;

(D) Reallocates income from one person to a related person under foreign transfer pricing rules;

(E) Requires a person to take into account a distributive share of income of an entity that is a partnership or other fiscally transparent entity for foreign tax law purposes; or

(F) Requires a person to take all or part of the income of an entity that is a corporation for U.S. Federal income tax purposes into account because foreign law treats the entity as a branch or fiscally transparent entity (a reverse hybrid). A reverse hybrid does not include an entity that is treated under foreign law as a branch or fiscally transparent entity solely for purposes of calculating combined income of a foreign consolidated group.

(iii) *Portion of combined income*—(A) *In general.* Each person's portion of the combined income is determined by reference to any return, schedule or other document that must be filed or maintained with respect to a person showing such person's income for foreign tax purposes, as properly amended or adjusted for foreign tax purposes. If no such return, schedule or other document must be filed or maintained with respect to a person for foreign tax purposes, then, for purposes of this paragraph (f)(3), such person's income is determined from the books of account regularly maintained by or on behalf of the person for purposes of computing its income for foreign tax purposes. Each person's portion of the combined income is determined by adjusting such person's income determined under this paragraph (f)(3)(iii)(A) as provided in paragraph (f)(3)(iii)(B) and (f)(3)(iii)(C) of this section.

(B) *Effect of certain payments*—(*1*) Each person's portion of the combined income is determined by giving effect to payments and accrued amounts of interest, rents, royalties, and other amounts between persons whose income is included in the combined base to the extent such amounts would be taken into account in computing the separate taxable incomes of such persons under foreign law if they did not compute their income on a combined basis. Each person's portion of the combined income is determined without taking into account any payments from other persons whose income is included in the combined base that are treated as dividends or other non-deductible distributions with respect to equity under foreign law, and without taking into account deemed dividends or any similar attribution of income made for purposes of computing the combined income under foreign law, regardless of whether any such deemed dividend or attribution of income results in a deduction or inclusion under foreign law.

(*2*) For purposes of determining each person's portion of the combined income, the treatment of a payment is determined under foreign law. Thus, for example, interest accrued by one group member with respect to an instrument

held by another member that is treated as debt for foreign tax purposes but as equity for U.S. Federal income tax purposes would be considered income of the holder and would reduce the income of the issuer. See also § 1.909–2T(b)(3)(i) for rules requiring suspension of foreign income taxes paid or accrued by the owner of a U.S. equity hybrid instrument.

(C) *Net losses.* If tax is considered to be imposed on the combined income of three or more persons and one or more of such persons has a net loss for the taxable year for foreign tax purposes, the following rules apply. If foreign law provides mandatory rules for allocating the net loss among the other persons, then the rules that apply for foreign tax purposes apply for purposes of this paragraph (f)(3). If foreign law does not provide mandatory rules for allocating the net loss, the net loss is allocated among all other such persons on a pro rata basis in proportion to the amount of each person's income, as determined under paragraphs (f)(3)(iii)(A) and (f)(3)(iii)(B) of this section. For purposes of this paragraph (f)(3)(iii)(C), foreign law is not considered to provide mandatory rules for allocating a net loss solely because such loss is attributed from one person to a second person for purposes of computing combined income, as described in paragraph (f)(3)(ii) of this section.

(iv) *Collateral consequences.* U.S. tax principles apply to determine the tax consequences if one person remits a tax that is the legal liability of, and thus is considered paid by, another person.

(4) *Taxes imposed on partnerships and disregarded entities*—(i) *Partnerships.* If foreign law imposes tax at the entity level on the income of a partnership, the partnership is considered to be legally liable for such tax under foreign law and therefore is considered to pay the tax for U.S. Federal income tax purposes. The rules of this paragraph (f)(4)(i) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. See §§ 1.702–1(a)(6) and 1.704–1(b)(4)(viii) for rules relating to the determination of a partner's distributive share of such tax. If the U.S. taxable year of a partnership closes for all partners due to a termination of the partnership under section 708(b)(1)(A) and the regulations under that section and the foreign taxable year of the partnership does not close, then foreign tax paid or accrued with respect to the foreign taxable year in which the termination occurs is allocated between the terminating partnership and its successors or assigns. For example, if, as a result of a change in ownership during a partnership's foreign taxable year, the partnership becomes a disregarded entity and the entity's foreign taxable year does not close, foreign tax paid or accrued by the owner of the disregarded entity with respect to the foreign taxable year is allocated between the partnership and the owner of the disregarded entity. If the U.S. taxable year of a partnership closes for all partners due to a termination of the partnership under section 708(b)(1)(B) and the regulations under that section and the foreign taxable year of the partnership does not close, then foreign tax paid or accrued by the new partnership with respect to the foreign taxable year in which the termination occurs is allocated between the terminating partnership and the new partnership. If multiple terminations under section 708(b)(1)(B) occur within the foreign taxable year, foreign tax paid or accrued with respect to that foreign taxable year by a new partnership is allocated among all terminating and new partnerships. In the case of any termination under section 708(b)(1), the allocation of foreign tax is made based on the respective portions of the taxable income (as determined under foreign law) for the foreign taxable year that are attributable under the principles of § 1.1502–76(b) to the period of existence of each terminating and new partnership, or successor or assign of a terminating partnership, during the foreign taxable year. Foreign tax allocated to a terminating partnership under this paragraph (f)(4)(i) is treated as paid or accrued by such partnership as of the close of the last day of its final U.S. taxable year. In the case of a change in any partner's interest in the partnership (a variance), except as otherwise provided in section 706(d)(2) (relating to certain cash basis items) or 706(d)(3) (relating to tiered partnerships), foreign tax paid or accrued by the partnership during its U.S. taxable year in which the variance occurs is allocated between the portion of the U.S. taxable year ending on, and the portion of the U.S. taxable year beginning on the day after, the day of the variance. The allocation is made under the principles of this paragraph (f)(4)(i) as if the variance were a termination under section 708(b)(1).

(ii) *Disregarded entities.* If foreign law imposes tax at the entity level on the income of an entity described in § 301.7701–2(c)(2)(i) of this chapter (a *disregarded entity*), the person (as defined in section 7701(a)(1)) who is treated as owning the assets of the disregarded entity for U.S. Federal income tax purposes is considered to be legally liable for such tax under foreign law. Such person is considered to pay the tax for U.S. Federal income tax purposes. The rules of this paragraph (f)(4)(ii) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. If there is a change in the ownership of such disregarded entity during the entity's foreign taxable year and such change does not result in a closing of the disregarded entity's foreign taxable year, foreign tax paid or accrued with respect to such foreign taxable year is allocated between the transferor and the transferee. If there is more than one change in the ownership of a disregarded entity during the entity's foreign taxable year, foreign tax paid or accrued with respect to that foreign taxable year is allocated among all transferors and transferees. The allocation is made based on the respective portions of the taxable income of the disregarded entity (as determined under foreign law) for the foreign taxable year that are attributable under the principles of § 1.1502–76(b) to the period of ownership of each transferor and transferee during the foreign taxable year. If, as a result of a change in ownership, the disregarded entity becomes a partnership and the entity's foreign taxable year does not close, foreign tax paid or accrued by the partnership with respect to the foreign taxable year is allocated between the owner of the disregarded entity and the partnership under the principles of this paragraph (f)(4)(ii). If the person who owns a disregarded entity is a partnership for U.S. Federal income tax purposes, see § 1.704–1(b)(4)(viii) for rules relating to the allocation of such tax among the partners of the partnership.

(5) *Examples.* The following examples illustrate the rules of paragraphs (f)(3) and (f)(4) of this section:

Example 1. (i) *Facts.* A, a United States person, owns 100 percent of B, an entity organized in country X. B owns 100 percent of C, also an entity organized in country X. B and C are corporations for U.S. and foreign tax purposes that use the ''u'' as their functional currency. Pursuant to a consolidation regime, country X imposes an income tax described in (a)(1) of this section on the combined income of B and C within the meaning of paragraph (f)(3)(ii) of this section. In year 1, C pays 25u of interest to B. If B and C did not report their income on a combined basis for country X tax purposes,

the interest paid from C to B would result in 25u of interest income to B and 25u of deductible interest expense to C. For purposes of reporting the combined income of B and C, country X first requires B and C to determine their own income (or loss) on a separate schedule. For this purpose, however, neither B nor C takes into account the 25u of interest paid from C to B because the income of B and C is included in the same combined base. The separate income of B and C reported on their country X schedules for year 1, which do not reflect the 25u intercompany payment, is 100u and 200u, respectively. The combined income reported for country X purposes is 300u (the sum of the 100u separate income of B and 200u separate income of C).

(ii) *Result.* On the separate schedules described in paragraph (f)(3)(iii)(A) of this section, B's separate income is 100u and C's separate income is 200u. Under paragraph (f)(3)(iii)(B)(*1*) of this section, the 25u interest payment from C to B is taken into account for purposes of determining B's and C's portions of the combined income under paragraph (f)(3)(iii) of this section, because B and C would have taken the items into account if they did not compute their income on a combined basis. Thus, B's portion of the combined income is 125u (100u plus 25u) and C's portion of the combined income is 175u (200u less 25u). The result is the same regardless of whether the 25u interest payment from C to B is deductible for U.S. Federal income tax purposes. See paragraph (f)(3)(iii)(B)(*2*) of this section.

Example 2. (i) *Facts.* A, a United States person, owns 100 percent of B, an entity organized in country X. B is a corporation for country X tax purposes, and a disregarded entity for U.S. income tax purposes. B owns 100 percent of C and D, entities organized in country X that are corporations for both U.S. and country X tax purposes. B, C, and D use the ''u'' as their functional currency and file on a combined basis for country X income tax purposes. Country X imposes an income tax described in paragraph (a)(1) of this section at the rate of 30 percent on the taxable income of corporations organized in country X. Under the country X combined reporting regime, income (or loss) of C and D is attributed to, and treated as income (or loss) of, B. B has the sole obligation to pay country X income tax imposed with respect to income of B and income of C and D that is attributed to, and treated as income of, B. Under the law of country X, country X may proceed against B, but not C or D, if B fails to pay over to country X all or any portion of the country X income tax imposed with respect to such income. In year 1, B has income of 100u, C has income of 200u, and D has a net loss of (60u). Under the law of country X, B is considered to have 240u of taxable income with respect to which 72u of country X income tax is imposed. Country X does not provide mandatory rules for allocating D's loss.

(ii) *Result.* Under paragraph (f)(3)(ii) of this section, the 72u of country X tax is considered to be imposed on the combined income of B, C, and D. Because country X law does not provide mandatory rules for allocating D's loss between B and C, under paragraph (f)(3)(iii)(C) of this section D's (60u) loss is allocated pro rata: 20u to B ((100u/300u) × 60u) and 40u to C ((200u/300u) × 60u). Under paragraph (f)(3)(i) of this section, the 72u of country X tax must be allocated pro rata among B, C, and D. Because D has no income for country X tax purposes, no country X tax is allocated to D. Accordingly, 24u (72u × (80u/240u)) of the country X tax is allocated to B, and 48u (72u × (160u/240u)) of such tax is allocated to C. Under paragraph (f)(4)(ii) of this section, A is considered to have legal liability for the 24u of country X tax allocated to B under paragraph (f)(3) of this section.

Example 3. (i) *Facts.* A, B, and C are U.S. persons that each use the calendar year as their taxable year. A and B each own 50 percent of the capital and profits of D, an entity organized in country M. D is a partnership for U.S. tax purposes, but is a corporation for country M tax purposes. D uses the ''u'' as its functional currency and the calendar year as its taxable year for both U.S. tax purposes and country M tax purposes. Country M imposes an income tax described in paragraph (a)(1) of this section at a rate of 30 percent at the entity level on the taxable income of D. On September 30 of Year 1, A sells its 50 percent interest in D to C. A's sale of its partnership interest results in a termination of the partnership under section 708(b)(1)(B) for U.S. tax purposes. As a result of the termination, ''old'' D's taxable year closes on September 30 of Year 1 for U.S. tax purposes. New D also has a short U.S. taxable year, beginning on October 1 and ending on December 31 of Year 1. The sale of A's interest does not close D's taxable year for country M tax purposes. D has 400u of taxable income for its foreign taxable year ending December 31, Year 1 with respect to which country M imposes 120u of income tax, equal to $120 as translated in accordance with section 986(a).

(ii) *Result.* Under paragraph (f)(4)(i) of this section, partnership D is legally liable for the $120 of country M income tax imposed on its foreign taxable income. Because D's taxable year closes on September 30, Year 1, for U.S. tax purposes, but does not close for country M tax purposes, under paragraph (f)(4)(i) of this section the $120 of country M tax must be allocated under the principles of § 1.1502–76(b) between terminating D and new D. See § 1.704–1(b)(4)(viii) for rules relating to the allocation of terminating D's country M taxes between A and B and the allocation of new D's country M taxes between B and C.

* * * * *

(h) * * *

(4) Paragraphs (f)(3), (f)(4), and (f)(5) of this section apply to foreign taxes paid or accrued in taxable years beginning after February 14, 2012. However, if an amount of tax is paid or accrued in a taxable year of any person beginning on or before February 14, 2012, and the tax is treated as paid or accrued by such person under 26 CFR 1.901–2(f) (revised as of April 1, 2011), then paragraph (f)(4) of this section will not apply, and 26 CFR 1.901–2(f) (revised as of April 1, 2011) will apply, to determine the person with legal liability for that tax. No other person will be treated as legally liable for such tax, even if the tax is paid or accrued on a date that falls within a taxable year of such other person beginning after February 14, 2012. Taxpayers may choose to apply paragraph (f)(3) of this section to foreign taxes paid or accrued in taxable years beginning after December 31, 2010, and on or before February 14, 2012.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: February 8, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9577]

RIN 1545–BK50

Foreign Tax Credit Splitting Events

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary Income Tax Regulations with respect to a new provision of the Internal Revenue Code (Code) that addresses situations in which foreign income taxes have been separated from the related income. These regulations are necessary to provide guidance on applying the new statutory provision, which was enacted as part of legislation commonly referred to as the Education Jobs and Medicaid Assistance Act (EJMAA) on August 10, 2010. These regulations affect taxpayers claiming foreign tax credits. The text of the temporary regulations also serves as the text of the proposed regulations (REG–132736–11) published in the Proposed Rules section of this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on February 14, 2012.

Applicability Dates: For dates of applicability, see §§ 1.704–1T(b)(1)(ii)(*b*)(*3*), 1.909–1T(e), 1.909–2T(c), 1.909–3T(c), 1.909–4T(b), 1.909–5T(c), and 1.909–6T(h).

FOR FURTHER INFORMATION CONTACT: Suzanne M. Walsh, (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

I. Section 909

Section 909 was enacted as part of EJMAA (Pub. L. 111–226, 124 Stat. 2389 (2010)) to address situations in which foreign income taxes have been separated from the related income. Section 909(a) provides that if there is a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a taxpayer, such tax is not taken into account for federal tax purposes before the taxable year in which the related income is taken into account by the taxpayer. Section 909(b) provides special rules with respect to a ''section 902 corporation,'' which is defined in section 909(d)(5) as any foreign corporation with respect to which one or more domestic corporations meets the ownership requirements of section 902(a) or (b) (a section 902 shareholder of the relevant section 902 corporation). If there is a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a section 902 corporation, the tax is not taken into account for purposes of section 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by such section 902 corporation or a section 902 shareholder. Thus, the tax is not added to the section 902 corporation's pool of ''post-1986 foreign income taxes'' (as defined in section 902(c)(2) and § 1.902–1(a)(8)), and its pool of ''post-1986 undistributed earnings'' (as defined in section 902(c)(1) and § 1.902–1(a)(9)) is not reduced by such tax. Accordingly, section 909 suspends foreign income taxes paid or accrued by a section 902 corporation at the level of the payor section 902 corporation. In the case of a partnership, section 909(a) and (b) apply at the partner level, and, except as otherwise provided by the Secretary, a similar rule applies in the case of an S corporation or trust. See section 909(c)(1).

For purposes of section 909, there is a foreign tax credit splitting event with respect to a foreign income tax if the related income is (or will be) taken into account by a covered person. See section 909(d)(1). Section 909 does not suspend foreign income taxes if the same person pays the tax but takes into account the related income in a different taxable period (or periods) due to, for example, timing differences between the U.S. and foreign tax accounting rules. The term ''foreign income tax'' means any income, war profits, or excess profits tax paid or accrued to any foreign country or to any possession of the United States. See section 909(d)(2). The Joint Committee on Taxation's technical explanation of the revenue provisions of EJMAA states that a foreign income tax includes any tax paid in lieu of such a tax within the meaning of section 903. Staff of the Joint Committee on Taxation, Technical Explanation of the Revenue Provisions of the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 1586, Scheduled For Consideration by the House of Representatives on August 10, 2010, at 5 (August 10, 2010) (JCT Explanation). Section 909(d)(3) provides that the term ''related income'' means, with respect to any portion of any foreign income tax, the income (or, as appropriate, earnings and profits) to which such portion of the foreign income tax relates. The term ''covered person'' means, with respect to any person who pays or accrues a foreign income tax (the ''payor''): (1) Any entity in which the payor holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value); (2) any person that holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value) in the payor; (3) any person that bears a relationship to the payor described in section 267(b) or 707(b); and (4) any other person specified by the Secretary. See section 909(d)(4).

Except as otherwise provided by the Secretary, any foreign income tax not currently taken into account by reason of section 909 is taken into account as a foreign income tax paid or accrued in the taxable year in which, and to the extent that, the taxpayer, the section 902 corporation or a section 902 shareholder (as the case may be) takes the related income into account under chapter 1 of Subtitle A of the Code. See section 909(c)(2). Notwithstanding this general rule, foreign income taxes are translated into U.S. dollars under the rules of section 986(a) in the year actually paid or accrued and suspended, and not as if they were paid or accrued in the year in which the related income is taken into account. See section 909(c)(2).

Section 909(e) provides that the Secretary may issue such regulations or other guidance as is necessary or appropriate to carry out the purposes of section 909, including guidance providing appropriate exceptions from the provisions of section 909 and for its proper application to hybrid instruments. The JCT Explanation states that such guidance may address the proper application of section 909 in cases involving disregarded payments, group relief, or other arrangements having a similar effect. JCT Explanation at 6. Section 211(c)(1) of EJMAA provides that section 909 applies to foreign income taxes paid or accrued (including foreign income taxes paid or accrued by section 902 corporations) in taxable years beginning after December 31, 2010 (post-2010 taxable years). Section 211(c)(2) of EJMAA provides that section 909 also applies to foreign taxes paid or accrued in taxable years beginning on or before December 31, 2010 (pre-2011 taxable years), but only for purposes of applying sections 902 and 960 to periods after December 31, 2010. For this purpose, there is no increase to a section 902 corporation's earnings and profits for the amount of any pre-2011 taxes to which section 909 applies that were previously deducted in computing earnings and profits in a pre-2011 taxable year. The JCT Explanation clarifies that the section 902 effective date rule ''applies for purposes of applying sections 902 and 960 to dividends paid, and inclusions under section 951(a) that occur, in taxable years beginning after December 31, 2010.'' JCT Explanation at 6–7.

II. Section 901 Proposed Regulations Issued in 2006

Section 909 was enacted to address concerns about the inappropriate separation of foreign income taxes and related income. These concerns were also the basis for the issuance in 2006 of proposed regulations under section 901 (2006 proposed regulations) concerning the determination of the person who paid a foreign income tax for foreign tax credit purposes (REG–124152–06, 71 FR 44240 (Aug. 4, 2006)). In particular, the proposed regulations would provide guidance under § 1.901–2(f) relating to the person on whom foreign law imposes legal liability for tax, including in the case of taxes imposed on the income of foreign consolidated groups and entities that have different classifications for U.S. and foreign tax law purposes. The Treasury Department and the IRS received written comments on the proposed regulations and held a hearing on October 13, 2006. All comments are available at *www.regulations.gov* or upon request. After taking into account the comments received, the 2006 proposed regulations are adopted, in part, as final regulations published elsewhere in this issue of the **Federal Register**.

III. Notice 2010–92

The Treasury Department and the IRS issued Notice 2010–92 (2010–2 CB 916 (December 6, 2010)), which primarily

addresses the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years. The notice provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years (pre-2011 taxes) are suspended under section 909 in post-2010 taxable years of a section 902 corporation. It also identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre-2011 taxable years (pre-2011 splitter arrangements) and provides guidance on determining the amount of related income and pre-2011 taxes paid or accrued with respect to pre-2011 splitter arrangements. The pre-2011 splitter arrangements are reverse hybrid structures, certain foreign consolidated groups, disregarded debt structures in the context of group relief and other loss-sharing regimes, and two classes of hybrid instruments. The notice states that the Treasury Department and the IRS expect future guidance will treat pre-2011 splitter arrangements as giving rise to foreign tax credit splitting events in post-2010 taxable years.

Notice 2010–92 states that future guidance may identify additional transactions or arrangements to which section 909 applies (including, for example, additional arrangements involving group relief regimes), although any such guidance will apply only with respect to foreign taxes paid or accrued in post-2010 taxable years. The notice also states that the Treasury Department and the IRS do not intend to finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse hybrid. See Prop. § 1.901–2(f)(2)(iii).

Concerning the effective date of section 909(b) (addressing a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a section 902 corporation), Notice 2010–92 provides that, consistent with the JCT Explanation, the Treasury Department and the IRS intend to issue regulations providing that section 909 does not apply in computing foreign taxes deemed paid under section 902 or 960 before the first day of the section 902 corporation's first post-2010 taxable year. Regarding the application of the section 909 effective date to situations involving partnerships, the notice states that in the case of a section 902 corporation that is a partner in a partnership, the section 902 corporation's distributive share of foreign income taxes paid or accrued by the partnership in a pre-2011 taxable year of the partnership that is included in a post-2010 taxable year of the section 902 corporation will be treated as a tax paid or accrued by the section 902 corporation in a post-2010 taxable year. See § 1.702–1(a)(6).

Notice 2010–92 also provides guidance concerning the application of section 909 to partnerships and trusts, as well as the interaction between section 909 and other Code provisions. In addition, the notice solicits comments on issues that should be addressed in regulations, including whether portions of the 2006 proposed regulations should be finalized or modified in light of the enactment of section 909. The Treasury Department and the IRS received written comments on Notice 2010–92, which are discussed in this preamble.

Explanation of Provisions

I. Section 704(b)

Section 1.704–1(b)(4)(viii)(*d*)(*3*) provides that if a branch of a partnership (including a disregarded entity owned by the partnership) is required to include in income under foreign law a payment (an inter-branch payment) it receives from the partnership or another branch of the partnership, any creditable foreign tax expenditure (CFTE) imposed with respect to the payment relates to the income in the CFTE category that includes the items attributable to the recipient (the recipient CFTE category). However, because the inter-branch payment is disregarded for U.S. Federal income tax purposes, the income related to the CFTEs imposed with respect to the payment may remain in the CFTE category that includes the items attributable to the payor of the inter-branch payment (the payor CFTE category). This is an exception to the general application of the principles of § 1.904–6 that would allocate the CFTEs to the payor CFTE category that includes the related income. See § 1.704–1(b)(4)(viii)(*d*)(*1*). Because this exception allows the CFTEs and related income to be allocated to different CFTE categories, they may potentially be allocated to the partners in a manner that separates the CFTEs from the related income.

Notice 2010–92 states that the Treasury Department and the IRS recognize that certain allocations of CFTEs and income of a partnership can result in a separation of the CFTEs and the related income for purposes of section 909, notwithstanding that these allocations satisfy the requirements of section 704(b) and the regulations under that section. The notice states that partnership allocations that satisfy the requirements of section 704(b) and the regulations under that section will not constitute pre-2011 splitter arrangements except to the extent the arrangement otherwise constitutes one of the arrangements identified in the notice as a pre-2011 splitter arrangement (for example, allocations of taxes paid by a hybrid partnership on income of a reverse hybrid). However, the notice also states that the Treasury Department and the IRS will provide in future guidance that allocations described in § 1.704–1(b)(4)(viii)(*d*)(*3*) will result in a foreign tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income. The notice also solicits comments on the extent to which § 1.704–1(b)(4)(viii)(*d*) and (b)(5), *Example 24* should be modified in light of the enactment of section 909. A comment recommended eliminating the special exception for inter-branch payments set forth in § 1.704–1(b)(4)(viii)(*d*)(*3*). The Treasury Department and the IRS have determined that the regulations should be revised to prevent allocations under § 1.704–1(b)(4)(viii)(*d*)(*3*) that would result in such a separation of taxes and related income from satisfying the safe harbor, regardless of whether section 909 applies.

These temporary regulations remove the special exception for inter-branch payments set forth in § 1.704–1(b)(4)(viii)(*d*)(*3*). As a result, the general principles of § 1.904–6 will apply to an inter-branch payment so that the CFTEs imposed on that payment will be allocated to the CFTE category that includes the related income for U.S. Federal income tax purposes. Accordingly, if the CFTEs and related income are allocated to partners in the same ratios, the safe harbor is satisfied and the allocation does not give rise to a foreign tax credit splitting event. The temporary regulations revise *Example 24* of § 1.704–1(b)(5) to reflect these changes. These changes are generally effective for taxable years beginning on or after January 1, 2012. Allocations made in accordance with § 1.704–1(b)(4)(viii)(*d*)(*3*) in taxable years beginning on or after January 1, 2011, and before January 1, 2012, will result in a foreign tax credit splitting event and suspension of foreign income taxes that are allocated to a different partner than the covered person that is allocated the related income. See § 1.909–5T(a)(2).

The temporary regulations also provide a transition rule for partnerships whose agreements were entered into prior to February 14, 2012. If there has been no material modification to the partnership agreement on or after February 14, 2012, then the partnership may apply the provisions of § 1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and § 1.704–1(b)(4)(viii)(*d*)(*3*) as in effect prior to February 14, 2012. See § 1.704–1T(b)(1)(ii)(*b*)(*3*). For purposes of this transition rule, any change in ownership constitutes a material modification to the partnership agreement. This transition rule does not apply to any taxable year in which persons bearing a relationship to each other specified in section 267(b) or 707(b) collectively have the power to amend the partnership agreement without the consent of any unrelated party (and all subsequent taxable years). In the case of any partnership that applies, under the transition rule, the provisions of § 1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and § 1.704–1(b)(4)(viii)(*d*)(*3*) as in effect prior to February 14, 2012, an allocation of foreign income taxes paid or accrued by the partnership with respect to an inter-branch payment will result in a foreign tax credit splitting event to the extent that the tax on the inter-branch payment is not allocated to the partners in proportion to the distributive shares of income to which the inter-branch payment tax relates. See § 1.909–2T(b)(4).

II. Section 909

A. In General

The temporary regulations provide an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events under section 909 with respect to foreign income taxes paid or accrued in taxable years beginning on or after January 1, 2012, as well as an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events with respect to foreign income taxes paid or accrued in a taxable year beginning on or after January 1, 2011, and before January 1, 2012. The temporary regulations further treat the foreign consolidated group splitter arrangement described in § 1.909–6T(b)(2) as giving rise to a foreign tax credit splitting event with respect to foreign income taxes paid or accrued in a taxable year beginning on or after January 1, 2012, and on or before February 14, 2012. In addition, these regulations provide rules for determining related income and split taxes and for coordinating the interaction between section 909 and other Code provisions. Finally, these regulations include the guidance described in Notice 2010–92, which primarily addresses the application of section 909 to foreign income taxes paid or accrued by section 902 corporations in taxable years beginning on or before December 31, 2010.

B. Definitions and Special Rules

Section 1.909–1T(a) provides definitions, and § 1.909–1T(b), (c), and (d) provide rules that apply for purposes of that section and §§ 1.909–2T through 1.909–5T. First, § 1.909–1T(b) and (c) provide rules substantially similar to those set forth in Notice 2010–92 concerning the application of section 909 to partnerships and trusts, except that the temporary regulations expand the scope of the rules to include S corporations and taxes paid or accrued by persons other than section 902 corporations. Section 1.909–1T(b) provides that under section 909(c)(1), section 909 applies at the partner level, and similar rules apply in the case of an S corporation or trust. Accordingly, in the case of foreign income taxes paid or accrued by a partnership, S corporation or trust, taxes allocated to one or more partners, shareholders or beneficiaries (as the case may be) will be treated as split taxes to the extent such taxes would be split taxes if the partner, shareholder or beneficiary had paid or accrued the taxes directly on the date such taxes are taken into account by the partner under sections 702 and 706(a), by the shareholder under section 1373(a), or by the beneficiary under section 901(b)(5). Any such split taxes will be suspended in the hands of the partner, shareholder or beneficiary.

Section 5.02 of Notice 2010–92 provides that, for purposes of applying section 909 in post-2010 taxable years, there will not be a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a partner with respect to its distributive share of the related income of a partnership that is a covered person with respect to the partner to the extent the related income is taken into account by the partner. A comment recommended that regulations adopt an aggregate approach in the partnership context in determining whether related income is taken into account by a covered person. The Treasury Department and the IRS agree with this comment. Accordingly, § 1.909–1T(c) provides that for purposes of determining whether related income is taken into account by a covered person, related income of a partnership, S corporation or trust is considered to be taken into account by the partner, shareholder or beneficiary to whom the related income is allocated.

Second, § 1.909–1T(d) addresses the application of section 909 to annual layers of pre-1987 accumulated profits and pre-1987 foreign income taxes of a section 902 corporation. Section 909 and the regulations under that section will apply to pre-1987 accumulated profits and pre-1987 foreign income taxes of a section 902 corporation attributable to taxable years beginning on or after January 1, 2012. Pursuant to section 902(c)(6) and § 1.902–1(a)(10)(i) and (a)(10)(iii), earnings and profits and associated foreign income taxes paid or accrued by a foreign corporation in taxable years before it was a section 902 corporation are treated as pre-1987 accumulated profits and pre-1987 foreign income taxes. Section 1.909–1T(d) provides that foreign corporations that become section 902 corporations must account for split taxes paid or accrued and related income in pre-acquisition taxable years beginning on or after January 1, 2012. Suspension of split taxes paid or accrued with respect to pre-1987 accumulated profits attributable to earlier taxable years is not required.

The rules of § 1.909–1T apply to taxable years beginning on or after January 1, 2011.

C. Splitter Arrangements

1. In General

Section 909(d)(1) provides that there is a foreign tax credit splitting event with respect to a foreign income tax if the related income is (or will be) taken into account by a covered person. The Treasury Department and the IRS believe that a transaction or arrangement in which the related income was taken into account by a covered person before the associated foreign income tax is paid or accrued (for example, due to a timing difference) presents the same concerns about the inappropriate separation of foreign income taxes and related income that section 909 was intended to address. Accordingly, § 1.909–2T(a)(1) provides that there is a foreign tax credit splitting event with respect to foreign income taxes paid or accrued if and only if, in connection with an arrangement described in § 1.909–2T(b) (a splitter arrangement) the related income was, is or will be taken into account for U.S. Federal income tax purposes by a person that is a covered person with respect to the payor of the tax.

Foreign income taxes that are paid or accrued in connection with a splitter arrangement are split taxes to the extent provided in § 1.909–2T(b). Income (or,

as the case may be, earnings and profits) that was, is or will be taken into account by a covered person in connection with a splitter arrangement is related income to the extent provided in § 1.909–2T(b). Split taxes will not be taken into account for U.S. Federal income tax purposes before the taxable year in which the related income is taken into account by the payor or, in the case of split taxes paid or accrued by a section 902 corporation, by a section 902 shareholder of such section 902 corporation. Therefore, in the case of split taxes paid or accrued by a section 902 corporation, split taxes will not be taken into account for purposes of section 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by the payor section 902 corporation, a section 902 shareholder of the section 902 corporation, or a member of the section 902 shareholder's consolidated group. See § 1.909–3T(a) for rules relating to when split taxes and related income are taken into account.

A comment requested that the regulations provide an exclusive list of arrangements that are subject to section 909 for post-2010 taxable years, similar to the approach adopted in Notice 2010–92, which provides an exclusive list of arrangements that are treated as giving rise to foreign tax credit splitting events for purposes of applying section 909 to pre-2011 taxes paid or accrued by section 902 corporations. The Treasury Department and the IRS agree with the comment, and accordingly, § 1.909–2T(b) sets forth an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events. Future guidance may identify additional transactions or arrangements to which section 909 applies, although any such guidance will apply to foreign taxes paid or accrued in taxable years beginning on or after the date such guidance is issued.

In particular, the Treasury Department and the IRS are concerned about certain types of asset transfers that can result in the separation of foreign income taxes and the related income, for example, because of differences in when income accrues or how basis is determined for purposes of U.S. and foreign tax law. Section 901(m) applies to foreign taxes paid or accrued in connection with certain transactions that are covered asset acquisitions described in section 901(m)(2). The Treasury Department and the IRS considered several approaches to address the interaction of sections 901(m) and 909, including providing taxpayers with an election to apply section 909 in lieu of section 901(m). The Treasury Department and the IRS concluded that applying section 909 to covered asset acquisitions between related parties would substantially increase the complexity and administrative burdens associated with such transactions. Accordingly, a covered asset acquisition is not a foreign tax credit splitting event for purposes of section 909. Nevertheless, section 901(m) may apply to foreign taxes paid or accrued in connection with a foreign tax credit splitting event, for example, if an election under section 338(a) is made with respect to the acquisition of the interests in a reverse hybrid. In such case, the Treasury Department and the IRS are considering the extent to which section 909 should apply to suspend deductions for foreign income taxes with respect to which section 901(m) disallows a credit.

The Treasury Department and the IRS are also considering whether to treat as foreign tax credit splitting events other arrangements or transactions that can result in the separation of foreign income taxes and the related income, for example, because of differences in when a shareholder is taxed on a dividend out of earnings of a covered person. One such arrangement is a distribution that is a dividend for foreign tax purposes but for U.S. Federal income tax purposes is either not includible in the shareholder's gross income pursuant to section 305(a) or is disregarded. See Rev. Rul. 80–154 (1980–1 CB 68) (involving a series of arrangements that were treated as a stock distribution from a foreign corporation to which section 305(a) applies), and Rev. Rul. 83–142 (1983–2 CB 68) (involving a cash payment by a corporation to its shareholder which was returned to the corporation and disregarded for U.S. Federal income tax purposes even though treated as a dividend subject to withholding tax under foreign law). The Treasury Department and the IRS are considering whether and to what extent such types of asset transfers and distributions should be treated as foreign tax credit splitting events and request comments on the circumstances in which such treatment should apply.

2. Reverse Hybrid Splitter Arrangements

Section 1.909–2T(b)(1) describes a reverse hybrid splitter arrangement. The definition of a reverse hybrid splitter arrangement is substantially identical to that set forth in Notice 2010–92, except that the scope is extended to cover taxes paid or accrued by persons other than section 902 corporations. A reverse hybrid is an entity that is a corporation for U.S. Federal income tax purposes but is a fiscally transparent entity (under the principles of § 1.894–1(d)(3)) or a branch under the laws of a foreign country imposing tax on the income of the entity. A reverse hybrid is a splitter arrangement when a payor pays or accrues foreign income taxes with respect to income of a reverse hybrid. A reverse hybrid splitter arrangement exists even if the reverse hybrid has a loss or a deficit in earnings and profits for a particular year for U.S. Federal income tax purposes (for example, due to a timing difference). The foreign income taxes paid or accrued with respect to income of the reverse hybrid are split taxes. The related income with respect to split taxes from a reverse hybrid splitter arrangement is the earnings and profits (computed for U.S. Federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the payor's foreign tax base with respect to which the split taxes were paid or accrued. Accordingly, related income of the reverse hybrid only includes items of income or expense attributable to a disregarded entity owned by the reverse hybrid to the extent that the income attributable to the activities of the disregarded entity is included in the payor's foreign tax base.

3. Loss-Sharing Splitter Arrangements

Section 1.909–2T(b)(2) expands the types of loss-sharing arrangements that Notice 2010–92 treats as splitter arrangements. A foreign group relief or loss-sharing regime is a regime in which one entity may surrender its loss to offset the income of one or more other entities. Such a loss of one entity that, in connection with a foreign group relief or other loss-sharing regime, is taken into account by one or more other entities for foreign tax purposes is a ''shared loss.'' Shared losses can be used to shift foreign tax liability from one entity to another without a concomitant shift in U.S. earnings and profits. Notice 2010–92 applied only to shared losses attributable to debt that is disregarded for U.S. Federal income tax purposes. A comment suggested that it would be appropriate to treat other loss-sharing arrangements as foreign tax credit splitter arrangements as well, in particular, when the payor of a tax could have used the shared loss to offset foreign tax on income that is treated as the payor's own income under U.S. Federal income tax principles. The Treasury Department and the IRS agree that the scope of loss-sharing arrangements that are treated as splitter arrangements should be expanded to cover these cases. Accordingly § 1.909–

2T(b)(2)(i) defines a ''loss-sharing splitter arrangement'' as arising under a foreign group relief or other loss-sharing regime to the extent a shared loss of a U.S. combined income group could have been used to offset income of that group (a ''usable shared loss'') but is used instead to offset income of another U.S. combined income group.

Under § 1.909–2T(b)(2)(ii), a U.S. combined income group consists of a single individual or corporation and all other entities (including entities that are fiscally transparent for U.S. Federal income tax purposes under the principles of § 1.894–1(d)(3)) that for U.S. Federal income tax purposes combine any of their respective items of income, deduction, gain or loss with the income, deduction, gain or loss of such individual or corporation. A U.S. combined income group may arise, for example, as a result of an entity being disregarded for U.S. Federal income tax purposes or, in the case of a partnership or hybrid partnership and a partner, as a result of the allocation of income or any other item of the partnership to the partner. For this purpose, a branch is treated as an entity, all members of a U.S. consolidated group are treated as a single corporation, and individuals filing a joint return are treated as a single individual. A U.S. combined income group may consist of a single individual or corporation and no other entities, but cannot include more than one individual or corporation. In addition, an entity that combines items of income, deduction, gain or loss with the income, deduction, gain or loss of two or more other entities can belong to more than one U.S. combined income group. For example, a hybrid partnership that has two corporate partners that do not combine items of income, deduction, gain or loss with each other belongs to each partner's separate U.S. combined income group, because each partner receives an allocable share of hybrid partnership items.

Under § 1.909–2T(b)(2)(iii)(A), the income of a U.S. combined group consists of the aggregate amount of taxable income of the members of the group that have positive taxable income, as computed under foreign law. Under § 1.909–2T(b)(2)(iii)(B), the amount of shared loss of a U.S. combined income group is the sum of the shared losses of all members of the group. Section 1.909–2T(b)(2)(iii)(A) and (B) provide that in the case of an entity that is fiscally transparent (under the principles of § 1.894–1(d)(3)) for foreign tax purposes and that is a member of more than one U.S. combined income group, the foreign taxable income or shared loss of the entity is allocated between or among the groups under foreign tax law. In the case of an entity that is not fiscally transparent for foreign tax purposes and is a member of more than one U.S. combined income group, the entity's foreign taxable income or shared loss is allocated between the separate U.S. combined income groups based on U.S. Federal income tax principles. Although the allocations are based on U.S. Federal income tax principles, the amount of the foreign taxable income or shared loss to be allocated is determined under foreign law. In the case of a hybrid partnership with two partners that are in different U.S. combined income groups, income or a shared loss incurred by the hybrid partnership, as determined under foreign law, is allocated between or among the U.S. combined income groups based on how the hybrid partnership allocated the income or loss under section 704(b). To the extent the income or shared loss would be income or loss under U.S. tax principles in another year, the income or shared loss is allocated to the U.S. combined income groups based on how the hybrid partnership would allocate the income or shared loss if it were recognized for U.S. tax purposes in the year it is recognized for foreign tax purposes. To the extent the income or shared loss would not constitute income or loss under U.S. tax principles in any year, the income or shared loss is allocated to the U.S. combined income groups in the same manner as the partnership items attributable to the activity giving rise to the income or shared loss.

Section 1.909–2T(b)(2)(iv) provides that split taxes from a loss-sharing splitter arrangement are foreign income taxes paid or accrued by a member of a U.S. combined income group with respect to income equal to the amount of the usable shared loss of that U.S. combined income group that offsets income of a different U.S. combined income group. Under § 1.909–2T(b)(2)(v), the related income is an amount of income of the individual or corporate member of a U.S. combined income group equal to the amount of income of that U.S. combined income group that is offset by the usable shared loss of another U.S. combined income group.

4. Hybrid Instrument Splitter Arrangements

Section 1.909–2T(b)(3) describes hybrid instrument splitter arrangements. The definition of hybrid instrument splitter arrangements is substantially identical to that set forth in Notice 2010–92, except that the scope is extended to cover taxes paid or accrued by persons other than section 902 corporations. In addition, § 1.909–2T(b)(3)(i)(D) defines a U.S. equity hybrid instrument as an instrument that is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes, or with respect to which the issuer is otherwise entitled to a deduction for foreign tax purposes for amounts paid or accrued with respect to the instrument. For example, an instrument that is treated as equity for U.S. Federal income tax purposes but with respect to which amounts paid or accrued by the issuer are treated for foreign tax purposes as a deductible notional interest payment (even though the instrument is otherwise treated as equity for foreign tax purposes) is a U.S. equity hybrid instrument. Under § 1.909–2T(b)(3)(i)(A), a U.S. equity hybrid instrument is a splitter arrangement if foreign income taxes are paid or accrued by the owner of a U.S. equity hybrid instrument with respect to payments or accruals on or with respect to the instrument that are deductible by the issuer under the laws of a foreign jurisdiction in which the issuer is subject to tax but that do not give rise to income for U.S. Federal income tax purposes.

Under § 1.909–2T(b)(3)(i)(B), split taxes from a U.S. equity hybrid instrument splitter arrangement equal the total amount of foreign income taxes, including withholding taxes, paid or accrued by the owner of the hybrid instrument less the amount of foreign income taxes that would have been paid or accrued had the owner of the U.S. equity hybrid instrument not been subject to foreign tax on income from the instrument. Under § 1.909–2T(b)(3)(i)(C), the related income with respect to split taxes from a U.S. equity hybrid instrument splitter arrangement is income of the issuer of the U.S. equity hybrid instrument in an amount equal to the payments or accruals giving rise to the split taxes that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's income or earnings and profits for U.S. Federal income tax purposes.

Section 1.909–2T(b)(3)(ii)(D) defines a U.S. debt hybrid instrument as an instrument that is treated as equity for foreign tax purposes but as indebtedness for U.S. Federal income tax purposes. Under § 1.909–2T(b)(3)(ii)(A), a U.S. debt hybrid instrument is a splitter arrangement if foreign income taxes are paid or accrued by the issuer of a U.S. debt hybrid instrument with respect to income in an amount equal to the

interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. Federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax. Under § 1.909–2T(b)(3)(ii)(B), split taxes from a U.S. debt hybrid instrument splitter arrangement are the foreign income taxes paid or accrued by the issuer on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes. Under § 1.909–2T(b)(3)(ii)(C), the related income from a U.S. debt hybrid instrument splitter arrangement is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner's income or earnings and profits for U.S. Federal income tax purposes.

5. Partnership Inter-Branch Payment Splitter Arrangements

Section 1.909–2T(b)(4) describes a partnership inter-branch payment splitter arrangement. The Treasury Department and the IRS stated in section 5.03 of Notice 2010–92 that future guidance would provide that allocations described in § 1.704–1(b)(4)(viii)(*d*)(*3*) will result in a foreign tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income.

Under § 1.909–2T(b)(4)(i), an allocation of foreign income tax paid or accrued by a partnership with respect to an inter-branch payment as described in § 1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011) (the inter-branch payment tax), is a splitter arrangement to the extent the inter-branch payment tax is not allocated to the partners in the same proportion as the distributive shares of income in the CFTE category to which the inter-branch payment tax is or would be assigned under § 1.704–1(b)(4)(viii)(*d*) without regard to § 1.704–1(b)(4)(viii)(*d*)(*3*). Under § 1.909–2T(b)(4)(ii), split taxes from a partnership inter-branch payment splitter arrangement equal the excess of the amount of the inter-branch payment tax allocated to a partner under the partnership agreement over the amount of the inter-branch payment tax that would have been allocated to the partner if the tax had been allocated in the same proportion as the distributive shares of income in that CFTE category. Under § 1.909–2T(b)(4)(iii), related income from a partnership inter-branch payment splitter arrangement equals the amount of income allocated to a partner that exceeds the amount of income that would have been allocated to the partner if income in that CFTE category in the amount of the inter-branch payment had been allocated to the partners in the same proportion as the inter-branch payment tax was allocated under the partnership agreement.

D. Rules Regarding Related Income and Split Taxes and Coordination Rules

Section 4.06 of Notice 2010–92 provides guidance on determining the amount of related income and pre-2011 split taxes paid or accrued with respect to pre-2011 splitter arrangements. A comment requested guidance on the treatment of related income and split taxes in the case of certain dispositions that were not described in section 4.06 of Notice 2010–92 (specifically, dispositions of section 902 corporations in transactions other than those that qualify under section 381). The Treasury Department and the IRS expect to issue regulations that provide additional guidance on determining the amount of related income and split taxes attributable to a foreign tax credit splitting event, and intend to address the comment when such regulations are issued. Until such guidance is issued, § 1.909–3T(a) provides that the principles of § 1.909–6T(d) through 1.909–6T(f) (which adopt the rules described in section 4.06 of Notice 2010–92) will apply to related income and split taxes in taxable years beginning on or after January 1, 2011, except that the alternative ''related income first'' method described in § 1.909–6T(d)(4) (which adopts section 4.06(b)(4) of Notice 2010–92) for identifying distributions of related income applies only to identify the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first taxable year beginning on or after January 1, 2011. A comment recommended that taxpayers be given the choice to apply the ''related income first'' method to identify post-2010 split taxes of a section 902 corporation, with use of such method conditioned on the taxpayer not applying section 902 to distributions from a section 902 corporation until all of the corporation's earnings and profits attributable to related income have been distributed. The Treasury Department and the IRS believe that the recommendation would necessitate rules that would result in significant administrative complexity, and accordingly, the comment was not adopted.

These temporary regulations include a rule concerning split taxes that was not described in Notice 2010–92. Section 1.909–3T(b) provides that split taxes include taxes paid or accrued in taxable years beginning on or after January 1, 2011, with respect to the amount of a disregarded payment that is deductible by the payor of the disregarded payment under the laws of a foreign jurisdiction in which the payor of the disregarded payment is subject to tax on related income from a splitter arrangement. The amount of the deductible disregarded payment to which this rule applies is limited to the amount of related income from such splitter arrangement.

In addition to future guidance on determining the amount of related income and split taxes, the Treasury Department and the IRS expect to issue regulations that provide additional guidance on the interaction between section 909 and other Code provisions such as sections 904(c), 905(a), and 905(c). Until such guidance is issued, § 1.909–4T(a) provides that the principles of § 1.909–6T(g), which adopt the rules described in section 6 of Notice 2010–92, will apply to taxable years beginning on or after January 1, 2011.

E. 2011 and Certain 2012 Splitter Arrangements

Section 909 applies to foreign income taxes paid or accrued in taxable years beginning after December 31, 2010. Section 1.909–2T(b), setting forth the exclusive list of splitter arrangements, is effective for foreign income taxes paid or accrued in taxable years beginning on or after January 1, 2012. Notice 2010–92 states that pre-2011 splitter arrangements will give rise to foreign tax credit splitting events in post-2010 taxable years. Accordingly, § 1.909–5T(a)(1) provides that foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a pre-2011 splitter arrangement (as defined in § 1.909–6T(b)), are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a pre-2011 taxable year. The related income with respect to split taxes from such an arrangement is the related income described in § 1.909–6T(b), determined as if the payor were a section 902 corporation.

In addition, Notice 2010–92 states that allocations described in § 1.704–1(b)(4)(viii)(*d*)(*3*) will result in a foreign

tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income. Accordingly, § 1.909–5T(a)(2) provides that foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a partnership inter-branch payment splitter arrangement described in § 1.909–2T(b)(4) are split taxes to the extent such taxes are identified as split taxes in § 1.909–2T(b)(4)(ii). The related income with respect to the split taxes is the related income described in § 1.909–2T(b)(4)(iii).

Finally, these temporary regulations provide that foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2012, and on or before February 14, 2012 in connection with a foreign consolidated group splitter arrangement described in § 1.909–6T(b)(2) are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a pre-2011 taxable year. This rule ensures that section 909 applies to suspend foreign tax on income of foreign consolidated groups paid or accrued in post-2010 taxable years to the extent the tax is not apportioned among the members of the group in accordance with the principles of Treas. Reg. § 1.901–2(f)(3). Final regulations published elsewhere in this issue of the **Federal Register** explicitly apply the ratable allocation rules of Treas. Reg. § 1.901–2(f)(3) to tax paid on combined income of foreign consolidated groups, without regard to whether the group members are jointly and severally liable for the tax under foreign law.

F. Pre-2011 Foreign Tax Credit Splitting Events

Section 1.909–6T adopts the rules described in Notice 2010–92 regarding pre-2011 foreign tax credit splitting events and the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years.

Availability of IRS Documents

IRS notices and revenue rulings cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Effect on Other Documents

The following publication is obsolete as of February 14, 2012:

Notice 2010–92 (2010–2 CB 916).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble of the cross-referenced notice of proposed rulemaking published in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Suzanne M. Walsh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.704–1 is amended as follows:

■ 1. Paragraph (b)(0) is amended by adding an entry for § 1.704–1(b)(1)(ii)(*b*)(*3*) and revising the entry for § 1.704–1(b)(4)(viii)(*d*)(*3*).

■ 2. Paragraph (b)(1)(ii)(*b*)(*3*) is added.

■ 3. Paragraph (b)(4)(viii)(*c*)(*3*)(*ii*) is revised.

■ 4. Paragraph (b)(4)(viii)(*d*)(*3*) is revised.

■ 5. Paragraph (b)(5) *Example 24* is revised.

The additions and revisions read as follows:

§ 1.704–1. Partner's distributive share.

* * * * *

(b) *Determination of partner's distributive share*—(0) *Cross-references.*

Heading	Section
* * * * *	
[Reserved]	1.704–1(b)(1)(ii)(*b*)(*3*)
* * * * *	
[Reserved]	1.704–1(b)(4)(viii)(*d*)(*3*)
* * * * *	

(1) * * *

(ii) * * *

(*b*) * * *

(*3*) [Reserved]. For further guidance, see § 1.704–1T(b)(1)(ii)(*b*)(*3*).

* * * * *

(4) * * *

(viii) * * *

(*c*) * * *

(*3*) * * *

(*ii*) *Special rules.* Income attributable to an activity shall include the amount included in a partner's income as a guaranteed payment (within the meaning of section 707(c)) from the partnership to the extent that the guaranteed payment is not deductible by the partnership under foreign law. See paragraph (b)(5) *Example 25 (iv)* of this section. Income attributable to an activity shall not include an item of partnership income to the extent the allocation of such item of income (or payment thereof) results in a deduction under foreign law. See paragraph (b)(5) *Example 25 (iii)* and *(iv)* of this section. Similarly, income attributable to an activity shall not include net income that foreign law would exclude from the foreign tax base as a result of the status of a partner. See paragraph (b)(5) *Example 27* of this section.

(*d*) * * *

(*3*) [Reserved]. For further guidance, see § 1.704–1T(b)(4)(viii)(*d*)(*3*).

* * * * *

(5) * * *

Example 24. [Reserved]. For further guidance, see § 1.704–1T(b)(5) *Example 24.*

* * * * *

■ **Par. 3.** Section 1.704–1T is added to read as follows:

§ 1.704–1T Partner's distributive share (temporary).

(a) Through (b)(1)(ii)(*b*)(*2*) [Reserved]. For further guidance, see § 1.704–1(a) through (b)(1)(ii)(*b*)(*2*).

(*3*) *Special rules for certain inter-branch payments*—(A) *In general.* The provisions of § 1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and § 1.704–1(b)(4)(viii)(*d*)(*3*) apply for partnership taxable years beginning on or after January 1, 2012.

(B) *Transition rule.* Transition relief is provided herein to partnerships whose

agreements were entered into prior to February 14, 2012. In such case, if there has been no material modification to the partnership agreement on or after February 14, 2012, then the partnership may apply the provisions of § 1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and § 1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011). For purposes of this paragraph (b)(1)(ii)(*b*)(*3*), any change in ownership constitutes a material modification to the partnership agreement. This transition rule does not apply to any taxable year in which persons bearing a relationship to each other that is specified in section 267(b) or section 707(b) collectively have the power to amend the partnership agreement without the consent of any unrelated party (and all subsequent taxable years).

(b)(1)(iii) through (b)(4)(viii)(*d*)(*2*) [Reserved]. For further guidance, see § 1.704–1(b)(1)(iii) through (b)(4)(viii)(*d*)(*2*).

(*3*) *Special rules for inter-branch payments.* For rules relating to foreign tax paid or accrued in partnership taxable years beginning before January 1, 2012 in respect of certain inter-branch payments, see 26 CFR 1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011).

(b)(4)(ix) through (b)(5) *Example 23* [Reserved]. For further guidance, see § 1.704–1(b)(4)(ix) through (b)(5) *Example 23.*

Example 24. (i) The facts are the same as in *Example 21,* except that businesses M and N are conducted by entities (DE1 and DE2, respectively) that are corporations for country X and Y tax purposes and disregarded entities for U.S. tax purposes. Also, assume that DE1 makes payments of $75,000 during 2012 to DE2 that are deductible by DE1 for country X tax purposes and includible in income of DE2 for country Y tax purposes. As a result of such payments, DE1 has taxable income of $25,000 for country X purposes on which $10,000 of taxes are imposed and DE2 has taxable income of $125,000 for country Y purposes on which $25,000 of taxes are imposed. For U.S. tax purposes, $100,000 of AB's income is attributable to the activities of DE1 and $50,000 of AB's income is attributable to the activities of DE2. Pursuant to the partnership agreement, all partnership items from business M, excluding CFTEs paid or accrued by business M, are allocated 75 percent to A and 25 percent to B, and all partnership items from business N, excluding CFTEs paid or accrued by business N, are split evenly between A and B (50 percent each). Accordingly, A is allocated 75 percent of the income from business M ($75,000), and 50 percent of the income from business N ($25,000). B is allocated 25 percent of the income from business M ($25,000), and 50 percent of the income from business N ($25,000).

(ii) Because the partnership agreement provides for different allocations of the net income attributable to businesses M and N, the net income attributable to each of business M and business N is income in separate CFTE categories. See paragraph (b)(4)(viii)(*c*)(*2*) of this section. Under paragraph (b)(4)(viii)(*c*)(*3*) of this section, the $100,000 of net income attributable to business M is in the business M CFTE category and the $50,000 of net income attributable to business N is in the business N CFTE category. Under paragraph (b)(4)(viii)(*d*)(*1*) of this section, the $10,000 of country X taxes is allocated to the business M CFTE category and $10,000 of the country Y taxes is allocated to the business N CFTE category. The additional $15,000 of country Y tax imposed with respect to the inter-branch payment is assigned to the business M CFTE category because for U.S. tax purposes, the related $75,000 of income that country Y is taxing is in the business M CFTE category. Therefore, $25,000 of taxes ($10,000 of country X taxes and $15,000 of the country Y taxes) is related to the $100,000 of net income in the business M CFTE category and the other $10,000 of country Y taxes is related to the $50,000 of net income in the business N CFTE category. See paragraph (b)(4)(viii)(*c*)(*1*) of this section. The allocations of country X taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if such taxes are allocated 75 percent to A and 25 percent to B. The allocations of country Y taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if $15,000 of such taxes is allocated 75 percent to A and 25 percent to B and the other $10,000 of such taxes is allocated 50 percent to A and 50 percent to B. No inference is intended with respect to the application of other provisions to arrangements that involve disregarded payments.

(iii) Assume that the facts are the same as in paragraph (i) of this *Example 24,* except that in order to reflect the $75,000 payment from DE1 to DE2, the partnership agreement allocates $75,000 of the income attributable to business M equally between A and B (50 percent each). In order to prevent separating the CFTEs from the related foreign income, the $75,000 payment is treated as a divisible part of the business M activity and, therefore, a separate activity. See paragraph (b)(4)(viii)(*c*)(*2*)(*iii*) of this section. Because items from the disregarded payment and business N are both shared equally between A and B, the disregarded payment activity and the business N activity are treated as a single CFTE category. See paragraph (b)(4)(viii)(*c*)(*2*)(*i*) of this section. Accordingly, $25,000 of net income attributable to business M is in the business M CFTE category and $75,000 of income of business M attributable to the disregarded payment and the $50,000 of net income attributable to business N are in the business N CFTE category. Under paragraph (b)(4)(viii)(*d*)(*1*) of this section, the $10,000 of country X taxes is allocated to the business M CFTE category and all $25,000 of the country Y taxes is allocated to the business N CFTE category. The allocations of country X taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if such taxes are allocated 75 percent to A and 25 percent to B. The allocations of country Y taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if such taxes are allocated 50 percent to A and 50 percent to B.

Example 25 through (e) [Reserved]. For further guidance, see § 1.704–1(b)(5) *Example 25* through (e).

(f) *Expiration date.* The applicability of this section expires on February 9, 2015.

■ **Par. 4.** Section 1.909–0T is added to read as follows:

§ 1.909–0T Outline of regulation provisions for section 909 (temporary).

This section lists the headings for §§ 1.909–1T through 1.909–6T.

§ 1.909–1T Definitions and special rules (temporary).

(a) Definitions.

(b) Taxes paid or accrued by a partnership, S corporation or trust.

(c) Related income of a partnership, S corporation or trust.

(d) Application of section 909 to pre-1987 accumulated profits and pre-1987 foreign income taxes.

(e) Effective/applicability date.

(f) Expiration date.

§ 1.909–2T Splitter arrangements (temporary).

(a) Foreign tax credit splitting event.

(1) In general.

(2) Split taxes not taken into account.

(b) Splitter arrangements.

(1) Reverse hybrid splitter arrangements.

(i) In general.

(ii) Split taxes from a reverse hybrid splitter arrangement.

(iii) Related income from a reverse hybrid splitter arrangement.

(iv) Reverse hybrid.

(2) Loss-sharing splitter arrangements.

(i) In general.

(ii) U.S. combined income group.

(iii) Income and shared loss of a U.S. combined income group.

(iv) Split taxes from a loss-sharing splitter arrangement.

(v) Related income from a loss-sharing splitter arrangement.

(vi) Foreign group relief or other loss-sharing regime.

(vii) Examples.

(3) Hybrid instrument splitter arrangements.

(i) U.S. equity hybrid instrument splitter arrangement.

(ii) U.S. debt hybrid instrument splitter arrangement.

(4) Partnership inter-branch payment splitter arrangements.

(i) In general.

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(2) Section 704(b) allocations.
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(g) Interaction between section 909 and other Code provisions.
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■ **Par. 5.** Sections 1.909–1T, 1.909–2T, 1.909–3T, 1.909–4T, 1.909–5T, and 1.909–6T are added to read as follows:

§ 1.909–1T Definitions and special rules (temporary).

(a) *Definitions.* For purposes of section 909, this section, and §§ 1.909–2T through –5T, the following definitions apply:

(1) The term *section 902 corporation* means any foreign corporation with respect to which one or more domestic corporations meet the ownership requirements of section 902(a) or (b).

(2) The term *section 902 shareholder* means any domestic corporation that meets the ownership requirements of section 902(a) or (b) with respect to a section 902 corporation.

(3) The term *payor* means a person that pays or accrues a foreign income tax within the meaning of § 1.901–2(f), and also includes a person that takes foreign income taxes paid or accrued by a partnership, S corporation, estate or trust into account pursuant to section 702(a)(6), section 901(b)(5) or section 1373(a).

(4) The term *covered person* means, with respect to a payor—

(i) Any entity in which the payor holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value);

(ii) Any person that holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value) in the payor; or

(iii) Any person that bears a relationship that is described in section 267(b) or 707(b) to the payor.

(5) The term *foreign income tax* means any income, war profits, or excess profits tax paid or accrued to any foreign country or to any possession of the United States. A foreign income tax includes any tax paid in lieu of such a tax within the meaning of section 903.

(6) The term *post-1986 foreign income taxes* has the meaning provided in § 1.902–1(a)(8).

(7) The term *post-1986 undistributed earnings* has the meaning provided in § 1.902–1(a)(9).

(8) The term *disregarded entity* means an entity that is disregarded as an entity separate from its owner, as provided in § 301.7701–2(c)(2)(i).

(9) The term *hybrid partnership* means a partnership that is subject to income tax in a foreign country as a corporation (or otherwise at the entity level) on the basis of residence, place of incorporation, place of management or similar criteria.

(b) *Taxes paid or accrued by a partnership, S corporation or trust.* Under section 909(c)(1), section 909 applies at the partner level, and similar rules apply in the case of an S corporation or trust. Accordingly, in the case of foreign income taxes paid or accrued by a partnership, S corporation or trust, taxes allocated to one or more partners, shareholders or beneficiaries (as the case may be) will be treated as split taxes to the extent such taxes would be split taxes if the partner, shareholder or beneficiary had paid or accrued the taxes directly on the date such taxes are taken into account by the partner under sections 702 and 706(a), by the shareholder under section 1373(a), or by the beneficiary under section 901(b)(5). Any such split taxes will be suspended in the hands of the partner, shareholder or beneficiary.

(c) *Related income of a partnership, S corporation or trust.* For purposes of determining whether related income is taken into account by a covered person, related income of a partnership, S corporation or trust is considered to be taken into account by the partner, shareholder or beneficiary to whom the related income is allocated.

(d) *Application of section 909 to pre-1987 accumulated profits and pre-1987 foreign income taxes.* Section 909 and §§ 1.909–1T through –5T will apply to pre-1987 accumulated profits (as defined in § 1.902–1(a)(10)(i)) and pre-1987 foreign income taxes (as defined in § 1.902–1(a)(10)(iii)) of a section 902 corporation attributable to taxable years beginning on or after January 1, 2012.

(e) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2011.

(f) *Expiration date.* The applicability of this section expires on February 9, 2015.

§ 1.909–2T Splitter arrangements (temporary).

(a) *Foreign tax credit splitting event*—(1) *In general.* There is a foreign tax credit splitting event with respect to foreign income taxes paid or accrued if and only if, in connection with an arrangement described in paragraph (b) of this section (a *splitter arrangement*) the related income was, is or will be taken into account for U.S. Federal income tax purposes by a person that is a covered person with respect to the payor of the tax. Foreign income taxes that are paid or accrued in connection with a splitter arrangement are split taxes to the extent provided in paragraph (b) of this section. Income (or, as appropriate, earnings and profits) that was, is or will be taken into account by a covered person in connection with a splitter arrangement is related income to the extent provided in paragraph (b) of this section.

(2) *Split taxes not taken into account.* Split taxes will not be taken into account for U.S. Federal income tax purposes before the taxable year in which the related income is taken into account by the payor or, in the case of split taxes paid or accrued by a section 902 corporation, by a section 902 shareholder of such section 902 corporation. Therefore, in the case of split taxes paid or accrued by a section 902 corporation, split taxes will not be taken into account for purposes of sections 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by the payor section 902 corporation, a section 902 shareholder of the section 902 corporation, or a member of the section 902 shareholder's consolidated group. See § 1.909–3T(a) for rules relating to when split taxes and related income are taken into account.

(b) *Splitter arrangements.* The arrangements set forth in this paragraph (b) are splitter arrangements.

(1) *Reverse hybrid splitter arrangements*—(i) *In general.* A reverse hybrid is a splitter arrangement when a payor pays or accrues foreign income taxes with respect to income of a reverse hybrid. A reverse hybrid splitter arrangement exists even if the reverse hybrid has a loss or a deficit in earnings and profits for a particular year for U.S. Federal income tax purposes (for example, due to a timing difference).

(ii) *Split taxes from a reverse hybrid splitter arrangement.* The foreign income taxes paid or accrued with respect to income of the reverse hybrid are split taxes.

(iii) *Related income from a reverse hybrid splitter arrangement.* The related income with respect to split taxes from a reverse hybrid splitter arrangement is the earnings and profits (computed for U.S. Federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the payor's foreign tax base with respect to which the split taxes were paid or accrued. Accordingly, related income of the reverse hybrid only includes items of income or expense attributable to a disregarded entity owned by the reverse hybrid to the extent that the income attributable to the activities of the disregarded entity is included in the payor's foreign tax base.

(iv) *Reverse hybrid.* The term *reverse hybrid* means an entity that is a corporation for U.S. Federal income tax purposes but is a fiscally transparent entity (under the principles of § 1.894–1(d)(3)) or a branch under the laws of a foreign country imposing tax on the income of the entity.

(2) *Loss-sharing splitter arrangements*—(i) *In general.* A foreign group relief or other loss-sharing regime is a loss-sharing splitter arrangement to the extent that a shared loss of a U.S. combined income group could have been used to offset income of that group (*usable shared loss*) but is used instead to offset income of another U.S. combined income group.

(ii) *U.S. combined income group.* The term *U.S. combined income group* means an individual or a corporation and all entities (including entities that are fiscally transparent for U.S. Federal income tax purposes under the principles of § 1.894–1(d)(3)) that for U.S. Federal income tax purposes combine any of their respective items of income, deduction, gain or loss with the income, deduction, gain or loss of such individual or corporation. A U.S. combined income group can arise, for example, as a result of an entity being disregarded or, in the case of a partnership or hybrid partnership and a partner, as a result of the allocation of income or any other item of the partnership to the partner. For purposes of this paragraph (b)(2)(ii), a branch is treated as an entity, all members of a U.S. affiliated group of corporations (as defined in section 1504) that file a consolidated return are treated as a single corporation, and two or more individuals that file a joint return are treated as a single individual. A U.S. combined income group may consist of a single individual or corporation and no other entities, but cannot include more than one individual or corporation. In addition, an entity may belong to more than one U.S. combined income group. For example, a hybrid partnership with two corporate partners that do not combine any of their items of income, deduction, gain or loss for U.S. Federal income tax purposes is in a separate U.S. combined income group with each of its partners.

(iii) *Income and shared loss of a U.S. combined income group*—(A) *Income.* Except as otherwise provided in this paragraph (b)(2)(iii)(A), the income of a U.S. combined income group is the aggregate amount of taxable income recognized or taken into account for foreign tax purposes by those members that have positive taxable income for foreign tax purposes. In the case of an entity that is fiscally transparent (under the principles of § 1.894–1(d)(3)) for foreign tax purposes and that is a member of more than one U.S. combined income group, the foreign taxable income of the entity is allocated between or among the groups under foreign tax law. In the case of an entity that is not fiscally transparent for foreign tax purposes and that is a member of more than one U.S. combined income group, the foreign taxable income of that entity is allocated between or among those groups based on U.S. Federal income tax principles. For example, in the case of a hybrid partnership, the foreign taxable income of the partnership is allocated between or among the groups in the manner the partnership allocates the income under section 704(b). To the extent the foreign taxable income would be income under U.S. tax principles in another year, the income is allocated between or among the groups based on how the hybrid partnership would allocate the income if the income were recognized for U.S. tax purposes in the year in which the income is recognized for foreign tax purposes. To the extent the foreign taxable income would not constitute income under U.S. tax principles in any year, the income is allocated between or among the groups in the same manner as the partnership items attributable to the activity giving rise to the foreign taxable income.

(B) *Shared loss.* The term *shared loss* means a loss of one entity for foreign tax purposes that, in connection with a foreign group relief or other loss-sharing regime, is taken into account by one or more other entities. Except as otherwise provided in this paragraph (b)(2)(iii)(B), the amount of shared loss of a U.S. combined income group is the sum of the shared losses of all members of the U.S. combined income group. In the case of an entity that is fiscally transparent (under the principles of § 1.894–1(d)(3)) for foreign tax purposes and that is a member of more than one U.S. combined income group, the

shared loss of the entity is allocated between or among the groups under foreign tax law. In the case of an entity that is not fiscally transparent for foreign tax purposes and that is a member of more than one U.S. combined income group, the shared loss of that entity will be allocated between or among those groups based on U.S. Federal income tax principles. For example, in the case of a hybrid partnership, the shared loss of the partnership will be allocated between or among the groups in the manner the partnership allocates the loss under section 704(b). To the extent the shared loss would be a loss under U.S. tax principles in another year, the loss is allocated between or among the groups based on how the partnership would allocate the loss if the loss were recognized for U.S. tax purposes in the year in which the loss is recognized for foreign tax purposes. To the extent the shared loss would not constitute a loss under U.S. tax principles in any year, the loss is allocated between or among the groups in the same manner as the partnership items attributable to the activity giving rise to the shared loss.

(iv) *Split taxes from a loss-sharing splitter arrangement.* Split taxes from a loss-sharing splitter arrangement are foreign income taxes paid or accrued by a member of the U.S. combined income group with respect to income equal to the amount of the usable shared loss of that group that offsets income of another U.S. combined income group.

(v) *Related income from a loss-sharing splitter arrangement.* The related income with respect to split taxes from a loss-sharing splitter arrangement is an amount of income of the individual or corporate member of the U.S. combined income group equal to the amount of income of that U.S. combined income group that is offset by the usable shared loss of another U.S. combined income group.

(vi) *Foreign group relief or other loss-sharing regime.* A foreign group relief or other loss-sharing regime exists when an entity may surrender its loss to offset the income of one or more other entities. A foreign group relief or other loss-sharing regime does not include an allocation of loss of an entity that is a partnership or other fiscally transparent entity (under the principles of § 1.894–1(d)(3)) for foreign tax purposes or regimes in which foreign tax is imposed on combined income (such as a foreign consolidated regime), as described in § 1.901–2(f)(3).

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

Example 1. (i) *Facts.* USP, a domestic corporation, wholly owns CFC1, a corporation organized in country A. CFC1 wholly owns CFC2 and CFC3, both corporations organized in country A. CFC2 wholly owns DE, an entity organized in country A. DE is a corporation for country A tax purposes and a disregarded entity for U.S. Federal income tax purposes. Country A has a loss-sharing regime under which a loss of CFC1, CFC2, CFC3 or DE may be used to offset the income of one or more of the others. Country A imposes an income tax at the rate of 30% on the taxable income of corporations organized in country A. In year 1, before any loss sharing, CFC1 has no income, CFC2 has income of 50u, CFC3 has income of 200u, and DE has a loss of 100u. Under the provisions of country A's loss-sharing regime, the group decides to use DE's 100u loss to offset 100u of CFC3's income. After the loss is shared, for country A's tax purposes, CFC2 still has 50u of income on which it pays 15u of country A tax. CFC3 has income of 100u (200u less the 100u shared loss) on which it pays 30u of country A tax. For U.S. tax purposes, the loss sharing with CFC3 is not taken into account. Because DE is a disregarded entity, its 100u loss is taken into account by CFC2 and reduces its earnings and profits for U.S. Federal income tax purposes. Accordingly, before application of section 909, CFC2 has a loss for earnings and profits purposes of 65u (50u income less 15u taxes paid to country A less 100u loss of DE). CFC2 also has the U.S. dollar equivalent of 15u of foreign taxes to add to its post-1986 foreign income taxes pool. CFC3 has earnings and profits of 170u (200u income less 30u of taxes) and the dollar equivalent of 30u of foreign taxes to add to its post-1986 foreign income taxes pool.

(ii) *Result.* Pursuant to § 1.909–2T(b)(2)(ii), CFC2 and DE constitute one U.S. combined income group, while CFC1 and CFC3 each constitute separate U.S. combined income groups. Pursuant to § 1.909–2T(b)(2)(iii)(A), the income of the CFC2 combined income group is 50u (CFC2's country A taxable income of 50u). The income of the CFC3 U.S. combined income group is 200u (CFC3's country A taxable income of 200u). Pursuant to § 1.909–2T(b)(2)(iii)(B), the shared loss of the CFC2 U.S. combined income group includes the 100u of shared loss incurred by DE. The usable shared loss of the CFC2 U.S. combined income group is 50u, the amount of the group's shared loss that could have otherwise offset CFC2's 50u of country A taxable income that is included in the income of the CFC2 U.S. combined income group. There is a splitter arrangement because the 50u usable shared loss of the CFC2 U.S. combined income group was used instead to offset income of CFC3, which is included in the CFC3 U.S. combined income group. Pursuant to § 1.909–2T(b)(2)(iv), the split taxes are the 15u of country A income taxes paid by CFC2 on 50u of income, an amount of income of the CFC2 U.S. combined income group equal to the amount of usable shared loss of that group that was used to offset income of the CFC3 U.S. combined income group. Pursuant to § 1.909–2T(b)(2)(v), the related income is the 50u of CFC3's income that equals the amount of income of the CFC3 U.S. combined income group that was offset by the usable shared loss of the CFC2 U.S. combined income group.

Example 2. (i) *Facts.* USP, a domestic corporation, wholly owns CFC1, a corporation organized in country B. CFC1 wholly owns CFC2 and CFC3, both corporations organized in country B. CFC2 wholly owns DE, an entity organized in country B. DE is a corporation for country B tax purposes and a disregarded entity for U.S. Federal income tax purposes. CFC2 and CFC3 each own 50% of HP1, an entity organized in country B. HP1 is a corporation for country B tax purposes and a partnership for U.S. Federal income tax purposes. Assume that all items of income and loss of HP1 are allocated for U.S. Federal income tax purposes equally between CFC2 and CFC3, and that all entities use the country B currency ''u'' as their functional currency. Country B has a loss-sharing regime under which a loss of any of CFC1, CFC2, CFC3, DE, and HP1 may be used to offset the income of one or more of the others. Country B imposes an income tax at the rate of 30% on the taxable income of corporations organized in country B. In year 1, before any loss sharing, CFC2 has income of 100u, CFC1 and CFC3 have no income, DE has a loss of 100u, and HP1 has income of 200u. Under the provisions of country B's loss-sharing regime, the group decides to use DE's 100u loss to offset 100u of HP1's income. After the loss is shared, for country B tax purposes, CFC2 has 100u of income on which it pays 30u of country B income tax, and HP1 has 100u of income (200u less the 100u shared loss) on which it pays 30u of country B income tax. For U.S. Federal income tax purposes, the loss sharing with HP1 is not taken into account, and, because DE is a disregarded entity, its 100u loss is taken into account by CFC2 and reduces CFC2's earnings and profits for U.S. Federal income tax purposes. The 200u income of HP1 is allocated 50/50 to CFC2 and CFC3, as is the 30u of country B income tax paid by HP1. Accordingly, before application of section 909, for U.S. Federal income tax purposes, CFC2 has earnings and profits of 55u (100u income + 100u share of HP1's income – 100u loss of DE – 30u country B income tax paid by CFC2 – 15u share of HP1's country B income tax) and the dollar equivalent of 45u of country B income tax to add to its post-1986 foreign income taxes pool. CFC3 has earnings and profits of 85u (100u share of HP1's income less 15u share of HP1's country B income taxes) and the dollar equivalent of 15u of country B income tax to add to its post-1986 foreign income taxes pool.

(ii) *U.S. combined income groups.* Pursuant to § 1.909–2T(b)(2)(ii), because the income and loss of HP1 are combined in part with the income and loss of both CFC2 and CFC3, it belongs to both of the separate CFC2 and CFC3 U.S. combined income groups. DE is a member of the CFC2 U.S. combined income group.

(iii) *Income of the U.S. combined income groups.* Pursuant to § 1.909–2T(b)(2)(iii)(A), the income of the CFC2 U.S. combined income group is the 200u country B taxable income of the members of the group with

positive taxable incomes (CFC2's country B taxable income of 100u + 50% of HP1's country B taxable income of 200u, or 100u). Because DE does not have positive taxable income for country B tax purposes, its 100u loss is not included in the income of the CFC2 U.S. combined income group. The income of the CFC3 U.S. combined income group is 100u (50% of HP1's country B taxable income of 200u, or 100u).

(iv) *Shared loss of the U.S. combined income groups.* Pursuant to § 1.909–2T(b)(2)(iii)(B), the shared loss of the CFC2 U.S. combined income group is the 100u loss incurred by DE that is used to offset 100u of HP1's income. The CFC3 U.S. combined income group has no shared loss. Pursuant to § 1.909–2T(b)(2)(i), the usable shared loss of the CFC2 U.S. combined income group is 100u, the full amount of the group's 100u shared loss that could have been used to offset income of the CFC2 U.S. combined income group had the loss been used to offset 100u of CFC2's country B taxable income.

(v) *Income offset by shared loss.* The shared loss of the CFC2 combined income group is used to offset 100u country B taxable income of HP1. Because the taxable income of HP1 is allocated 50/50 between the CFC2 and CFC3 U.S. combined income groups, the shared loss is treated as offsetting 50u of the CFC2 U.S. combined income group's income and 50u of the CFC3 U.S. combined income group's income.

(vi) *Splitter arrangement.* There is a splitter arrangement because 50u of the 100u usable shared loss of the CFC2 U.S. combined income group was used to offset income of the CFC3 U.S. combined income group. Pursuant to § 1.909–2T(b)(2)(iv), the split taxes are the 15u of country B income tax paid by CFC2 on 50u of its income, which is equal to the amount of the CFC2 U.S. combined income group's usable shared loss that was used to offset income of another U.S. combined income group. Pursuant to § 1.909–2T(b)(2)(v), the related income is the 50u of CFC3's income that was offset by the usable shared loss of the CFC2 U.S. combined income group.

(3) *Hybrid instrument splitter arrangements*—(i) *U.S. equity hybrid instrument splitter arrangement*—(A) *In general.* A U.S. equity hybrid instrument is a splitter arrangement if payments or accruals on or with respect to such instrument:

(*1*) Give rise to foreign income taxes paid or accrued by the owner of such instrument;

(*2*) Are deductible by the issuer under the laws of a foreign jurisdiction in which the issuer is subject to tax; and

(*3*) Do not give rise to income for U.S. Federal income tax purposes.

(B) *Split taxes from a U.S. equity hybrid instrument splitter arrangement.* Split taxes from a U.S. equity hybrid instrument splitter arrangement equal the total amount of foreign income taxes paid or accrued by the owner of the hybrid instrument less the amount of foreign income taxes that would have been paid or accrued had the owner of the U.S. equity hybrid instrument not been subject to foreign tax on income from the instrument.

(C) *Related income from a U.S. equity hybrid instrument splitter arrangement.* The related income with respect to split taxes from a U.S. equity hybrid instrument splitter arrangement is income of the issuer of the U.S. equity hybrid instrument in an amount equal to the payments or accruals giving rise to the split taxes that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's income or earnings and profits for U.S. Federal income tax purposes.

(D) *U.S. equity hybrid instrument.* The term *U.S. equity hybrid instrument* means an instrument that is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes, or with respect to which the issuer is otherwise entitled to a deduction for foreign tax purposes for amounts paid or accrued with respect to the instrument.

(ii) *U.S. debt hybrid instrument splitter arrangement*—(A) *In general.* A U.S. debt hybrid instrument is a splitter arrangement if foreign income taxes are paid or accrued by the issuer of a U.S. debt hybrid instrument with respect to income in an amount equal to the interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. Federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax.

(B) *Split taxes from a U.S. debt hybrid instrument splitter arrangement.* Split taxes from a U.S. debt hybrid instrument splitter arrangement are the foreign income taxes paid or accrued by the issuer on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes.

(C) *Related income from a U.S. debt hybrid instrument splitter arrangement.* The related income from a U.S. debt hybrid instrument splitter arrangement is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner's income or earnings and profits for U.S. Federal income tax purposes.

(D) *U.S. debt hybrid instrument.* The term *U.S. debt hybrid instrument* means an instrument that is treated as equity for foreign tax purposes but as indebtedness for U.S. Federal income tax purposes.

(4) *Partnership inter-branch payment splitter arrangements*—(i) *In general.* An allocation of foreign income tax paid or accrued by a partnership with respect to an inter-branch payment as described in § 1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011) (the *inter-branch payment tax*) is a splitter arrangement to the extent the inter-branch payment tax is not allocated to the partners in the same proportion as the distributive shares of income in the CFTE category to which the inter-branch payment tax is or would be assigned under § 1.704–1(b)(4)(viii)(*d*) without regard to § 1.704–1(b)(4)(viii)(*d*)(*3*).

(ii) *Split taxes from a partnership inter-branch payment splitter arrangement.* The split taxes from a partnership inter-branch splitter arrangement equal the excess of the amount of the inter-branch payment tax allocated to a partner under the partnership agreement over the amount of the inter-branch payment tax that would have been allocated to the partner if the inter-branch payment tax had been allocated to the partners in the same proportion as the distributive shares of income in the CFTE category referred to in paragraph (b)(4)(i) of this section.

(iii) *Related income from a partnership inter-branch payment splitter arrangement.* The related income from a partnership inter-branch payment splitter arrangement equals the amount of income allocated to a partner that exceeds the amount of income that would have been allocated to the partner if income in the CFTE category referred to in paragraph (b)(4)(i) of this section in the amount of the inter-branch payment had been allocated to the partners in the same proportion as the inter-branch payment tax was allocated under the partnership agreement.

(c) *Effective/applicability date.* This section applies to foreign income taxes paid or accrued in taxable years beginning on or after January 1, 2012.

(d) *Expiration date.* The applicability of this section expires on February 9, 2015.

§ 1.909–3T Rules regarding related income and split taxes (temporary).

(a) *Interim rules for identifying related income and split taxes.* The principles of paragraphs (d) through (f) of § 1.909–6T apply to related income and split taxes in taxable years beginning on or after January 1, 2011, except that the alternative method for identifying distributions of related income described in § 1.909–6T(d)(4) applies

only to identify the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first taxable year beginning on or after January 1, 2011.

(b) *Split taxes on deductible disregarded payments.* Split taxes include taxes paid or accrued in taxable years beginning on or after January 1, 2011, with respect to the amount of a disregarded payment that is deductible by the payor of the disregarded payment under the laws of a foreign jurisdiction in which the payor of the disregarded payment is subject to tax on related income from a splitter arrangement. The amount of the deductible disregarded payment to which this paragraph (b) applies is limited to the amount of related income from such splitter arrangement.

(c) *Effective/applicability date.* The rules of this section apply to taxable years beginning on or after January 1, 2011.

(d) *Expiration date.* The applicability of this section expires on February 9, 2015.

§ 1.909–4T Coordination rules (temporary).

(a) *Interim rules.* The principles of paragraph (g) of § 1.909–6T apply to taxable years beginning on or after January 1, 2011.

(b) *Effective/applicability date.* The rules of this section apply to taxable years beginning on or after January 1, 2011.

(c) *Expiration date.* The applicability of this section expires on February 9, 2015.

§ 1.909–5T 2011 and 2012 splitter arrangements (temporary).

(a) *Taxes paid or accrued in taxable years beginning in 2011.* (1) Foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a pre-2011 splitter arrangement (as defined in § 1.909–6T(b)), are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a taxable year beginning on or before December 31, 2010. The related income with respect to split taxes from such an arrangement is the related income described in § 1.909–6T(b), determined as if the payor were a section 902 corporation.

(2) Foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a partnership inter-branch payment splitter arrangement described in § 1.909–2T(b)(4) are split taxes to the extent that such taxes are identified as split taxes in § 1.909–2T(b)(4)(ii). The related income with respect to the split taxes is the related income described in § 1.909–2T(b)(4)(iii).

(b) *Taxes paid or accrued in certain taxable years beginning in 2012 with respect to a foreign consolidated group splitter arrangement.* Foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2012, and on or before February 14, 2012, in connection with a foreign consolidated group splitter arrangement described in § 1.909–6T(b)(2) are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a taxable year beginning on or before December 31, 2010. The related income with respect to split taxes from such an arrangement is the related income described in § 1.909–6T(b)(2), determined as if the payor were a section 902 corporation.

(c) *Effective/applicability date.* The rules of this section apply to foreign taxes paid or accrued in taxable years beginning on or after January 1, 2011, and on or before February 14, 2012.

(d) *Expiration date.* The applicability of this section expires on February 9, 2015.

§ 1.909–6T Pre-2011 foreign tax credit splitting events (temporary).

(a) *Foreign tax credit splitting event*—(1) *In general.* This section provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation (as defined in section 909(d)(5)) in taxable years beginning on or before December 31, 2010 (*pre-2011 taxable years* and *pre-2011 taxes*) are suspended under section 909 in taxable years beginning after December 31, 2010 (*post-2010 taxable years*) of a section 902 corporation. Paragraph (b) of this section identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre-2011 taxable years (*pre-2011 splitter arrangements*). Paragraphs (c), (d), and (e) of this section provide rules for determining the related income and pre-2011 split taxes paid or accrued with respect to pre-2011 splitter arrangements. Paragraph (f) of this section provides rules concerning the application of section 909 to partnerships and trusts. Paragraph (g) of this section provides rules concerning the interaction between section 909 and other Internal Revenue Code (*Code*) provisions.

(2) *Taxes not subject to suspension under section 909.* Pre-2011 taxes that will not be suspended under section 909 or paragraph (a) of this section are:

(i) Any pre-2011 taxes that were not paid or accrued in connection with a pre-2011 splitter arrangement identified in paragraph (b) of this section;

(ii) Any pre-2011 taxes that were paid or accrued in connection with a pre-2011 splitter arrangement identified in paragraph (b) of this section (*pre-2011 split taxes*) but that were deemed paid under section 902(a) or 960 on or before the last day of the section 902 corporation's last pre-2011 taxable year;

(iii) Any pre-2011 split taxes if either the payor section 902 corporation took the related income into account in a pre-2011 taxable year or a section 902 shareholder (as defined in § 1.909–1T(a)(2)) of the relevant section 902 corporation took the related income into account on or before the last day of the section 902 corporation's last pre-2011 taxable year; and

(iv) Any pre-2011 split taxes paid or accrued by a section 902 corporation in taxable years of such section 902 corporation beginning before January 1, 1997.

(3) *Taxes subject to suspension under section 909.* To the extent that the section 902 corporation paid or accrued pre-2011 split taxes that are not described in paragraph (a)(2) of this section, section 909 and the regulations under that section will apply to such pre-2011 split taxes for purposes of applying sections 902 and 960 in post-2010 taxable years of the section 902 corporation. Accordingly, these taxes will be removed from the section 902 corporation's pools of post-1986 foreign income taxes and suspended under section 909 as of the first day of the section 902 corporation's first post-2010 taxable year. There is no increase to a section 902 corporation's earnings and profits for the amount of any pre-2011 taxes to which section 909 applies that were previously deducted in computing earnings and profits in a pre-2011 taxable year.

(b) *Pre-2011 splitter arrangements.* The arrangements set forth in this paragraph (b) are pre-2011 splitter arrangements.

(1) *Reverse hybrid structure splitter arrangements.* A reverse hybrid structure exists when a section 902 corporation owns an interest in a reverse hybrid. A reverse hybrid is an entity that is a corporation for U.S. Federal income tax purposes but is a pass-through entity or a branch under the laws of a foreign country imposing tax on the income of the entity. As a result, the owner of the reverse hybrid

is subject to tax on the income of the entity under foreign law. A pre-2011 splitter arrangement involving a reverse hybrid structure exists when pre-2011 taxes are paid or accrued by a section 902 corporation with respect to income of a reverse hybrid that is a covered person with respect to the section 902 corporation. A pre-2011 splitter arrangement involving a reverse hybrid structure may exist even if the reverse hybrid has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Such taxes paid or accrued by the section 902 corporation are pre-2011 split taxes. The related income is the earnings and profits (computed for U.S. Federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued. Accordingly, related income of the reverse hybrid would not include any item of income or expense attributable to a disregarded entity (as defined in § 301.7701–2(c)(2)(i) of this chapter) owned by the reverse hybrid if income attributable to the activities of the disregarded entity is not included in the foreign tax base.

(2) *Foreign consolidated group splitter arrangements.* A foreign consolidated group exists when a foreign country imposes tax on the combined income of two or more entities. Tax is considered imposed on the combined income of two or more entities even if the combined income is computed under foreign law by attributing to one such entity the income of one or more entities. A foreign consolidated group is a pre-2011 splitter arrangement to the extent that the taxpayer did not allocate the foreign consolidated tax liability among the members of the foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of § 1.901–2(f)(3) (revised as of April 1, 2011). A pre-2011 splitter arrangement involving a foreign consolidated group may exist even if one or more members has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Pre-2011 taxes paid or accrued with respect to the income of a foreign consolidated group are pre-2011 split taxes to the extent that taxes paid or accrued by one member of the foreign consolidated group are imposed on a covered person's share of the consolidated taxable income included in the foreign tax base. The related income is the earnings and profits (computed for U.S. Federal income tax purposes) of such other member attributable to the activities of that other member that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued. No inference should be drawn from the treatment of foreign consolidated groups under section 909 as to the determination of the person who paid the foreign income tax for U.S. Federal income tax purposes.

(3) *Group relief or other loss-sharing regime splitter arrangements*—(i) *In general.* A foreign group relief or other loss-sharing regime exists when one entity with a loss permits the loss to be used to offset the income of one or more entities (*shared loss*). A pre-2011 splitter arrangement involving a shared loss exists when the following three conditions are met:

(A) There is an instrument that is treated as indebtedness under the laws of the jurisdiction in which the issuer is subject to tax and that is disregarded for U.S. Federal income tax purposes (*disregarded debt instrument*). Examples of a disregarded debt instrument include a debt obligation between two disregarded entities that are owned by the same section 902 corporation, two disregarded entities that are owned by a partnership with one or more partners that are section 902 corporations, a section 902 corporation and a disregarded entity that is owned by that section 902 corporation, or a partnership in which the section 902 corporation is a partner and a disregarded entity that is owned by such partnership.

(B) The owner of the disregarded debt instrument pays a foreign income tax attributable to a payment or accrual on the instrument.

(C) The payment or accrual on the disregarded debt instrument gives rise to a deduction for foreign tax purposes and the issuer of the instrument incurs a shared loss that is taken into account under foreign law by one or more entities that are covered persons with respect to the owner of the instrument.

(ii) *Split taxes and related income.* In situations described in paragraph (b)(3)(i) of this section, pre-2011 taxes paid or accrued by the owner of the disregarded debt instrument with respect to amounts paid or accrued on the instrument (up to the amount of the shared loss) are pre-2011 split taxes. The related income of a covered person is an amount equal to the shared loss, determined without regard to the actual amount of the covered person's earnings and profits.

(4) *Hybrid instrument splitter arrangements*—(i) *In general.* A hybrid instrument for purposes of this paragraph (b)(4) is an instrument that either is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes (*U.S. equity hybrid instrument*), or is treated as indebtedness for U.S. Federal income tax purposes but is treated as equity for foreign tax purposes (*U.S. debt hybrid instrument*).

(ii) *U.S. equity hybrid instrument splitter arrangement.* If the issuer of a U.S. equity hybrid instrument is a covered person with respect to a section 902 corporation that is the owner of the U.S. equity hybrid instrument, there is a pre-2011 splitter arrangement with respect to the portion of the pre-2011 taxes paid or accrued by the owner section 902 corporation with respect to the amounts on the instrument that are deductible by the issuer as interest under the laws of a foreign jurisdiction in which the issuer is subject to tax but that do not give rise to income for U.S. Federal income tax purposes. Pre-2011 split taxes paid or accrued by the section 902 corporation equal the total amount of pre-2011 taxes paid or accrued by the section 902 corporation less the amount of pre-2011 taxes that would have been paid or accrued had the section 902 corporation not been subject to tax on income from the U.S. equity hybrid instrument. The related income of the issuer of the U.S. equity hybrid instrument is an amount equal to the amounts that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's earnings and profits.

(iii) *U.S. debt hybrid instrument splitter arrangement.* If the owner of a U.S. debt hybrid instrument is a covered person with respect to a section 902 corporation that is the issuer of the U.S. debt hybrid instrument, there is a pre-2011 splitter arrangement with respect to the portion of the pre-2011 taxes paid or accrued by the section 902 corporation on income in an amount equal to the interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. Federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax. Pre-2011 split taxes are the pre-2011 taxes paid or accrued by the section 902 corporation on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes. The

related income with respect to a U.S. debt hybrid instrument is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner's earnings and profits.

(c) *General rules for applying section 909 to pre-2011 split taxes and related income*—(1) *Annual determination.* The determination of related income, other income, pre-2011 split taxes, and other taxes, and the portion of these amounts that were distributed, deemed paid or otherwise transferred or eliminated must be made on an annual basis beginning with the first taxable year of the section 902 corporation beginning after December 31, 1996 (*post-1996 taxable year*) in which the section 902 corporation paid or accrued a pre-2011 tax with respect to a pre-2011 splitter arrangement and ending with the section 902 corporation's last pre-2011 taxable year. Annual amounts of related income and pre-2011 split taxes are aggregated for each separate pre-2011 splitter arrangement.

(2) *Separate categories.* The determination of annual and aggregate amounts of related income and pre-2011 split taxes with respect to each pre-2011 splitter arrangement must be made for each separate category as defined in § 1.904–4(m) of the section 902 corporation, each covered person, and any other person that succeeds to the related income and pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a shared loss (as described in paragraph (b)(3) of this section), the amount of the related income in each separate category of the covered person is equal to the amount of income in that separate category that was offset by the shared loss for foreign tax purposes. In the case of a pre-2011 splitter arrangement involving a U.S. equity hybrid instrument (as described in paragraph (b)(4)(ii) of this section), the related income is assigned to the issuer's separate categories in the same proportions as the pre-2011 split taxes. Earnings and profits, including related income, are assigned to separate categories under the rules of §§ 1.904–4, 1.904–5, and 1.904–7. Foreign income taxes, including pre-2011 split taxes, are assigned to separate categories under the rules of § 1.904–6. A section 902 shareholder must consistently apply methodologies for determining pre-2011 split taxes and related income with respect to all pre-2011 splitter arrangements.

(d) *Special rules regarding related income*—(1) *Annual adjustments.* In the case of each pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group (as described in paragraphs (b)(1) and (b)(2) of this section, respectively), a covered person's aggregate amount of related income must be adjusted each year by the net amount of income and expense attributable to the activities of the covered person that give rise to income included in the foreign tax base, even if the net amount is negative and regardless of whether the section 902 corporation paid or accrued any pre-2011 split taxes in such year.

(2) *Effect of separate limitation losses and deficits.* Related income is determined without regard to the application of § 1.960–1(i)(4) (relating to the effect of separate limitation losses on earnings and profits in another separate category) or section 952(c)(1) (relating to certain earnings and profits deficits).

(3) *Pro rata method for distributions out of earnings and profits that include both related income and other income.* If the earnings and profits of a covered person include amounts attributable to both related income and other income, including earnings and profits attributable to taxable years beginning before January 1, 1997, then distributions, deemed distributions, and inclusions out of earnings and profits (for example, under sections 301, 304, 367(b), 951(a), 964(e), 1248, or 1293) of the covered person are considered made out of related income and other income on a pro rata basis. Any reduction of a covered person's earnings and profits that results from a payment on stock that is not treated as a dividend for U.S. Federal income tax purposes (for example, pursuant to section 312(n)(7)) will also reduce related income and other income on a pro rata basis.

(4) *Alternative method for distributions out of earnings and profits that include both related income and other income.* Solely for purposes of identifying the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first post-2010 taxable year, in lieu of the rule set forth in paragraph (d)(3) of this section, a section 902 shareholder may choose to treat all distributions, deemed distributions, and inclusions out of earnings and profits of a covered person as attributable first to related income. A section 902 shareholder may choose to use this alternative method on a timely filed original income tax return for the first post-2010 taxable year in which the shareholder computes an amount of foreign income taxes deemed paid with respect to a section 902 corporation that paid or accrued pre-2011 split taxes. Such choice by a section 902 shareholder is evidenced by employing the method on its income tax return; the section 902 shareholder need not file a separate statement. A section 902 shareholder that chooses this alternative method must consistently apply it with respect to all pre-2011 splitter arrangements.

(5) *Distributions, deemed distributions, and inclusions of related income.* Distributions, deemed distributions, and inclusions of related income (including indirectly through a partnership) to persons other than the payor section 902 corporation retain their character as related income with respect to the associated pre-2011 split taxes.

(6) *Carryover of related income.* Related income carries over to other corporations in the same manner as earnings and profits carry over under section 381, § 1.367(b)–7, or similar rules, and retains its character as related income with respect to the associated pre-2011 split taxes.

(7) *Related income taken into account by a section 902 shareholder.* Related income will be considered taken into account by a section 902 shareholder to the extent that the related income is recognized as gross income by the section 902 shareholder, or by an affiliated corporation described in paragraph (d)(9) of this section, upon a distribution, deemed distribution, or inclusion (such as under section 951(a)) out of the earnings and profits of the covered person attributable to such related income.

(8) *Related income taken into account by a payor section 902 corporation.* Related income will be considered taken into account by a payor section 902 corporation if:

(i) The related income is reflected in the earnings and profits of such section 902 corporation for U.S. Federal income tax purposes by reason of a distribution, deemed distribution, or inclusion out of the earnings and profits of the covered person attributable to such related income; or

(ii) The payor section 902 corporation and the covered person are combined in a transaction described in section 381(a)(1) or (a)(2).

(9) *Related income taken into account by an affiliated group of corporations that includes a section 902 shareholder.* A section 902 shareholder will be considered to have taken related income into account if one or more members of an affiliated group of corporations (as defined in section 1504) that files a consolidated Federal income tax return that includes the section 902

shareholder takes the related income into account.

(10) *Distributions of previously-taxed earnings and profits.* Distributions and deemed distributions described in paragraph (d) of this section (including in the case of a section 902 shareholder that has chosen the alternative method described in paragraph (d)(4) of this section) do not include distributions of amounts described in section 959(c)(1) or (c)(2), which are distributed before amounts described in section 959(c)(3).

(e) *Special rules regarding pre-2011 split taxes*—(1) *Taxes deemed paid pro-rata out of pre-2011 split taxes and other taxes.* If the pre-2011 taxes of a section 902 corporation include both pre-2011 split taxes and other taxes, then foreign taxes deemed paid under section 902 or 960 or otherwise removed from post-1986 foreign income taxes in pre-2011 taxable years will be treated as attributable to pre-2011 split taxes and other taxes on a pro-rata basis.

(2) *Pre-2011 split taxes deemed paid in pre-2011 taxable years.* Pre-2011 split taxes deemed paid in pre-2011 taxable years in connection with a dividend paid to a shareholder described in section 902(b) retain their character as pre-2011 split taxes. The section 902(b) shareholder will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(3) *Carryover of pre-2011 split taxes.* Pre-2011 split taxes that carry over to another foreign corporation, including under section 381, § 1.367(b)–7 or similar rules, retain their character as pre-2011 split taxes. The transferee foreign corporation will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(4) *Determining when pre-2011 split taxes are no longer treated as pre-2011 split taxes.* For each pre-2011 splitter arrangement, as related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in paragraph (d) of this section, a ratable portion of the associated pre-2011 split taxes will no longer be treated as pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group (as described in paragraphs (b)(1) and (b)(2) of this section, respectively), if aggregate related income is reduced to zero (other than as a result of a distribution, deemed distribution, or inclusion described in paragraph (d) of this section) or less than zero, pre-2011 split taxes will retain their character as pre-2011 split taxes until the amount of aggregate related income is positive and the related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in paragraph (d) of this section.

(f) *Rules relating to partnerships and trusts*—(1) *Taxes paid or accrued by partnerships.* In the case of foreign income taxes paid or accrued by a partnership, the taxes will be treated as pre-2011 split taxes to the extent such taxes are allocated to one or more section 902 corporations and would be pre-2011 split taxes if the partner section 902 corporation had paid or accrued the taxes directly on the date such taxes are included by the section 902 corporation under sections 702 and 706(a). Further, any foreign income taxes subject to section 909 will be suspended in the hands of the partner section 902 corporation.

(2) *Section 704(b) allocations.* Partnership allocations that satisfy the requirements of section 704(b) and the regulations thereunder will not constitute pre-2011 splitter arrangements except to the extent the arrangement is otherwise described in paragraph (b) of this section (for example, a payment or accrual on a disregarded debt instrument that gives rise to a shared loss).

(3) *Trusts.* Rules similar to the rules of paragraph (f)(1) of this section will apply in the case of any trust with one or more beneficiaries that is a section 902 corporation.

(g) *Interaction between section 909 and other Code provisions*—(1) *Section 904(c).* Section 909 does not apply to excess foreign income taxes that were paid or accrued in pre-2011 taxable years and carried forward and deemed paid or accrued under section 904(c) in a post-2010 taxable year.

(2) *Section 905(a).* For purposes of determining in post-2010 taxable years the allowable deduction for foreign income taxes paid or accrued under section 164(a), the carryover of excess foreign income taxes under section 904(c), and the extended period for claiming a credit or refund under section 6511(d)(3)(A), foreign income taxes to which section 909 applies are first taken into account and treated as paid or accrued in the year in which the related income is taken into account, and not in the earlier year to which the tax relates (determined without regard to section 909).

(3) *Section 905(c).* If a redetermination of foreign taxes claimed as a direct credit under section 901 occurs in a post-2010 taxable year and the foreign tax redetermination relates to a pre-2011 taxable year, to the extent such foreign tax redetermination increased the amount of foreign income taxes paid or accrued with respect to the pre-2011 taxable year (for example, due to an additional assessment of foreign tax or a payment of a previously accrued tax not paid within two years), section 909 will not apply to such taxes. If a redetermination of foreign tax paid or accrued by a section 902 corporation occurs in a post-2010 taxable year and increases the amount of foreign income taxes paid or accrued by the section 902 corporation with respect to a pre-2011 taxable year (for example, due to an additional assessment of foreign tax or a payment of a previously accrued tax not paid within two years), such taxes will be treated as pre-2011 taxes. Section 909 will apply to such taxes if they are pre-2011 split taxes and the taxes will be suspended in the post-2010 taxable year in which they would otherwise be taken into account as a prospective adjustment to the section 902 corporation's pools of post-1986 foreign income taxes.

(4) *Other foreign tax credit provisions.* Section 909 does not affect the applicability of other restrictions or limitations on the foreign tax credit under existing law, including, for example, the substantiation requirements of section 905(b).

(h) *Effective/applicability date.* This section applies to foreign income taxes paid or accrued by section 902 corporations in pre-2011 taxable years for purposes of computing foreign income taxes deemed paid with respect to distributions or inclusions out of earnings and profits of section 902 corporations in taxable years of the section 902 corporation beginning after December 31, 2010.

(i) *Expiration date.* The applicability of this section expires on February 9, 2015.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: February 8, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2012–3356 Filed 2–9–12; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9568]

RIN 1545–BI47

Section 482; Methods To Determine Taxable Income in Connection With a Cost Sharing Arrangement; Correction

AGENCY: Internal Revenue Service (IRS).

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final regulations (TD 9568), which were published in the **Federal Register** on Thursday, December 22, 2011 (76 FR 80082), relating to section 482 and methods to determine taxable income in connection with a cost sharing arrangement.

DATES: This correction is effective on February 14, 2012 and is applicable beginning December 22, 2011.

FOR FURTHER INFORMATION CONTACT: Joseph L. Tobin at (202) 435–5265 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that is the subject of these corrections are under section 482 of the Internal Revenue Code.

Need for Correction

As published, final regulations (TD 9568), contains errors which may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, the final regulations (TD 9568) that was the subject of FR Doc. 2012–895 is corrected to read as follows:

PART 1—INCOME TAXES

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

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

PART 1—[Corrected]

■ **Par. 2.** Section 1.482–7 is amended by:

1. Revising the title of the table of paragraph (g)(4)(viii), Example 2 (ii).

2. Revising the fourth sentence of paragraph (g)(4)(viii), Example 3 (ii).

The revisions read as follows:

§ 1.482–7 Methods to determine taxable income in connection with a cost sharing arrangement.

* * * * *

(g) * * *

(4) * * *

(viii) *Examples.* * * *

Example 2. * * *

(ii) * * *

''INCOME METHOD APPLICATION NUMBER:''

* * * * *

Example 3. * * *

(ii) * * * FS determines that the discount rate that would be applied to determine the present value of income and costs attributable to its participation in the licensing alternative would be 12.5% as compared to the 15% discount rate that would be applicable in determining the present value of the net income attributable to its participation in the CSA (reflecting the increased risk borne by FS in bearing a share of the R & D costs in the cost sharing alternative). * * *

* * * * *

Guy R. Traynor,

Federal Register Liaison, Legal Processing Division, Publication & Regulation Branch, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2012–3351 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9568]

RIN 1545–BI47

Section 482; Methods To Determine Taxable Income in Connection With a Cost Sharing Arrangement; Correction

AGENCY: Internal Revenue Service (IRS).

ACTION: Correction to notice of correcting amendments.

SUMMARY: This document contains corrections to a correcting amendment (TD 9568), which was published in the **Federal Register** on Wednesday, January 25, 2012 (77 FR 3606) relating to section 482 and methods to determine taxable income in connection with a cost sharing arrangement.

DATES: This correction is effective on February 14, 2012, and is applicable beginnning December 22, 2011.

FOR FURTHER INFORMATION CONTACT: Joseph L. Tobin at (202) 435–5265 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections are under section 482 of the Internal Revenue Code.

Need for Correction

As published, the correcting amendments to final regulations (TD 9568), contains errors which may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the correcting amendments to final regulations, (TD 9568), which were the subject of FR Doc. 2012–895, is corrected as follows:

1. On page 3606, second column, instructional paragraph 3., item 4. the language ''4. Revising paragraph (k)(2)(ii)(3) is corrected to read ''5. Revising paragraph (k)(2)(ii)(A)(*3*).

2. On page 3606, second column, under the instructional paragraph 3., the language ''4. Revising the fourth sentence of paragraph (g)(4)(viii), *Example 3.''* is added.

§ 1.482–7 [Corrected].

3. On page 3606, third column, § 1.482–7(g)(2)(v)(C), *Example* (i), add three asterisks to the end of the paragraph and remove the five asterisks from below the paragraph.

4. On page 3606, third column, § 1.482–7(g)(2) after the five asterisks following paragraph (ii) the language ''(3) * * *'', is corrected to read ''(4) * * *''.

5. On page 3606, third column, § 1.482–7 (g)(4)(viii), the language ''(viii) * * *'' is corrected to read ''(viii) *Examples.* * * *''

6. On page 3606, third column, § 1.482–7(k)(2) below the five asterisks following paragraph (viii), *Example 3* add ''(A)* * *'' below ''(ii)* * *'' and above ''(3)'' and underscore ''(*3*)''.

Guy R. Traynor,

Federal Register Liaison, Legal Processing Division, Publication and Regulations Branch, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2012–3353 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[SATS Nos. TX–061–FOR; TX–062–FOR; TX–063–FOR; Docket No. OSM–2011–0007]

Texas Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving three amendments to the Texas regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas at its own initiative submitted three separate amendments to its program: SATS Nos. TX–061–FOR, TX–062–FOR, and TX–063–FOR. Texas proposed revisions in TX–061–FOR by

adding language that no longer requires an operation with only reclamation activities ongoing to renew their mining permit, to clarify the requirement to maintain public liability insurance for sites where the permit is not renewed because the only activities ongoing are reclamation, and to clarify midterm review times for sites where the permit is not renewed because the only ongoing activities are reclamation. Texas proposed revisions in TX–062–FOR by adding a new definition for ''Previously mined land,'' adding new language on the effects of previous mining violations from operations on previously mined lands in relation to permit application denials, and adding new language explaining performance standards for revegetation liability timeframes for coal mining and reclamation operations. Texas proposed revisions in TX–063–FOR by adding a new definition for ''Director;'' deleting old language, and adding new language clarifying the review periods for new permits, renewals, and significant revisions. Texas revised its program to improve operational efficiency.

DATES: *Effective Date:* February 14, 2012.

FOR FURTHER INFORMATION CONTACT: Alfred L. Clayborne, Director, Tulsa Field Office. Telephone: (918) 581–6430. Email: *aclayborne@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Texas Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Texas Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Texas program effective February 16, 1980. You can find background information on the Texas program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Texas program in the February 27, 1980, **Federal Register** (45 FR 12998). You can also find later actions concerning the Texas program and program amendments at 30 CFR 943.10, 943.15, and 943.16.

II. Submission of the Amendment

By letter dated May 18, 2011, (Administrative Record No. TX–667) Texas sent us an amendment to its Program under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative. This amendment added language to no longer require an operation with only reclamation activities ongoing to renew their mining permit, to clarify the requirement to maintain public liability insurance for sites where the permit is not renewed because the only activities ongoing are reclamation, and to clarify midterm review times for sites where the permit is not renewed because the only ongoing activities are reclamation.

By letter dated May 26, 2011, (Administrative Record No. TX–668) Texas sent us an amendment to its Program under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative. This amendment added a new definition for ''Previously mined land,'' added new language on the effects of previous mining violations from operations on previously mined lands in relation to permit application denials, and added new language explaining performance standards for revegetation liability timeframes for coal mining and reclamation operations.

By letter dated June 3, 2011, (Administrative Record No. TX–669) Texas sent us an amendment to its Program under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative. This amendment added a new definition for ''Director;'' deleted old language, and added new language clarifying the review periods for new permits, renewals, and significant revisions.

Texas revised its program with these three amendments to improve operational efficiency.

We announced receipt of the proposed amendments in the August 16, 2011, **Federal Register** (75 FR 50708). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendments. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on September 15, 2011. We did not receive any public comments.

III. OSM's Findings

We are approving the amendments as described below. The following are the findings we made concerning the amendments under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. The full text of the changes made can be found in the administrative record or online at Regulations.gov.

A. TX–061–FOR

1. 16 Texas Administrative Code Section 12.100. Responsibilities

Texas added new language allowing a permittee to not renew their mining permit if the activities on the site are solely for reclamation purposes.

We find that Texas' new language is substantively the same as the language of the counterpart Federal regulations at 30 CFR 773.4(a) and will not make Texas' regulations less effective than the Federal counterpart. Therefore, we are approving it.

2. 16 Texas Administrative Code Section 12.225. Commission Review of Outstanding Permits

Texas added a new paragraph (a)(3) to clarify that midterm permit reviews will continue to be conducted when an existing permit is not renewed because the only ongoing activities within the permit area are for reclamation.

We find that this new paragraph is comparable to its Federal counterpart at 30 CFR 774.10(a)(2) and (3) and its addition does not make Texas' regulations less effective than the Federal regulation. Therefore, we are approving it.

3. 16 Texas Administrative Code Section 12.311. Terms and Conditions for Liability Insurance

Texas revised this section with minor language changes to paragraph (b).

We find that Texas' changes make this paragraph substantively the same as the counterpart Federal regulation 30 CFR 800.60(b). Therefore, we are approving them.

B. TX–062–FOR

1. Texas Surface Coal Mining and Reclamation Act Section 134.004. Definitions

Texas added a new definition for ''previously mined land'' in lieu of the definition of ''lands eligible for remining'' contained in SMCRA at § 701(34).

We find that Texas' new definition coincides with definitions found in the Federal regulations dealing with remining and is a suitable counterpart to the definition contained in SMCRA because it addresses all aspects of the SMCRA definition. Therefore, the addition of this new definition will make Texas' statutes no less stringent than SMCRA and we are approving it.

2. Texas Surface Coal Mining and Reclamation Act Section 134.069. Effect of Past or Present Violation

Texas added a new paragraph (c) to incorporate equivalent statutory language found at SMCRA § 510(e) with regard to the criteria for denial of a permit application due to permit violations during mining on previously mined land. Although Texas' language is not identical to the Federal language, it is similar. SMCRA § 510(e) is specific that the unanticipated event or condition is ''at'' a surface coal mine while Texas' § 134.069 uses the phrase ''in connection with.''

We find that this difference in wording is allowable as long as Texas implements it with the same intent of SMCRA § 510(e) and the Federal regulations at 30 CFR 773.13. Based on this, we find that the addition of the new paragraph will make Texas' statutes no less stringent than the requirements of SMCRA. Therefore, we are approving it.

3. Texas Surface Coal Mining and Reclamation Act Section 134.092. Performance Standards

Texas added new language to (a)(20) to incorporate equivalent statutory language found at SMCRA § 515(b)(20) with regard to the term of the extended responsibility period for mining of previously mined lands.

This new language creates a separate paragraph, (a)(20)(B), for lands that meet the new definition of ''previously mined lands'' which we have already found to be no less stringent than SMCRA. Texas' new provision requiring an operator to assume responsibility for 2 years on previously mined land is substantively the same as the Federal requirements at 515(b)(20)(B). However, this section does not address the period of responsibility for areas that receive an annual precipitation amount of 26 inches or less. This responsibility requirement is addressed in section 134.104 and is discussed below.

We find that this new language makes Texas' statutes no less stringent than the requirements of SMCRA. Therefore, we are approving it.

4. Texas Surface Coal Mining and Reclamation Act Section 134.104. Responsibility for Revegetation: Area of Low Precipitation

Texas added new language to this section to incorporate equivalent statutory language found at SMCRA § 515(b)(20) with regard to the term of the extended responsibility period for mining of previously mined lands. The new language clarifies the liability periods for areas that receive an annual average precipitation amount of 26 inches or less as five years on previously mined lands and 10 years on lands not previously mined.

We find that this new language makes Texas' statutes no less stringent than the requirements of SMCRA. Therefore, we are approving it.

5. Texas Surface Coal Mining and Reclamation Act Section 134.105. Responsibility for Revegetation: Long-Term Intensive Agricultural Postmining Use

Texas deleted language in this section referring to the ''five year or 10 year'' period of responsibility. This deletion was made so the section coincides with other changes made to the statutes that were discussed above. This change allows the modified sentence to refer to whichever ''applicable period'' applies.

We find that this deletion makes Texas' statutes no less stringent than the requirements of SMCRA. Therefore, we are approving it.

C. TX–063–FOR

1. Texas Surface Coal Mining and Reclamation Act Section 134.004. Definitions

Texas added a definition for ''Director,'' defining it as the director of the Surface Mining and Reclamation Division of the Railroad Commission of Texas or the director's representative.

We find that there is no Federal counterpart for the new definition and it does not make Texas' statutes less stringent than the requirements of SMCRA. However, Texas' current regulations at § 12.3(54) currently define ''director'' as ''the Director of the Office of Surface Mining Reclamation and Enforcement (OSM).'' Once we approve this change to Texas' statute, Texas will amend its approved program regulations. We are approving this change to Texas' statutes.

2. Texas Surface Coal Mining and Reclamation Act Section 134.080. Approval of Permit Revision

Texas modified the section's title and deleted paragraph (b), which required the Commission to approve or disapprove a permit revision within 90 days. Texas added a new section 134.085 that describes, in detail, the Commission's requirements for processing new permits, renewals, and revisions, including processing and notification timeframes. SMCRA § 511(a)(2) requires that revisions be approved or disapproved ''within a period of time established by the State or Federal Program.''

We find that these changes make Texas' statutes no less stringent than the requirements of SMCRA. Therefore, we are approving them.

3. Texas Surface Coal Mining and Reclamation Act Section 134.085. Review Periods for New Permits, Renewals, and Revisions

Texas added this new section to codify application processing timeframes that have previously been in effect and to comply with SMCRA § 511(a)(2) which requires States to establish such timeframes. Texas established a seven day application review period to determine application completeness followed by a 120 day review period for new permits, renewals, or significant revisions and a 90 day review period for applications considered to be non-significant departures.

We find that the addition of this new section makes Texas' statutes no less stringent than the requirements of SMCRA. Therefore, we are approving it.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendments, but did not receive any.

Federal Agency Comments

On June 27, 2011, under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the Texas program (Administrative Record Nos. TX–667.02, TX–668.02, and TX–669.02). We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendments that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Texas proposed to make in these amendments pertained to air or water quality standards. Therefore, we did not ask EPA to concur on the amendments. However, on June 27, 2011, under 30 CFR 732.17(h)(11)(i), we requested comments on the amendments from the EPA (Administrative Record Nos. TX–667.02, TX–668.02, and TX–669.02). The EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On June 27, 2011, we requested comments on Texas' amendments (Administrative Record Nos. TX–667.02, TX–668.02, and TX–669.02), but neither responded to our request.

V. OSM's Decision

Based on the above findings, we approve the amendments Texas sent us on May 18, 2011, May 26, 2011, and June 3, 2011.

To implement this decision, we are amending the Federal regulations at 30 CFR part 943, which codify decisions concerning the Texas program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10) decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Texas program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Texas program has no effect on Federally-recognized Indian tribes.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior 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.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector

of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 9, 2011.

Ervin J. Barchenger,

Regional Director, Mid-Continent Region.

For the reasons set out in the preamble, 30 CFR part 943 is amended as set forth below:

PART 943—TEXAS

■ 1. The authority citation for Part 943 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 943.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 943.15 Approval of Texas regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/Description
*	*	*
May 18, 2011, May 26, 2011, and June 3, 2011.	February 14, 2012	16 TAC 12.100(a); 12.225(a)(3); 12.311(b); TSCMRA 134.004 (7-a) and (15-a); 134.069(c); 134.080(a) and (b); 134.085; 134.092(20); 134.104(1) and (2); and 134.105(a).

[FR Doc. 2012–3418 Filed 2–13–12; 8:45 am]

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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010 and 1029

RIN 1506–AB02

Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN, a bureau of the Department of the Treasury (''Treasury''), is issuing this Final Rule defining non-bank residential mortgage lenders and originators as loan or finance companies for the purpose of requiring them to establish anti-money laundering programs and report suspicious activities under the Bank Secrecy Act.

DATES: *Effective Date:* This rule is effective April 16, 2012.

Compliance Date: The compliance date for 31 CFR 1029.210 is August 13, 2012.

FOR FURTHER INFORMATION CONTACT: FinCEN, Regulatory Policy and Programs Division at (800) 949–2732 and select Option 1.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

The Bank Secrecy Act (''BSA'') [1] authorizes the Secretary of the Treasury (the ''Secretary'') to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines ''have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [2] In addition, the Secretary is authorized to impose anti-money laundering (''AML'') program requirements on financial institutions.[3] The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.[4]

Financial institutions are required to establish AML programs that include, at a minimum: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. When prescribing minimum standards for AML programs, FinCEN must ''consider the extent to which the requirements imposed under [the AML program requirement] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.'' [5] The BSA also requires financial institutions to file suspicious activity reports (''SARs'').[6]

The BSA defines the term ''financial institution'' to include, in part, a loan or finance company.[7] The term ''loan or finance company'' is not defined in any FinCEN regulation, and there is no legislative history on the term. The term, however, can reasonably be construed to extend to any business entity that makes loans to or finances purchases on behalf of consumers and businesses. Some loan and finance companies extend personal loans and loans secured by real estate mortgages and deeds of trust, including home equity loans. Non-bank residential mortgage lenders and originators (''RMLOs''—generally known as ''mortgage companies'' and ''mortgage brokers'' in the residential mortgage business sector) are a significant subset of the ''loan or finance company'' category, in terms of the number of businesses and the aggregate volume

[1] ''Bank Secrecy Act'' is the name that has come to be applied to the Currency and Foreign Transactions Reporting Act (Titles I and II of Pub. L. 91–508), its amendments, and the other statutes referring to the subject matter of that Act. These statutes are codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto.

[2] 31 U.S.C. 5311.

[3] 31 U.S.C. 5318(h).

[4] *See* Treasury Order 180–01 (Sept. 26, 2002).

[5] Public Law 107–56 352(c), 115 Stat. § 322, *codified at* 31 U.S.C. 5318 note. Public Law 107–56 is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act'').

[6] 31 U.S.C. 5318(g). Section 5318(g) gives the Secretary authority to require financial institutions to file SARs. This section was added to the BSA by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, Title XV of the Housing and Community Development Act of 1992, Public Law 102–550; it was expanded by section 403 of the Money Laundering Suppression Act of 1994, Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, to require designation of a single government recipient for reports of suspicious transactions.

[7] 31 U.S.C. 5312(a)(2)(P).

and value of transactions they facilitate.[8]

In 2002, FinCEN issued a regulation that temporarily exempted loan and finance companies and other categories of BSA-defined financial institutions from the obligation to establish AML programs.[9] The purpose of the exemption was to enable Treasury and FinCEN to study these categories of institutions and to consider the extent to which BSA requirements should be applied to them, taking into account their specific characteristics and money laundering vulnerabilities.[10] As a result, RMLOs did not have to comply with AML or SAR regulations or other BSA reporting and recordkeeping requirements intended to help prevent money laundering and fraud, and support law enforcement efforts. Subsequently, FinCEN analyses and law enforcement investigations identified this exemption as a regulatory gap that can be exploited by criminals, particularly in the conduct of mortgage fraud.

On July 21, 2009, FinCEN issued an Advance Notice of Proposed Rulemaking (''ANPRM'') [11] soliciting general comments on whether FinCEN should issue AML and SAR program regulations for RMLOs. Most of the comments received in response to the ANPRM generally supported AML and SAR regulations for RMLOs. On December 9, 2010, FinCEN issued a Notice of Proposed Rulemaking (''NPRM'') [12] to solicit comments on specific proposed regulations for RMLOs. The NPRM proposed AML and SAR regulations with standards and requirements that are substantially identical to those in AML and SAR regulations for banks and other financial institutions that offer retail consumer banking services and originate mortgage loans.

Both the ANPRM and the NPRM suggested that the AML program and SAR filing regulations for RMLOs would be issued as the first step in an incremental approach to implementation of regulations for the broad loan or finance company category of financial institutions. Thus, the definition of ''loan or finance company'' would initially include only RMLOs, but would be structured to permit the addition of other types of loan and finance related businesses and professions in future amendments.

Since 2006, FinCEN has issued numerous studies analyzing SARs reporting suspected mortgage fraud and money laundering that involved both banks and RMLOs, the latter typically brokering or selling purchase money and refinance loans to lending institutions.[13] The reports underscore the potential benefits of AML and SAR regulations for a variety of businesses in the primary and secondary residential mortgage markets, including RMLOs. As noted in the NPRM and emphasized in several related public comments, RMLOs are primary providers of mortgage finance—in most cases dealing directly with the consumer—and are in a unique position to assess and identify money laundering risks and fraud while directly assisting consumers with their financial needs and protecting the sector from the abuses of financial crime. Comments on the ANPRM and NPRM emphasized that the risks of fraud and other financial crimes, including money laundering, are substantial in the RMLO sector and are growing. Some comments stated that the financial crime risks in the sector are ''no less significant'' than those faced by banks providing mortgage loan services.[14]

Most of the comments on the NPRM generally supported the issuance of AML program and SAR filing regulations for RMLOs. The Final Rule is based on the NPRM and adopts all of the regulatory provisions proposed with a few exceptions, noted below. The AML regulation promulgates the four minimum requirements noted earlier. The SAR regulation requires reporting of suspicious activity, including but not limited to fraudulent attempts to obtain a mortgage or launder money by use of the proceeds of other crimes to purchase residential real estate. The Final Rule does not require RMLOs to comply with any other BSA reporting or recordkeeping regulations, such as currency transaction reports (CTRs).[15] The few large currency transactions expected to be conducted in the sector will continue to be subject to reporting on FinCEN Form 8300.[16]

FinCEN believes that much of the effort necessary to meet these regulatory obligations, including information gathering, will be accomplished through business operations already undertaken as part of normal transaction negotiation, completion of required Federal forms and disclosures, and due diligence and review of property and collateral. With this Final Rule, FinCEN believes RMLOs will assume a crucial role in government and industry efforts to protect consumers, mortgage finance businesses, and the U.S. financial system from mortgage fraud, money laundering, and other financial crimes.

II. Notice of Proposed Rulemaking

The comment period on the NPRM ended on February 7, 2011. FinCEN received 15 comment letters from individuals, businesses, and representatives of various groups whose members had an interest in the proposed AML and SAR program requirements. The comments offered a range of views on the appropriate scope of any new regulations, and on various implementation- and compliance-related matters of concern to industry, regulators and law enforcement.

A. Incremental Implementation of Rules

The NPRM proposed specific AML program and SAR filing requirements for RMLOs as the first step in an incremental approach to implementation of regulations for loan and finance companies. In order to limit the scope of the Final Rule to RMLOs, the NPRM proposed a definition of the

[8] Loan and finance companies also supply short- and intermediate-term credit for such purposes as the purchase of equipment, accounts receivable portfolios and motor vehicles, and the financing of inventories. In addition, specialized wholesale loan and finance companies provide liquidity that allows retail loan and finance companies, as well as banks and others, to service end users.

[9] 31 CFR 1010.205 (2011).

[10] *See* 67 FR 21113 (Apr. 29, 2002), *as amended at* 67 FR 67549 (Nov. 6, 2002), *corrected at* 67 FR 68935 (Nov. 14, 2002), *recodified at* 75 FR 65806 (Oct. 26, 2010).

[11] 74 FR 35830 (July 21, 2009). ''Anti-Money Laundering Program and Suspicious Activity Report Requirements for Non-Bank Residential Mortgage Lenders and Originators.'' *http://edocket.access.gpo.gov/2009/pdf/E-9-17117.pdf.*

[12] 75 FR 76677 (Dec. 9, 2010). ''Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators.'' *http://edocket.access.gpo.gov/2010/pdf/2010–30765.pdf.*

[13] *See* Mortgage Loan Fraud Update (SARs Jan. 1–Mar. 31, 2011), June 2011, *http://www.fincen.gov/news_room/rp/files/MLF_Update_1st_Qtyl_11_FINAL_508.pdf;* Mortgage Loan Fraud Update (SARs Jan. 1–Dec. 31, 2010), Mar. 2011, *http://www.fincen.gov/news_room/rp/files/MLF_Update_4th_Qtly_10_FINAL_508.pdf;* Mortgage Loan Fraud Update (SARs July 1–Sept. 30, 2010), Jan. 2011, *http://www.fincen.gov/news_room/rp/files/MLF_Update_3rd_Qtly_10_FINAL.pdf;* Mortgage Loan Fraud Update (SARs Apr. 1–June 30, 2010), Dec. 2010, *http://www.fincen.gov/news_room/rp/files/MLF_Update_2nd_Qtly_10_FINAL.pdf;* Mortgage Loan Fraud Update: SAR Filings Jan. 1–Mar. 31, 2010, *http://www.fincen.gov/news_room/rp/files/MLF_Update_1st_Qtly_10_FINAL.pdf. See also* NPRM, notes 13, 20 and 21.

[14] *See* NPRM, 75 FR at 76679. One government agency comment on the NPRM stated that the ''regulatory gap in coverage has hampered efforts to be proactive in detecting and investigating mortgage fraud at non-banks (i.e., unsupervised lenders and originators [RMLOs under this Final Rule]) * * *.'' The commenter further noted that in 2010, unsupervised lenders and originators comprised fully two-thirds (67 percent) of FHA's approved originating lenders. The commenter also stated that ''[o]ne vital weapon in the war on mortgage fraud has been FinCEN's regulations that require banks to establish AML programs and to file SARs.''

[15] 31 CFR 1010.310.

[16] 31 CFR 1010.330.

term ''loan or finance company'' that includes business entities or sole proprietorships (not individuals) acting within the bounds of specified definitions for the terms *residential mortgage lender* and *residential mortgage originator.*

Seven comments on the NPRM addressed aspects of the incremental approach FinCEN has chosen, mostly supportive. Many commenters also urged that the Final Rule cover other types of businesses and professions in the primary and secondary residential real estate markets, as well as other types of consumer and commercial loan and finance companies, not just residential mortgage lenders and originators.

Two commenters argued that FinCEN should not delay implementation of BSA requirements for other loan or finance companies. One argued that an uneven playing field would be to the advantage of fraudsters and criminals, who will take advantage of financial industry sectors that have less stringent BSA requirements. The other commenter argued that such an incremental approach misses the opportunity to provide law enforcement with critical information about high-risk real estate transactions and needlessly continues the exemption of U.S. real estate and escrow agents. A number of comments suggested that FinCEN issue final rules for commercial lenders, as well as RMLOs, in connection with this rulemaking.

Comments of this nature were anticipated from industry as well as regulators and law enforcement, due to heightened concern about criminals potentially shifting the focus of their fraud and other illegal financial transactions and money laundering to uncovered businesses and professions. Arguably, the absence of rules for other types of loan or finance companies might be exploited by criminals insofar as they may shift the focus of their criminal enterprises from residential real estate to other consumer and commercial finance businesses. FinCEN reports note that SARs involving commercial real estate, in particular, have increased in recent periods.[17]

Some comments urged simultaneous—or very prompt—issuance of AML and SAR rules for businesses in a separate, but related, category of BSA-defined financial institution—''persons involved in real estate closings and settlements.'' [18] FinCEN regulations in this category could include persons as varied as real estate agents and real estate brokers, closing attorneys and agents, title search and title insurance companies, appraisers, escrow companies, and other firms involved in initial purchase money transactions as well as subsequent refinancing in the form of, for example, home equity loans, reverse mortgages, and real estate-secured consumer loans. Three commenters suggested that FinCEN should propose rules for real estate agents and other persons involved in real estate closings and settlements. One commenter advocated for the Final Rule to include two types of businesses that logically belong in the ''persons involved * * *'' category—real estate agents and escrow companies. The comment emphasized the critical role a few of these companies played in recent high-profile money laundering cases. One comment specifically opposed such a proposal, arguing that in nearly all real estate finance transactions in which real estate agents participate funds are transferred using the services of different businesses that already are required to comply with AML and SAR regulations.

In sum, several comments on the NPRM expressed support for expanding the scope of the Final Rule to cover businesses and professions involved in a broad range of consumer and commercial real estate and non-real estate related finance. Upon consideration of the comments, FinCEN is not inclined at this time to propose a definition of ''loan or finance company'' that would encompass other types of consumer or commercial finance companies, or real estate agents and other ''persons involved in real estate closings and settlements.''

FinCEN intends to defer regulations for these other businesses and professions until further research and analysis can be conducted to enhance our understanding of the operations and money laundering vulnerabilities of these businesses. Accordingly, as the NPRM suggested, the definition of ''loan or finance company'' in the Final Rule has been structured to permit the addition of other types of loan and finance companies in future rulemakings.

B. Final Rule Limited to AML and SAR Regulations Only

The NPRM suggested that FinCEN would not propose any additional BSA regulations for the sector at this time, including CTR requirements.[19] One commenter addressed this issue specifically, supporting FinCEN's view that CTR filing requirements are unnecessary for loan or finance companies. FinCEN agrees, and therefore, the Final Rule does not adopt any CTR requirements or any other BSA regulations.[20]

C. Consideration of Examination Authority

FinCEN sought comment on any particular aspects of the loan or finance company sector that should be considered when making a decision about whether, to whom, and how to delegate examination authority. Under 31 CFR 1010.810(a), ''[O]verall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated [by the Secretary of the Treasury] to the Director, FinCEN.'' In turn, Federal functional regulators have been delegated authority to examine certain financial institutions they oversee for compliance with FinCEN's regulations. As noted in the NPRM, the Internal Revenue Service (''IRS'') has been delegated the authority, under this regulation,[21] to examine for compliance with FinCEN's regulations those financial institutions that are not examined by a Federal functional regulator.

Commenters suggested options for FinCEN to delegate complete or partial examination authority over RMLOs for compliance with the Final Rule. The options noted in the public comments included, in addition to the IRS, state regulatory agencies, the Consumer Financial Protection Bureau, and the Federal banking agencies (particularly with respect to RMLOs affiliated with banks or insured depository institutions and their holding companies). Upon consideration of all the comments, FinCEN will work with other relevant regulatory agencies in the development of consistent compliance examination

[17] *See, e.g.,* Mortgage Loan Fraud Update (SARs Apr. 1–June 30, 2010), Dec. 2010, page 18. *http://www.fincen.gov/news_room/rp/files/MLF_Update_2nd_Qtly_10_FINAL.pdf. See also* Commercial Real Estate Financing Fraud (SARs by Depository Institutions, Jan. 1, 2007 to Dec. 31, 2010) Mar. 2011; Advisory: Activities Potentially Related to Commercial Real Estate Fraud (Mar. 30, 2011); Remarks of James H. Freis, Jr., Director, FinCEN, delivered at the Mortgage Bankers Association National Fraud Issues Conference, Mar. 28, 2011, page 4 (the ''Fraud Conference Speech'').

http://www.fincen.gov/news_room/speech/pdf/20110328.pdf.

[18] 31 U.S.C. 5312(a)(2)(U).

[19] *See* note 15, *supra.*

[20] As financial institutions for purposes of 31 U.S.C. 5312(a)(2), loan or finance companies have been, and remain subject to, the special information procedures to deter money laundering and terrorist activity. *See* Subpart E of 31 CFR Part 1010.

[21] 31 CFR 1010.810(b)(8).

procedures, and in the future will provide public notice of other agencies that will exercise delegated compliance examination authority with respect to certain classes of RMLOs and other loan or finance companies.

D. SAR Filing System and Form

Three commenters suggested that FinCEN establish a separate SAR filing system and form for the exclusive use of residential mortgage lenders and originators. Another commenter requested that FinCEN continue to accommodate manual paper SAR filings, as many covered entities do not have automated systems.

FinCEN considered requiring RMLOs to use Treasury SAR Form TD F 90–22.47, presently used by banks and other insured depository institutions. The information required for a SAR from an RMLO would be substantially the same as that required of banks and other depository institutions that make mortgage loans and use Form TD F 90–22.47. However, FinCEN is modernizing its SAR filing system and intends to establish a uniform electronic form for use by all financial institutions with a SAR filing obligation.[22] Accordingly, the Final Rule has a delayed compliance date to allow time for industry to implement programs and systems and for FinCEN to implement the new SAR filing system. In addition, FinCEN intends to phase out the manual filing of paper SAR forms.[23] RMLOs will, therefore, be required to use FinCEN's electronic, web-based E-Filing system under development for the filing of the uniform SAR form. This electronic filing system will not require use of commercial automated systems, but will be usable by anyone with access to the Internet.[24]

E. Exclusions and Exemptions Considered

The NPRM suggested exceptions or exclusions for: banks and insured depository institutions; persons registered with and functionally regulated or examined by the U. S. Securities and Exchange Commission or the Commodity Futures Trading Commission; individuals employed by covered loan or finance companies and affiliated financial institutions; and individuals who finance the sale of their own property (*i.e.,* seller-financed sales). The NPRM expressed the long-held view that exceptions are appropriate for individuals and entities already subject to AML and SAR regulations to avoid overlapping or duplicative requirements, and that seller-financed transactions do not present the same risks as most transactions conducted at arm's-length.

In response to FinCEN's request for comments on the matter of appropriate exclusions and exceptions, some commenters opposed any additional exemptions or exceptions beyond those suggested in the NPRM, while others urged FinCEN to consider one or more additional exceptions. One commenter stated that the registration and training requirements mandated by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (''SAFE Act'') [25] are sufficient to address anti-money laundering and terrorist financing risks encountered by RMLOs. Another commenter argued that small businesses with fewer than five employees should be exempt.

FinCEN does not agree that the registration and training requirements under the SAFE Act are sufficient to address all of the concerns and accomplish all of the goals related to AML and SAR programs. However, FinCEN intends to continue its dialogue with the CSBS to coordinate the identification and examination of mortgage originators subject to the Final Rule. SARs filed pursuant to FinCEN's regulations go into a database that is accessible to regulatory agencies and law enforcement on the Federal, state and local levels. The information in FinCEN's database, and FinCEN's complementary analysis, is crucial to the successful investigation and prosecution of money laundering, fraud, and other financial crimes—a point emphasized in several comments on the NPRM.

FinCEN does not agree that RMLOs with less than a certain arbitrary number of employees or net worth should be excepted from the Final Rule. Such an exception would leave a large gap in coverage of RMLO businesses. Comments on the NPRM confirm that the absence of SAR rules for RMLOs has resulted in a substantial gap in mortgage fraud related SAR reporting. FinCEN believes that a ''small business'' exclusion or exception for businesses with fewer than five employees, or for businesses that satisfy some other arbitrary size, net worth or similar criteria, would perpetuate the present substantial gap in SAR reporting. The widespread knowledge that all banks and other insured depository institutions have well-established AML and SAR programs likely has deterred some criminals and caused them to consider other options for integrating illicit funds into the financial system. The inclusion of arbitrary, size-related exceptions from the Final Rule may result in unintended consequences that undermine the effectiveness of a comprehensive, risk-based AML and SAR program regime. Such exceptions could, for example, encourage a shift of a substantial portion of mortgage transactions to small lenders and brokers, however ''small'' is defined.

A similar comment suggested a *de minimis* exception for businesses that lend or broker loans under a relatively low value, or low aggregate volume of transactions within a set time period. For the reasons stated above, we see no compelling reason to except any businesses or transactions based on an arbitrary, *de minimis* dollar amount or volume of transactions.

Commenters both supported and opposed the NPRM's proposed coverage of sole proprietorships. Consistent with the NPRM, the Final Rule explicitly covers sole proprietorships. For the same reasons that support the rejection of an exception for small businesses, the Final Rule does not recognize an exception based on a business's status as a sole proprietorship or other kind of business entity under Federal or state incorporation or tax laws. An exception for sole proprietorships likely would perpetuate, to some degree, the SAR filing gap and risk adverse impacts on the mortgage markets. Thus, the Final Rule does not incorporate any such exceptions for businesses based on their form of organization.

III. Section-by-Section Analysis

A. Definition of Loan or Finance Company

Section 1010.100(lll) defines the key terms used in the Final Rule. The definitions reflect FinCEN's determination that the term ''loan or finance company'' should be limited, at this time, to RMLOs, and that AML program and SAR requirements should be applied first to these businesses, and later—as part of a phased approach—applied to other consumer and commercial loan and finance companies. With the exception of the addition of explicit exclusions for government-sponsored enterprises and certain government programs and a slight change to the definition of residential mortgage originator, discussed below, the Final Rule adopts the definitions as proposed.

[22] 75 FR 63545 (Oct. 15, 2010).

[23] 76 FR 57799 (Sept. 16, 2011).

[24] *Id.,* note 4, referencing information on filing methods posted on FinCEN's Web site, *http://bsaefiling.fincen.treas.gov/main.html.*

[25] *See* Title V of Division A of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2810 (2008), *codified at* 12 U.S.C. 5101, *et. seq.*

In the NPRM, ''residential mortgage originator'' was defined as a person who ''takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain.'' One commenter suggested that the proposed language ''takes a residential mortgage loan application'' was ambiguous as to who would be subject to the requirements. FinCEN intends the Final Rule to be broad in scope and cover most non-bank residential mortgage originators, with the few exceptions recognized in the Final Rule and described in this notice. FinCEN intends the Final Rule to cover any business that, on behalf of one or more lenders, accepts a completed mortgage loan application, even if the business does not in any manner engage in negotiating the terms of a loan. FinCEN also intends the Final Rules to cover businesses that offer or negotiate specific loan terms on behalf of either a lender or borrower, regardless of whether they also accept a mortgage loan application. Accordingly, the Final Rule modifies the proposed definition of ''residential mortgage originator'' slightly to include ''persons'' who *accept* a residential mortgage loan application *or* that offer or negotiate terms of a residential mortgage loan.'' The change made from the NPRM of replacing the term ''take'' with ''accept'' is intended to differentiate the Final Rule from the SAFE Act. The change from ''and'' to ''or'' is intended to ensure that persons who either accept an application or offer or negotiate the terms of a loan are covered. In addition, FinCEN intends the Final Rule to apply to residential mortgage originators, regardless of whether they receive compensation or gain for acting in that capacity. Accordingly, the phrase ''for compensation or gain'' in the proposed definition is removed from the definition in the Final Rule. These changes create greater differences between the definitions in this Final Rule and those used in the SAFE Act and other federal mortgage-related statutes. This was done intentionally to differentiate this Final Rule from those statutes so that the interpretation of this Final Rule is not based on the interpretation of those statutes. FinCEN intends the definitions in the Final Rule and subsequent amendments thereto to be consistent with definitions in the SAFE Act and other federal mortgage-related statutes, only to the extent deemed appropriate to advance FinCEN's mission, strategic goals, and policies. As discussed in the NPRM, the Final Rule does not contemplate coverage of an individual employed by a loan or finance company or financial institution, and provides an exception for individuals financing the sale of their own real estate.[26] For example, individuals employed by a loan or finance company that would be not be subject to the rule include administrative assistants and office clerks who gather documents, review land records and complete forms on behalf of a lender or originator.

One commenter inquired whether the Final Rule (or any aspects thereof) would apply to the housing government sponsored enterprises (''GSEs'') and their employees involved in ''loss mitigation'' activities. FinCEN would like to clarify that no provision of the Final Rule applies to the housing GSEs or any of their employees, regardless of whether they are involved in loss mitigation or any other housing GSE activity or program. FinCEN has revised the proposed definition of ''loan or finance company'' to exclude ''any government sponsored enterprise regulated by the Federal Housing Finance Agency.'' Where fraud is suspected by a housing GSE, there is an established procedure, currently set forth in a Memorandum of Understanding between FinCEN and the Federal Housing Finance Agency (''FHFA'') for the GSE to report to the FHFA, which then reports the suspicious activity to FinCEN.[27]

The Final Rule generally is intended to cover initial purchase money loans and traditional refinancing transactions facilitated by RMLOs. Another commenter asked FinCEN to clarify whether the Final Rule would apply to transactions involving funds or programs under the Troubled Asset Relief Program and similar Federal programs,[28] or any similar state housing authority or housing assistance program. These programs are intended to prevent loan default and foreclosure. Most of these programs apply to existing loans in default or at risk of default. While these programs are administered by government agencies that have developed standards, procedures, and qualifications to prevent fraud and abuse, the programs nonetheless are vulnerable to fraud and money laundering—a risk acknowledged by the commenter.

Since 2009 FinCEN has warned financial institutions and consumers about the fraud and money laundering risks associated with foreclosure prevention and loan modification programs,[29] and FinCEN agrees with the commenter's assessment of the risks associated with the programs identified in the comment. Accordingly, FinCEN expects that RMLOs participating in such programs to comply with the Final Rule to the extent any transactions conducted by the RMLO could reasonably be considered to be extending a residential mortgage loan or offering or negotiating the terms of a residential mortgage loan, within the meaning of the definitions of ''residential mortgage lender'' and ''residential mortgage originator'' in the Final Rule. The Final Rules, however, do not apply to the Federal or state housing authorities and agencies administering such programs. The proposed definition of ''loan or finance company'' has been revised to exclude ''any Federal or state agency or authority administering mortgage or housing assistance, fraud prevention or foreclosure prevention programs.''

The commenter also requested clarification whether the Final Rule would apply to foreclosure prevention actions and counseling services performed by legitimate, non-profit organizations—some of which may receive minimal compensation to assist in the preparation of a mortgage application, or provide short-term loans to facilitate foreclosure prevention actions. Consistent with our views regarding RMLOs that participate in Federal and state foreclosure prevention programs, FinCEN also expects non-profit housing organizations to comply with the Final Rule, to the extent any such organization may reasonably be deemed to be extending a residential mortgage loan (including a short-term mortgage loan), or offering or negotiating the terms of a residential mortgage loan. However, FinCEN would not expect legitimate, non-profit organizations that limit their activities

[26] The Final Rule applies to businesses, including sole proprietorships, not individuals. Some individuals covered by the SAFE Act definition of ''loan originator,'' 12 U.S.C. 5102(3)(A)(ii), would not be covered by the Final Rule.

[27] In a recently issued NPRM, FinCEN proposed AML and SAR regulations for the housing GSEs that would, in part, replace the existing reporting arrangement with a more direct and efficient reporting procedure. *See* 76 FR 69204 (Nov. 8, 2011). *http://www.gpo.gov/fdsys/pkg/FR-2011-11-08/pdf/2011-28820.pdf.*

[28] Other Federal programs noted by the commenter include the Making Home Affordable Program, the Home Affordable Modification Program, the Hardest Hit Funds Program and the Federal Housing Administration Refinance Program.

[29] *See* FIN–2010–A005—Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Home Equity Conversion Mortgage Fraud Schemes (Apr. 27, 2011), *http://www.fincen.gov/statutes_regs/guidance/html/fin-2010-a005.html;* FIN–2009–A001—Guidance to Financial Institutions on Filing Suspicious Activity Reports regarding Loan Modification/Foreclosure Rescue Scams (Apr. 6, 2009), *http://www.fincen.gov/statutes_regs/guidance/html/fin-2009-a001.html.*

to assisting with the preparation of loan applications or referral of prospective borrowers to qualified lenders, for free or for a fee; that provide short-term, non-mortgage loans to qualified borrowers or homeowners; or that otherwise *facilitate* the extension of a residential mortgage loan (but do not make the loan or offer or negotiate the terms of the loan), to fall within the scope of the Final Rule.

One commenter requested that FinCEN exclude mortgage servicers from the definition of residential mortgage loan originator. FinCEN generally views loan servicers as businesses that support post-origination principal and interest collection and taxation, and not as a business or activity that ''offers or negotiates'' the terms of a mortgage loan. FinCEN agrees that the typical activities of mortgage servicing companies do not fall within the definition of residential mortgage originator in this Final Rule. We will not, however, make a blanket exclusion or exception for mortgage servicers. The definition is based on the activity in which an entity is engaged. Thus, as long as a mortgage servicer does not extend residential mortgage loans or offer or negotiate the terms of a residential mortgage loan application, it will not fall under of the definition of residential mortgage loan originator. The commenter also requested that FinCEN exclude servicers working with loan modification programs, such as the Home Affordable Modification Program, or ''HAMP,'' from the definition of residential mortgage loan originator. FinCEN agrees that loan modifications under such programs are not covered by this Final Rule to the extent that the modifications do not involve extending new residential mortgage loans or offering or negotiating the terms of a residential mortgage loan application.

B. Anti-Money Laundering Program

Section 1029.210 requires that each loan or finance company develop and implement an anti-money laundering program reasonably designed to prevent the loan or finance company from being used to facilitate money laundering or the financing of terrorist activities. Two commenters argued that RMLOs should not be required to maintain AML programs, but only be required to file SARs. One commenter, a mortgage company, argued that mortgage fraud was the primary issue and not money laundering, so an AML program is unnecessary. The other commenter, a trade association, argued that SAR filings are the primary means of conveying valuable information to law enforcement, as contemplated under the BSA, and that requiring a full AML program imposes unnecessary complexity, paperwork, and regulatory burdens that outweigh the potential benefits to law enforcement. The commenter argued simply that maintaining an AML program would create an unnecessary regulatory burden, and the costs would far outweigh the benefits to law enforcement.

FinCEN believes that a complete AML program is essential to an adequate, efficient SAR filing program. FinCEN refers to the ''four pillars'' of an AML program for a reason, as each one is critical to holding up the overall structure of the program. Without one, the others will fail.[30] It would be difficult to expect useful SAR reporting without the pillars of an AML program firmly in place. Moreover, it is in the best interest of everyone involved in a mortgage finance transaction to try to prevent the fraud before it occurs. Prevention is a core purpose behind FinCEN's regulatory requirements for AML programs.

FinCEN's regulations are structured to ensure that financial institutions are knowledgeable of risks and vigilant against criminal abuse. With all BSA AML regulations, businesses are required to implement risk-based programs that take into account the unique risks associated with that particular business' products and services, as well as the business' size, market, and other issues. Thus, each AML program would necessarily be different than those of businesses with different product, geographic, and other risks. FinCEN reports and other research underscore that mortgage fraud is one of the most significant operational risks facing RMLOs in the ordinary course of business.

Under a risk-based approach to implementation of the Final Rule, FinCEN expects fraud prevention, as well as money laundering prevention, to be key goals underlying the various policies and procedures in an effective AML program for an RMLO. Therefore, the proposed AML regulation is adopted in this Final Rule without change.

C. Reports of Suspicious Transactions

Section 1029.320 contains the rules setting forth the obligation of loan or finance companies to report suspicious transactions that are conducted or attempted by, at, or through a loan or finance company and involve or aggregate at least $5,000 in funds or other assets. It is important to recognize that transactions are reportable under this Final Rule and 31 U.S.C. 5318(g) regardless of whether they involve currency. The $5,000 minimum amount is consistent with existing SAR filing requirements for other financial institutions regulated by FinCEN.

Section 1029.320(a)(2) specifically describes the four categories of transactions that require reporting. A loan or finance company is required to report a transaction if it knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part): (i) Involves funds derived from illegal activity or is intended or conducted to hide or disguise funds or assets derived from illegal activity; (ii) is designed, whether through structuring or other means, to evade the requirements of the BSA; (iii) has no business or apparent lawful purpose, and the loan or finance company knows of no reasonable explanation for the transaction after examining the available facts; or (iv) involves the use of the loan or finance company to facilitate criminal activity.[31]

Several comments requested guidance with regard to when a SAR would be required to be filed. A determination as to whether a SAR is required must be based on all the facts and circumstances relating to the transaction and customer of the loan or finance company in question. Different fact patterns will require different judgments. Some examples of red flags are referenced in previous FinCEN reports on mortgage fraud and money laundering in the residential and commercial real estate sectors.[32] However, the means of commerce and the techniques of money laundering and mortgage fraud are continually evolving, and there is no way to provide an exhaustive list of suspicious transactions. FinCEN will continue to pursue a regulatory approach that involves a combination of appropriate regulations, written guidance, support of industry training programs, and maintenance of a government-industry information exchange so that any new AML program and SAR reporting regulations can be implemented in as flexible and cost efficient way as possible, while protecting the sector and the financial

[30] *See* the Fraud Conference Speech, fn. 17.

[31] The fourth reporting category has been added to the suspicious activity reporting rules promulgated since the passage of the USA PATRIOT Act to make it clear that the requirement to report suspicious activity encompasses the reporting of transactions involving fraud and those in which legally derived funds are used for criminal activity, such as the financing of terrorism.

[32] *See* note 17, *supra*. *See also* NPRM, notes 13 and 20.

system as a whole from fraud, money laundering, and other financial crimes.

Section 1029.320(b) sets forth the filing procedures to be followed by loan or finance companies making reports of suspicious transactions. Within 30 days after a loan or finance company becomes aware of a suspicious transaction, the business must report the transaction by completing a SAR and filing it with FinCEN. Two commenters addressed FinCEN's SAR reporting system. The first commenter suggested that there should be one centralized place for reporting to allow streamlined interaction with regulators. That is, in fact, the case, as all SARs are filed with FinCEN and made available to the appropriate agencies. The second commenter argued that a specific system for residential mortgage lenders needs to be developed that is separate from the current system for other financial industries. While FinCEN's new uniform filing system, discussed in II.D. above, will require the use of one form by all businesses subject to FinCEN SAR regulations, the uniform form has been designed to be used by a range of filer types, with required data fields for each type of filer reflecting the kinds of activities reported by those specific filer types, including RMLOs.

Section 1029.320(d)(1) reinforces the statutory prohibition against the disclosure by a financial institution of a SAR (regardless of whether the report is required by the Final Rule or is filed voluntarily). Thus, the section requires that a SAR and information that would reveal the existence of that SAR be kept confidential and not be disclosed except as authorized within the rules of construction. The Final Rule includes rules of construction that identify actions an institution may take that are not precluded by the confidentiality provision. These actions include the disclosure of SAR information to FinCEN, or Federal, state, or local law enforcement agencies, or a Federal regulatory authority that examines the loan or finance company for compliance with the BSA, or a state regulatory authority administering a State law that requires the loan or finance company to comply with the BSA or otherwise authorizes the State authority to ensure that the loan or finance company complies with the BSA.[33] This confidentiality provision also does not prohibit the disclosure of the underlying facts, transactions, and documents upon which a SAR is based (provided the existence of the SAR is not disclosed), or the sharing of SAR information within the loan or finance company's corporate organizational structure for purposes consistent with Title II of the BSA as determined by FinCEN in regulation or in guidance.[34]

Section 1029.320(d)(2) incorporates the statutory prohibition against disclosure of a SAR or the fact that a SAR has been filed, other than in fulfillment of official duties consistent with the BSA, by government users of SAR data. The section also clarifies that official duties do not include the disclosure of SAR information in response to a request for non-public information [35] or for use in a private legal proceeding, including a request under 31 CFR 1.11.[36]

Section 1029.320(e) provides protection from liability for making reports of suspicious transactions, and for failures to disclose the fact of such reporting, to the full extent provided by 31 U.S.C. 5318(g)(3). Two commenters requested the same protection from liability for RMLOs as that which exists for other financial institutions. This Final Rule, in section 1029.320(e), provides exactly the same ''safe harbor'' for RMLOs as is provided for other financial institutions. The provisions in the NPRM are adopted without change.

Section 1029.320(f) notes that compliance with the obligation to report suspicious transactions will be examined by FinCEN or its delegates, and provides that failure to comply with the Final Rule may constitute a violation of the BSA and the BSA regulations. One comment requested that FinCEN clearly define the consequences of failing to file a SAR. Section 1029.320(f) is intended to cover violations of SAR filing requirements, and FinCEN is authorized to impose a range of civil and criminal penalties, the severity of which depends on the specific circumstances.[37]

Section 1029.320(g) provides that the new SAR requirement applies to transactions occurring after an AML program is required, which is [six months from the Final Rule's publication date]. As noted above, the delayed compliance date for SAR filings is also intended to allow time for implementation of the new SAR filing system.

D. Special Information Procedures To Deter Money Laundering and Terrorist Activity

Section 1029.500 states generally that loan or finance companies are subject to the special information procedures to detect money laundering and terrorist activity requirements set forth and cross referenced in sections 1029.520 (cross-referencing to 31 CFR 1010.520) and 1029.540 (cross-referencing to 31 CFR 1010.540). Sections 1010.520 and 101.540 implement sections 314(a) and 314(b) of the USA PATRIOT Act, respectively, and generally apply to any financial institution listed in 31 U.S.C. 5312(a)(2) and any such financial institution that is subject to an AML program requirement, respectively. Because loan or finance companies are specifically enumerated in section 5312(a)(2), and upon the effective date will be subject to the AML program requirement, they will be subject to the section 314 rules on that date. For the sake of clarity, the Final Rule adds subpart E to part 1029 to confirm that both of the section 314 rules will apply to loan or finance companies on that date.

IV. Regulatory Flexibility Act

When an agency issues a rulemaking, the Regulatory Flexibility Act (''RFA'') requires the agency to ''prepare and make available for public comment a regulatory flexibility analysis'' which will ''describe the impact of the rule on small entities'' (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Estimate of the number of small entities to which the Final Rule will apply:

For the purpose of arriving at an estimated number of RMLOs, FinCEN relied on information gathered from

[33] *See* NPRM, 75 FR at 76683. The language in the rules of construction pertaining to State regulators has been revised in the Final Rule to reflect the terms adopted in FinCEN's SAR confidentiality rulemaking, finalized in December 2010. *See* 75 FR 75593, 75596–97 (December 3, 2010).

[34] On January 20, 2006, FinCEN issued guidance for the banking, securities, and futures industries authorizing the sharing of SAR information with parent companies, head offices, or controlling companies. *http://www.fincen.gov/statutes_regs/guidance/pdf/sarsharingguidance01202006.pdf.* To date, no such guidance has been issued for the loan or finance industry.

[35] For purposes of this rulemaking, ''non-public information'' refers to information that is exempt from disclosure under the Freedom of Information Act.

[36] 31 CFR 1.11 is the Department of the Treasury's information disclosure regulation. Generally, these regulations are known as ''Touhy regulations,'' after the Supreme Court's decision in *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. An agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

[37] *See* 31 U.S.C. 5321 and 5322, and 31 CFR 1010.820 and 1010.840.

various public sources, including major trade associations and Federal and state government regulators. Estimates based on this data suggest that as of 2010 there were approximately 31,000 qualifying entities in the United States, down from approximately 42,000 in 2009. FinCEN also referred to information gathered from the North American Industry Classification System codes, which lists loan or finance companies as codes 522292 (Real Estate Credit) and 522310 (Mortgage and Nonmortgage Loan Brokers).[38] The U.S. Census Bureau estimated there were about 36,275 entities in these classifications in 2002. However, these classifications include services that are broader than those provided by loan or finance companies, so the number of loan or finance companies to which this Final Rule is applicable is significantly less. Within this classification, those entities that have less than seven million dollars in annual gross revenue are considered small. FinCEN estimates that 95% of the affected industry is considered a small business, and that the Final Rule will affect most RMLO compliance programs in a limited manner.

Description of the reporting and recordkeeping requirements of the Final Rule:

The Final Rule requires loan or finance companies to maintain AML programs and file reports on suspicious transactions. By requiring this, FinCEN is addressing vulnerabilities in the U.S. financial system and is leveling the playing field between bank and non-bank lenders. FinCEN does not foresee a significant impact on the regulated industry from these requirements. Loan or finance companies, as a usual and customary part of their business for each transaction, conduct a significant amount of due diligence on both the property securing the loan and the borrower. This process of due diligence involves the types of inquiry and collecting the types of information that would be expected in any program to prevent money laundering and fraud and to detect and report suspicious transactions.[39]

AML Program Requirement in General

The Final Rule does not impose significant burden on loan or finance companies. These companies may build on their existing risk management procedures and prudential business practices to ensure compliance with this Final Rule. FinCEN and other agencies have issued substantial guidance on the development of AML programs and SAR reporting requirements.[40] Most loan or finance companies subject to the Final Rule likely will not need to obtain more sophisticated legal or accounting advice than that already required to run their businesses. Residential mortgage lenders and originators undertake due diligence of borrowers and collateral to assess the credit risk associated with a particular loan. The information gathered by these businesses generally is the same as, or very similar to, the information that is expected in any programs to prevent money laundering and detect and report suspicious transactions.

In the NPRM, FinCEN sought comment on the extent to which AML programs or SAR reporting requirements would require affected businesses to conduct a degree of due diligence, or collect an amount of information, beyond that presently conducted to assess credit worthiness and minimize losses due to fraud. Of the three responses on this issue, two (one from a mortgage company and one from a trade association representing mortgage related businesses) argued that AML program and SAR reporting requirements could be integrated into existing compliance and anti-fraud infrastructure without considerable difficulty. One commenter suggested that such integration could be done efficiently and effectively if accompanied by guidance, training, and feedback from FinCEN. Only one commenter questioned FinCEN's assumptions regarding integration of the proposed rules into existing procedures and systems of affected businesses. The commenter stated that FinCEN had not offered evidence that AML programs could be efficiently and cost-effectively integrated into businesses' existing anti-fraud programs, and that businesses would need to establish new, separate programs to satisfy FinCEN's AML program requirements. Based on the comments that responded positively to FinCEN's assumptions and analysis regarding this issue, and FinCEN's experience over two decades with other businesses that have been required to adopt AML programs—including businesses which all have the same or more extensive requirements than are required by this Final Rule and have gone through this same process of building on existing compliance policies and procedures—FinCEN believes that loan and finance companies will be able to build on their existing compliance policies and procedures and prudential business practices to ensure compliance with this Final Rule with relatively minimal cost and effort. As FinCEN has done with the other industries subject to the requirements of the BSA, FinCEN will actively engage with loan and finance companies, provide guidance and feedback, and endeavor to make compliance with the regulations as cost effective and efficient as possible for all affected businesses.

A few commenters opposed the NPRM, arguing that the regulations would be too burdensome and costly, particularly for small businesses. One commenter stated that the burden falls on the owner of a small business to be the compliance officer and do training, which takes away from time developing business. The costs and burdens of developing risk management and AML compliance procedures, complying with a range of consumer protection regulations, and generally establishing safe and sound business practices, however, generally are borne by businesses of all sizes, and the exceptions available to small businesses with respect to some specific requirements may minimize—but not entirely eliminate—general compliance costs and burdens. FinCEN believes that the minimal, incremental increase in compliance costs and burdens that may potentially be borne by affected businesses in complying with the Final Rule will not disproportionately burden small businesses; thus, the Final Rule does not establish any blanket exception for any businesses, regardless of size or other criteria or characteristics.

One commenter suggested that loan and finance companies should have AML programs commensurate with their risk profile, as is the case with banks subject to AML and SAR regulations. FinCEN believes that the flexibility incorporated into the Final Rule permits each loan and finance company to tailor its AML program to

[38] *See* NPRM, note 23.

[39] *See, e.g.,* Form 1003 Uniform Residential Mortgage Application, available at *https://www.efanniemae.com/sf/formsdocs/forms/pdf/sellingtrans/1003.pdf* or *http://www.freddiemac.com/uniform/doc/form_65_urla_7_05.doc.*

[40] *See, e.g.,* Guidance—Preparing a Complete and Sufficient Suspicious Activity Report Narrative (including related PowerPoint Presentation—Keys to Writing a Complete and Sufficient SAR Narrative), Nov. 2003, *http://www.fincen.gov/statutes_regs/guidance/html/narrativeguidance_webintro.html;* Guidance—Suggestions for Addressing Common Errors Noted in Suspicious Activity Reporting, Oct. 10, 2007, *http://www.fincen.gov/statutes_regs/guidance/html/SAR_Common_Errors_Web_Posting.html;* Guidance—Suspicious Activity Report Supporting Documentation, June 13, 2007 (FIN–2007–G003), *http://www.fincen.gov/statutes_regs/guidance/html/Supporting_Documentation_Guidance.html;* The SAR Activity Review—Trends, Tips and Issues (Issue 16), Oct. 2009, Section 4, *Law Enforcement Suggestions When Preparing Suspicious Activity Reports,* p. 45, *http://www.fincen.gov/statutes_regs/guidance/html/narrativeguidance_webintro.html. See also NPRM, note 45.*

fit its own size, needs, and operational risks. In this regard, FinCEN believes that expenditures associated with establishing and implementing an AML program will be commensurate with the size and risk profile of a loan or finance company. Based on inherent risks, some businesses may deem it appropriate to implement more comprehensive policies, procedures, and internal controls than others. FinCEN does not intend for each RMLO to have identical policies and procedures for their AML programs. This flexibility to tailor programs to the risk profile of the loan or finance company is exactly what one trade association commenter noted. As with other financial institutions subject to the requirements of the BSA, if a loan or finance company is small or does not engage in high-risk transactions the burden to comply with the Final Rule likely will be negligible. One commenter disagreed with the estimated burden hours listed in the NPRM, for both AML program and SAR filing requirements, but did not provide any specific estimates or data for FinCEN to consider in the alternative. The estimated hours for the establishment of a new AML program and SAR filing requirements are based on FinCEN's experience with other industries newly required to comply with the same or more extensive BSA obligations, and these estimates are the same as those used in other such rulemakings for businesses that, as yet, have had no AML program or SAR filing requirement.

FinCEN understands that commenters are concerned about the potential impact that compliance regulations—BSA-related or otherwise—may have on small firms and solo practitioners. Nonetheless, the Final Rule requires the establishment of a complete AML program. An AML program is essential to an effective SAR reporting program. The AML regulations are risk-based, as are all FinCEN AML regulations. Accordingly, company management has broad discretion to design and implement programs that reflect and respond to the company's unique fraud and money laundering risks. Small businesses will not be expected to invest in elaborate or expensive systems to comply with the Final Rule, nor will they be required to hire consulting firms or outside professionals to assess risks. FinCEN estimates that the impact of the AML program requirement and the assessment of risks associated with it will not be significant for covered loan and finance companies.

Suspicious Activity Reporting

The Final Rule requires loan or finance companies to report on transactions of $5,000 or more that they determine to be suspicious. Loan or finance companies have not previously been required to comply with such a regulation. However, as noted above, most loan or finance companies, in order to remain viable, have in place policies and procedures to prevent and detect fraud, insider abuse, and other crimes. Established anti-fraud measures should assist loan or finance companies in reporting suspicious transactions. Many loan or finance companies already voluntarily report suspicious transactions and fraud through entities such as the Loan Modification Scam Prevention Network.[41] Additionally, loan or finance companies, as part of the application process for loans, already gather the information necessary to fill out SAR forms as a usual and customary part of their business. It is likely that the software packages most of these companies already use will, after this regulation, incorporate the ability to automatically fill out all but the narrative field in a SAR based on information already input for the loan application. Therefore, FinCEN estimates that the burden of the SAR filing requirements for loan or finance companies will be low.

Certification

The additional burden under the Final Rule is a requirement to maintain an AML program and a SAR filing requirement. As discussed above, FinCEN estimates that the impact from these requirements will not be significant. Accordingly, FinCEN certifies that the Final Rule will not have a significant impact on a substantial number of small entities.

V. Paperwork Reduction Act Notices

The collection of information contained in this Final Rule is being submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (''PRA'').[42] The information collections in this proposal are contained in 31 CFR 1029.210 and 31 CFR 1010.320.

AML Program for Loan or Finance Companies

AML programs for loan or finance companies (31 CFR 1020.210). This information is required to be retained pursuant to 31 U.S.C. 5318(h) and 31 CFR 1029.210. The collection of information would be mandatory. The information is collected pursuant to 103.142 and is used by examiners to determine whether loan or finance companies comply with the BSA.

Description of Recordkeepers: Loan or finance companies as defined in 31 CFR 1010.100(lll).

Estimated Number of Recordkeepers: 31,000.

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 1029.210 is three hours.

Estimated Total Annual Recordkeeping Burden: FinCEN estimates that the annual recordkeeping burden is 93,000 hours.

In order to manage our estimated burden hours related to implementation of new AML program regulations most efficiently, the burden hours associated with this Final Rule will be included (added to) the existing burden listed under OMB Control Number 1506–0035 currently titled AML Programs for insurance companies. The new title for this control number will become AML Programs for insurance companies and loan or finance companies. The new total burden will be 94,200 hours.

SAR Filing for Loan or Finance Companies

SARs for loan and finance companies (31 CFR 1029.320). This information is required to be provided pursuant to 31 U.S.C. 5318(g) and 31 CFR 1029.320. This information is used by law enforcement agencies in the enforcement of criminal and regulatory laws and to prevent loan and finance companies from engaging in illegal activities. The collection of information is mandatory. The Final Rule increases the number of recordkeepers by 31,000.

Description of Recordkeepers: Loan or finance companies as defined in 31 CFR 1010.100(kkk).

Estimated Number of Recordkeepers: 31,000.

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 1029.320 is 2 hours per report, and FinCEN estimates that, on average, one report per filer will be filed per year.

[41] The Loan Modification Scam Prevention Network includes Fannie Mae, Freddie Mac, the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) and NeighborWorks America, among others, with representatives from key governmental agencies, such as the Federal Trade Commission, the Department of Housing and Urban Development, the Department of Justice, the Department of the Treasury, the Federal Bureau of Investigation, and state Attorneys General offices, as well as leading non-profit organizations from across the country. *See http://www.preventloanscams.org/.*

[42] 44 U.S.C. 3507(d).

Estimated Total Annual Recordkeeping Burden: The Final Rule increases the estimated annual burden by 62,000 consisting of one hour for report completion and one hour for required recordkeeping. The reporting and recordkeeping burden for this requirement is reflected under OMB Control Number 1506–0065, the BSA Suspicious Activity Report, which is increased by 62,000 hours.

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. Records required to be retained under the BSA must be retained for five years.

VI. Executive Orders 13563 and 12866

It has been determined that this Final Rule is a significant regulatory action for purposes of Executive Orders 13563 and 12866.

VII. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by the state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the Final Rule, FinCEN has determined that it is not required to prepare a written statement under section 202.

List of Subjects in 31 CFR Parts 1010 and 1029

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Authority and Issuance

For the reasons set forth in the preamble, Chapter X of title 31 of the Code of Federal Regulations is amended as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307.

■ 2. Amend § 1010.100 by adding paragraph (lll) to read as follows:

§ 1010.100 Meaning of terms.

* * * * *

(lll) *Loan or finance company.* A person engaged in activities that take place wholly or in substantial part within the United States in one or more of the capacities listed below, whether or not on a regular basis or as an organized business concern. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States. For the purposes of this paragraph (lll), the term ''loan or finance company'' shall include a sole proprietor acting as a loan or finance company, and shall not include: A bank, a person registered with and functionally regulated or examined by the Securities and Exchange Commission or the Commodity Futures Trading Commission, any government sponsored enterprise regulated by the Federal Housing Finance Agency, any Federal or state agency or authority administering mortgage or housing assistance, fraud prevention or foreclosure prevention programs, or an individual employed by a loan or finance company or financial institution under this part. A loan or finance company is not a financial institution as defined in the regulations in this part at 1010.100(t).

(1) *Residential mortgage lender or originator.* A residential mortgage lender or originator includes:

(i) *Residential mortgage lender.* The person to whom the debt arising from a residential mortgage loan is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement, or to whom the obligation is initially assigned at or immediately after settlement. The term ''residential mortgage lender'' shall not include an individual who finances the sale of the individual's own dwelling or real property.

(ii) *Residential mortgage originator.* A person who accepts a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan.

(iii) *Residential mortgage loan.* A loan that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on:

(A) A residential structure that contains one to four units, including, if used as a residence, an individual condominium unit, cooperative unit, mobile home or trailer; or

(B) Residential real estate upon which such a structure is constructed or intended to be constructed.

(2) [Reserved]

§ 1010.205 [Amended]

■ 3. Amend § 1010.205 in paragraph (b)(1) by removing paragraph (b)(1)(ii) and redesignating paragraphs (b)(1)(iii) through (x) as paragraphs (b)(1)(ii) through (ix), respectively.

■ 4. Add part 1029 to read as follows:

PART 1029—RULES FOR LOAN OR FINANCE COMPANIES

Subpart A—Definitions

Sec.
1029.100 Definitions.

Subpart B—Programs

1029.200 General
1029.210 Anti-money laundering programs for loan or finance companies.

Subpart C—Reports Required To Be Made By Loan or Finance Companies

1029.300 General.
1029.310 [Reserved]
1029.315 [Reserved]
1029.320 Reports by loan or finance companies of suspicious transactions.
1029.330 *Reports relating to currency in excess of $10,000 received in a trade or business.*

Subpart D—Records Required To Be Maintained By Loan or Finance Companies

1029.400 General.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

1029.500 General.
1029.520 Special information sharing procedures to deter money laundering and terrorist activity for loan or finance companies.
1029.530 [Reserved]
1029.540 Voluntary information sharing among financial institutions.

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures for Loan or Finance Companies

1029.600 [Reserved]
1029.610 [Reserved]
1029.620 [Reserved]
1029.630 [Reserved]
1029.640 [Reserved]
1029.670 [Reserved]

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307.

Subpart A—Definitions

§ 1029.100 Definitions.

Refer to § 1010.100 of this Chapter for general definitions not noted herein.

Subpart B—Programs

§ 1029.200 General.

Loan or finance companies are subject to the program requirements set forth and cross referenced in this subpart. Loan or finance companies should also refer to subpart B of part 1010 of this chapter for program requirements contained in that subpart which apply to loan or finance companies.

§ 1029.210 Anti-money laundering programs for loan or finance companies.

(a) *Anti-money laundering program requirements for loan or finance companies.* Each loan or finance company shall develop and implement a written anti-money laundering program that is reasonably designed to prevent the loan or finance company from being used to facilitate money laundering or the financing of terrorist activities. The program must be approved by senior management. A loan or finance company shall make a copy of its anti-money laundering program available to the Financial Crimes Enforcement Network or its designee upon request.

(b) *Minimum requirements.* At a minimum, the anti-money laundering program shall:

(1) Incorporate policies, procedures, and internal controls based upon the loan or finance company's assessment of the money laundering and terrorist financing risks associated with its products and services. Policies, procedures, and internal controls developed and implemented by a loan or finance company under this section shall include provisions for complying with the applicable requirements of subchapter II of chapter 53 of title 31, United States Code and this part, integrating the company's agents and brokers into its anti-money laundering program, and obtaining all relevant customer-related information necessary for an effective anti-money laundering program.

(2) Designate a compliance officer who will be responsible for ensuring that:

(i) The anti-money laundering program is implemented effectively, including monitoring compliance by the company's agents and brokers with their obligations under the program;

(ii) The anti-money laundering program is updated as necessary; and

(iii) Appropriate persons are educated and trained in accordance with paragraph (b)(3) of this section.

(3) Provide for on-going training of appropriate persons concerning their responsibilities under the program. A loan or finance company may satisfy this requirement with respect to its employees, agents, and brokers by directly training such persons or verifying that such persons have received training by a competent third party with respect to the products and services offered by the loan or finance company.

(4) Provide for independent testing to monitor and maintain an adequate program, including testing to determine compliance of the company's agents and brokers with their obligations under the program. The scope and frequency of the testing shall be commensurate with the risks posed by the company's products and services. Such testing may be conducted by a third party or by any officer or employee of the loan or finance company, other than the person designated in paragraph (b)(2) of this section.

(c) *Compliance.* Compliance with this section shall be examined by FinCEN or its delegates, under the terms of the Bank Secrecy Act. Failure to comply with the requirements of this section may constitute a violation of the Bank Secrecy Act and of this part.

(d) *Compliance date.* A loan or finance company must develop and implement an anti-money laundering program that complies with the requirements of this section by August 13, 2012.

Subpart C—Reports Required To Be Made by Loan or Finance Companies

§ 1029.300 General.

Loan or finance companies are subject to the reporting requirements set forth and cross referenced in this subpart. Loan or finance companies should also refer to subpart C of part 1010 of this chapter for reporting requirements contained in that subpart which apply to loan or finance companies.

§ 1029.310 [Reserved]

§ 1029.315 [Reserved]

§ 1029.320 Reports by loan or finance companies of suspicious transactions.

(a) *General.* (1) Every loan or finance company shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. A loan or finance company may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation, but whose reporting is not required by this section.

(2) A transaction requires reporting under this section if it is conducted or attempted by, at, or through a loan or finance company, it involves or aggregates funds or other assets of at least $5,000, and the loan or finance company knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this part or any other regulations promulgated under the Bank Secrecy Act, Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314, 5316–5332;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the loan or finance company knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the loan or finance company to facilitate criminal activity.

(3) More than one loan or finance company may have an obligation to report the same transaction under this section, and other financial institutions may have separate obligations to report suspicious activity with respect to the same transaction pursuant to other provisions of this part. In those instances, no more than one report is required to be filed by the loan or finance company(s) and other financial institution(s) involved in the transaction, provided that the report filed contains all relevant facts, including the name of each financial institution involved in the transaction, the report complies with all instructions applicable to joint filings, and each institution maintains a copy of the report filed, along with any supporting documentation.

(b) *Filing and notification procedures*—(1) *What to file.* A suspicious transaction shall be reported by completing a Suspicious Activity Report (''SAR''), and collecting and maintaining supporting documentation as required by paragraph (c) of this section.

(2) *Where to file.* The SAR shall be filed with FinCEN in accordance with the instructions to the SAR.

(3) *When to file.* A SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting loan or finance company of facts that may constitute a basis for filing a SAR under this section. If no suspect is identified on the date of such initial detection, a loan or finance company may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection.

(4) *Mandatory notification to law enforcement.* In situations involving violations that require immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, a loan or finance company shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SAR.

(5) *Voluntary notification to FinCEN.* Any loan or finance company wishing voluntarily to report suspicious transactions that may relate to terrorist activity may call the FinCEN's Financial Institutions Hotline at 1–866–556–3974 in addition to filing timely a SAR if required by this section.

(c) *Retention of records.* A loan or finance company shall maintain a copy of any SAR filed by the loan or finance company or on its behalf (including joint reports), and the original (or business record equivalent) of any supporting documentation concerning any SAR that it files (or is filed on its behalf), for a period of five years from the date of filing the SAR. Supporting documentation shall be identified as such and maintained by the loan or finance company, and shall be deemed to have been filed with the SAR. The loan or finance company shall make all supporting documentation available to FinCEN, or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the loan or finance company for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the loan or finance company to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the loan or finance company complies with the Bank Secrecy Act, upon request.

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by loan or finance companies*—(i) *General rule.* No loan or finance company, and no director, officer, employee, or agent of any loan or finance company, shall disclose a SAR or any information that would reveal the existence of a SAR. Any loan or finance company, and any director, officer, employee, or agent of any loan or finance company that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, paragraph (d)(1) of this section shall not be construed as prohibiting:

(A) The disclosure by a loan or finance company, or any director, officer, employee, or agent of a loan or finance company of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, any Federal regulatory authority that examines the loan or finance company for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the loan or finance company to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the loan or finance company complies with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(B) The sharing by a loan or finance company, or any director, officer, employee, or agent of the loan or finance company, of a SAR, or any information that would reveal the existence of a SAR, within the loan or finance company's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) *Limitation on liability.* A loan or finance company, and any director, officer, employee, or agent of any loan or finance company, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Loan or finance companies shall be examined by FinCEN or its delegates under the terms of the Bank Secrecy Act, for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

(g) *Compliance date.* This section applies to transactions initiated after an anti-money laundering program required by section 1029.210 of this part is required to be implemented.

§ 1029.330 Reports relating to currency in excess of $10,000 received in a trade or business.

Refer to § 1010.330 of this chapter for rules regarding the filing of reports relating to currency in excess of $10,000 received by loan or finance companies.

Subpart D—Records Required To Be Maintained By Loan or Finance Companies

§ 1029.400 General.

Loan or finance companies are subject to the recordkeeping requirements set forth and cross referenced in this subpart. Loan or finance companies should also refer to subpart D of part 1010 of this chapter for recordkeeping requirements contained in that subpart which apply to loan or finance companies.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

§ 1029.500 General.

Loan or finance companies are subject to the special information sharing procedures to deter money laundering and terrorist activity requirements set forth and cross referenced in this subpart. Loan or finance companies should also refer to subpart E of part 1010 of this chapter for special information sharing procedures to deter money laundering and terrorist activity contained in that subpart which apply to loan or finance companies.

§ 1029.520 Special information sharing procedures to deter money laundering and terrorist activity for loan or finance companies.

(a) Refer to § 1010.520 of this chapter.
(b) [Reserved]

§ 1029.530 [Reserved]

§ 1029.540 Voluntary information sharing among financial institutions.

(a) Refer to § 1010.540 of this chapter.
(b) [Reserved]

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures for Loan or Finance Companies

§ 1029.600 [Reserved]

§ 1029.610 [Reserved]

§ 1029.620 [Reserved]

§ 1029.630 [Reserved]

§ 1029.640 [Reserved]

§ 1029.670 [Reserved]

Dated: February 6, 2012.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2012–3074 Filed 2–13–12; 8:45 am]

BILLING CODE 4802–10–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2010–0873; FRL–9630–7]

RIN 2060–AH23

Quality Assurance Requirements for Continuous Opacity Monitoring Systems at Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is taking direct final action to establish quality assurance and quality control (QA/QC) procedures for continuous opacity monitoring systems (COMS) used to demonstrate continuous compliance with opacity standards in federally enforceable regulations. This action is necessary because we do not currently have QA/QC procedures for COMS. This action would require COMS used to demonstrate continuous compliance to meet these procedures (referred to as Procedure 3).

DATES: This rule is effective on April 16, 2012 without further notice, unless the EPA receives adverse comment by March 15, 2012. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0873 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2010–0873, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* The EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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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 Procedure 3—Quality Assurance Requirements for Continuous Opacity Monitoring Systems at Stationary Sources Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Docket Facility and Public Reading Room are open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Air Docket is (202) 566–1742, and the telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: Ms. Lula H. Melton, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Measurement Technology Group (Mail Code: E143–02), Research Triangle Park, NC 27711; telephone number: (919) 541–2910; fax number: (919) 541–0516; *email address: melton.lula@epa.gov.*

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I. General Information

A. Why is the EPA using a direct final rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comment. This action establishes QA/QC procedures for continuous opacity monitoring systems used to demonstrate continuous compliance with opacity standards in federally enforceable regulations. We believe that these QA/QC procedures are reasonable and that they can be met by any well-maintained and operated COMS. Furthermore, the procedures were developed based on input provided by the affected parties. On May 8, 2003, we published a proposed rule to codify QA/QC procedures for COMS (i.e., Procedure 3). Due to other priorities, we did not finalize Procedure 3, but public comments received on the proposal have been considered in this action. This rule also takes into account changes in technology since 2003.

In the ''Proposed Rules'' section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rule if relevant adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting, must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

B. Does this action apply to me?

Procedure 3 applies to COMS used to demonstrate continuous compliance with opacity standards in federally enforceable regulations.

C. Where can I obtain a copy of this action?

In addition to being available in the docket, an electronic copy of this rule will also be available on the Worldwide Web (www) through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the final rule will be placed on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control. A redline strikeout document that compares this final rule to the proposed rule has also been added to the docket.

D. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this direct final rule is available by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by April 16, 2012. Under section 307(d)(7)(B) of the CAA, only an objection to this direct final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements that are the subject of this direct final rule may not be challenged later in civil or criminal proceedings brought by the EPA to enforce these requirements.

II. This Action

This direct final rule codifies Procedure 3 in 40 CFR part 60, Appendix F. Procedure 3 establishes quality assurance and quality control procedures for continuous opacity monitoring systems used to demonstrate continuous compliance with opacity standards in federally enforceable regulations. More specifically, Procedure 3 provides requirements for daily instrument zero and upscale drift checks, daily status indicator checks, quarterly performance audits, annual zero alignment audits, and corrective action for malfunctioning COMS. On May 8, 2003, we published a proposed rule to codify Procedure 3. However, due to other priorities, we did not finalize Procedure 3 after the comment period ended July 7, 2003. Public comments received on the May 8, 2003, proposal have been considered in this action.

Most of the comments on the 2003 proposal required us to provide clarifications and updates. For example, several commenters were confused by the wording of the applicability statement in the 2003 proposal. We revised the applicability statement in the direct final rule to remove the ambiguity. The direct final rule references the 1998, 2003, and 2007 versions of the American Society of Testing and Materials' Standard Practice for Opacity Monitor Manufacturers to Certify Conformance with Design and Performance Specifications, whereas the 2003 proposal referenced the 1998 version only.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

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

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). These quality assurance procedures do not add information collection requirements beyond those currently required under the applicable regulations.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of accessing the impacts of this 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 this rule on small entities, I

certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. This action establishes quality assurance procedures for continuous opacity monitoring systems used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations and does not impose additional regulatory requirements on sources.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Rules establishing quality assurance requirements impose no costs independent from national emission standards which require their use, and such costs are fully reflected in the regulatory impact assessment for those emission standards. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action simply establishes quality assurance procedures for continuous opacity monitoring systems used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action establishes quality assurance procedures for continuous opacity monitoring systems used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action establishes quality assurance procedures for continuous opacity monitoring systems used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. It does not add any emission limits and does not affect pollutant emissions or air quality. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

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

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, 12(d) (15 U.S.C. 272 note) directs the 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 the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

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

The EPA has determined that this direct final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rule does not relax the control measures on sources regulated by the rule and, therefore, will not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, 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. The 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). This rule will be effective April 16, 2012.

List of Subjects in 40 CFR Part 60

Air pollution control, Environmental protection, Continuous opacity monitoring.

Dated: February 6, 2012.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 60—[AMENDED]

■ 1. The authority citation for part 60 continues to read as follows:

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

■ 2. Appendix F of part 60 is amended by adding Procedure 3 to read as follows:

Appendix F to Part 60—Quality Assurance Procedures

* * * * *

Procedure 3—Quality Assurance Requirements for Continuous Opacity Monitoring Systems at Stationary Sources

1.0 What are the purpose and applicability of Procedure 3?

The purpose of Procedure 3 is to establish quality assurance and quality control (QA/QC) procedures for continuous opacity monitoring systems (COMS). Procedure 3 applies to COMS used to demonstrate continuous compliance with opacity standards in federally enforceable regulations.

1.1 *What are the data quality objectives of Procedure 3?* The overall data quality objective (DQO) of Procedure 3 is the generation of valid and representative opacity data. Procedure 3 specifies the minimum requirements for controlling and assessing the quality of COMS data submitted to us or the delegated regulatory agency. Procedure 3 requires you to perform periodic evaluations of a COMS performance and to develop and implement QA/QC programs to ensure that COMS data quality is maintained.

1.2 *What is the intent of the QA/QC procedures specified in Procedure 3?* Procedure 3 is intended to establish the minimum QA/QC requirements to verify and maintain an acceptable level of quality of the data produced by COMS. It is presented in general terms to allow you to develop a program that is most effective for your circumstances.

1.3 *When must I comply with Procedure 3*? You must comply with Procedure 3 after your COMS has been initially certified.

2.0 What are the basic functions of Procedure 3?

The basic functions of Procedure 3 are assessment of the quality of your COMS data and control and improvement of the quality of the data by implementing QC requirements and corrective actions. Procedure 3 provides requirements for:

(1) Daily instrument zero and upscale drift checks, as well as, daily status indicators checks;

(2) Quarterly performance audits which include the following assessments:

(i) Optical alignment,

(ii) Calibration error,

(iii) Zero compensation; and

(3) Annual zero alignment.

Sources that consistently achieve quality assured data may request a semi-annual audit frequency by submitting the request in writing to the Administrator.

3.0 What special definitions apply to Procedure 3?

The definitions in Procedure 3 include those provided in Performance Specification 1 (PS–1) of Appendix B and ASTM D 6216–98, 03, 07 and the following additions.

3.1 *Out-of-control periods.* Out-of-control periods mean that one or more COMS parameters falls outside of the acceptable limits established by this rule.

(1) Daily Assessments. Whenever the calibration drift (CD) exceeds twice the specification of PS–1, the COMS is out-of-control. The beginning of the out-of-control period is the time corresponding to the completion of the daily calibration drift check. The end of the out-of-control period is the time corresponding to the completion of appropriate adjustment and subsequent successful CD assessment.

(2) Quarterly and Annual Assessments. Whenever an annual zero alignment or quarterly performance audit indicates noncompliance with the criteria established in paragraphs (2) and (3) of section 10.4, the COMS is out-of-control. The beginning of the out-of-control period is the time corresponding to the completion of the performance audit indicating noncompliance. The end of the out-of-control period is the time corresponding to the completion of appropriate corrective actions and the subsequent successful audit (or, if applicable, partial audit).

4.0 What interferences must I avoid?

Opacity cannot be measured accurately in the presence of water droplets. Thus, COMS opacity compliance determinations cannot be made when water droplets are present, such as downstream of a wet scrubber without a reheater or at other saturated flue gas locations.

5.0 What do I need to know to ensure the safety of persons using Procedure 3?

People using Procedure 3 may be exposed to hazardous materials, operations and equipment. Procedure 3 does not purport to address all of the safety issues associated with its use. It is your responsibility to establish appropriate health and safety practices and determine the applicable regulatory limitations before performing this procedure. You should consult the COMS user's manual for specific precautions to take.

6.0 What equipment and supplies do I need?

The equipment and supplies that you need are specified in PS–1.

7.0 What reagents and standards do I need?

The reagents and standards that you need are specified in PS–1.

8.0 What sample collection, preservation, storage, and transport are relevant to this procedure ? [Reserved]

9.0 What quality control measures are required by this procedure for my COMS?

You must develop and implement a QC program for your COMS. Your QC program must, at a minimum, include written procedures which describe in detail complete step-by-step procedures and operations for the activities in paragraphs (1) through (4):

(1) Procedures for performing drift checks, including both zero and upscale drift and the status indicators check,

(2) Procedures for performing quarterly performance audits,

(3) A means of checking the zero alignment of the COMS, and

(4) A program of corrective action for a malfunctioning COMS. The corrective action must include, at a minimum, the requirements specified in section 10.5.

9.1 *What QA/QC documentation must I have?* You are required to keep the QA/QC written procedures on record and available for inspection by us, the State, and/or local enforcement agencies for the life of your COMS or until you are no longer subject to the requirements of this procedure.

9.2 *What are the consequences of failing QC audits?* Your QC procedures are deemed to be inadequate or your COMS incapable of providing quality data if you fail two consecutive annual audits, two consecutive quarterly audits, or five consecutive daily checks. If this occurs, you must either revise your QC procedures or repair or replace the COMS to correct the deficiencies causing the audit failures. If you determine that your COMS requires extensive repairs, you may use a substitute COMS provided the substitute meets the requirements in section 10.6.

10.0 What calibration and standardization procedures must I perform for my COMS?

(1) You must perform routine system checks to ensure proper operation of system electronics and optics, light and radiation sources and detectors, electric or electro-mechanical systems, and general stability of the system calibration.

(2) You must subject your COMS to a performance audit to include checks of the individual COMS components and factors affecting the accuracy of the monitoring data at least once per calendar quarter.

(3) At least annually, you must perform a zero alignment by comparing the COMS simulated zero to the actual clear path zero. The simulated zero device produces a simulated clear path condition or low-level opacity condition, where the energy reaching the detector is between 90 and 110 percent of the energy reaching the detector under actual clear path conditions.

10.1 *What routine system checks must I perform on my COMS?* Necessary components of the routine system checks will depend on the design details of your COMS. At a minimum, you must verify the system operating parameters listed in paragraphs (1) through (3) of this section on a daily basis. Some COMS may perform one or more of these functions automatically or as an integral portion of unit operations; other COMS may perform one or more of these functions manually.

(1) You must check the zero drift to ensure stability of your COMS response to the simulated zero device. The simulated zero device, an automated mechanism within the transmissometer that produces a simulated clear path condition or low-level opacity condition, is used to check the zero drift. You must, at a minimum, take corrective action on your COMS whenever the daily zero drift exceeds twice the applicable drift specification in PS–1.

(2) You must check the upscale drift to ensure stability of your COMS response to the upscale drift value. The upscale calibration device, an automated mechanism (employing a filter or reduced reflectance device) within the transmissometer that produces an upscale opacity value is used to check the upscale drift. You must, at a minimum, take corrective action on your COMS whenever the daily upscale drift check exceeds twice the applicable drift specification in PS–1.

(3) You must, at a minimum, check the status indicators, data acquisition system error messages, and other system self-diagnostic indicators. You must take appropriate corrective action based on the manufacturer's recommendations when the COMS is operating outside preset limits. All COMS data recorded during periods in which the fault status indicators are illuminated are to be considered invalid.

10.2 *What are the quarterly auditing requirements for my COMS*? At a minimum, the parameters listed in paragraphs (1) through (3) of this section must be included in the quarterly performance audit.

(1) For units with automatic zero compensation, you must determine the zero compensation for the COMS. The value of the zero compensation applied at the time of the audit must be calculated as equivalent opacity and corrected to stack exit conditions according to the procedures specified by the manufacturer. The compensation applied to the effluent recorded by the monitor system must be recorded.

(2) You must conduct a three-point calibration error test of the COMS. For either calibration error test method identified below, three neutral density filters meeting the requirements of PS–1 must be placed in the COMS light beam path for at least three nonconsecutive readings. All monitor responses must then be independently recorded from the COMS permanent data recorder. Additional guidance for conducting this test is included in section 8.1(3)(ii) of PS–1. The low-, mid-, and high-range calibration error results must be computed as the mean difference and 95 percent confidence interval for the difference between the expected and actual responses of the monitor as corrected to stack exit conditions. The equations necessary to perform the calculations are found in section 12.0 of PS–1. For the calibration error method, you must use the external audit device. You must confirm that the external audit device produces a zero value within one percent opacity.

(3) You must check the optical alignment of the COMS. The optical alignment should be checked when the stack temperature is ±50 percent of the typical operating temperature in degrees Farenheit.

10.3 *What are the annual auditing requirements for my COMS?*

(1) You must perform the primary zero alignment method under clear path conditions. The COMS may be removed from its installation and setup under clear path conditions or, if the process is not operating and the monitor path is free of particulate matter, the zero alignment may be conducted at the installed site. Determining if the monitor path is free of particulate matter can be accomplished by, but is not limited to, the following procedure: observe the instantaneous or one-minute average opacity for at least two hours prior to the clear path adjustment; open the reflector or detector housing and observe the projected light beam and look for the presence of forward scattered light (halo-effect); if the beam observation reveals no perceptible particulate, and the 2-hour readings do not vary more than ±3 percent opacity, adjust the clear path zero based on the lowest opacity reading recorded during the 2-hour period. There must be no adjustments to the monitor other than the establishment of the proper monitor path length and correct optical alignment of the COMS components. You must record the COMS response to a clear condition and to the COMS's simulated zero condition as percent opacity corrected to stack exit conditions. For a COMS with automatic zero compensation, you must disconnect or disable the zero compensation mechanism or record the amount of correction applied to the COMS's simulated zero condition. The response difference in percent opacity to the clear path and simulated zero conditions must be recorded as the zero alignment error. You must adjust the COMS's simulated zero device to provide the same response as the clear path condition as specified in paragraph (3) of section 10.0. You must perform the zero alignment audits with the COMS off the stack at least every three years.

(2) As an alternative, monitors capable of allowing the installation of an external zero device (commonly referred to as zero-jig) may use the device for the zero alignment provided that: the zero-jig setting has been established for the monitor path length and recorded for the specific COMS by comparison of the COMS responses to the installed zero-jig and to the clear path condition, and the zero-jig is demonstrated to be capable of producing a consistent zero response when it is repeatedly (i.e., three consecutive installations and removals prior to conducting the final zero alignment check) installed on the COMS. This can be demonstrated by either the MCOC or actual on-site performance. The zero-jig setting must be permanently set at the time of initial zeroing to the clear path zero value and protected when not in use to ensure that the setting equivalent to zero opacity does not change. The zero-jig response must be checked and recorded prior to initiating the zero alignment. If the zero-jig setting has changed, you must remove the COMS from the stack in order to reset the zero-jig. If you employ a zero-jig, you must perform the zero alignment audits with the COMS off the stack at least every three years. If the zero-jig is adjusted within the three-year period, you must perform the zero alignment with the COMS off the stack no later than three years from the date of adjustment.

(3) The procedure in section 6.8 of ASTM D 6216–98, 03, 07 is allowed.

(4) Other alternatives that verify that the zero optical adjustment is ±3 percent opacity are also allowed.

10.4 *What are my limits for excessive audit inaccuracy*? Unless specified otherwise in the applicable subpart, the criteria for excessive inaccuracy are listed in paragraphs (1) through (4) of this section.

(1) What is the criterion for excessive zero or upscale drift? Your COMS is out-of-control if either the zero drift check or upscale drift check exceeds twice the applicable drift specification in PS–1 for any one day.

(2) What is the criterion for excessive zero alignment? Your COMS is out-of-control if the zero alignment error exceeds 2 percent opacity.

(3) What is the criterion to pass the quarterly performance audit? Your COMS is out-of-control if the results of a quarterly performance audit indicate noncompliance with the following criteria:

(i) The optical alignment misalignment error exceeds 3 percent opacity,

(ii) The zero compensation exceeds 4 percent opacity, or

(iii) The calibration error exceeds 3 percent opacity.

(4) What is the criterion for data capture? The data capture will be considered insufficient if your COMS fails to obtain valid opacity data for at least 95 percent of your operating hours per calendar quarter, considering COMS downtime for all causes (e.g., monitor malfunctions, data system failures, preventative maintenance, unknown causes, etc.) except for downtime associated with routine zero and upscale checks and QA/QC activities required by this procedure. Whenever less than 95 percent of the valid data averages are obtained, you must either:

(i) Perform additional QA/QC activities as deemed necessary to ensure acceptable data capture, or

(ii) Determine if the COMS is functioning properly. If your COMS is malfunctioning, you may use a substitute COMS until repairs are made, provided the substitute meets the requirements in section 10.6.

10.5 *What corrective action must I take if my COMS is malfunctioning?* You must have a corrective action program in place to address the repair and/or maintenance of your COMS. There are four classes of maintenance and repair procedures to be considered as described in paragraphs (1) through (4) of this section. They may be performed at the manufacturer's facility, a service provider's facility, the user's instrument laboratory, or at the stack/duct at the discretion of the owner/operator and within the recommendation of the manufacturer. They must be performed by persons either skilled and/or trained in the operation and maintenance of the analyzer. After the repair/maintenance of your COMS, you must ensure that the COMS is still in compliance with PS–1. Table 17–1 outlines the tests required to maintain PS–1 certification.

(1) Routine/Preventative Maintenance. Routine/preventative maintenance includes the routine replacement of consumables, cleaning of optical surfaces, and adjustment of monitor operating parameters as needed to maintain normal operation. Replacement of consumables that have the possibility of adversely affecting the performance of an analyzer may cause the nature of the maintenance procedure to fall within one of the classifications described below.

(2) Measurement Non-Critical Repairs. Measurement non-critical repairs include repair and/or replacement of standard non-critical components, the unique characteristics of which do not materially affect the performance of the monitor. These components include, but are not limited to, resistors, capacitors, inductors, transformers, semiconductors, such as discrete components and integrated circuits, brackets and machined parts (not associated with internal optical components), cabling and connectors,

electro mechanical components, such as relays, solenoids, motors, switches, blowers, pressure/flow indicators, tubing, indicator lights, software with the same version and/or revision level, glass windows (uncoated or anti-reflection coated, but with no curvature), lenses with mounts where such mounts are not adjustable as installed, circuit boards where such boards are interchangeable and without unique adjustments (except offset and gain adjustments) for the specific analyzer of the same model, with such repairs to include the maintenance procedures required to ensure that the analyzer is appropriately setup.

(3) Primary Measurement Light Source. Repair or replace the primary measurement light source.

(4) Measurement Critical Repairs. Measurement critical repairs include repair and/or replacement of measurement sensitive components, the unique characteristics of which may materially affect the performance of the monitor. These components include, but are not limited to, optical detectors associated with the opacity measurement/reference beam(s), spectrally selective optical filters, beam splitters, internal zero and/or upscale reference reflective or transmissive materials, electro optical light switches, retro reflectors, adjustable apertures used on external zero devices or reflectors, lenses which have an adjustable mount, circuit boards which are not completely interchangeable and/or require unique adjustments for the specific analyzer, with such repairs to include the maintenance procedures required to ensure that the analyzer is appropriately setup.

(5) Rebuilt or Refurbished Analyzers. Rebuilt or refurbished analyzers include analyzers for which a major sub-assembly has been replaced or multiple lesser sub-assemblies with different revision levels from the original have been replaced and/or modified. This also includes major changes to the analyzer measurement detection and processing hardware or software.

10.6 *What requirements must I meet if I use a substitute opacity monitor?* In the event that your certified opacity monitor has to be removed for extended service, you may install a temporary replacement monitor to obtain required opacity emissions data provided that:

(1) The temporary monitor has been certified according to ASTM D 6216–98, 03, 07 for which a manufacturer's certificate of conformance (MCOC) has been provided;

(2) The use of the temporary monitor does not exceed 720 hours (30 days) of operation per year as a replacement for a fully certified opacity monitor. After that time, the analyzer must complete a full certification according to PS–1 prior to further use as a temporary replacement monitor. Once a temporary replacement monitor has been installed and required testing and adjustments have been successfully completed, it cannot be replaced by another temporary replacement monitor to avoid the full PS–1 certification testing required after 720 hours (30 days) of use;

(3) The temporary monitor has been installed and successfully completed an optical alignment assessment and status indicator assessment;

(4) The temporary monitor has successfully completed an off-stack clear path zero assessment and zero calibration value adjustment procedure;

(5) The temporary monitor has successfully completed an abbreviated zero and upscale drift check consisting of seven zero and upscale calibration value drift checks which may be conducted within a 24-hour period with not more than one calibration drift check every three hours and not less than one calibration drift check every 25 hours. Calculated zero and upscale drift requirements are the same as specified for the normal PS–1 certification;

(6) The temporary monitor has successfully completed a three-point calibration error test;

(7) The upscale reference calibration check value of the new monitor has been updated in the associated data recording equipment;

(8) The overall calibration of the monitor and data recording equipment has been verified; and

(9) The user has documented all of the above in the maintenance log or in other appropriate permanently maintained records.

10.7 *When do out-of-control periods begin and end?* The out-of-control periods are as specified in section 3.1.

10.8 *What are the limitations on the use of my COMS data collected during out-of-control periods?* During the period your COMS is out-of-control, you may not use your COMS data to calculate emission compliance or to meet minimum data capture requirements in this procedure or the applicable regulation.

10.9 *What are the QA/QC reporting requirements for my COMS?* You must report the accuracy results from section 10.0 for your COMS at the interval specified in this procedure or the applicable regulation. You must report the drift and accuracy information as a Data Assessment Report (DAR), and include one copy of this DAR for each quarterly audit with the report of emissions required under the applicable regulation. An example DAR is provided in Procedure 1, Appendix F of this part.

10.10 *What minimum information must I include in my DAR?* At a minimum, you must include the information listed in paragraphs (1) through (5) of this section in the DAR.

(1) Your name and address,

(2) Identification and location of your COMS(s),

(3) Manufacturer, model, and serial number of your COMS(s),

(4) Assessment of COMS data accuracy/acceptability and date of assessment as determined by a performance audit described in section 10.0. If the accuracy audit results show your COMS to be out-of-control, you must report both the audit results showing your COMS to be out-of-control and the results of the audit following corrective action showing your COMS to be operating within specifications, and

(5) Summary of all corrective actions you took when you determined your COMS was out-of-control.

10.11 *Where and how long must I retain the QA data that this procedure requires me to record for my COMS?* You must keep the records required by this procedure for your COMS onsite and available for inspection by us, the State, and/or the local enforcement agency for the period specified in the regulations requiring the use of COMS.

11.0 What analytical procedures apply to this procedure? [Reserved]

12.0 What calculations and data analysis must I perform for my COMS?

The calculations required for the performance audit are in section 12.0 of PS–1.

13.0 Method Performance [Reserved]

14.0 Pollution Prevention [Reserved]

15.0 Waste Management [Reserved]

16.0 References

16.1 Performance Specification 1–Specifications and Test Procedures for Continuous Opacity Monitoring Systems in Stationary Sources, 40 CFR part 60, Appendix B.

16.2 ASTM D 6216–98, 03, 07–Standard Practice for Opacity Monitor Manufacturers to Certify Conformance with Design and Performance Specifications, American Society for Testing and Materials (ASTM).

17.0 What Tables, Diagrams, Flowcharts, and Validation Data Are Relevant to This Procedure?

17.1. TABLE 17–1—DIAGNOSTIC TESTS REQUIRED AFTER VARIOUS REPAIRS

Description of event	Optical alignment	Optical alignment indicator assessment (Note 1)	Zero calibration check	Clear path (off-stack) zero assessment (Note 3)	Upscale calibration check	Calibration error check	Fault status indicator check	Averaging period calculation and recording	7-Day zero and up-scale drift check (Note 2)	Recertify per PS–1	New MCOC per ASTM D 6216–98, 07	Comments
(1) Replace or repair components described as routine and/or preventative maintenance..	X	—	X	—	X	—	X	—	—	—	—	Includes replacement of blower, cleaning optical surfaces, resetting adjustable parameters to maintain normal performance, etc.

17.1. TABLE 17–1—DIAGNOSTIC TESTS REQUIRED AFTER VARIOUS REPAIRS—Continued

Description of event	Optical alignment	Optical alignment indicator assessment (Note 1)	Zero calibration check	Clear path (off-stack) zero assessment (Note 3)	Upscale calibration check	Calibration error check	Fault status indicator check	Averaging period calculation and recording	7-Day zero and up-scale drift check (Note 2)	Recertify per PS–1	New MCOC per ASTM D 6216–98, 07	Comments
(2) Replace or repair primary measurement light..	X	X	X	X	X	X	X	—	—	—	—	Light source uniformity and position are key source to many performance parameters.
(3) Replace or repair components which are measurement noncritical..	X	—	X	—	X	.....	X	—	—	—	—	See text description, section 10.5(2).
(4) Replace or repair components which are measurement critical..	X	X	X	X	X	X	X	—	X	—	—	See test description, section 10.5(3).
(5) Replace or repair components which are measurement critical but do not involve optical or electro-optical components..	—	—	X	—	X	X	X	X	—	—	—	Includes changes of components involving data acquisition and recording.
(6) Rebuild or substantially refurbish the analyzer..	—	—	—	—	—	—	—	—	—	X	—	See text description, section 10.5(4).
(7) Change to, or addition of, analyzer components which may affect MCOC-specified performance parameters..	—	—	—	—	—	—	—	—	—	X	X	Significant changes which are not part of the MCOC-designated configuration.

Notes: (1) Optical alignment indicator assessment requires the operator to verify during an off the stack clear path zero assessment that the beam is centered on the reflector/retro reflector when the alignment indicator indicates on-axis centered alignment. If not, the analyzer optical train must be adjusted until this condition is met.
(2) 7-Day zero and upscale drift assessment. Opacity measurement data recorded prior to completion of the 7-day drift test will be considered as valid provided that the first 7-day drift test is successful, that it is completed within 14 days of completion of the repair, and that other QA requirements are met during this time period.
(3) Requires verification of the external zero-jig response, or recalibration of the same, after the off-stack clear path zero has been re-established.

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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Parts 704, 713, 714, 715, 716, 744, and 752

RIN 0412–AA63

Partner Vetting in USAID Acquisitions

AGENCY: United States Agency for International Development.

ACTION: Final rule.

SUMMARY: The U.S. Agency for International Development (USAID) is implementing a pilot for a Partner Vetting System for USAID assistance and acquisition awards. The purpose of the Partner Vetting System is to help ensure that USAID funds and other resources do not inadvertently benefit individuals or entities that are terrorists, supporters of terrorists or affiliated with terrorists, while also minimizing the impact on USAID programs and its implementing partners. We are amending the USAID Acquisition Regulations (AIDAR) regulations in order to apply the Partner Vetting System to USAID acquisitions for the pilot and any subsequent implementation of PVS that is determined appropriate.

DATES: This final rule is effective on March 15, 2012.

FOR FURTHER INFORMATION CONTACT: Michael Gushue, Telephone: 202–567–4678, Email: *AIDARPartnerVetting@usaid.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

USAID's final rule exempting portions of the Partner Vetting System (PVS) from provisions of the Privacy Act of 1974 went into effect on August 4, 2009 after several extensions, the most recent of which was published on May 6, 2009 (74 FR 20871). Although USAID did not further extend the effective date, the agency did not implement PVS at that time in order to allow additional input from interested parties and to allow PVS to be applied to both assistance and acquisitions. Before the agency determines whether to implement PVS on a world-wide basis, USAID is launching a PVS pilot program to determine the costs and benefits of implementing PVS more broadly. At the conclusion of the pilot program, State and USAID will determine whether it is necessary to implement PVS more broadly, and/or make changes to the risk-based model it employs. In order to apply PVS to USAID acquisitions, USAID is amending 48 CFR Chapter 7, which is USAID's procurement regulation. USAID published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on June 26, 2009 (74 FR 30494) with a public comment period of 60 days, closing on August 25, 2009. During the 60-day comment period, USAID received comments from five separate respondents. All respondents expressed concerns about USAID's intent to implement PVS and reiterated objections raised during and after the public comment period when USAID established the PVS as a new system of records (72 FR 39042) and exempted portions of PVS from one or more provisions of the Privacy Act (74 FR 9). However, since comments of this nature are outside the scope of the Proposed Rule, we are not addressing them in this Final Rule. Only those comments directly addressing the proposed amendments to the AIDAR and our responses are discussed below.

B. Summary of the Final Rule

USAID is issuing a final rule amending 48 CFR Chapter 7, as described in the proposed rule with some modifications in response to the public comments received. This final rule implements the partner vetting system for USAID acquisitions by adding a new subpart 704.70 to (48 CFR) AIDAR, with an associated solicitation provision and contract clause in (48 CFR) AIDAR Part 752. Additionally, this final rule amends (48 CFR) AIDAR Parts 713, 714, and 715, 716, and adds a new Part 744 to include reference to the requirements at (48 CFR) AIDAR Subpart 704.70.

C. Discussion of Comments

USAID received comments and suggestions from five organizations on its proposed rule to amend 48 CFR Chapter 7, which would enable USAID to apply the Partner Vetting System to USAID acquisitions. While some of the comments and suggestions received did

address the proposed amendments, many of the comments and suggestions focused instead on the Partner Vetting System itself. Most, if not all, of those comments and suggestions previously were responded to when USAID published in the **Federal Register** its Privacy Act final rule for the Partner Vetting System. *See* 74 FR 9 (January 2, 2009). Although that final rule exempted from release under the Privacy Act only information from other government agencies and related to investigations, USAID's discussion of all comments and suggestions received, beginning at 74 FR 10, addresses these general comments.

While not required to respond to comments and suggestions which did not expressly address the proposed amendment to 48 CFR Chapter 7, USAID nevertheless would like to dispel one major misconception that was reiterated in many of those comments and suggestions. Some organizations that submitted comments and suggestions erroneously referred to the Privacy Act final rule as a rule applicable only to ''non-profit, non-governmental applicants to USAID.'' That is not an accurate description of either the Privacy Act final rule or of any other Partner Vetting System notices published by USAID in the **Federal Register**. With the exception of the NPRM for 48 CFR Chapter 7, which is specific to acquisition, USAID's notices pertaining to the Partner Vetting System were all applicable to all non-governmental organizations (NGOs), both for-profit and non-profit, whether they are applying for assistance awards or submitting offers/bids for acquisition instruments. The term ''NGO'' as used in the following notices was comprehensive, covering all organizations that were non-governmental organizations. These notices established a system of records for the Partner Vetting System (72 FR 39042), proposed to exempt portions of this system of records from one or more provisions of the Privacy Act (72 FR 39768), proposed information collection procedures for the Partner Vetting System (72 FR 40110), and included a Partner Information Form for information collection purposes (72 FR 56041). While USAID initially determined that it was not necessary to amend its regulation on assistance (22 CFR 226) to implement the Partner Vetting System, we did determine, as reflected in the proposed rule to amend 48 CFR Chapter 7, that it is necessary to amend the AIDAR. We have subsequently determined that rulemaking is appropriate for our assistance regulation, 22 CFR Part 226, and will publish separate Notices for that purpose.

The following responses address comments that were specific to the proposed rule for Partner vetting in USAID Acquisitions:

Source Selection vs. Vetting

Comment 1: ''USAID declares that 'regardless of the point at which vetting begins, source selection proceeds separately from vetting' and the contracting officer only confirms with the vetting official whether an offeror has 'passed' the vetting process. We strongly concur and recommend that the declarative statement that 'source selection proceeds separately from vetting' be included in both the prescriptive provisions in Subpart 704.70 as well as in the clauses.''

Response: USAID concurs with this recommendation. Although the proposed rule already stated in sections 704.7004–1(d) and 752.704–70(c) that the two processes are separate, we agree that the recommended declarative statements would strengthen the requirement. We have added the recommended statements. USAID also intends to provide its contracting officers and negotiators with detailed implementing procedures in the Agency's Automated Directives System (ADS) that will emphasize the importance of keeping the two processes separate.

Timing of Vetting

Comment 2: The Professional Services Council (PSC) provided extensive discussion on the timing of vetting. It recommended that USAID establish an ''open season'' on submissions of the Form to the USAID Office of Security (SEC). It also encouraged potential offerors to collect their information early and suggested that USAID should encourage early submission of the Form to SEC in order to allow for the maximum amount of time for vetting to occur. The PSC also suggested that untimely vetting could result in a constructive adverse ''responsibility'' determination.

Response: USAID appreciates the concern expressed in these comments about the need to carefully time vetting and would like to reassure all prospective offerors that we share this concern. As stated in the NPRM, for FAR Part 15 competitive negotiations, we determined that vetting should *typically* be done at the competitive range stage (see 48 CFR 15.306(c)), after we carefully weighed the need to allow as much time as possible for vetting against the burden to offerors and USAID staff, especially SEC, of collecting information from offerors who may have no chance of receiving an award. Discussions would therefore occur concurrently with vetting. The Rule does allow for contracting officers to still have the discretion to request offerors to submit the Form at a different stage. And, for procurements using other procedures, including IQC task orders, contracting officers will have full discretion to decide the most appropriate time, and the Rule allows for this flexibility. We considered an ''open season'' approach of allowing prospective offerors to decide for themselves when to submit the vetting form, but because of the possible impact on the SEC's workload and the burden on offerors, we determined that early submission may not be practical.

We also recognize that for many contractors, the key individuals who are part of the company's management team are unlikely to change from one procurement to another, so most likely these key individuals' passing initial vetting will expedite subsequent vetting. For this reason, submitting the Vetting Form for key management individuals is unlikely to make much difference to the overall amount of time needed for vetting. Offerors and contractors may collect the vetting information at the time they consider more practical, but USAID will request submission at the time the contracting officer considers most appropriate, as stated in the solicitation.

Regarding the comment that should the Office of Security workload affect timing and potentially lead to a ''constructive adverse 'responsibility' determination outside the acquisition process,'' we disagree with any characterization of a vetting determination as a responsibility determination, constructively or otherwise. USAID views vetting as an eligibility requirement.

Finally, USAID is formalizing plans for a joint pilot conducted with the Department of State. This pilot will implement PVS in 5 countries with varying levels of risk. The pilot will help the Agency determine the resource requirements for both the vetting officials and the Office of Security, as well as testing our assumptions about vetting and its impact on our programs. If the results of the pilot indicate that adjustments to improve timing will improve the vetting process, then we will certainly make those adjustments, including through rule-making if appropriate.

Definitions of ''Key Individuals'' and ''Key Personnel''

Comment 3: ''USAID differentiates between 'key individuals' and 'key personnel,' noting that 'the terms are not synonymous; all key personnel will be key individuals but not all key individuals will be key personnel.' Both the Background information accompanying the rule, the definition section in Part 704.7002 and the 752.204–71 clause define the terms 'key individuals' and 'key personnel.' *All key personnel, whether or not they are employees of the offeror, are considered key individuals and must be vetted* * * * As a technical matter, we believe the phrase 'key individuals, including all key personnel' should be modified to read 'all key individuals' since the term 'key individual' is specifically defined in the clause and incorporates all 'key personnel.'''

Response: USAID agrees with this comment and has revised the final rule accordingly.

Subpart 704.7004–2: Post-award Requirements—Annual Vetting

Comment 4: ''This subpart imposes both a new annual vetting submission, as well as a continuous vetting submission if there are changes in (1) any key individual, including all key personnel, and (2) subcontractors for which vetting is required. Neither of these factors has been addressed in the Agency's prior paperwork clearance forms or in the discussion of the PVS program. Nevertheless, while we can appreciate the importance of vetting new key individuals who were not part of any prior vetting to achieving the objectives of the PVS program, we see little value to USAID, and considerable burden to both USAID and its implementing partners, in requiring an annual re-submission of the PVS Form from those that have already 'passed' the vetting process. If USAID determines that new issues arise that should trigger another review, or if USAID determines to randomly sample recipients, we recommend that the regulations reserve for USAID, through the contracting officer, the right to require key individuals of a specific contractor and/or its covered subcontractors to submit the PVS Form for one-time vetting.''

Response: USAID agrees with this comment and we have revised the rule to remove annual submittal of the Form. Contractors will still be required to submit the Form any time key individuals change and before issuance of covered subcontractors, but will not be required to resubmit the form annually if no information has changed. Instead, USAID will conduct post-award vetting based on the latest submittal.

Ambiguity Regarding Which Subcontractor Personnel Must Be Vetted

Comment 5: Subpart 704.7004–2 ''provides that vetting is required for all subcontracts for which consent to subcontract is required under FAR 52.244–2 and the contracting officer may not consent until the subcontractor has 'passed' vetting. The Background information accompanying the rule makes it clear that 'the contracting officer will not consent to a subcontract until the subcontractor's key individuals have passed vetting' (emphasis added), but the rule itself is silent on the vetting of subcontractors. We have assumed, and strongly recommend that the rule explicitly state, that subcontractors are required to vet only 'key individuals' as that term is defined in the proposed rule.''

Response: USAID agrees with this comment and revised the final rule accordingly, in sections 704.7004–2(b), 704.7004–3(a), and 704.7004–3(c).

Classes of Items Requiring Sub-tier Vetting Should Be Specific

Comment 6: ''However, subsection (c) of subpart 7004–3 also authorizes vetting for subcontracts at any tier (for subcontractors not otherwise subject to consent) for 'certain classes of items (supplies and services)' that the contracting officer identifies in the solicitation. While we recognize the flexibility the Agency must have to require vetting of any additional 'classes of items' based on the Agency's internal risk-based assessment, it is also important that any of these selected classes of items are described with specificity and, if they remain appropriate for vetting at the time of award, that these designated 'classes of items' are also carried over into the resulting contracts—because only if these additional classes of items are included in the resulting contract will there be a post-award requirement for vetting.

Response: USAID agrees that a contract must specifically identify the classes of items subject to sub-tier vetting and considers Alternate I to the clause at 752.204–71 to adequately address this. Further, we will emphasize in the separate internal guidance in the ADS to contracting officers the need to be specific about the class of subcontracts that are subject to vetting at any tier.

Coverage of Subcontractors in the Definition of 'Key Individuals'

Comment 7: ''In addition, there is no coverage for subcontractors under the definition of the term 'key individual' in 704.7002 or in the 204–71 clause. The 'policy' statement in Subpart 704.7003 notes that USAID will require vetting of first tier subcontractors only, although the coverage for subcontractors in Subpart 704.7004–3(c) provides that vetting may be required at any tier for certain classes of items identified in the solicitation; yet neither of the clauses address the scope of coverage for subcontractors except in terms of submissions to the vetting official and through the requirement in 204–71(i) that the prime contractor flow down certain provisions of the 204–71 clause to 'all subcontracts under this contract.' Furthermore, there is no provision in the clauses for the contracting officer to designate any additional 'classes of items' as authorized in 704.7003. The gaps create considerable confusion between the policy and the clause and the actions that prime contractors should take during the solicitation process and after source selection.''

Response: USAID agrees in part and disagrees in part. We revised the policy statement in section 704.7003 to apply vetting to subcontracts for specified classes of items if these subcontracts are not subject to contracting officer consent. We did not revise the definition of key individual in section 704.7002 since it is not specific to the prime offeror, contractor or first tier subcontractor; it uses the term ''organization'' which applies to the prime offeror, contractor and any subcontractors when vetting applies to such subcontractors through subsection (h) of the base clause 752.704–71 and its Alternate I. In fact, regarding the comments that neither clause addresses the ''scope of coverage for subcontractors'' or that there is no provision for the contracting officer to designate any classes of items, we disagree since subsection (h) in the base and Alt. I specifically applies vetting to subcontracts, and Alt. I provides for the contracting officer to designate classes of items subject to vetting at any subcontract tier.

Lack of Coverage for Schedules Purchases Under FAR Part 8.4

Comment 8: ''While the rule addresses the PVS treatment for contracts awarded under AIDAR Parts 713 (Simplified Acquisition Procedures), 714 (Sealed Bidding), and 715 (Contracting by Negotiation), there is no coverage in the proposed rule for

contracts awarded under Schedules purchases under FAR Part 8.4. While there is no current coverage in the AIDAR regarding Schedules purchases, and while we cannot foresee that any such awards might be subject to the PVS requirements, we believe it easier to address this contract type and not use it than to need this contract type and not have the appropriate coverage.''

Response: USAID does not envision applying PVS to GSA Schedule Orders as the basic contract would not include the vetting clause and the contractors would not have been made aware of the requirement to vet prior to award. Should GSA and USAID determine that vetting is appropriate for purchases made under FAR Part 8.4, appropriate action will be taken at that time.

Lack of Coverage for Commercial Items Awarded Under Part 712

Comment 9: ''While the rule addresses the PVS treatment for contracts awarded under AIDAR Parts 713 (Simplified Acquisition Procedures), 714 (Sealed Bidding), and 715 (Contracting by Negotiation), there is no coverage in the proposed rule for contracts awarded for commercial items under FAR Part 12 (Commercial Items), even though there is no current coverage in the AIDAR regarding commercial items. In our view, given the policy approach USAID recommends—that 'key personnel' of the prime contractor and for all subcontracts for which consent to subcontract is required under FAR 52.244–2 (but see our comments above), we believe it appropriate and consistent with USAID's policy to exempt from the PVS requirements solicitations and resulting awards entered into pursuant to FAR Part 12 and subcontracts for commercial items regardless of the method of procurement of the prime contract. Again, while we cannot foresee that any such awards might be subject to the PVS requirements, we believe it easier to address this contract type and not use it than to need this contract type and not have the appropriate coverage.''

Response: In preparing the Proposed Rule, USAID considered the need to address commercial item procurements but determined that such coverage was unnecessary since commercial purchases are made through either FAR Part 13, Part 14, Part 15, or Part 16.5 (indefinite delivery contracts, see Comment 10) procedures. There is no contracting process that is unique to commercial items, so we do not consider it necessary to address vetting in AIDAR Part 712.

Lack of Coverage for IQCs Awarded Under Part 716

Comment 10: ''While the rule addresses the PVS treatment for contracts awarded under AIDAR Parts 713 (Simplified Acquisition Procedures), 714 (Sealed Bidding), and 715 (Contracting by Negotiation), there is no coverage for contracts awarded under Part 716 (relating to IQCs). While the background information recognizes that PVS could apply to task orders under IQCs, there are no special procedures called out for contracting officers or IQC holders to follow when PVS is required after the award of the underlying IQC but during the competitive solicitation, evaluation and subsequent award of a task order under an IQC. This type of contract still dominates USAID contracting and should be specifically addressed.''

Response: USAID agrees with this comment and has revised AIDAR Subpart 716.5 and added a contract clause at 752.216–70 to address the procedures for vetting indefinite-delivery contracts and orders placed against them. This revised subpart may appear to be a substantial addition to the rule but since it merely clarifies procedures we intended under the proposed rule and is consistent with the overall approach we are taking with PVS, we consider the added coverage to be within the scope of the proposed rule. As noted in the comment, the proposed rule was clear about applying vetting to IQCs, so this added coverage addresses the concern expressed in the comment.

Location of the Treatment of Indefinite Quantity Contracts and Task Orders

Comment 11: ''Task order competitions under Indefinite Quantity Contracts (IQC) always come 'post-award' of the underlying contracts but are more likely to trigger a new vetting requirement. Subpart 7004–1(c) is the only other place in the proposed rule where IQCs are addressed, but it covers only 'potential awardee(s)' and does not address competition for task orders under awarded contracts or modifications to existing contracts. We strongly recommend that the treatment of task orders under IQCs be addressed in this post-award requirements section. Here, too, we strongly support an 'open season' for submission of the Form to USAID's Office of Security to minimize the risk that vetting will not be completed in a timely manner to meet the timeliness requirements of the acquisition process.''

Response: Regarding the timing of vetting for IQC task orders, we stand by our position discussed above (Comment 2) and will allow the task order contracting officer to determine the appropriate stage to vet. However, USAID agrees that the rule must more clearly address how partner vetting will apply to IQC task orders. Task orders are placed after the basic IQC has been awarded, but the task orders themselves are ''awards'' in their own right and for that reason we included them in the pre-award section. The process for vetting task orders is more similar to pre-award vetting for contracts rather than to post-award vetting, since the key individuals for each task order must pass vetting before the contracting officer may place the order. However, in acknowledgement of the ''post-award'' nature of task orders, we have added a contract clause at 752.216–70 which includes the standard post award vetting requirements and also addresses the procedures for vetting orders against Indefinite Delivery contracts.

D. Impact Assessment

Regulatory Planning and Review

Under Executive Orders (E.O.) 13563 and 12866, USAID must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB).

USAID has determined that this Rule is not an ''economically significant regulatory action'' under Section 3(f)(1) of E.O.12866. The application of the Partner Vetting System to USAID acquisitions will not have an economic impact of $100 million or more. The regulation will not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. However, as this rule is a ''significant regulatory action'' under Section 3(f)(4) of the E.O., USAID submitted it to OMB for review.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), USAID has considered the economic impact of the rule and has certified that its provisions would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The changes to the (48 CFR) AIDAR use information collected via USAID Partner Information Form, USAID Form 500–13, which was approved in accordance with 44 U.S.C. 3501 by the Office of Management and Budget on

August 19, 2015 (OMB Control Number 0412–0577).

List of Subjects in 48 CFR Parts 704, 713, 714, 715, 744, and 752

Government procurement.

Regulatory Text

For the reasons set forth in the preamble, the U. S. Agency for International Development amends 48 CFR chapter 7 as follows:

1. The authority citation for 48 CFR Parts 704, 713, 714, 715, 744, and 752 continues to read as follows:

Authority: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

PART 704—ADMINISTRATIVE MATTERS

■ 2. Add Subpart 704.70 to read as follows:

Subpart 704.70—Partner Vetting

Sec.

704.7001 Scope of subpart.
704.7002 Definitions.
704.7003 Policy.
704.7004 Procedures.
704.7004–1 Preaward requirements.
704.7004–2 Post award requirements.
704.7004–3 Subcontracts.
704.7005 Solicitation provision and contract clause.

Subpart 704.70—Partner Vetting

704.7001 Scope of subpart.

This subpart prescribes the policies and procedures to apply partner vetting to USAID acquisitions.

704.7002 Definitions.

As used in this subpart—

Key individual means:

(1) Principal officers of the organization's governing body (e.g., chairman, vice chairman, treasurer and secretary of the board of directors or board of trustees);

(2) The principal officer and deputy principal officer of the organization (e.g., executive director, deputy director, president, vice president);

(3) The program manager or chief of party for the USG-financed program; and

(4) Any other person with significant responsibilities for administration of the USG-financed activities or resources, such as key personnel as described in Automated Directives System Chapter 302. Key personnel, whether or not they are employees of the prime contractor, must be vetted.

Vetting official means the USAID employee identified in the solicitation or contract as having responsibility for receiving vetting information, responding to questions about information to be included on the Partner Information Form, coordinating with the USAID Office of Security (SEC), and conveying the vetting determination to each offeror, potential subcontractors subject to vetting, and the contracting officer. The vetting official is not part of the contracting office and has no involvement in the source selection process.

704.7003 Policy.

In the interest of national security, USAID may determine that a particular acquisition is subject to vetting. In that case, USAID will require vetting of all key individuals of offerors, first tier subcontractors, and any other class of subcontracts if identified in the solicitation and resulting contract. When USAID conducts partner vetting, it will not award a contract to any offeror who does not pass vetting.

704.7004 Procedures.

704.7004–1 Preaward requirements.

(a) When USAID determines an acquisition to be subject to vetting, the contracting officer determines the appropriate stage of the acquisition cycle to require offerors to submit the completed USAID Partner Information Form, USAID Form 500–13, to the vetting official identified in the solicitation. The contracting officer must specify in the solicitation the stage at which the offerors will be required to submit the USAID Partner Information Form.

(b) For negotiated procurements using FAR part 15, this stage will typically be when the contracting officer establishes the competitive range (48 CFR 15.306(c)). However, the contracting officer may determine that vetting is more appropriate at a different stage of the source selection process, such as immediately prior to award, and then require only the apparently successful offeror to submit the completed USAID Partner Information Form.

(c) For Indefinite Delivery contracts under FAR subpart 16.5, vetting will occur prior to award of the basic contract if the contracting officer anticipates placing orders subject to vetting under that contract. Vetting will also occur before USAID places any orders subject to vetting. The contracting officer will notify awardees of the appropriate timing for vetting in the request for task or delivery order proposals. See AIDAR subpart 716.5 for vetting procedures for task and delivery orders.

(d) For all other acquisitions, including those under FAR parts 13 and 14, the contracting officer determines the appropriate time to require potential awardee(s) to submit the completed USAID Partner Information Form to the vetting official.

(e) Source selection proceeds separately from vetting. The source selection authority makes the source selection determination separately from the vetting process and without knowledge of vetting-related information other than that the apparently successful offeror has passed or not passed vetting.

(f) The contracting officer may only award to an offeror who has passed vetting.

704.7004–2 Post award requirements.

(a) For those contracts and task orders the agency has determined are subject to vetting, the contractor must submit the completed USAID Partner Information Form any time it changes:

(1) Key individuals, and

(2) Subcontractors for which vetting is required.

(b) USAID may vet key individuals of the contractor and any required subcontractors periodically during contract performance using the information already submitted on the Form.

704.7004–3 Subcontracts.

(a) When the prime contract is subject to vetting, vetting is required for key individuals of all subcontracts under that contract for which consent is required under FAR clause 52.244–2, Subcontracts.

(b) The contracting officer must not consent to a subcontract with any subcontractor subject to vetting until that subcontractor has passed vetting.

(c) Vetting may be required for key individuals of subcontracts at any tier for certain classes of items (supplies and services). The contracting officer must identify these classes of items in the solicitation.

(d) The contractor may instruct prospective subcontractors who are subject to vetting to submit the USAID Partner Information Form to the vetting official as soon as the contractor submits the USAID Partner Information Form for its key individuals.

704.7005 Solicitation provision and contract clause.

(a) The contracting officer will insert the provision at 752.204–70 Partner Vetting Pre–Award Requirements, in all solicitations USAID identifies as subject to vetting.

(b) Except for awards made under FAR part 16, the contracting officer will—

(1) Insert the clause at 752.204–71 Partner Vetting, in all solicitations and contracts USAID identifies as subject to vetting, or

(2) Use the clause with its Alternate I when USAID determines that subcontracts at any tier for certain classes of supplies or services are subject to vetting.

(c) For awards made under FAR part 16, see (48 CFR) subpart 716.5.

PART 713—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Add section 713.106–370 to subpart 713.1 to read as follows:

713.106–370 Partner vetting.

If an acquisition is identified as subject to vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

PART 714—SEALED BIDDING

■ 4. Add section 714.408–170 to subpart 714.4 to read as follows:

714.408–170 Partner vetting.

If an acquisition is identified as subject to vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

PART 715—CONTRACTING BY NEGOTIATION

■ 5. Add subpart 715.70 to read as follows:

Subpart 715.70—Partner Vetting

715.70 Partner vetting.

If an acquisition is identified as subject to vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

PART 716—TYPES OF CONTRACTS

■ 6. Add subpart 716.5 to read as follows:

Subpart 716.5 Indefinite-Delivery Contracts

Sec.

716.501–270 Partner vetting—indefinite-delivery contracts.
716.505–70 Vetting orders under indefinite delivery contracts.
716.506 Solicitation provision and contract clause.

716.501–270 Partner vetting—indefinite-delivery contracts.

If a task order or delivery order under an indefinite-delivery contract has the potential to be subject to vetting, then the contract itself will be subject to the applicable procedures and requirements for partner vetting in (48 CFR) AIDAR 704.70.

716.505–70 Vetting orders under indefinite delivery contracts.

(a) The task order contracting officer will specify in the request for task or delivery order proposals whether the order is subject to vetting and when awardees must submit the USAID Partner Information Form.

(b) For orders under multiple award contracts, fair opportunity selection procedures are conducted separately from vetting. The contracting officer for the order must follow the ordering procedures in the contract to select the order awardee without knowledge of vetting-related information, other than that the contractor has passed or not passed vetting.

(c) The contracting officer may only place an order subject to vetting with an awardee that has passed vetting for that order.

716.506 Solicitation provision and contract clause.

(a) As prescribed in 48 CFR 704.7005(a), the contracting officer will insert the provision at 752.204–70 Partner Vetting Pre–Award Requirements, in solicitations for indefinite delivery contracts when USAID anticipates that any orders placed under the contract will be subject to vetting.

(b)(1) The contracting officer will insert the clause at 752.216–71 Partner Vetting, in those solicitations and contracts for indefinite-delivery contracts that USAID identifies as subject to vetting.

(2) The contracting officer will use the clause with its Alternate I when USAID determines that subcontracts at any tier for certain classes of supplies or services are subject to vetting.

■ 7. Add Part 744 to read as follows:

PART 744—SUBCONTRACTING POLICIES AND PROCEDURES

Subpart 744.2—Consent to Subcontracts

Sec.

744.202–170 Partner vetting.

Authority: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

744.202–170 Partner vetting.

If an acquisition is identified as subject to partner vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend Part 752 by adding sections 752.204–70 and 752.204–71 to subpart 752.2 to read as follows:

752.204–70 Partner vetting pre-award requirements.

As prescribed in (48 CFR) AIDAR 704.7005(a), insert the following provision in all solicitations subject to vetting:

PARTNER VETTING PRE–AWARD REQUIREMENTS (FEB 2012)

(a) USAID has determined that any contract resulting from this solicitation is subject to vetting. Terms used in this provision are defined in paragraph (b) of the AIDAR clause at 752.204–71 Partner Vetting, of this solicitation. An offeror that has not passed vetting is ineligible for award.

(b) The following are the vetting procedures for this solicitation:

(1) Prospective offerors review the attached USAID Partner Information Form, USAID Form 500–13, and submit any questions about the USAID Partner Information Form or these procedures to the contracting officer by the deadline for questions in the solicitation.

(2) The contracting officer notifies the offeror when to submit the USAID Partner Information Form. For this solicitation, USAID will vet at [*insert in the provision the applicable stage of the source selection process at which the Contracting Officer will notify the offeror(s) who must be vetted*]. Within the timeframe set by the contracting officer in the notification, the offeror must complete and submit the information on the USAID Partner Information Form in accordance with instructions from the vetting official named in paragraph (d) of the AIDAR clause at 752.204–71 Partner Vetting, of this solicitation.

Note: Offerors who submit using non-secure methods of transmission do so at their own risk.

(3) The offerors must notify proposed subcontractors of this requirement when the subcontractors are subject to vetting.

(c) Source selection proceeds separately from vetting. Vetting is conducted independently from any discussions the contracting officer may have with an offeror. The offeror and any subcontractor subject to vetting must not provide vetting information to other than the vetting official. The offeror and any subcontractor subject to vetting will communicate only with the vetting official regarding their vetting submission(s) and not with any other USAID or USG personnel, including the contracting officer or his/her representatives. Exchanges between the Government and an offeror about vetting information submitted by the offeror or any proposed subcontractor are clarifications in accordance with FAR 15.306(a) (48 CFR

15.306(a)). The contracting officer designates the vetting official as the only individual authorized to clarify the offeror's and proposed subcontractor's vetting information.

(d)(1) The vetting official notifies the offeror that it:

(i) Has passed vetting,

(ii) Has not passed vetting, or

(iii) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specified in the notification.

(2) The vetting official will include in the notification any information that USAID's Office of Security(SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(e) *Reconsideration.* (1) Within 7 calendar days after the date of the vetting official's notification, an offeror that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(2) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the offeror's additional information warrants a revised decision.

(3) The Agency's determination of whether reconsideration is warranted is final.

(f) *Revisions to vetting information.* (1) Offerors who change key individuals, whether the offeror has previously passed vetting or not, must submit a revised USAID Partner Information Form to the vetting official. This includes changes to key personnel resulting from revisions to the technical proposal.

(2) The vetting official will follow the vetting process in paragraph (d) of this clause for any revision of the offeror's Form.

(g) *Award.* At the time of award, the contracting officer will confirm with the vetting official that the apparently successful offeror has passed vetting. The contracting officer may award only to an apparently successful offeror that has passed vetting.

752.204–71 Partner vetting.

As prescribed in (48 CFR) AIDAR 704.7005(b)(1) and 716.506(a), insert the following clause in all contracts subject to vetting:

PARTNER VETTING (FEB 2012)

(a) The contractor must comply with the vetting requirements for key individuals under this contract.

(b) Definitions. As used in this provision—

Key individual means:

(i) Principal officers of the organization's governing body (e.g., chairman, vice chairman, treasurer and secretary of the board of directors or board of trustees);

(ii) The principal officer and deputy principal officer of the organization (*e.g.,* executive director, deputy director, president, vice president);

(iii) The program manager or chief of party for the USG-financed program; and

(iv) Any other person with significant responsibilities for administration of the USG-financed activities or resources, such as key personnel as described in Automated Directives System Chapter 302. Key personnel, whether or not they are employees of the prime contractor, must be vetted.

Vetting official means the USAID employee identified in paragraph (d) of this clause as having responsibility for receiving vetting information, responding to questions about information to be included on the USAID Partner Information Form, USAID Form 500–13, coordinating with the USAID Office of Security, and conveying the vetting determination to each offeror, potential subcontractors subject to vetting, and to the contracting officer. The vetting official is not part of the contracting office and has no involvement in the source selection process.

(c) The Contractor must submit a USAID Partner Information Form, USAID Form 500–13, to the vetting official identified below during the contract when the Contractor replaces key individuals with individuals who have not been previously vetting for this contract. Note: USAID will not approve any key personnel who have not passed vetting.

(d) The designated vetting official is:

Vetting official:

_____

Address:

_____

_____

Email: _____ (for inquiries only)

(e)(1) The vetting official will notify the Contractor that it—

(i) Has passed vetting,

(ii) Has not passed vetting, or

(iii) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specifies.

(2) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(f) *Reconsideration.* (1) Within 7 calendar days after the date of the vetting official's notification, the contractor or prospective subcontractor that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(2) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the contractor's additional information warrants a revised decision.

(3) The Agency's determination of whether reconsideration is warranted is final.

(g) A notification that the Contractor has passed vetting does not constitute any other approval under this contract.

(h) When the contractor anticipates awarding a subcontract for which consent is required under FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the vetting official identified in paragraph (d) of this clause. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(i) The contractor agrees to incorporate the substance of paragraphs (a) through (g) of this clause in all subcontracts under this contract.

(End of clause)

Alternate I (FEB 2012). As prescribed in 704.7005(b)(2), substitute paragraphs (h) and (i) below for paragraphs (h) and (i) of the basic clause:

(h)(1) When the contractor anticipates awarding a subcontract for which consent is required under FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the vetting official identified in paragraph (d) of this clause. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(2) In addition, prospective subcontractors at any tier providing the following classes of items (supplies and services):

_____

_____

_____

must pass vetting. Contractors must not place subcontracts for these classes of items until they receive confirmation from the vetting official that the prospective subcontractor has passed vetting.

(i) The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.

■ 9. Amend Part 752 by adding section 752.216–71 to subpart 752.2 to read as follows:

752.216–71 Partner vetting in indefinite delivery contracts.

As prescribed in (48 CFR) AIDAR 716.506(b)(1), insert the following clause in all indefinite-delivery contracts subject to vetting:

PARTNER VETTING IN INDEFINITE DELIVERY CONTRACTS (FEB 2012)

(a) The contractor must comply with the vetting requirements for key individuals under this contract and in any orders that are identified as subject to vetting.

(b) Definitions. As used in this provision—

Key individual means:

(i) Principal officers of the organization's governing body (e.g., chairman, vice chairman, treasurer and secretary of the board of directors or board of trustees);

(ii) The principal officer and deputy principal officer of the organization (e.g.,

executive director, deputy director, president, vice president);

(iii) The program manager or chief of party for the USG-financed program; and

(iv) Any other person with significant responsibilities for administration of the USG-financed activities or resources, such as key personnel as described in Automated Directives System Chapter 302. Key personnel, whether or not they are employees of the prime contractor, must be vetted.

Vetting official means the USAID employee identified in paragraph (d) of this clause as having responsibility for receiving vetting information, responding to questions about information to be included on the USAID Partner Information Form, USAID Form 500–13, coordinating with the USAID Office of Security, and conveying the vetting determination to each contractor, potential subcontractors subject to vetting, and to the cognizant contracting officer. The vetting official is not part of the contracting office and has no involvement in the source selection process.

(c) The contractor must submit a USAID Partner Information Form, USAID Form 500–13 to the designated vetting official:

(1) when the contractor replaces key individuals under the basic contract with individuals who have not been previously vetted.

(2) when the contractor replaces key individuals under an order subject to vetting with individuals who have not been previously vetted. For changes to any key individuals associated with both the basic contract and any orders subject to vetting, the contractor must submit updated vetting forms to each designated vetting official. Note: USAID will not approve any key personnel who have not passed vetting.

(d)(1) The designated vetting official for the basic contract is:

Vetting official:

_____

Address:

_____

_____

Email: _____ (for inquiries only)

(2) Each order subject to vetting will identify the vetting official for that order. The contractor must submit vetting information specific to an order to the vetting official identified in that order.

(e)(1) The vetting official will notify the contractor that it—

(i) Has passed vetting,

(ii) Has not passed vetting, or

(iii) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specifies.

(2) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(f) *Reconsideration.* (1) Within 7 calendar days after the date of the vetting official's notification, the contractor or prospective subcontractor that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(2) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the contractor's additional information warrants a revised decision.

(3) The Agency's determination of whether reconsideration is warranted is final.

(g) A notification that the contractor has passed vetting does not constitute any other approval under this contract.

(h) The request for task or delivery order proposals will identify whether the order is subject to vetting. The following are the procedures for vetting orders under this contract. Note that the term ''awardee'' as used below refers to a contractor under multiple-award indefinite-delivery contracts, consistent with the use of the term in (48 CFR) FAR 16.505(b):

(1) The contracting officer will notify the awardees when to complete and submit the USAID Partner Information Form to the vetting official named in the request for order proposals. Note: Awardees who submit using non-secure methods of transmission do so at their own risk.

(2) The awardee must notify proposed subcontractors of this requirement when the subcontractors are subject to vetting.

(3) The fair opportunity process proceeds separately from vetting. Vetting is conducted independently from any discussions the contracting officer may have with an awardee. The awardee and any subcontractor subject to vetting must not provide vetting information to other than the vetting official identified in the request for order proposal. The awardee and any subcontractor subject to vetting will communicate only with the vetting official regarding their vetting submission(s) and not with any other USAID or USG personnel, including the contracting officer or his/her representatives.

(4)(i) The vetting official notifies the awardee that it:

(A) Has passed vetting,

(B) Has not passed vetting, or

(C) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specified in the notification.

(ii) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(5) *Reconsideration.* (i) Within 7 calendar days after the date of the vetting official's notification, an awardee that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(ii) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the contractor's additional information warrants a revised decision.

(iii) The Agency's determination of whether reconsideration is warranted is final.

(6) *Revisions to vetting information.* (i) Before the order is awarded, any awardee who changes key individuals, whether it has previously passed vetting or not, must submit a revised USAID Partner Information Form to the vetting official. This includes changes to key personnel resulting from revisions to the technical proposal.

(ii) The order vetting official will follow the vetting process in paragraph (e) of this clause for any revision of the awardee's Form.

(7) *Award of order.* The contracting officer may award an order subject to vetting only to an apparently successful awardee that has passed vetting for that order.

(i) When the contractor anticipates awarding a subcontract for which consent is required under FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the designated vetting official. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(j) The contractor agrees to incorporate the substance of paragraphs (a) through (g) of this clause in all subcontracts under this contract.

(End of clause)

Alternate I (FEB 2012). As prescribed in 716.506(b), substitute paragraphs (i) and (j) below for paragraphs (i) and (j) of the basic clause:

(i)(1) When the contractor anticipates awarding a subcontract for which consent is required under FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the designated vetting official. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(2) In addition, prospective subcontractors at any tier providing the following classes of items (supplies and services):

_____

_____

_____

must pass vetting. Contractors must not place subcontracts for these classes of items until they receive confirmation from the vetting official that the prospective subcontractor has passed vetting.

(j) The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.

Aman S. Djahanbani,

Senior Procurement Executive, US Agency For International Development.

[FR Doc. 2012–3239 Filed 2–13–12; 8:45 am]

BILLING CODE 6116–01–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Part 1511

[EPA–HQ–OARM–2010–0273; FRL–9630–4]

EPAAR Prescription for Work Assignments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA will amend the EPA Acquisition Regulation (EPAAR) prescription for the work assignment clause. This final rule provides revised language to the prescription for the work assignment clause, incorporating prescriptive language that provides further instructions on the use of the related clause.

DATES: This final rule is effective February 29, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OARM–2010–0273. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Office of Environmental (OEI) Information Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Donna S. Blanding, Policy, Training, and Oversight Division, Office of Acquisition Management (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202–564–1130; fax number: 202–565–2475; email address: *blanding.donna@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include firms that are performing or will perform under contract for the EPA. This includes firms in all industry groups.

II. Background

Recent contract file review activities revealed better guidance is needed for EPA Contracting Officers (COs) on the work plan and work assignment processes with regard to when a CO should provide the expected level of service needed to the contractor.

As a result, clarifying policy is being added to the prescription for 1511.011–74. Accordingly, the revised language incorporated into EPAAR prescription 1511.011–74 provides the EPA contracting officer with further instructions on the use of EPAAR clause 1552.211–74, when administering work assignments under Cost Reimbursable type term form contracts.

III. General Comments

One comment was received on June 6, 2011. The comment appears to be misplaced; it appears the commenter may have been attempting to address a different notice. The comment in reference to physician owned physical therapy practices is not relevant to this requirement. This rule focuses on the administration of work assignments under Cost Reimbursable contracts and not physical therapy practices. As a result, after in-depth review of this public comment, no changes will be made to this final rule.

IV. Final Rule

This rule amends the EPAAR to add policy to prescription 1511.011–74 for work assignments under clause 1552.211–74. The original prescription language generally states that the work assignment clause, 1552.211–74, shall be used when a Cost Reimbursable type term form contract with work assignments will be issued. This policy revision only adds additional instructive language. The new policy language contained under 1511.011–74, Work Assignments (Deviation), will serve to provide contracting officers with better guidance on issuing a work assignment. Therefore a revision will not be required to the related EPAAR clause, 1552.211–74 Work Assignments; as this change does not affect the meaning of the clause. The revised language communicates to contract personnel and program staff that government cost-related estimates should not be provided to contractors prior to receiving the contractor's work plan (proposal); and how to address exceptions. The exceptions addressed in the policy involve circumstances where a contracting officer may need to be able to provide some of the expected level of service needed to the contractor prior to receipt of the work plan (proposal) due to the nature of the work.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and EO 13563 (76 FR 3821, January 21, 2011). Therefore, no review is required by the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* No information is collected under this action.

C. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's final rule on small entities, ''small entity'' is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified 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 this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action revises a current EPAAR provision and does not impose requirements involving capital investment, implementing procedures, or record keeping. This rule will not have a significant economic impact on small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector.

This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

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 rule 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. Rather, this rule on work assignments only provides clarification to Contracting Officers when issuing level of effort estimates in a work assignment. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comments from State and local officials on this rule and no comments were received from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Goverments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. Rather, this rule on work assignments only provides clarification to Contracting Officers when issuing level of effort estimates in a work assignment. Thus, Executive Order 13175 does not apply to this action. EPA specifically solicited additional comment from tribal officials on this rule and no comments were received from tribal officials.

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

Executive Order 13045, entitled ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution of Use'' (66 FR 28335 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995 (NTTAA)

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

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

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

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rulemaking does not involve human health or environmental affects.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3).

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 48 CFR Part 1511

Environmental protection, Government procurement.

Dated: January 31, 2012.

John R. Bashista,

Director, Office of Acquisition Management.

Therefore, 48 CFR chapter 15 is amended as set forth below:

PART 1511—DESCRIBING AGENCY NEEDS

■ 1. The authority citation for part 1511 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 2. Revise section 1511.011–74 to read as follows:

1511.011–74 Work Assignments.

(a) *Policy.* When issuing work assignments, the independent government cost estimate shall not be released to the contractor. In most cases the Contracting Officer (CO) should authorize the contractor to expend only the estimated labor hours necessary to develop the work plan and to initiate preliminary tasks which must be performed before work plan approval can be made. However, in cases where the uncertainties involved in the effort are of such a magnitude that there is no reasonable expectation that the contractor can estimate the level of effort required by the tasks, objectives, or outcomes of the requirement, the CO may provide a ceiling level of effort for the entire work assignment at the time of its issuance. In such cases, the specific uncertainties precluding reasonable estimation of the required level of effort on the contractor's part must be documented in the contract file.

(b) *Solicitation Provision.* The CO shall insert the contract clause at 1552.211.74, Work Assignments, in cost-reimbursement type term form contracts when work assignments are used. For Superfund contracts, except for contracts which require annual conflict of interest certificates (e.g. Site Specific contracts, the Contract Laboratory Program (CLP), and Sample Management Office (SMO) contracts), the CO shall use the clause with either Alternate I or Alternate II. Alternate I shall be used for contractors who have at least three (3) years of records that may be searched for certification purposes. Alternate II shall be used for contractors who do not have at least three (3) years of records that may be searched.

[FR Doc. 2012–3292 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–02]

RIN 0648–XA987

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (18.3 meters) length overall using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the A season apportionment of the 2012 total allowable catch of Pacific cod to be harvested.

DATES: Effective February 8, 2012, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2012.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (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.

The A season apportionment of the 2012 Pacific cod total allowable catch (TAC) specified for vessels using jig gear in the BSAI is 1,958 metric tons (mt) for the period 2400 hrs, A.l.t., January 1, 2012, through 1200 hrs, A.l.t., April 30, 2012, as established by the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011) and inseason adjustment (76 FR 81875, December 29, 2011).

The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that jig vessels will not be able to harvest 1,800 mt of the A season apportionment of the 2012 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*1*). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions from 1,800 mt of Pacific cod from the A season jig gear apportionment to catcher vessels less than 60 feet (18.3 meters(m)) length overall (LOA) using hook-and-line or pot gear.

The harvest specifications for Pacific cod included in the final 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011) and inseason adjustment (76 FR 81875, December 29, 2011) are revised as follows: 158 mt for vessels using jig gear to the A season apportionments and 6,445 mt to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

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 reallocation of Pacific cod specified from jig vessels to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 8, 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 9, 2012.

James P. Burgess,

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

[FR Doc. 2012–3397 Filed 2–9–12; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–2]

RIN 0648–XA992

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Using Pot Gear in the Central 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 Central 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 Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 10, 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 Central Regulatory Area of the GOA is 7,538 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 Central Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 7,528 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 Central 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 Central 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 8, 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 9, 2012.

James P. Burgess,

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

[FR Doc. 2012–3399 Filed 2–9–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 30
Tuesday, February 14, 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 ENERGY

10 CFR Part 430

[Docket No. EERE–2010–BT–TP–0038]

Test Procedures for Central Air Conditioners and Heat Pumps: Public Meeting

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Department of Energy (DOE) is holding a public meeting to discuss methodologies and gather comments on testing residential central air conditioners and heat pumps designed to use hydrochlorofluorocarbon-22 (R–22) refrigerant.

DATES: DOE will hold a public meeting on Tuesday, February 14, 2012, from 3 p.m. to 5 p.m. in Washington, DC. Additionally, DOE plans to conduct the public meeting via webinar. To participate via webinar, participants must sign up by following the instructions in the Web site. Registration information, participant instructions, and information about the capabilities available to webinar participants will be published on the following Web site *https://www1.gotomeeting.com/register/141337089.* Participants are responsible for ensuring that their systems are compatible with the webinar software.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue SW., Washington, DC 20585–0121. To attend, please notify Ms. Brenda Edwards at (202) 586–2945. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the public meeting should advise DOE as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 to initiate the necessary procedures.

Docket: The docket is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents in the index may be publicly available, such as information that is exempt from public disclosure. A link to the docket web page can be found at *www.regulations.gov.* The *www.regulations.gov* web page contains a link to the docket for this notice, along with simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Phone: (202) 586–6590. Email: *Ashley.Armstrong@ee.doe.gov* or Elizabeth Kohl, U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue SW., Washington, DC 20585–0121. Phone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, including the residential central air conditioners and heat pumps that are single phase with rated cooling capacities less than 65,000 British thermal units per hour (Btu/h) that are the focus of this notice.[1] (42 U.S.C. 6291(1)–(2), (21) and 6292(a)(3))

Under EPCA, the program consists of four activities: (1) Testing; (2) labeling; and (3) Federal energy conservation standards, and also (4) certification, compliance, and enforcement. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for certifying to DOE that their products comply with applicable energy conservation standards adopted pursuant to EPCA and for representing the efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s)) Similarly, DOE must use these test procedures in any enforcement action to determine whether covered products comply with these energy conservation standards. (42 U.S.C. 6295(s))

DOE's existing test procedures for residential central air conditioners and heat pumps adopted pursuant to these provisions appear under Title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendix M (''Uniform Test Method for Measuring the Energy Consumption of Central Air Conditioners and Heat Pumps''). These procedures establish the currently permitted means for determining energy efficiency and annual energy consumption of these products.

DOE regulations require that residential split system central air conditioners and heat pumps be tested using ''the evaporator coil that is likely to have the largest volume of retail sales with the particular model of condensing unit.'' 10 CFR 430.24(m)(2). Effective January 1, 2010, the U.S. Environmental Protection Agency (EPA) banned the sale and distribution of those central air conditioning systems and heat pump systems manufactured after January 1, 2010, that are designed to use R–22 refrigerant. 74 FR 66450 (Dec. 15, 2009). EPA's rulemaking included an exception for the manufacture and importation of replacement components, as long as those components are not pre-charged with R–22. Id. at 66459–66460. In light of EPA's rulemaking, DOE received numerous inquiries regarding the sale of R–22 systems and the applicability of our regulations with respect to these types of systems.

Because complete R–22 systems can no longer be distributed per EPA's regulations, manufacturers inquired how to test and rate condensing units and outdoor units using R–22 refrigerant. DOE has issued two guidance documents surrounding testing central air conditioner and heat pump systems utilizing R–22 refrigerant. See *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1* for additional information. The Department is holding this public meeting and webinar to gather information on the testing of central air conditioners and heat pumps designed to use R–22. Among other things, DOE seeks

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

information on the characteristics of the coil-only indoor unit for testing and rating purposes to satisfy the requirement that the highest volume sales unit combination be tested. 10 CFR 429.16(a)(2)(ii).

DOE will conduct the public meeting in an informal, facilitated, conference style. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws. A court reporter will record the minutes of the meeting, after which a transcript will be available for purchase from the court reporter and placed on the DOE Web site.

Anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about wine chillers and miscellaneous refrigeration products should contact Ms. Brenda Edwards at (202) 586–2945.

Issued in Washington, DC, on February 7, 2012.

Kathleen Hogan,

Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2012–3375 Filed 2–13–12; 8:45 am]

BILLING CODE 6450–01–P

FARM CREDIT ADMINISTRATION

12 CFR Part 630

RIN 3052–AC77

Disclosure to Investors in System-wide and Consolidated Bank Debt Obligations of the Farm Credit System

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA, us, we, or our) proposes to amend our regulations related to the Federal Farm Credit Banks Funding Corporation (Funding Corporation) System Audit Committee (SAC) and the Farm Credit System (System) annual report to investors. The proposed rule would remove the provision that a two-thirds majority vote of the Funding Corporation board of directors be required to deny a request for resources by the SAC to engage independent legal counsel, outside advisors or consultants. The proposed rule would instead require appropriate funding to the SAC to perform these duties, quarterly reporting by the SAC to the Funding Corporation board on resources used, and annual reporting to investors.

DATES: Submit comments on or before April 16, 2012.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by email or through the FCA's Web site. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we no longer accept comments submitted by fax. Regardless of the method you use, please do not submit your comments multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send an email to *reg-comm@fca.gov.*
- *FCA Web site: http://www.fca.gov.* Select ''Public Commenters,'' then ''Public Comments,'' and follow the directions for ''Submitting a Comment.''
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of all comments we receive at our office in McLean, Virginia or on our Web site at *http://www.fca.gov.* Once you are in the Web site, select ''Public Commenters,'' then ''Public Comments,'' and follow the directions for ''Reading Submitted Public Comments.'' We will show your comments as submitted, including any supporting data provided, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce Internet spam.

FOR FURTHER INFORMATION CONTACT: Deborah Wilson, Senior Accountant, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4414, TTY (703) 883–4434, or Laura McFarland, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of this proposed rule are to:

- Allow the SAC unrestricted access to resources to engage legal counsel, consultants and outside advisors,
- Ensure that investors are provided transparent and complete disclosure on the safe and sound use of resources by the SAC, and
- Clarify that the appointment, compensation, and retention of the external auditor for the System-wide reports cannot be changed without the agreement of both the SAC and the Funding Corporation board.

II. Background

The Farm Credit Act of 1971, as amended (Act),[1] authorizes the FCA to issue regulations implementing the Act's provisions.[2] Our regulations are intended to ensure the safe and sound operations of System institutions and to govern the disclosure of financial information to shareholders of, and investors in, the System. In 2006, we issued a final rulemaking on the governance of System institutions.[3] Those regulations changed the structure, responsibilities, and authority of existing audit committees at the banks and the SAC, and it required audit committees at System associations.

We explained in our 2006 rulemaking that an audit committee is the guardian of an institution's financial integrity, and its independence is essential to investor confidence in the transparency of audited financial statements. The 2006 rulemaking required that audit committees at banks and associations be comprised solely of well-qualified board members,[4] but made an exception to the composition of the SAC. Section 630.6(a) requires that only one-third of the SAC membership be composed of directors from the Funding Corporation board. This exception was in response to comments received on the 2006 rulemaking that audit committee composition derived solely from the board of directors may be appropriate for individual System institutions, but not for the SAC. Commenters believed that the duties of the SAC require broader representation and greater financial experience of its members due to its oversight for the preparation of System combined financial statements.

The 2006 rulemaking required that the SAC be permitted to contract for independent legal counsel and expert advisers and that the Funding Corporation provide monetary and nonmonetary resources for these activities. Also, the rulemaking required

[1] Public Law 92–181, 85 Stat. 583 (1971), 12 U.S.C. 2001 *et seq.*

[2] 12 U.S.C. 2252(a)(8), (9) and (10).

[3] 71 FR 5740 (Feb. 2, 2006).

[4] Section 620.6 of the FCA's regulations states, ''[e]ach member of an audit committee must be a member of the Farm Credit institution's board of directors * * * All committee members should be knowledgeable in at least one of the following: public and corporate finance, financial reporting and disclosure, or accounting procedures.''

a two-thirds super majority vote, in lieu of a simple majority vote, of the full Funding Corporation board to deny an SAC request for resources. In a petition dated May 2010, the SAC requested that we amend § 630.6 to allow it unfettered ability to engage outside advisors, consultants and legal counsel in the performance of its duties. On November 18, 2010, we issued an advance notice of proposed rulemaking (ANPRM) on senior officer compensation disclosures and related topics in order to gather information for the development of a proposed rulemaking.[5] Part of the ANPRM discussed the authority of the SAC to obtain resources. Among the comment letters received in response to the ANPRM, several responders, including the Farm Credit Council (Council) acting for its membership, and the Funding Corporation, addressed the ability of the SAC to have unfettered ability to access resources. The Council expressed the view of its membership that existing FCA regulations appropriately balance audit committee need with the board's ultimate responsibility to the customer-shareholder for the safety and financial stability of the institution. However, the Council also noted that its membership supported the SAC's request.

This proposed rule would expand the authority of the SAC related to its use of Funding Corporation resources for consultants, legal counsel and outside advisors. In its petition, the SAC asserted that expanding its authority on the use of resources would:

- Avoid any future potential conflict that could arise between it and the Funding Corporation board on SAC requests for resources,
- Enhance its independence, and
- Promote the integrity of the System both in fact and perception to investors in System-wide debt securities.

We considered these views in proposing this rule. The rule proposes that the SAC report to the board at least quarterly on its use of resources, and the Funding Corporation disclose the uses and their benefits in the System annual report to investors. Further, we propose to clarify that the SAC appoint, compensate, retain and oversee the System's independent accountants with the agreement of the Funding Corporation board.

III. Section-by-Section Analysis

We request and encourage any interested person to submit comments on this proposed rule and ask that you support your comments with relevant data or examples. We are especially interested in receiving comments related to the proposed clarification that the SAC appoint, compensate, and retain external auditors with the agreement of the Funding Corporation board of directors.

A. System Audit Committee Authority [§ 630.6(a)]

FCA regulations authorize the Funding Corporation board of directors to deny an SAC request for resources by a two-thirds majority vote of the full board. The proposed rule would provide the SAC with the unlimited ability to engage outside advisors, consultants and legal counsel in the performance of its duties. This proposed rule would require that the SAC use Funding Corporation resources in a manner that would not adversely affect the safety and soundness of the System and that the use of resources complies with law and regulation. Also, it would require that the SAC report to the Funding Corporation board at least quarterly on resources used pursuant to this proposed rule.

This provision would not prevent the Funding Corporation from developing its own procedures to address the use of resources by the SAC. To facilitate an open and balanced discussion on the appropriate use of resources, we would expect the SAC to confer with the Funding Corporation board on its intent to use resources. We would also expect that in performing its fiduciary responsibilities, the full board would review the use of resources for any safety or soundness issues.

B. External Auditors [§ 630.6(a)(4)(ii)(A)]

The proposed rule would revise our regulation relating to the appointment, compensation and retention of the external auditor. The revision would clarify that the SAC perform this duty with the agreement of the Funding Corporation board. We believe this clarification will ensure that the SAC's appointment, compensation and retention of the external auditor for the System-wide report are executed with the agreement of the full board of the Funding Corporation. Since the SAC is a subset of the full board, we believe the SAC duties related to the external auditors are of such significance that they must remain under the direct oversight of the full board.

C. Disclosure of System Audit Committee Expenditures [§ 630.20(n)]

To ensure that investors are provided transparent and complete disclosure on the safe and sound use of resources by the SAC, we propose in § 630.20(n) that Funding Corporation resources used by the SAC be disclosed by category in the annual report to investors. The proposed categories would include, at a minimum, independent legal counsel and related services, consultants, actuaries, outside advisors and other services performed on behalf of the SAC. We propose that fees paid for the audit of the combined System-wide financial statements and any fees under $5,000 per category need not be disclosed. In addition to disclosing the name of SAC members, we propose that experience and compensation for each member be included in the annual report. We propose this change for consistency with audit committee disclosures required at the bank and association level.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, Farm Credit System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 630

Accounting, Agriculture, Banks, banking, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, part 630 of chapter VI, title 12 of the Code of Federal Regulations are proposed to be amended as follows:

PART 630—DISCLOSURE TO INVESTORS IN SYSTEM–WIDE AND CONSOLIDATED BANK DEBT OBLIGATIONS OF THE FARM CREDIT SYSTEM

1. The authority citation for part 630 is revised to read as follows:

Authority: Secs. 4.2, 4.9, 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2153, 2160, 2243, 2252, 2254); sec. 424 of Pub. L. 100–233, 101 Stat. 1568, 1656; sec. 514 of Pub. L. 102–552, 106 Stat. 4102.

Subpart A—General

2. Section 630.6 is amended by revising paragraphs (a)(3) and (a)(4)(ii)(A) to read as follows:

[5] 75 FR 70619 (Nov. 18, 2010).

§ 630.6 Funding Corporation committees.

(a) *System Audit Committee.* * * *

* * * * *

(3) *Resources.* The Funding Corporation must provide the SAC monetary and nonmonetary resources the SAC determines necessary to enable it to perform the duties listed in paragraph (a)(4) of this section. The Funding Corporation must permit the SAC to contract, for reasons directly related to the duties listed in paragraph (a)(4), the services of external auditors, independent legal counsel, and outside advisors. The SAC must not use the resources of the Funding Corporation in a manner that would adversely affect the safety and soundness of the System or be contrary to law and regulation. The SAC must provide the Funding Corporation board of directors a quarterly accounting of expenditures made pursuant to this section.

(4) *Duties.* * * *

* * * * *

(ii) *External auditors.* The external auditor must report directly to the SAC. The SAC must:

(A) Determine, with the agreement of the Funding Corporation board of directors, the appointment, compensation, and retention of the external auditors issuing System-wide audit reports;

* * * * *

Subpart B—Annual Report to Investors

3. Section 630.20 is amended by revising paragraph (n) to read as follows:

§ 630.20 Contents of the annual report to investors.

* * * * *

(n) *System Audit Committee.* The Funding Corporation must include in the System-wide Report to Investors a description of the System Audit Committee and its activities during the reporting period. At a minimum, the report must:

(1) List the names of the System Audit Committee members, including each member's term of office and principal occupation during the past 5 years. For each member, state the total cash and noncash compensation paid for services on the System Audit Committee during the reporting period.

(2) Categorize and disclose the dollar value of monetary and nonmonetary resources used by the System Audit Committee during the reporting period. Describe the benefit(s) obtained from expenditures made under each category. Disclosures of fees paid for the audit of the System-wide financial statements and those categories of expenses having an annual aggregate dollar value of less than $5,000 are not required. At a minimum, there must be separate categories for:

(i) Administrative expenses,

(ii) Contracted legal services,

(iii) Contracted consultants and advisors, and

(iv) Other contracted services, identifying the services.

* * * * *

Dated: February 9, 2012.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2012–3411 Filed 2–13–12; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0141; Directorate Identifier 2011–NM–092–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes. This proposed AD was prompted by an in-flight failure of the hydraulic control panel, which resulted in the absence of pressure and quantity indication of the hydraulic system and accompanying alerts for ''hydraulic system 1 low quantity'' and ''hydraulic system 2 low quantity.'' This proposed AD would require implementing new abnormal procedures for hydraulics in the airplane flight manual (AFM). We are proposing this AD to prevent loss of control of the airplane due to incorrect hydraulic system failure information being provided to the flightcrew, followed by application of inappropriate procedures.

DATES: We must receive comments on this proposed AD by March 30, 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 Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252–627–350; fax +31 (0)252–627–211; email *technicalservices.fokkerservices@stork.com;* Internet *http://www.myfokkerfleet.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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0141; Directorate Identifier 2011–NM–092–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0051, dated March 22, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> An in-flight failure of the hydraulic control panel resulted in the absence of pressure and quantity indication of the hydraulic system and accompanying alerts for ''hydraulic system 1 low quantity'' and ''hydraulic system 2 low quantity''. The procedures prescribed the shut-off of the engine driven hydraulic pumps, resulting in complete absence of hydraulic pressure, which made it impossible to hydraulically control the flight controls, including the stabiliser. The status information contained in the procedures for these alerts may give the false impression that the stabiliser is still hydraulically controllable on one channel. The flight crew regained control by using the alternate electrically powered stabiliser control.
>
> A safety review revealed that a ''hydraulic system 1 and 2 low quantity'' alert could give the right information, however this alert is not available in the Flight Warning System. To solve this problem, Fokker Services improved the Hydraulic 1(2) Low Quantity Procedures in the Airplane Flight Manual (AFM).
>
> For the reasons described above, this [EASA] AD requires the implementation of new abnormal procedures for hydraulics in the AFM.

The unsafe condition is possible loss of control of the airplane due to incorrect hydraulic system failure information being provided to the flightcrew, followed by application of inappropriate procedures. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Fokker Services B.V. has issued Manual Change Notification—Operational Documentation MCNO F100–057, dated December 17, 2010. 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 4 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the 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 $340, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Fokker Services B.V.: Docket No. FAA–2012–0141; Directorate Identifier 2011–NM–092–AD.

(a) Comments Due Date

We must receive comments by March 30, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 29: Hydraulic power.

(e) Reason

This AD was prompted by an in-flight failure of the hydraulic control panel, which resulted in the absence of pressure and quantity indication of the hydraulic system and accompanying alerts for ''hydraulic system 1 low quantity'' and ''hydraulic system 2 low quantity.'' This proposed AD would require implementing new abnormal procedures for hydraulics in the airplane flight manual (AFM). We are issuing this AD to prevent loss of control of the airplane due to incorrect hydraulic system failure information being provided to the flightcrew, followed by application of inappropriate procedures.

(f) Compliance

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

(g) Airplane Flight Manual (AFM) Revision

Within 3 months after the effective date of this AD, revise the Abnormal Procedures—Hydraulics section of the Fokker F.28 AFM by incorporating the information specified in Fokker Manual Change Notification—Operational Documentation (MCNO) MCNO–

F100–057, dated December 17, 2010, into the Abnormal Procedures—Hydraulics section of the AFM.

Note 1 to paragraph (g): The actions required by paragraph (g) of this AD may be done by inserting a copy of MCNO Fokker MCNO–F100–057, dated December 17, 2010, into the Abnormal Procedures—Hydraulics section of the Fokker F.28 AFM. When MCNO Fokker MCNO–F100–057, dated December 17, 2010, has been included in the general revisions of the AFM, the general revisions may be inserted in the AFM, provided the relevant information in the general revision is identical to that in MCNO Fokker MCNO–F100–057, dated December 17, 2010, and that MCNO may be removed.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(i) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2011–0051, dated March 22, 2011; and MCNO Fokker MCNO-F100-057, dated December 17, 2010; for related information.

Issued in Renton, Washington on February 7, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–3387 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–13–P

RAILROAD RETIREMENT BOARD

20 CFR Parts 200, 320, and 345

RIN 3220—AB65

Restructuring of the Office of Programs; Elimination of Regional Offices

AGENCY: Railroad Retirement Board.

ACTION: Proposed rule.

SUMMARY: The Railroad Retirement Board (Board) proposes to amend its regulations to reflect the restructuring of the Office of Programs and the elimination of the Regional Offices.

DATES: Submit comments on or before April 16, 2012.

ADDRESSES: Address any comments concerning this proposed rule to Martha P. Rico, Secretary to the Board, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092.

FOR FURTHER INFORMATION CONTACT: Marguerite P. Dadabo, Assistant General Counsel, (312) 751–4945, TTD (312) 751–4701.

SUPPLEMENTARY INFORMATION: The Railroad Retirement Board has restructured its Office of Assessment and Training in a Board-approved reorganization plan. The Office of Assessment and Training, formerly a single component of the Office of Programs, is now intermingled with other subcomponents of the Office of Programs. Therefore, issues that were formerly under the jurisdiction of the Office of Programs/Assessment and Training are now under the jurisdiction of the Office of Programs/Policy and Systems for purposes of the following regulations.

Additionally, the Railroad Retirement Board underwent a reorganization of its regional offices in an effort to improve efficiency and eliminate duplication. As a result of this reorganization, the Railroad Retirement Board eliminated its Regional Offices in Atlanta, Georgia, Denver, Colorado, and Philadelphia, Pennsylvania. The work done by the Regional Offices is now handled by the Field Services Headquarters staff.

The Board, with the concurrence of the Office of Management and Budget, has determined that this is not a significant regulatory action under Executive Order 12866, as amended. Therefore, no regulatory impact analysis is required. There are no changes to the information collections associated with Parts 200, 320 and 345.

List of Subjects in 20 CFR Parts 200, 320, and 345

Railroad employees, Railroad employers, Railroad retirement, Railroad unemployment.

For the reasons set out in the preamble, the Railroad Retirement Board proposes to amend title 20, chapter II, subchapter A, part 200 and subchapter C, parts 320 and 345 of the Code of Federal Regulations as follows:

PART 200—GENERAL ADMINISTRATION

1. The authority citation for part 200 continues to read as follows:

Authority: 45 U.S.C. 231f(b)(5) and 45 U.S.C. 362; 200.4 also issued under 5 U.S.C. 552; 200.5 also issued under 5 U.S.C. 552a; 200.6 also issued under 5 U.S.C. 552b; and 200.7 also issued under 31 U.S.C. 3717.

2. In § 200.1, paragraph (a)(4) is revised to read as follows:

§ 200.1 Designation of central and field organization.

(a) * * *

(4) The headquarters of the Board is in Chicago, Illinois, at 844 North Rush Street. The Board maintains numerous district offices across the country in localities easily accessible to large numbers of railroad workers.

* * * * *

3. In § 200.4, paragraphs (d)(1), (d)(2), and (d)(5) are revised to read as follows:

§ 200.4 Availability of information to the public.

* * * * *

(d) * * *

(1) In the Office of Programs/Operations: The Retirement Claims Manual, RCM Circulars, Special Services Manual, Policy Decisions, Procedural Memoranda containing information on the adjudication of claims not contained in the Retirement Claims Manual or in RCM Circulars, Field Operating Manual (Parts I and VI), FOM Circulars and Memoranda, the Occupational Disability Rating Schedule, Adjudication Instruction Manual, memorandum instructions on adjudication, and circular letters of instruction to railroad officials.

(2) In the Office of Programs/Policy and Systems: The Instructions to Employers, and Circular Letters to Employers.

* * * * *

(5) Field offices shall also make available to the extent practicable such of these materials and indexes as are furnished them in the ordinary course of business.

* * * * *

PART 320—INITIAL DETERMINATIONS UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT AND REVIEWS OF AND APPEALS FROM SUCH DETERMINATIONS

4. The authority citation for part 320 continues to read as follows:

Authority: 45 U.S.C. 355 and 362(1).

5. In § 320.6, paragraph (c) introductory text is revised to read as follows:

§ 320.6 Adjudicating office.

* * * * *

(c) *Field Service-Headquarters.* Field Service-Headquarters staff are authorized to make determinations on any of the issues listed in paragraph (b) of this section. In addition, Field Service-Headquarters staff are authorized to make initial determinations on the following issues:

* * * * *

6. In § 320.10, paragraph (c) is revised to read as follows:

§ 320.10 Reconsideration of initial determination.

* * * * *

(c) *Notice of decision.* The adjudicating office shall, as soon as possible, render a decision on the request for reconsideration. If a decision rendered by a district office, as the adjudicating office, sustains the initial determination, either in whole or in part, the decision shall be referred to the appropriate Field Service-Headquarters staff for review prior to issuance. The party who requested reconsideration shall be notified, in writing, of the decision on reconsideration no later than 15 days from the date of the decision or, where the Field Service-Headquarters staff has conducted a review of the decision, within 7 days following the completion of the review. If the decision results in denial of benefits, the claimant shall be notified of the right to appeal as provided in § 320.12 of this part. If the decision results in payment of benefits, the base-year employer(s) shall be notified of the right to appeal as provided in § 320.12 of this part.

* * * * *

PART 345—EMPLOYERS' CONTRIBUTIONS AND CONTRIBUTION REPORTS

7. The authority citation for part 345 continues to read as follows:

Authority: 45 U.S.C. 362(1).

8. Revise § 345.202 to read as follows:

§ 345.202 Consolidated employer records.

(a) *Establishing a consolidated employer record.* Two or more employers that are under common ownership or control may request the Board to consolidate their individual employer records into a joint individual employer record. Such joint individual employer record shall be treated as though it were a single employer record. A request for such consolidation shall be made to the Director of Policy and Systems, and such consolidation shall be effective commencing with the calendar year following the year of the request.

(b) *Discontinuance of a consolidated employer record.* Two or more employers that have established and maintained a consolidated employer record will be permitted to discontinue such consolidated record only if the individual employers agree to an allocation of the consolidated employer record and such allocation is approved by the Director of Policy and Systems. The discontinuance of the consolidated record shall be effective commencing with the calendar year following the year of the Director of Policy and Systems' approval.

9. In § 345.307 paragraphs (a) and (b) are revised to read as follows:

§ 345.307 Rate protest.

(a) *Request for reconsideration.* An employer may appeal a determination of a contribution rate computed under this part by filing a request for reconsideration with the Director of Policy and Systems within 90 days after the date on which the Board notified the employer of its rate of contribution for the next ensuing calendar year. Within 45 days of the receipt of a request for reconsideration, the Director shall issue a decision on the protest.

(b) *Appeal to the Board.* An employer aggrieved by the decision of the Director of Policy and Systems under paragraph (a) of this section may appeal to the Board. Such appeal shall be filed with the Secretary to the Board within 30 days after the date on which the Director notified the employer of the decision on reconsideration. The Board may decide such appeal without a hearing or, in its discretion, may refer the matter to a hearings officer pursuant to part 319 of this chapter.

* * * * *

Dated: February 1, 2012.

By Authority of the Board.

Martha P. Rico, for the Board,

Secretary to the Board.

[FR Doc. 2012–2808 Filed 2–13–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–132736–11]

RIN 1545–BK49

Foreign Tax Credit Splitting Events

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section in this issue of the **Federal Register,** the IRS is issuing temporary regulations that provide guidance relating to a new provision of the Internal Revenue Code (Code) that addresses situations in which foreign income taxes have been separated from the related income. Those regulations are necessary to provide guidance on applying the new statutory provision, which was enacted as part of legislation commonly referred to as the Education Jobs and Medicaid Assistance Act (EJMAA) on August 10, 2010. The text of those temporary regulations published in this issue of the **Federal Register** also serves as the text of these proposed regulations.

DATES: Comments and requests for a public hearing must be received by May 14, 2012.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–132736–11), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–132736–11), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20044, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–132736–11).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Suzanne M. Walsh, (202) 622–3850; concerning submissions of comments, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** contain amendments to the Income Tax Regulations (26 CFR part 1) which

provide rules relating to a new provision of the Code that was enacted as part of EJMAA (Pub. L. 111–226, 124 Stat. 2389 (2010)) which addresses situations in which foreign income taxes have been separated from the related income. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations. The regulations affect taxpayers claiming foreign tax credits.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

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

Drafting Information

The principal author of these regulations is Suzanne M. Walsh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.704–1 is amended as follows:

1. Paragraph (b)(1)(ii)(*b*)(*3*) is added.

2. Paragraph (b)(4)(viii)(*d*)(*3*) and paragraph (b)(5) *Example 24* are revised.

The addition and revisions read as follows:

§ 1.704–1 Partner's distributive share.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(*b*) * * *

(*3*) [The text of the proposed amendments to § 1.704–1(b)(1)(ii)(*b*)(*3*) is the same as the text of § 1.704–1T(b)(1)(ii)(*b*)(*3*) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(4) * * *

(viii) * * *

(*d*) * * *

(*3*) [The text of the proposed amendments to § 1.704–1(b)(4)(viii)(*d*)(*3*) is the same as the text of § 1.704–1T(b)(4)(viii)(*d*)(*3*) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(5) * * *

Example 24. [The text of the proposed amendments to § 1.704–1(b)(5) *Example 24* is the same as the text of §§ 1.704–1T(b)(5) *Example 24* published elsewhere in this issue of the **Federal Register.**]

* * * * *

Par. 3. Section 1.909–0 is added to read as follows:

§ 1.909–0 Outline of regulation provisions for section 909.

[The text of proposed § 1.909–0 is the same as the text of § 1.909–0T published elsewhere in this issue of the **Federal Register.**]

Par. 4. Sections 1.909–1 through 1.909–6 are added to read as follows:

§ 1.909–1 Definitions and special rules.

[The text of proposed § 1.909–1 is the same as the text of § 1.909–1T(a) through (e) published elsewhere in this issue of the **Federal Register.**]

§ 1.909–2 Splitter arrangements.

[The text of proposed § 1.909–2 is the same as the text of § 1.909–2T(a) through (c) published elsewhere in this issue of the **Federal Register.**]

§ 1.909–3 Rules regarding related income and split taxes.

[The text of proposed § 1.909–3 is the same as the text of § 1.909–3T(a) through (c) published elsewhere in this issue of the **Federal Register.**]

§ 1.909–4 Coordination rules.

[The text of proposed § 1.909–4 is the same as the text of § 1.909–4T(a) through (b) published elsewhere in this issue of the **Federal Register.**]

§ 1.909–5 2011 and 2012 Splitter arrangements.

[The text of proposed § 1.909–5 is the same as the text of § 1.909–5T(a) through (c) published elsewhere in this issue of the **Federal Register**.]

§ 1.909–6 Pre-2011 foreign tax credit splitting events.

[The text of proposed § 1.909–6 is the same as the text of § 1.909–6T(a) through (h) published elsewhere in this issue of the **Federal Register**.]

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–3350 Filed 2–9–12; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

[SATS No. OH–252–FOR; Docket ID OSM 2011–0003]

Ohio Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; reopening of the public comment period and opportunity for public hearing on the proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the Ohio regulatory program (the ''Ohio program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and reopening the public comment period. The comment period is being reopened to incorporate changes that Ohio made to its initial amendment submission of 2007 regarding Ohio's alternative bonding

system. We did not make a decision on that submission since Ohio planned to submit additional revisions in response to OSM's review of the submission. The comment period is being reopened to incorporate recent amendment submissions, which consist of changes in response to OSM's concerns and other changes that Ohio made at its own initiative. Taken together, the revised amendment includes legislative and regulatory actions regarding subjects such as bond program changes, AML provisions, program funding, permitting standards, valid existing rights, re-mining, blasting, and topsoil handling. It also includes two actuarial reports on Ohio's bonding program and letters to Ohio's Governor from the Reclamation Forfeiture Fund Advisory Board of Ohio with recommendations regarding these reports.

This document gives the times and locations that the Ohio submittal is available for your inspection, the comment period during which you may submit written comments, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments until 4 p.m., local time March 15, 2012. If requested, we will hold a public hearing on March 12, 2012. We will accept requests to speak until 4 p.m., local time on February 29, 2012.

ADDRESSES: You may submit comments, identified by ''OH–252–FOR; Docket ID: OSM–2011–0003 by either of the following two methods:

Federal eRulemaking Portal: www.regulations.gov. The proposed rule has been assigned Docket ID: OSM–2011–0003. If you would like to submit comments through the Federal eRulemaking Portal, go to *www.regulations.gov* and follow the instructions.

Mail/Hand Delivery/Courier: Mr. Ben Owens, Acting Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 4605 Morse Rd., Room 102, Columbus, Ohio 43230.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: In addition to obtaining a copy of the submission letter at *www.regulations.gov,* information may also be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Pittsburgh Field Division Office.

Ben Owens, Acting Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 4605 Morse Rd., Room 102, Columbus, OH 43230, Telephone: (614) 416–2238, Email: *bowens@osmre.gov.*

Lanny Erdos, Chief, Division of Mineral Resources Management, Ohio Department of Natural Resources, 2045 Morse Rd., Building H–2, Columbus, OH 43229, Telephone: (614) 265–6888; Email: *Lanny.Erdos@dnr.state.oh.us.*

FOR FURTHER INFORMATION CONTACT: Ben Owens, Telephone: (614) 416–2238. Email: *bowens@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program
II. Description of the Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Ohio Program

Section 503(a) of the Act permits a state to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a state law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior approved the Ohio program on August 16, 1982.

You can find background information on the Ohio program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Ohio program in the August 16, 1982, **Federal Register** (41 FR 34688). You can also find later actions concerning the Ohio program and program amendments at 30 CFR 935.11, 935.12, 935.15, and 935.16.

II. Description of the Amendment

Initial Submission: By letter dated March 6, 2007, Ohio sent us an amendment to its program (Administrative Record Number OH–2185–28), known by Ohio as Program Amendment No. 82. The amendment was intended primarily to satisfy a program condition codified in the Federal regulations at 30 CFR 935.11(h). It was in response to our letter of May 4, 2005, issued under provisions of 30 CFR 733.12(b). The program condition and the 733 letter provided that Ohio submit a program amendment that demonstrates how the alternative bonding system will assure timely reclamation at the site of all operations for which bond has been forfeited. We announced the receipt of this amendment in the April 30, 2007, **Federal Register** (72 FR 21176).

The submission was a result of the adoption of Ohio House Bill 443 in 2007, which was intended to address many of the issues of concern to OSM relative to Ohio's alternative bonding system. The submission involved legislative action resulting in changes to the Ohio Revised Code (ORC) regarding the state's alternative bonding system, funding for its regulatory and abandoned mine land programs, permitting procedures for determining the potential for acid mine drainage, and rulemaking if Ohio becomes covered by a state programmatic general permit issued by the U.S. Army Corps of Engineers for the discharge of dredged or fill material into waters of the United States by coal mining operations. The submission included: Ohio House Bill 443 as signed into law; a Summary of Coal Mining Provisions of House Bill 443 prepared by the Ohio Division of Mineral Resources Management (DMRM); Program Amendment No. 82 request; revisions to the Ohio Bonding Program; Explanation of Proposed Bond Pool Revisions; and an Analysis of the impacts of House Bill 443 upon DMRM revenues.

OSM conducted a review of the submission and documented its findings in a letter to Ohio dated July 26, 2007 (Administrative Record No. OH–2185–36). In that letter, OSM identified 24 issues that required additional clarification or a description of necessary rulemaking before OSM could provide the analysis necessary to make a decision on the adequacy of the amendment provisions in meeting SMCRA requirements. These issues would require additional legislative changes, rulemaking, procedure development, and completion of an actuarial study, followed by a revised program amendment. For these reasons, OSM deferred deciding on the submission until Ohio submitted additional information. The following actions occurred subsequent to the initial submission:

Establishment of Workgroups:

Ohio acknowledged that significant amendments to the Ohio Administrative Code (OAC) would be needed to ensure that the final program amendment, in whole, was consistent with the relevant Federal regulations. Ohio chartered several workgroups made up of internal

and external stakeholders to develop final procedures that would be issued as a basis for writing new and revising existing regulations under the Ohio Administrative Code (OAC) to implement the provisions of HB 443. The workgroups' efforts resulted in development of procedures affecting such matters as acid-base accounting, reclamation cost estimates, performance security release/approval, tax credits, and others as described in some of the following paragraphs.

OSM/State Communications:

OSM met with Ohio on August 22, 2007 (Administrative Record No. OH–2185–37), and on August 27, 2007 (Administrative Record No. OH–2185–38), to discuss the issues and Ohio's plans to address them. Ohio responded to OSM's July 26, 2007, letter on October 15, 2007 (Administrative Record No. OH–2185–39) requesting an extension of time until January 18, 2008, to respond to OSM's issues. OSM responded on November 6, 2007 (Administrative Record No. OH–2185–40), granting Ohio's request for an extension. Ohio provided a detailed response to OSM's issues on January 18, 2008 (Administrative Record No. OH–2185–41). Their response included Ohio's expectation that discussion with the mining industry regarding needed statutory changes would continue and regulations would be adopted by December 2009. By letter dated July 3, 2008 (Administrative Record No. OH–2185–42), Ohio responded to concerns that OSM identified regarding changes to program funding and described a new revenue source. By letter dated January 9, 2009, OSM responded (Administrative Record No. OH–2185–44) to Ohio's letter of January 18, 2008. In this letter OSM reiterated some of the major concerns with the amendment and acknowledged Ohio's letter of July 3, 2008, regarding program funding concerns. OSM met with Ohio on January 29, 2009 (Administrative Record No. OH–2185–45), to discuss OSM's January 9, 2009, letter and Ohio's progress with additional program changes in response to OSM's issues. Ohio responded to OSM's letter of January 9, 2009, by letter dated April 17, 2009 (Administrative Record No. OH–2185–46), that described statutory changes that had occurred or would occur to address the major concerns OSM identified.

Ohio provided OSM with a copy of a letter from Pinnacle Actuarial Resources to the Chair of the Ohio Reclamation Forfeiture Advisory Board dated June 22, 2009, that included a report entitled ''Analysis of the Ohio Reclamation Forfeiture Fund.'' This actuarial analysis provided information and recommendations regarding the fiscal condition of Ohio's performance security pool (Administrative Record No. OH–2185–47). The Board forwarded this report, along with recommendations resulting from the report, to the Governor of Ohio by letter dated June 29, 2009 (Administrative Record No. OH–2185–48).

On July 28, 2009, Ohio provided OSM with an update (Administrative Record No. OH–2185–49) to Ohio's Program Amendment No. 82, which was intended to address several of the issues OSM had identified with Ohio's original program amendment submittal. This document included three legislative actions (portions of House Bill 119, Senate Bill 73, and Senate Bill 386); changes to OAC effective April 30, 2009; an opinion from DMRM's Chief legal counsel regarding the cap on liability of Ohio's alternative bonding system, and the 2009 actuarial report. Since additional changes were forthcoming, OSM did not process this update as a formal program amendment.

On July 27, 2010, OSM sent a letter to Ohio (Administrative Record No. OH–2185–52), providing the issues that OSM believed to remain unresolved and asked for an update on the status of addressing the issues since Ohio's projected completion date of December 2009 had passed. Ohio replied on October 18, 2010 (Administrative Record No. OH–2185–53), providing a status report on negotiations with the Ohio Coal Association regarding additional legislative issues, the status of a second actuarial analysis, and a number of rules that had been adopted.

April Submission: By letter dated April 1, 2011, Ohio sent us an amendment to its program (a continuation of the original 2007 submission), Administrative Record No. OH–2185–54, under SMCRA (30 U.S.C. 1201 *et seq.*). Ohio changed its program by adding and changing statutory provisions (Ohio Revised Code—ORC) and rules (Ohio Administrative Code—OAC) regarding performance bond on coal mining operations in response to OSM's concerns and in order to codify regulatory language resulting from House Bill 443 (which had been announced previously). In addition to these changes, Ohio subsequently added or changed statutory provisions and regulations regarding topics such as valid existing rights, re-mining, abandoned mine lands, blasting, and topsoil handling, among others.

The submission includes statutory changes to Chapters 1513 and 5749 of the ORC that resulted from four different legislative actions (House Bill 119, Senate Bill 73, Senate Bill 181, and Senate Bill 386); regulatory changes to Chapter 1501 of the OAC; a 2009 actuarial report analysis of Ohio's reclamation forfeiture fund; and procedure directives. In addition to the documents mentioned above, the state has included procedure directives for the purposes of clarity and support and they are not considered part of this amendment.

July Submission: By letter dated July 26, 2011 (Administrative Record No. OH–2185–61), Ohio provided additional statutory changes adopted under House Bill 163 on June 30, 2011; a recently completed 2011 actuarial report on the reclamation forfeiture fund; and a letter to the Governor from the Reclamation Forfeiture Fund Advisory Board regarding the actuarial report.

We are combining the April 1, 2011, and the July 26, 2011, submissions with the original submission and reopening the comment period. When taken together, the March 8, 2007, the April 1, 2011, and the July 26, 2011, submissions include changes to the following provisions of the ORC and OAC.

Legislative Actions:

As mentioned above, we announced the provisions of the April 6, 2007, submission that included House Bill 443 in the April 30, 2007, **Federal Register** (72 FR 21176). Since that publication, five additional legislative actions have occurred: House Bill 119 dated September 28, 2007; Senate Bill 386 dated April 7, 2009; Senate Bill 73 dated June 15, 2009; Senate Bill 181 dated September 13, 2010; and House Bill 163 dated June 30, 2011. As legislative activity progressed throughout these years, many of the provisions of the more recent bills modified previously enacted bills. We did not announce these legislative actions as they occurred, but rather aggregately included them with this notice. To simplify our description of the outcome of the legislative activity that occurred subsequent to House Bill 443, we have summarized pertinent changes based on the ORC language that currently exists. While we had already announced the submission involving ORC changes resulting from the enacted provisions of House Bill 443, we have chosen to include them here to provide a comprehensive summary of all of the changes requested for approval. The summary of the changes follows:

1513.01: Coal Surface Mining Definitions (Revised by House Bill 443 and Senate Bill 73)

This section was revised to define the new term ''performance security'' and to

clarify that the state is the primary beneficiary of any trust fund.

1513.02: Chief of Division of Mineral Resources Management—Powers and Duties (Revised by House Bill 443)

With regard to the power and duties of the Chief concerning violations and penalty assessments, this section was revised to direct that all funds collected from civil penalties be deposited in the reclamation forfeiture fund, instead of the coal mining administration and reclamation reserve fund. With regard to the power and duties of the Chief, this section was revised to add the provision that if the state becomes covered by a state programmatic general permit issued by the U.S. Army Corps of Engineers for the discharge of dredged or fill material into the waters of the U.S. by operations that conduct surface and underground coal mining and reclamation operations and the restoration of abandoned mine lands, the Chief may establish programs and adopt rules and procedures designed to implement the terms, limitations, and conditions of the permit.

1513.07: Coal Mining and Reclamation Permit—Application or Renewal—Reclamation Plan (Revised by House Bill 443, Senate Bill 386, Senate Bill 73, and House Bill 163)

With regard to the permit application, this section was revised to delete the permit application and renewal fee. The loss of program operation funding previously generated by the fees was addressed through changes to the excise tax on coal production. With regard to the results of test borings or core samplings from the application area, the section was revised to add that if test borings or core samplings from the application area indicate the existence of potentially acid forming or toxic forming quantities of sulfur in the coal or overburden to be disturbed by mining, the application also shall include a statement of the acid generating potential and the acid neutralizing potential of the rock strata to be disturbed. With regard to the reclamation plan, this section was revised to clarify that it is the applicant's responsibility to provide adequate information in the application to enable the Chief to determine the estimated cost to reclaim the site in the event of forfeiture and eliminate the requirement that the permittee provide the estimated cost of reclamation per acre in a permit application. With regard to post-application processing, this section was revised to establish that the state must make a decision on completeness on coal mining permit applications and notify the applicant of a decision within 14 days of submission. This section was also revised to add a permit provision that addresses the situation involving a conflict of results between various methods of calculating potential acidity and neutralization potential. The change is for purposes of assessing the potential for acid mine drainage to occur at a mine site. It requires that the permit include provisions for monitoring and recordkeeping to identify the creation of unanticipated acid water at the mine site. If the monitoring detects the creation of acid water at the site, the permit shall impose additional requirements regarding mining practices and site reclamation to prevent the discharge of acid mine drainage from the mine site. With regard to right-of-entry documents, this section was revised to provide that right-of-entry documents must be provided in cases where the private mineral estate has been severed from the private surface estate only in cases where surface disturbance will result from the extraction of coal by the applicant's proposed strip mining method.

1513.073: Designating Areas as Unsuitable for Coal Mining Operations (Revised by House Bill 163)

With regard to the designation criteria, this section was revised to clarify that prohibitive distances for mining close to public roads, occupied dwellings, public buildings, schools, churches, community or institutional buildings, public parks, and cemeteries are measured horizontally.

1513.075: Potential Acidity and Neutralization of Disturbed Strata (Created by House Bill 443 and Revised by House Bill 163)

This is a new section that defines certain terms relative to potential acidity and neutralization potential of strata overlying the coal to be mined. The provision also provides for calculation of a proposed mining operation's potential to create acid or toxic drainage. The section provides specific criteria and the conditions under which proposed mining areas not meeting certain numeric criteria ''may'' not be considered as potential acid/toxic producers.

1513.076: Agency Coordination and Cooperation Respecting Permits (Created by Senate Bill 386)

This is a new section that requires coordination, cooperation, and communication between the Ohio Department of Natural Resources and the Ohio Environmental Protection Agency regarding processing of coal mining permit applications. It requires establishment of a joint-agency task force to ensure that procedures are established and implemented.

1513.08: Filing Performance Bond or Deposit of Cash or Securities (Revised by House Bill 443, House Bill 119, and Senate Bill 73)

With regard to an applicant's obligations after a coal mining and reclamation permit application has been approved, this section was revised to provide that the applicant shall file a performance security that is payable to the state and conditioned on the faithful performance of the requirements and rules and conditions of the permit. The section had previously provided that after the permit application was approved and before the permit was issued, the applicant must file such a security.

With regard to estimated cost of reclamation for performance security calculations, changes require the state to provide: (1) Reclamation cost estimates on all permits according to the basic criteria provided followed by a written notice of the estimate to the applicant; and (2) an option for some applicants/permittees to provide: (a) performance security in the full amount of the estimated cost to reclaim the site; or (b) performance security of $2,500 per acre with reliance on the reclamation forfeiture fund by paying an excise tax on coal production. With regard to the first option, the section was revised to establish that the amount of performance security will be based on the state's estimated cost to reclaim the site. With regard to the second option, this section was revised to: define the terms ''affiliate of the applicant'' and ''owner and controller of the applicant;'' clarify that the applicant includes the owner or controller and/or any affiliate of the applicant; clarify eligibility for applicants to participate in the performance security pool; establish that if forfeiture occurs, the difference between the amount of performance security provided by the permittee and the estimated cost to reclaim the site will be provided from the reclamation forfeiture fund; and, establish the methods of providing performance security for permits held prior to the effective date of House Bill 443.

With regard to the permittee's liability under the performance security, this section was revised to add that a permittee's liability under the performance security is limited to the obligation established under the permit. That includes completion of the reclamation plan to return the land to a

condition capable of supporting the postmining land use that was approved in the permit.

With regard to the estimated cost to reclaim, this section was changed to require the state to adjust the estimate under certain conditions, provide notice to the permittee and other interested parties, and provide an opportunity for an informal conference regarding the adjustment. Changes also provide that the permittee may request a reduction in the amount of performance security. The state will make a determination on such requests based on the documentation provided and other information and will notify the permittee of the findings.

With regard to performance security, this section was revised to provide that, upon approval by the Chief, performance security may be held in trust, provided that the state is the primary beneficiary of the trust, and the custodian of the performance security held in trust is a bank, trust company, or other financial institution that is licensed and operating in the state. With regard to surety insolvency, this section was revised to add provisions that require the operator to submit a plan for replacement of performance security if a surety, bank, savings and loan association, trust company, or other financial institution that holds the performance security becomes insolvent.

With regard to the permittee's responsibility for addressing subsidence damage, this section was revised to clarify that liability insurance may be used in lieu of performance security for subsidence damage under the full-cost performance security option. It also specifies that performance security must be adjusted to cover the cost of subsidence repair or water supply replacement if repairs/replacement/compensation does not occur within 90 days, with allowance for more time, up to one year, if the permittee shows that subsidence is not yet completed.

The section regarding the amount of security was revised to add the provision that, if the performance security provided exceeds the estimated cost of reclamation, the Chief may authorize the amount of security that exceeds the estimated cost of reclamation, together with any interest or other earnings on the performance security, to be paid to the permittee.

1513.081: Priority Lien Where Operator Becomes Insolvent (Created by House Bill 443 and Revised by House Bill 163)

This is a new section that provides the lien provisions and conditions when an operator becomes insolvent. It includes a provision that the state shall have a priority lien superior to all interested creditors against the assets of that operator for the amount of any reclamation that is required, including the cost of long-term water treatment and replacement of alternative water supplies, as a result of the operator's mining activities. This section describes the procedures the Chief will use in such cases. It also describes the conditions under which the Chief shall issue a certificate of release, modify the amount of the lien, and authorize a closing agent to hold a certificate of release in escrow for a period not to exceed 180 days for the purpose of facilitating the transfer of unreclaimed mine land. This section also adds the provision that all money from the collection of liens shall be deposited in the state treasury to the credit of the reclamation forfeiture fund.

1513.10: Refund of Permit Fees (Repealed by House Bill 443)

This section was repealed. It provided conditions in which the operator would be entitled to a permit fee refund and described the manner in which the reclamation fee fund and coal mining administration and reclamation reserve fund were used and maintained for such use.

1513.13: Public Adjudicatory Hearings (Revised by House Bill 443)

With regard to appeals made to the reclamation commission, this section was revised to clarify that only the petitioning party may be awarded costs and expenses, including attorney's fees that were necessary and reasonably incurred for, or in connection with participating in the proceeding before the commission.

1513.16: Performance Standards (Revised by House Bill 443 and House Bill 163)

With regard to general performance standards that apply to all coal mining and reclamation operations and performance security, this section was revised to provide that alternative financial security is required when the Chief determines that a permittee is responsible for mine drainage that requires water treatment after reclamation is completed under the terms of the permit or when the permittee must provide an alternative water supply after reclamation is completed. The revision also provides the amount and form of the security. It also provides permittees under performance security with reliance on the reclamation forfeiture fund with the option of funding an alternative financial security over time, up to five years, with reliance for the balance on the reclamation forfeiture fund until the alternative financial security is fully funded. Permittees taking this option must pay the state a fee of 7.5 percent of the average balance of the alternative financial security that is being provided by reliance on the reclamation forfeiture fund. The fee will be credited to the fund. In addition, the revision provides that rules must be developed to address how contracts/trusts/annuities for water treatment will be developed. With regard to final release of the performance security, this section was revised to add that the final release of the performance security terminates the jurisdiction of the Chief over the reclaimed site of a surface coal mining and reclamation operation or applicable portion of an operation. It provides the conditions under which the Chief may reassert jurisdiction over such a site and the appeal procedures regarding such a determination.

1513.171: Tax Credit for Reclamation Outside Permit Area (Created by House Bill 443)

This is a new section that provides the procedures for claiming a credit and the authority for approving and determining the amount of such a credit. It provides that rules shall be adopted to establish procedures for determining the amount; when the chief may obtain consent of the owners of land or water resources to allow reclamation work; and delivery of notice to the owners of land or water resources on which the reclamation work is to be performed.

1513.18: Reclamation Forfeiture Fund (Revised by House Bill 443, House Bill 119, Senate Bill 73, and House Bill 163)

With regard to the fund, this section was revised to delete a phrase describing the reclamation forfeiture fund and its contents. The fund was comprised of any monies transferred to it from the unreclaimed lands fund and monies collected and credited to it. The section now provides that the fund is comprised of all money from the collection of liens, any monies transferred to it from the coal mining and reclamation reserve fund, fines collected, and monies collected and credited to it. Since the fund is no longer responsible for non-coal sites, the Chief's priority for designating funding was eliminated. Thus, this section was further revised to delete the requirement that the Chief's priority for management of the fund, including the selection of projects and transfer of monies, shall be to ensure that sufficient funds are

available for the reclamation of areas affected by mining under a coal mining and reclamation permit. It now provides that the Chief may expend monies from the fund to pay necessary administrative costs of the reclamation forfeiture fund advisory board.

This section was revised to authorize the Chief to enter into a contract with a contractor hired by the trust administrator to provide long-term water treatment or a long-term alternative water supply on areas on which a permittee defaulted or has not fully funded an alternative financial security without advertising for bids. It clarifies that the money from forfeited performance security credited to the reclamation forfeiture fund will pay the cost of completing reclamation to the standards established by the law and rules. It also authorizes use of any alternative financial security in addition to forfeited performance security to complete the reclamation of sites. It clarifies that for permits covered by performance security with reliance on the reclamation forfeiture fund, if the forfeited performance security and any alternative financial security are not sufficient to complete reclamation to the standards of the law and rule, the Chief may expend any other monies transferred to the fund to complete the reclamation. It also provides an exception to the prohibition that the reclamation forfeiture fund cannot be used for water treatment. The exception allows use of money from the reclamation forfeiture fund for reclamation of land and water resources affected by mine drainage that requires treatment or for an alternative water supply in an amount not to exceed the balance of the alternative financial security provided by the reclamation forfeiture fund. In addition, money from the reclamation forfeiture fund shall not supplement the performance security of a permittee that has provided performance security without reliance on the reclamation forfeiture fund. This section was also revised to add that all investment earnings of the fund shall be credited to the fund and shall be used only for the reclamation of land for which the performance security was provided.

1513.181: Coal Mining Administration and Reclamation Reserve Fund (Revised by House Bill 443)

With regard to the fund, this section was revised to remove the provision that fines collected shall be paid into the coal mining administration and reclamation reserve fund. The section was also revised to provide that if the Director of Natural Resources determines it necessary, he/she may request the controlling board to transfer an amount of money from the coal mining administration and reclamation reserve fund to the unreclaimed lands fund.

1513.182: Reclamation Forfeiture Fund Advisory Board (Created by House Bill 443)

This is a new section that provides for the creation of the reclamation forfeiture fund advisory board. It includes provisions for the composition of the board, term limits for board members, compensation of board members, election of officers, meeting frequency, establishment of board procedures, and responsibilities of the board. The responsibilities of the board include: reviewing deposits into and expenditures from the reclamation forfeiture fund; procuring periodic actuarial studies; adopting rules to adjust the rate of tax levied; providing a forum for discussion of issues related to the reclamation forfeiture fund and the performance security that is required; submitting a biennial report to the Governor that describes the financial status of the reclamation forfeiture fund and the adequacy of the amount of money in the fund to accomplish the purposes of the fund; and, recommending to the Governor, if necessary, alternative methods of providing money for or using money in the reclamation forfeiture fund. The board will also evaluate any rules, procedures, and methods for estimating the cost of reclamation for purposes of determining the amount of performance security that is required; the collection of forfeited performance security; payments to the reclamation forfeiture fund; reclamation of sites for which operators have forfeited the performance security; and the compliance of operators with their reclamation plans.

1513.29: Council on Unreclaimed Strip Mined Lands (Revised by House Bill 443)

With regard to meeting frequency, this section has been revised to change the requirement to hold at least four quarterly meetings each year to providing that meetings would occur as necessary.

1513.30: Unreclaimed Lands Fund—Selection of Project Areas (Revised by House Bill 443)

The section regarding the Chief's recommendations concerning project selection and priorities to the council on unreclaimed strip mined lands has been revised. The revision removes the requirement that the Chief shall mail a notice at least two weeks before any meeting of the council during which the Chief will submit a project proposal, a project area will be selected, or the boundaries of a project area will be determined, to the board of county commissioners and the board of township trustees of the township in which the proposed project lies, and the Chief executive and the legislative authority of each municipal corporation within the proposed area. The Chief is no longer required to give reasonable notice to the news media in the county where the proposed project lies. This section has also been revised to remove the provision that the controlling board may transfer excess funds from the oil and gas well fund after recommendation by the council to meet deficiencies in the unreclaimed lands fund. Also, if the director of natural resources determines it necessary, he/she may request the controlling board to transfer an amount of money from the fund to the coal mining administration and reclamation reserve fund.

1513.371: Abandoned Mine Reclamation Fund (Created by House Bill 443, Revised by House Bill 163)

This is a new section that provides for the creation and management of an abandoned mine land set-aside fund. This section was later revised to delete research and demonstration projects from the list of eligible expenditures from the AML set-aside fund.

1513.372: Immunity From Liability (Created by Senate Bill 181)

This is a new section establishing the conditions under which an eligible landowner or nonprofit organization is immune from liability for injuries or damages that occur during an abandoned mine land or acid-mine drainage reclamation project. It also establishes procedures for notifying the division of known, latent, dangerous conditions located at the reclamation project work area and limitations on immunity.

5749.02: Excise Tax on Severance of Natural Resources (Revised by House Bill 443, House Bill 119, and Senate Bill 73)

With regard to the excise tax, this section was revised to increase the coal excise tax from 7 cents to 10 cents per ton for providing revenue to administer the state's coal mining and reclamation regulatory program. It also provides that if performance security is provided by way of the bond pool and $2,500 flat rate bond, then an additional 14 cents per ton is required by those operations and credited to the reclamation

forfeiture fund. It also provides the conditions and applicable dates for adjustment of this tax, depending on the forfeiture fund balance. In addition, it provides the conditions that must exist for determining that forfeiture liability no longer exists and the excise tax can be discontinued for a period of time. It further provides that an additional 1.2 cents per ton is required for coal mined by surface mining methods and credited to the unreclaimed lands fund. With regard to the allocation of the taxes levied, the section has been revised to specify the percentage of each severance tax that will be credited to each of the following funds: coal mining administration and reclamation reserve fund; reclamation forfeiture fund; the unclaimed lands fund; or, other fund as designated. The section was also revised to eliminate the tax levied at the rate of one cent per ton of coal, the monies of which were allocated to reclaim bond forfeiture lands.

5749.11: Nonrefundable Credit (Created by House Bill 443)

This is a new section that provides for a nonrefundable credit against the severance taxes imposed on coal production based on an issued reclamation tax credit certificate.

Rule Changes

As a result of the statutory changes, Federal rule changes, and Ohio's internal review of rules, Ohio made numerous rule changes as described in the paragraphs below. In addition to the substantive changes we mention below, non-substantive changes were also included with this submission. Non-substantive changes include: changes of address; inclusion of Web site addresses; changes in division names and titles; typographical errors; chapter titles; paragraph references; citations; use of ''performance security'' rather than ''bond;'' inclusion of reference to the National Register of Historic Places; name change to ''reclamation commission;'' use of ''applicant'' and ''permittee'' rather than ''operator'' to clarify obligations and responsibilities; and, the incorporation by reference to dates of Federal regulations and Federal laws. Substantive changes to the Ohio Administrative Code, Chapter 1501:13 included in the submission are as follows:

1501:13–1–02: Definitions

Ohio made several additions and modifications of definitions that are intended to simplify, clarify, or mirror Federal regulations or state statutory language. Definitions of the following terms have been added to this section: angle of draw; effluent limitations; incremental mining unit; national pollutant discharge elimination system; point source discharge; receiving water; shadow area; trust fund; and, water quality standards. The following definitions have been revised: collateral bond; engineer; incremental area; operator; performance security; pollution abatement area; person; recurrence interval; runoff; safety factor; surveyor; and valid existing rights.

1501:13–1–03: Restrictions on Financial Interest of Employees

The Reclamation Forfeiture Fund Advisory Board was added to this rule to clarify that the restrictions on financial interest of employees do not apply to the advisory board members. However, advisory board members do have to file an annual statement of employment and financial interest.

This section also clarifies that members of the Reclamation Commission do not have prohibited financial interests under this rule and, therefore, will never be ordered by the Chief to take remedial action. Instead, commission members are required to file statements of employment and financial interest and are required to recuse themselves from proceedings which may affect their direct or indirect financial interests. Unlike the requirements for commissioner members, there are prohibited financial interest provisions for hearing officers of the Reclamation Commission.

In addition, more detail was added regarding employees accepting gifts of nominal value from coal companies; clarification was added regarding how an employee is notified that remedial action is necessary to resolve a prohibited interest; and, clarification was added that appeals procedures involving remedial action to be taken by employees are different than those to be taken by the Chief or a hearing officer of the Reclamation Commission.

1501–13–1–10: Availability of Records

With regard to the public's accessibility to documents involving permits and inspection and enforcement actions, this rule was changed to only provide access to such documents at the Division of Mineral Resources Management's district office that is responsible for inspection of the mining operation. This rule has also been changed to delete the provision that copies of information sent by mail at the request of a member of the public will occur at the division's expense.

1501:13–1–14: Incorporation by Reference

This is a new rule that contains a list of all Federal regulations and Federal laws that are incorporated by reference in Chapter 1501:13 of the Ohio Administrative Code. The rule also explains where the public can find a copy of the Federal regulations and Federal laws, and the editions of the Code of Federal Regulations and United States Code in which the regulations and laws are published.

1501:13–3–01: Standards for Demonstration of Valid Existing Rights

This is a new rule that describes the demonstration requirements for a person claiming valid existing rights. As proof of valid existing rights, it requires that a person must provide a property rights demonstration and compliance with the good faith/all permits standard or compliance with the needed for and adjacent standard. In addition, if a person who claims valid existing rights to use or construct a road across the surface of protected lands, he/she must provide additional demonstrations. Possession of valid existing rights only provides exceptions to the prohibited distances from certain structures, facilities, and resources as described under the areas designated as unsuitable for mining provisions of ORC and OAC.

1501:13–3–02: Submission and Processing of Requests for Valid Existing Rights Determinations

This is a new rule that describes the requirements for submitting a request for a valid existing rights determination, which is required before preparing and submitting an application for a permit or boundary revision for the land for which the determination is sought. This includes: Requirements for property rights demonstration; additional requirements for the good faith/all permits standard; additional requirements for the needed for and adjacent standard; and requirements for roads.

This rule also describes the procedures Ohio will use to process a request for a valid existing rights determination. This includes the: Initial review of the request; public notice and opportunity to comment; determination of the Chief; and post-determination process.

1501:13–3–03: Areas Where Mining Is Prohibited or Limited

This rule was reorganized and a provision was added to provide exceptions for existing operations. The provisions of this rule do not apply to mining operations for which a valid

permit existed when the land came under protection of the law.

1501:13–3–04: Procedures for Identifying Areas Where Mining Is Prohibited Or Limited

The rule change clarifies that the rule applies to a complete application for a coal mining and reclamation operation permit as well as to a complete application for revision of the boundaries of a coal mining and reclamation operation permit. It also expands the requirements for obtaining a road permit to include situations where the applicant proposes to relocate or close a public road. The rule also provides that an applicant for a permit to mine on Federal land shall submit a permit application to the Director of the Office of Surface Mining under the terms of the cooperative agreement between OSM and Ohio. An applicant requesting a determination regarding valid existing rights to mine on Federal land must submit a request to the Director of the Office of Surface Mining.

1501:13–4–01: General Contents Requirements for Permit Applications

This rule change deletes the provision requiring submittal of a permit fee with an application.

1501:13–4–02: Requirements of Coal Exploration

With regard to the requirements for a written notice for coal exploration operations, this rule was revised to remove the limitation regarding the requirements for those operations involving the removal of 250 tons of coal or less. This rule was also revised to add the requirement that, for any area where mining is prohibited or limited, a demonstration that the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for coal mining operations, to the extent technologically and economically feasible. The application must include documentation of consultation with the owner of the feature causing the land to come under the protection of unsuitable for mining and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under such protection. With regard to decisions on applications for exploration, this rule was revised to add that before making a finding, the Chief shall provide reasonable opportunity to the owner of the feature causing the land to come under such protection and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection, to comment on whether the finding is appropriate.

1501:13–4–03: Permit Application, Requirements for Legal, Financial, Compliance and Related Information

With regard to right of entry and operation information, this rule was revised to clarify that right of entry information must be provided for the permit and shadow areas of underground mines.

1501:13–4–04: Permit Application Requirements for Information on Environmental Resources

With regard to groundwater and surface water information, this rule was revised to add parameters for aluminum and sulfates for analyzing water samples. This rule now requires that the application map be prepared by or under the direction of and certified by a surveyor (''engineer'' is removed from this portion of the paragraph), or jointly by a surveyor and an engineer, since this map is the responsibility of a surveyor rather than an engineer. This rule was also revised to require that the supplementary maps and cross sections required under this section be prepared by or under the direction of and certified by an engineer (''surveyor'' is removed from this portion of the paragraph), or jointly by an engineer and a surveyor, since the information required is the responsibility of an engineer rather than a surveyor.

1501:13–4–05: Permit Applications; Requirements for Legal, Financial, Compliance and Related Information

With regard to the requirement that an operation plan include a description of the mining operations proposed and a narrative explaining the construction, modification, use, maintenance, and removal of certain facilities (i.e., dams, overburden, topsoil handling, storage areas, and structures), this rule was revised to delete the requirement that retention of such facilities is necessary for the postmining land use. The revision now provides that the facilities be approved by the Chief for postmining land use. With regard to the application information, this rule was revised to include a requirement that it is the applicant's responsibility to provide adequate information in the application to enable the Chief to determine the estimated cost to reclaim the site in the event of forfeiture. Such information must be sufficient to determine the greatest potential reclamation cost liability to the state. With regard to the operation plan and existing structures, this rule was revised to no longer allow an applicant to make a showing that existing structures meet interim program performance standards. With regard to the reclamation plan, this rule was revised to clarify that that detailed design plans shall be certified by an engineer, not just prepared under the direction of an engineer.

1501:13–4–06: Permit Applications, Revisions, and Renewals, and Transfers, Assignments, and Sales of Permit Rights

With regard to the requirements for applications for permits and permit renewals, this rule was revised to require that an application is deemed complete unless the Chief notifies an applicant within 14 business days of an application submission that an application is incomplete and provides written notification that identifies the deficiencies in the application. This rule was also revised to add the requirement that the Chief review revisions to permits to determine if an adjustment of the estimated cost of reclamation will be required. This rule was also revised regarding transfer, assignment, or sale of permit rights by indicating that any person seeking to succeed by transfer, assignment, or sale must obtain the appropriate performance security coverage for the permitted operation by either obtaining transfer of the original performance security coverage of the original permittee, provided that the successor meets the eligibility requirements for obtaining performance security together with reliance on the reclamation forfeiture fund, or by providing sufficient performance security under the full-cost option.

1501:13–4–07: Annual Reports

With regard to the requirements that the permittee file information with the Chief 30 days after each anniversary date of the issuance of a coal mining and reclamation permit, this rule was revised to clarify that estimates of acreages are required for both the permit area and any incremental area or incremental mining unit. With regard to the requirement to provide performance security information, this rule was revised to clarify the information that is required. With regard to the annual map, it also includes the requirement that the annual report must include the boundaries of each incremental mining unit affected during the permit area during the permit year for which the annual report is filed and for all preceding permit years. It removes the requirement that the map be shaded in various colors, if applicable, for the types of bonds posted for each area of the permit and if more than one surety

was procured. This rule has also been revised to add that within 30 days after the completion of mining operations on a permit, a final report shall be filed with the Chief.

1501:13–4–09: General Map Requirements

With regard to general map requirements, this rule was revised to clarify that acreage figures shall be reported or estimated to the nearest 1/10th of an acre. This rule was also revised to remove engineers, to clarify that the certification of maps is limited to surveyors. A paragraph has been added to explain when a professional engineer must also sign and seal a map.

1501:13–4–12: Requirements for Permits for Special Categories of Mining

With regard to approximate original contour restoration requirements and variances granted under this rule, this rule was revised to clarify that recreational facilities are considered a public postmining land use allowable under the rules governing variances. For coal preparation plants or support facilities not located within the permit area of a specified mine, this rule adds the requirement that each application for a permit shall contain the information required for the proposed permit area in sufficient detail to determine the estimated cost of reclamation, if the reclamation has to be performed by the state in the event of forfeiture of the performance security by the permittee. It adds that the operational detail shall be sufficient to determine the greatest potential reclamation cost liability to the state and any other operational detail required that may affect the cost of reclamation.

1501:13–4–13: Underground Mining Permit Application Requirements for Information on Environmental Resources

With regard to groundwater and surface water information, this rule was revised to require testing for the added parameters of aluminum and sulfates. This rule has also been revised to allow surveyors to certify maps, but not cross sections, which are certified by an engineer.

1501:13–4–14: Underground Mining Permit Application Requirements for Reclamation and Operations Plans

With regard to the requirement that the narrative for the operation plan of an underground mining permit application explain the construction, modification, use, maintenance, and removal of certain facilities, this rule was revised to delete the requirement that retention of such facilities is necessary for postmining land use. The revision now provides that the facilities be approved by the Chief for postmining land use. With regard to underground mining permit application general requirements, this rule was revised to add the requirement that each application for a permit shall contain the information required for the proposed permit area in the detail necessary for the Chief to determine the estimated cost of reclamation, if the reclamation has to be performed by the state in the event of forfeiture of the performance security by the permittee. It adds that the operational detail shall be sufficient to determine the greatest potential reclamation cost liability to the state and any other operational detail required that may affect the cost of reclamation. With regard to the operation plan and existing structures, this rule was revised to no longer allow an applicant to make a showing that existing structures meet interim program performance standards. With regard to the reclamation plan, this rule was revised to clarify that detailed design plans shall be certified by an engineer, not just prepared and under the direction of an engineer. With regard to the subsidence control plan, this rule was revised to add the requirement that an application shall include a map of the shadow area, including the angle of draw for the workings described.

1501:13–4–15: Authorization To Conduct Coal Mining on Pollution Abatement Areas

The rule regarding effluent limits of a remining NPDES permit was revised to clarify that it applies to operators seeking authorization to conduct mining operations under modified effluent limits of a remining NPDES permit. The rule was revised to clarify and establish minimum sampling and data collection criteria, provide criteria for exceptions for meeting the minimum sampling and data collection, and provide exemptions from meeting numeric effluent standards when using best management practices under certain conditions. The rule revision also eliminates the requirement that the permittee must notify the Chief prior to the start and upon completion of each step of the pollution abatement plan. The rule was also changed to clarify criteria for treatment of mine discharges under the pollution abatement plan. Changes to the performance security release criteria clarify that numeric effluent limits established in the remining NPDES permit must be met when applicable.

1501:13–4–16: Requirements for Exemption for Coal Extraction Incidental to the Extraction of Other Minerals

With regard to the requirements for exemption for coal extraction incidental to the extraction of other minerals, this rule has been revised to add language regarding coal mining activities that are exempt from the requirements of ORC Chapter 1513. For an activity to be exempt from the requirements of the ORC, three of the five requirements were clarified: 1) the requirement that coal must be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use was clarified to define that the term ''immediately below'' means that the coal to be mined shall be located not more than three feet below the lowest other mineral to be mined; 2) language was added that other minerals mined in a mining area, but not in the stratigraphic column of coal removed, shall not be used to calculate cumulative production or cumulative revenue; and 3) language was added stating that augering of coal is not used as a mining method, except for permits issued prior to February 29, 1988, with approved mining plans that allowed the augering of coal.

1501:13–5–01: Review, Public Participation, and Approval or Disapproval of Permit Applications and Permit Terms and Conditions

With regard to the review of permit applications, revisions, and renewals, this rule was revised to add time frames for the review process. This rule was also revised to differentiate between the time frames for review when no informal conference is held and when an informal conference is held. A revision was also made to provide that the Chief shall grant or deny a permit not more than 240 business days after the submission of a complete application. It provides that any time during which the applicant is making revisions to the application or providing additional information requested by the Chief shall not be included in the 240 business days. If the Chief determines that a permit cannot be granted or denied within this time frame, the Chief shall provide the applicant with written notice of the expected delay no more than 210 business days after the submission of a complete application. The word ''significant'' was added before ''revisions'' throughout this section to clarify that public notice of

the filing of applications for significant permit revisions is required.

1501:13–7–01: General Requirements for Providing Performance Security for Coal Mining and Reclamation Operations

With regard to performance securities, this rule was revised to clarify provisions for those permittees opting to provide performance security with reliance on the reclamation forfeiture fund (performance security pool) and provide new rules for those permittees opting to provide performance security without reliance on the fund (full-cost performance security). The rule now allows performance security to be deposited for incremental mining units and establishes criteria for identifying incremental mining units on the application map and on subsequent annual maps. It also states that once a permittee opts to provide full-cost performance security, the permittee may not change to using performance security with reliance on the reclamation forfeiture fund participation once coal extraction begins.

Changes establish that the Chief will determine an estimated cost of reclamation for the state to reclaim the site should the permittee default on its obligation to reclaim. The rule describes the information the Chief will use to develop this estimate. The rule now specifies that the applicant must notify the Chief of the method chosen for providing performance security and provide the required amount of performance security after the Chief provides the written estimate to the applicant. Changes provide that for an applicant to be eligible to provide performance security with reliance on the reclamation forfeiture fund, the applicant, an owner or controller of the applicant, or an affiliate of the applicant must have had a permit in Ohio for not less than five years. The rule now establishes that if forfeiture of performance security on a permit that is reliant on the reclamation forfeiture fund occurs, the fund will provide the difference between the performance security provided by the permittee and the estimated cost of reclamation provided by the Chief. Changes also provide processes for obtaining release of excess performance security under both options and require the Chief to make adjustments to the estimated cost of reclamation.

1501:13–7–02: Amount and Duration of Performance Security

With regard to the amount and duration of a performance security, this rule was revised to distinguish the amount of performance security for those permittees opting to provide performance security with reliance on the reclamation forfeiture fund (performance security pool) from those permittees opting to provide performance security without reliance on the fund (full-cost performance security). The rule further describes responsibilities for providing performance security for areas affected by material damage and water supplies from subsidence under each option. The rule now lists events that trigger the Chief's review and adjustment of performance security, establishes a permittee's right to request an informal review concerning adjustments of performance security, and provides that a permittee may request the Chief to reduce the performance security estimate when the method of operation or other circumstances reduce the cost of reclamation. An adjustment to performance security is not considered a release of performance security.

1501:13–7–03: Form, Conditions, and Terms of Performance Security

With regard to the form, conditions, and terms of performance securities, this rule was revised to include a trust fund as an acceptable form of performance security. The rule is clarified to require that the name of the permittee on the performance security be identical to the name of the permittee on the permit. The rule also provides specific criteria that each form of bond must meet. Revisions further clarify that upon insolvency of an institution that holds the performance security, permittees under the full-cost option will have 90 days to replace performance security coverage. Permittees who are reliant on the reclamation forfeiture fund will have up to one year to replace coverage.

1501:13–7–04: Self-Bonding

With regard to self-bonding requirements, this rule has been revised to provide that an indemnity agreement, submitted by a limited liability company, must be signed by at least one member who is authorized to bind the company. The copy of such authorization shall be provided along with an affidavit certifying that such an agreement is valid under all applicable Federal and state laws.

1501:13–7–05: Procedures, Criteria, and Schedule for Release of Performance Security for Permits Reliant on the Reclamation Forfeiture Fund

With regard to performance securities, this section heading was revised to clarify that this rule applies to a permittee that provides performance security together with reliance on the reclamation forfeiture fund. With regard to the procedures for seeking release of performance security, this rule was revised to clarify that a request for approval of a reclamation phase shall also include a request for release of performance security. With regard to the request for approval of a reclamation phase III request for release of performance security, this rule has been revised to provide that the number of acres of the area requested for release that are reclaimed as lands eligible for remining must be stated with the request. With regard to the criteria and schedule for release of performance security, this rule was revised to clarify that any portion of an incremental area requiring extended liability because of augmentation or failure to achieve the crop yields for prime farmland required for phase II performance security may be separated from the rest of the incremental area and have performance security provided separately if approved by the Chief. It also requires that in addition to other requirements for completeness of reclamation, any permanent structures to be maintained as part of the postmining land use must be included in the approved reclamation plan prior to phase II release. With regard to the approval of a reclamation phase, a new paragraph was added regarding remining and security release to provide that a portion of an incremental area requiring a reduced period of liability because of its classification as a remining area shall be separated from the rest of the incremental area and shall be eligible for phase III performance security release.

1501:13–7–05.1 Procedures, Criteria and Schedule for Release of Performance Security for Permits not Reliant on the Reclamation Forfeiture Fund

This is a new rule applying only to a permittee that provides performance security without reliance on the reclamation forfeiture fund. This rule provides the terms, conditions, and procedures for seeking approval of a reclamation phase and release of performance security and the criteria and schedule for release of performance security.

1501:13–7–06: Performance Security Forfeiture Criteria and Procedures

With regard to forfeiture procedures, this rule was revised to provide that, should the permittee fail to enter into a reclamation agreement or fail to comply with the terms of the reclamation agreement and a trust fund was the performance security filed with the

division, the forfeiture order shall inform the permittee that the state will proceed as set forth in the terms of the trust agreement.

A paragraph was removed that provided that if during the forfeiture reclamation conducted by the state it appears that the cost of reclamation is greater than the performance bond filed for the incremental area and if there remains on file with the Chief performance bond for other incremental areas which have not already been forfeited, then the Chief may proceed to declare forfeit the remaining bond and collect monies under the bond up to an amount equal to the difference between the actual costs of reclamation and monies already collected. New language was added to the section to clarify that the Chief shall order forfeiture of all remaining performance security on deposit for the permit.

1501:13–7–06.1: Tax Credit for Reclamation Outside an Applicant's Permit Area

This is a new rule that applies to a permittee providing performance security together with reliance on the reclamation forfeiture fund who wishes to claim a tax credit under Section 5749.1 of the Revised Code. This rule sets forth the terms and conditions under which the Chief may approve an application to perform reclamation and establishes eligibility and application requirements for permittees applying for a tax credit. It also establishes procedures for obtaining the tax credit once reclamation is completed.

1501:13–7–08: Reclamation Phase Approval Conference and Performance Security Release Conference

With regard to reclamation phase approval and performance security release, this section heading was changed to clarify that this rule applies to reclamation phase approval conferences in addition to performance security release conferences. With regard to the procedures for requesting such releases, this rule was revised to establish a reclamation approval conference since reclamation can be approved on portions of permits or incremental mining units without a release of performance security on sites under full-cost performance security.

1501:13–9–01: Signs and Markers

With regard to signs and markers, this rule was revised to clarify that perimeter markers must be placed to clearly define the perimeter so that adjacent markers are visible by a person standing at any other marker along the perimeter. Markers must be maintained until final grading is approved.

1501:13–9–03: Topsoil Handling

With regard to the topsoil to be salvaged and removed before any drilling for blasting, mining, spoil, or other surface disturbances, this rule was revised to provide the conditions for which the Chief may choose not to require the removal of topsoil for minor disturbances that occur at the site of small structures, such as power poles, signs, or fence lines, or will not destroy the existing vegetation and will not cause erosion. With regard to final grading and replacement of topsoil, this rule was revised to provide that final grading shall follow the completion of backfilling and rough grading with a timeframe that will allow replacement of topsoil or approved resoiling materials to begin and be completed during either the current normal period for favorable planting or at the start of the first appropriate normal period for favorable planting following final grading, whichever occurs first. It also provides that resoiling shall begin, continue reasonably uninterrupted, and be completed prior to the end of the normal period for favorable planting unless the permittee receives an extension of time limit because of climatic conditions. With regard to final grading and replacement of topsoil and soil thickness, this rule was revised to clarify that topsoil or approved alternative resoiling materials shall be redistributed in a manner that achieves an approximately uniform, stable thickness when consistent with the postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit.

1501:13–9–06: Use of Explosives

With regard to the general provisions of the use of explosives, this rule was revised to provide that blasts that use more than five pounds of explosive or blasting agent shall be conducted according to the schedule required. With regard to how blasting operations shall be conducted, this rule was revised to clarify that in addition to a certified blaster, a member of the blasting crew under the direct supervision of the certified blaster may detonate a blast. With regard to who shall be responsible for controlling access to the blasting area to prevent the presence of livestock or unauthorized persons at least ten minutes before each blast, this rule was revised to delete references to the ''permittee'' and include references to ''certified mine foreperson'' because that is the person responsible for controlling access to the blasting area. With regard to blasting occurring within one-half mile of any public or private institution, this rule was revised to clarify that notification to an institution occurs on the same day of a blast instead of the day before. With regard to the definition of flyrock, this rule was revised to provide that debris does not include dust. The rule concerning flyrock being cast beyond the permit boundary was revised to require initial telephone notification to the Division of Mineral Resources Management within two hours, followed by a more detailed written report within three days. The rule regarding airblasts was revised to require that maximum levels not exceed 133 decibels (except as authorized). With regard to seismic measuring systems, this rule was revised to replace existing provisions regarding seismic measuring systems with more detailed seismograph specifications to match current technology. The rule regarding blast records was revised to clarify the data required in blast records, to match current technology, and more clearly document how a blast was designed. With regard to when bulk-loaded explosives are used, this rule was revised to provide that the blast record data for bulk-loaded explosives must be completed no more than 24 hours after the blast is detonated. The rule regarding maximum ground vibration was revised to refer to the frequency-dependent particle velocity limits that are being added through the chart. With regard to frequency-dependent particle velocity limits, a new chart was added that establishes frequency-dependent particle velocity limits using the Bureau of Mines' alternative blasting level criteria, which have become the standard of comparison for blasting seismology consultants and the legal community. The rule for protected structures and facilities was changed to clarify the types of structures and facilities within 300 feet that are protected. With regard to seismographic records, ''scaled-distance'' was changed to ''scaled distance'' and ''Ds'' was changed to ''SD'' to reflect standard industry usage. The term ''eight-millisecond period'' was changed to ''period less than eight milliseconds'' to clarify the requirements.

1501:13–9–10: Training, Examination, and Certification of Blasters

With regard to the certified blaster examination, this rule was revised to require 40 hours of training for initial blaster certification instead of 30 hours.

The section on certification and recertification was revised to clarify that, in addition to the Chief, an agency, board, or institution authorized by the Chief may provide certification. It also provides that each person approved for certification shall receive a certificate suitable for office display and a wallet-size identification card. The certificate and identification card shall include, at a minimum, the type of certification, the person's name, certification number and date of expiration, and the name and signature of the Chief or of the official of the authorized agency, board, or institution granting the certification.

1501:13–9–13: Contemporaneous Reclamation

With regard to contemporaneous reclamation, this rule was revised to provide that highwall mining is added to the language regarding auger mining timing requirements. With regard to final grading and replacement of topsoil, seeding and planting, and tree planting, this rule was revised to provide a timing element for each phase of reclamation. With regard to the Chief's granting additional time for backfilling and rough grading, this rule was revised to provide the requirements for requesting a permit revision including minimum criteria that must be provided to justify additional time.

1501:13–14–02: Enforcement

With regard to when the Chief has issued a cessation order for failure to abate a violation of the contemporaneous reclamation requirements, and performance security was provided together with reliance on the reclamation forfeiture fund, this rule was revised to add that the Chief may require the permittee to increase the amount of performance security for the permit from $2,500 per acre to $5,000 per acre of land. This rule was also revised to provide that the Chief may determine the amount of performance security increase depending on the status of reclamation at the site. In addition, if the Chief orders the permittee to increase the amount of performance security, the Chief shall also order the permittee to show cause why the permittee has the ability to comply with the requirements. If the Chief orders the permittee to increase the amount of performance security, the increased performance security shall remain in effect for the permit, including all future acreage of the permit, until the Chief determines that the amount of performance security may be reduced. A reduction in the amount of performance security shall not be considered release of performance security.

1501:13–14–05: Informal Conferences

With regard to requests for informal conferences, this rule was revised to clarify and include that the permittee may request an informal conference on a proposed performance security adjustment in addition to requesting that the Chief hold an informal conference on the application for a permit or application for significant revision or renewal of a permit. It also provides that the request shall be filed with the Chief not later than 30 days after receipt by the permittee of the proposed performance security adjustment. With regard to the timeliness of an informal conference, this rule has been revised to add the provision that the Chief hold an informal conference within a reasonable time, not to exceed 60 days following the close of the comment period for a permit application or significant revision or renewal or within a reasonable time, not to exceed 60 days following receipt by the permittee of a performance security adjustment. It was also revised to provide that if the informal conference has been held, the Chief shall issue and furnish the applicant for a permit, persons who participated in the informal conference, and persons who filed written objections, with the written finding of the Chief granting or denying the permit in whole or in part and stating the reasons therefore within 60 days of the conference.

Reclamation Forfeiture Fund Advisory Board Information

Included in this submission are two reports, dated June 2009 and June 2011, providing an actuarial analysis of the Reclamation Forfeiture Fund (Fund) along with letters from the Reclamation Forfeiture Fund Advisory Board (Board) to the Governor of Ohio dated June 2009 and June 2011 regarding the Reclamation Forfeiture Fund and the actuarial analysis.

Actuarial Analysis Reports: The 2009 and 2011 actuarial analysis reports were the result of the Board's commission of Pinnacle Actuarial Resources, Inc. to prepare an analysis of the Fund. The 2009 actuarial analysis report made similar findings to the 2011 report using a somewhat different analytical approach, but reported a higher amount of expected risk to the Fund. Since the 2011 report is the most current, we have summarized it below for purposes of this notice.

The 2011 report concluded that the Fund is solvent on a short-term basis, as the current Fund assets exceed the current Fund's outstanding liabilities and obligations for forfeited reclamation projects. For longer-term solvency, the measurement compares the current available Fund's assets to the Fund's long-term expected exposure or liability. The reviewers do not believe that the Fund currently meets the criteria for long-term solvency, nor do scenario projections of future revenues fully place it in a compliant basis for some period of time into the future. There is currently a mismatch between the revenues collected and the future exposure to reclamation forfeiture for which this revenue and accumulated capital is needed. The report further concludes: ''Based upon the methodology and assumptions * * *, we have estimated the present value of expected liability of $32.254 million.'' The report further states: ''In actuarial and insurance regulatory language, the Fund has significant risk of material adverse deviation from the estimated expected loss.''

Reclamation Forfeiture Fund Advisory Board Recommendations: The Board sent a letter to the Governor of Ohio on June 27, 2011, and did not recommend changes to the severance tax rates. The Board felt that more time was necessary to study the effectiveness of the present revenue structure to meet the requirements of the Fund. The letter outlined the key points concerning the review of the report, which included that the Fund is adequate to address the small current forfeiture liabilities; the current liabilities were estimated to be less than $100,000 and the fund had $9.92 million as of June 15, 2011; the backlog of forfeited sites was reclaimed at the end of calendar year 2010, with only small maintenance costs remaining; the Fund never received $5 million from the legislature in 2007 to eliminate the backlog of forfeitures as intended by House Bill 443; the actuarial study projects various financial liability scenarios into the future; the study concludes that the Fund may have longer-term solvency issues in the future, based on two of the three projected scenarios; the Division of Mineral Resources Management continues to do a very good job of fulfilling their duties in regulating the coal industry's performance regarding contemporaneous reclamation of permitted sites and of overseeing the reclamation of forfeited sites; generally speaking, the Ohio coal industry's financial strength and attention to good reclamation practices have improved over the past five to ten years; and since the Fund may have a longer-term

solvency issue, an abundance of caution dictates that the Board review the Fund's status next year. The Board recommended that an updated actuarial study be prepared in conjunction with the biennial report due to the Governor in 2013. In 2009, the Board asked DMRM to provide an analysis of Alternative Bonding Systems (ABS) conducted in other coal mining states. With the assistance of Pinnacle studying ABS systems in West Virginia and Kentucky, the Board believes that Ohio's ABS is at least as effective as those systems; the Board believes that a reasonable timeframe to reclaim forfeited sites is in the range of three to five years; should one of the largest five permit holders become insolvent, the Fund would likely be inadequate to allow reclamation within the 3 to 5-year range; and the Board will continue to study the model prepared by Pinnacle to refine, improve, and monitor this model of the Fund's inadequacy.

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the submission satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Ohio program.

Electronic or Written Comments

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent state or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., local time February 29, 2012. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the submission, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSM for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 935

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 23, 2011.

Thomas D. Shope,

Regional Director, Appalachian Region.

[FR Doc. 2012–3424 Filed 2–13–12; 8:45 am]

BILLING CODE 4310–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA–HQ–OAR–2010–0885, FRL–9630–6]

RIN 2060–AR32

Implementation of the 2008 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach, Attainment Deadlines and Revocation of the 1997 Ozone Standards for Transportation Conformity Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing thresholds for classifying nonattainment areas for the 2008 ozone National Ambient Air Quality Standards (NAAQS) (the ''2008 ozone NAAQS'') promulgated by the EPA on March 12, 2008. This proposal also addresses the timing of attainment dates for each classification. Finally, we are proposing to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only.

DATES: Comments must be received on or before March 15, 2012. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0885, by one of the following methods:

• *www.regulations.gov:* Follow the on-line instructions for submitting comments.

• *Email: a-and-r-docket@epa.gov*

• *Mail:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0885, Environmental Protection Agency, 1301 Constitution Ave. NW., Washington, DC 20460. Mail Code: 2822T. Please include two copies if possible. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

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Docket: All documents in the docket are listed in *www.regulations.gov.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: For further general information on this rulemaking, contact Dr. Karl Pepple, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (C539–01), Research Triangle Park, NC 27711, phone number (919) 541–2683, fax number (919) 541–0824 or by email at *pepple.karl@epa.gov,* or Mr. Butch Stackhouse, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (C539–01), Research Triangle Park, NC 27711, phone number (919) 541–5208, fax number (919) 541–0824 or by email at *stackhouse.butch@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by the proposed rule for this action include state, local, and tribal governments. Entities potentially affected indirectly by the proposed rule include owners and operators of sources of emissions [volatile organic compounds (VOCs) and nitrogen oxides (NO_X)] that contribute to ground-level ozone concentrations.

B. What should I consider as I prepare my comments for EPA?

1. Submitting CBI. Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed to be CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

• Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

• Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

• Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at *http://www.epa.gov/air/ozonepollution/actions.html#impl* under ''recent actions.''

D. How is this notice organized?

The information presented in this notice is organized as follows:

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B. History of Nonattainment Area Classification Systems for the Ozone NAAQS
C. Initial Area Designations for the 2008 Ozone NAAQS
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F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
VII. Statutory Authority

II. Background for Proposal

A. Overview

On March 12, 2008,[1] the EPA revised the primary National Ambient Air Quality Standards (NAAQS) for ozone to a level of 0.075 parts per million (ppm) (annual fourth-highest daily maximum 8-hour concentration, averaged over 3 years).[2] [3] On July 16, 2009, the EPA announced that it would initiate a rulemaking to reconsider the standard for various reasons, including the fact the 0.075 ppm level fell outside of the range recommended by the Clean Air Scientific Advisory Committee. Pending the outcome of that reconsideration, the EPA suspended further work on designating areas, including developing a classification approach for areas that would be designated nonattainment. In September 2011, the Office of Management and Budget (OMB) returned for further consideration the EPA's draft rulemaking to reconsider the 2008 ozone NAAQS.[4] The current NAAQS for ozone thus remains at 0.075 ppm, as established in 2008. The 2008 NAAQS retains the same general form and averaging time as the 0.08 ppm NAAQS set in 1997 but is set at a more stringent level.

While the 2008 NAAQS was being reconsidered, the EPA deferred initial designation of areas as attainment or nonattainment with respect to that standard until March 12, 2011.[5] (*See* 75 FR 2936.) Since this deadline has passed and the EPA's draft rulemaking to reconsider the 2008 ozone NAAQS has been returned by OMB for further consideration, the EPA is now proceeding with certain activities to implement the 2008 ozone NAAQS. In a separate action, the EPA will propose a rule to address the steps states will take to implement the NAAQS and the timing of those steps. In this action, we address the system for classifying nonattainment areas and a limited set of additional implementation issues.

A key first step after promulgating a new or revised NAAQS is for the EPA to issue initial area designations. Area designations establish which areas are meeting the NAAQS (attainment/unclassifiable) and which areas are not meeting the NAAQS (nonattainment), and the boundaries for those areas. Following the schedule provided in Clean Air Act (CAA) section 107(d), states were required to submit designation recommendations for every area of each state to the EPA by March 12, 2009, which was 1 year after the promulgation date of the 2008 ozone NAAQS. The EPA has received these recommendations and has proceeded with the designations process based on these recommendations.

In accordance with CAA section 181(a)(1), each area designated as nonattainment for the 2008 ozone NAAQS will be classified by operation of law at the same time as the area is designated by the EPA. Therefore, the EPA intends to finalize classification thresholds on or before the date that initial area designations are issued by the Administrator. The planning and emission reduction requirements as well as the maximum attainment date for each area are based on that area's classification. Areas classified as marginal are subject to the least stringent planning and control requirements and shortest attainment period and those classified as severe are subject to the most stringent requirements and longest attainment period.

Under Subpart 2 of part D of title I of the CAA, state planning and emissions control requirements for ozone are determined, in part, by a nonattainment area's classification. In 1990, Congress amended part D of title I of the CAA by adding several new subparts, including subpart 2, which specifies implementation requirements for ozone nonattainment areas. These requirements apply in addition to the general State Implementation Plan (SIP) planning requirements applicable to all nonattainment areas under subpart 1 of part D. Under subpart 2, ozone nonattainment areas are classified based on the severity of their ozone levels (as determined based on the area's ''design value,'' which represents the most recent 3-year average of the air quality in the area).[6] Nonattainment areas with a ''lower'' classification have ozone levels that are closer to the standard than areas with a ''higher'' classification. The subpart 2 classification section provides an increasing amount of time from the date of designation to attain the standards for the progressively higher classifications: Marginal (3 years), Moderate (6 years), Serious (9 years), Severe-15 (15 years), Severe-17 (17 years), and Extreme (20 years).

[1] *See* 73 FR 16436.

[2] The secondary ozone standard, designed to protect public welfare, was set at the same level and with the same averaging time as the primary standard.

[3] For a detailed explanation of the calculation of the 3-year 8-hour average, see 40 CFR part 50, Appendix I.

[4] Memorandum from Cass R. Sunstein to Administrator Lisa Jackson, dated September 2, 2011.

[5] The 2008 ozone NAAQS was promulgated on March 12, 2008. By the 2-year designation requirement found in CAA § 107(d)(1), the deadline for designating areas was March 12, 2010. The EPA determined that due to the reconsideration there was insufficient information to designate areas, and invoked the additional year for designations as allowed under CAA § 107(d)(1)(B).

[6] The air quality design value for the 8-hour O_3 NAAQS is the 3-year average of the annual 4th highest daily maximum 8-hour average ozone concentrations.

Areas in the lower classification levels have fewer and/or less stringent mandatory air quality planning and control requirements than those in higher classifications. For instance, Marginal areas are exempt from the requirement to prepare an attainment demonstration and associated contingency measures, although such areas are required to adopt an emissions statement rule for stationary sources, submit a baseline emissions inventory, and implement a nonattainment area preconstruction permit program. A Moderate area needs to comply with the Marginal area requirements; in addition the state must submit a demonstration that the area will attain within 6 years after designation, and it must adopt (and submit for EPA approval) certain emissions control requirements, such as reasonably available control technology, a basic vehicle inspection and maintenance program if the area meets the applicable population thresholds, and provisions for increased offsets for new or modified sources under the state's new source review (NSR) program. The higher classifications similarly require additional emissions controls and stricter NSR offset requirements beyond those required for a Moderate area. In addition, under the higher classifications, smaller sources are considered ''major sources'' for permitting and other requirements.

B. History of Nonattainment Area Classification Systems for the Ozone NAAQS

The CAA was amended in 1990 to add specific provisions that apply to ozone nonattainment areas. These include timelines for both planning and implementation, and requirements for specific programs to reduce emissions that vary based on an area's classification. The ozone standard that was in effect at the time of the 1990 CAA amendments was a 1-hour exceedance-based standard of 0.12 ppm.[7] Accordingly, the classification provisions in Table 1 in section 181 of subpart 2 of the CAA (also referred to herein as the ''subpart 2 classification table'') are specific to that 1-hour standard. In 1997, the EPA revised both the form and level of the ozone NAAQS to a 3-year average of the 4th highest daily maximum 8-hour averages.[8] In a subsequent rulemaking, the EPA adapted the CAA's 1-hour classification thresholds to the new 8-hour standard[9] and used the new 8-hour threshold values to classify certain areas designated nonattainment for the 1997 8-hour NAAQS. This approach for translating the CAA's 1-hour threshold values to 8-hour threshold values was challenged in litigation and was upheld by the court. *See South Coast Air Quality Management District* v. *Environmental Protection Agency,* 472 F.3d at 896–898.

C. Initial Area Designations for the 2008 Ozone NAAQS

Under CAA § 107(d), initial area designations are required when a NAAQS is revised. The process involves interaction between the EPA and states, starting with states preparing recommendations and submitting them to the EPA for review. If the EPA intends to modify a state's recommendation, the EPA must notify the state of such modification by letter no later than 120 days (''120 day letters'') prior to making a final decision.[10] For the 2008 ozone NAAQS, most states submitted designation recommendations to the EPA as required under section 107(d) in March 2009, 1 year after the 2008 NAAQS was promulgated. States also had the opportunity to update these recommendations in the fall of 2011, based on ambient air quality monitoring data for the years 2008–2010, which were (and still are) the most recent monitoring data available. Areas could elect to early certify their 2009–2011 data by February 29, 2012 for EPA to consider in the designation process.

The EPA plans to consider the state recommendations received in 2009 and any updates provided by the states based on current monitoring data in deciding whether to modify any recommendations. In the event that the EPA intends to modify a state's recommendation, the EPA will notify the state 120 days prior to issuing designations. The EPA's goal is to finalize designations by mid-2012.

D. Transportation Conformity and the 1997 Ozone NAAQS

In this rulemaking, the EPA is proposing to revoke the 1997 ozone NAAQS for transportation conformity purposes only.[11] The revocation of the 1997 ozone standard for this limited purpose would occur 1 year after the effective date of initial area designations for the 2008 ozone NAAQS. We believe this approach is the most logical because it would result in only one ozone NAAQS—the more protective 2008 ozone NAAQS—applying for purposes of transportation conformity, after the end of the 1-year transportation conformity grace period that applies to newly designated nonattainment areas (*see* CAA section 176(c)(6)). If the 1997 ozone NAAQS were to remain in place after conformity applies for the 2008 ozone NAAQS, areas currently in nonattainment or maintenance for the 1997 ozone NAAQS that are designated nonattainment for the 2008 ozone NAAQS would be required to implement the transportation conformity program for both ozone NAAQS concurrently. The EPA is proposing to revoke the 1997 ozone NAAQS for purposes of transportation conformity in an attempt to avoid this overlap of NAAQS for conformity requirements. The EPA intends to discuss potential revocation of the 1997 NAAQS for all other purposes in a future, separate rulemaking.

III. What are the proposed classification thresholds for nonattainment areas for the 2008 ozone NAAQS?

A. Proposed Classification Thresholds

1. Background

The subpart 2 classification table includes the classification thresholds for areas designated as nonattainment for the 1-hour ozone NAAQS. The subpart 2 classification table is based on 1-hour ozone nonattainment area design values (DVs) (i.e., beginning at a level of 0.121 ppm) because it was designed for implementation of the 0.12 ppm 1-hour standard, which was the effective ozone standard when Congress added the table to the CAA in 1990. Because the table is based on DVs for a 0.12 ppm 1-hour standard, we recognized in the rulemaking to implement the 1997 NAAQS that it did not make sense to apply the thresholds listed in the table for implementing the 1997 0.08 ppm 8-hour standard. The EPA believed that using 8-hour DVs to classify areas for the 8-hour standard would reflect the magnitude of the 8-hour ozone problem more accurately than would using the 1-hour DVs in the subpart 2 classification table. In addition, many of the areas that

[7] For additional detail on the 1-hour ozone NAAQS, *see* 56 FR 56694.

[8] *See* 40 CFR Appendix I.

[9] Referred to as the Phase 1 Rule, *see* 40 CFR part 51, subpart X at 51.903.

[10] While CAA section 107, which governs the process for initial area designations, specifically addresses states, the EPA intends to follow the same process for tribes to the extent practicable, pursuant to section 301(d) of the CAA regarding tribal authority and the Tribal Authority Rule (63 FR 7254; February 12, 1998). The EPA is working with the tribes and tribal organizations regarding their participation in the designations process.

[11] When EPA revises a NAAQS, the prior NAAQS is not automatically revoked. Accordingly, both the 1997 ozone NAAQS and the more stringent 2008 ozone NAAQS are active standards unless and until EPA takes action to revoke the previous 1997 standard.

were nonattainment for the 1997 8-hour NAAQS had 1-hour DVs less than 0.121 ppm and would not have been covered by the subpart 2 classification table at all.

We adopted by regulation a modified version of the subpart 2 classification table for the 1997 8-hour ozone standard which contains 8-hour DV thresholds for each classification, rather than the statutory 1-hour DV thresholds. We translated the classification thresholds in the subpart 2 classification table from 1-hour DVs to 8-hour DVs based on the percentage by which each classification threshold in the table exceeds the 1-hour ozone NAAQS. We noted that these percentages, as established by Congress in 1990, set the classification thresholds at certain percentages or fractions above the level of the standard.[12] We refer to this method as the ''percent-above-the-standard'' method. We are proposing to take the same approach for the 2008 ozone NAAQS. As we did for the 1997 8-hour NAAQS, we are proposing to establish by regulation a modified version of this classification table to account for the new level of 0.075 ppm as compared to the level of 0.08 ppm used to establish the classification table for the 1997 ozone NAAQS.

As we did for the 1997 NAAQS, the EPA analyzed various alternative options for establishing thresholds for classifications for the 2008 ozone NAAQS. However, we are proposing to use the same ''percent-above-the-standard'' methodology as was used for the 1997 ozone standard.[13] Options that were evaluated other than the one we are proposing are discussed in more detail in a background information document[14] in the docket to this rulemaking. While the EPA believes the ''percent-above-the-standard'' method is appropriate for designating areas for the 2008 NAAQS, alternative methods may be appropriate to consider in developing classification thresholds for any future revisions to the ozone standards.

The percent-above-the-standard method is a simple and straightforward method for establishing classification thresholds that is based on principles inherent in the subpart 2 classification table itself. The principles include the following:

- Areas are grouped by the severity of their air quality problem as characterized by the degree of nonattainment based on their DV.
- Classification would occur ''by operation of law'' without relying on EPA exercising discretion for individual situations (prior to any application of the 5 percent adjustment provision under section 181(a)(4)). *See* section III.B of this rule for additional details on how EPA intends to address previous requests for voluntary bump-ups for the 1997 ozone NAAQS.
- Classification thresholds are derived from the structure or logic of the CAA's nonattainment area planning and control requirements, including the subpart 2 classification table, and consistent with the overall goal of subpart 2 of attaining the standards as expeditiously as practicable.

2. Proposed Classification Threshold Method—Percent-Above-the-Standard Method

In this section, we describe the EPA's proposed methodology for establishing classification thresholds for purposes of classifying ozone nonattainment areas with respect to the 2008 ozone NAAQS. Using this approach for the 2008 NAAQS, the classification thresholds in the subpart 2 classification table would be translated into a corresponding set of 8-hour DVs by setting threshold DVs in the new table at the same percentages above the 2008 ozone NAAQS as the DV levels in the subpart 2 classification table are above the 1-hour ozone NAAQS. For example, the threshold separating the Marginal and Moderate classifications in the subpart 2 classification table (0.138 ppm) is 15 percent above the 1-hour ozone NAAQS (0.12 ppm). Thus, under this approach, the threshold separating the Marginal and Moderate classifications for the 2008 ozone NAAQS would be 0.075 ppm plus 15 percent, or 0.086 ppm. Table 1, below, depicts this proposed translation for classifications as it would apply for the 2008 ozone NAAQS.

TABLE 1—SUBPART 2 1-HOUR OZONE DESIGN VALUE CLASSIFICATION TABLE TRANSLATION TO 8-HOUR DESIGN VALUES FOR THE 2008 OZONE NAAQS OF 0.075 PPM

Area class		1-hour design value (ppm)	Percent above 1-hour ozone NAAQS	8-hr ozone design value (ppm)
Marginal	From	0.121	0.833	0.076
	up to [1]	0.138	15	0.086
Moderate	From	0.138	15	0.086
	up to [1]	0.160	33.333	0.100
Serious	From	0.160	33.333	0.100
	up to [1]	0.180	50	0.113
Severe-15	From	0.180	50	0.113
	up to [1]	0.190	58.333	0.119
Severe-17	From	0.190	58.333	0.119
	up to [1]	0.280	133.333	0.175
Extreme	equal to or above	0.280	133.333	0.175

Note 1: But not including.

Based on our analysis of air quality information from 2008–2010, we estimate that approximately 52 areas had ambient ozone concentrations exceeding the 2008 ozone NAAQS. We use these 52 ''hypothetical nonattainment areas'' for purposes of the following discussion.[15] These

[12] The upper thresholds of the Marginal, Moderate, Serious, and Severe classifications are precise percentages or fractions above the level of the standard, namely 15 percent (3/20ths more than the standard), 33.33 percent (one-third more than the standard), 50 percent (one-half more than the standard), and 133.3 percent (one and one-third more than the standard).

[13] Background Information Document: Development of Hypothetical Nonattainment Areas for Illustrating Proposed Classification Thresholds for Areas Designated Nonattainment for the 2008 0.075 PPM 8-Hour Ozone National Ambient Air Quality Standard. January 2012.

[14] Background Information Document: Additional Options Considered for Classification of Nonattainment Areas under the 2008 Ozone NAAQS. January 2012.

[15] Background Information Document: Development of Hypothetical Nonattainment Areas for Illustrating Proposed Classification Thresholds

Continued

hypothetical areas are intended to illustrate the distribution of areas into the proposed classifications. The actual number of total nonattainment areas and the classification of each area will depend on decisions made in the separate designations process under section 107(d). If we were to use the proposed thresholds in Table 1, above, as the basis for classifying nonattainment areas with respect to the 2008 ozone NAAQS, the 52 hypothetical nonattainment areas based on 2008–2010 air quality data would be distributed in each classification as shown in Table 2.

TABLE 2—NUMBER OF HYPOTHETICAL NONATTAINMENT AREAS IN EACH CLASSIFICATION UNDER THE 2008 OZONE NAAQS: PERCENT-ABOVE-THE-STANDARD METHOD

Classification	2008 O3 NAAQS (hypothetical areas)
Marginal	43
Moderate	6
Serious	3
Severe	0
Extreme	0
Total	52

The proposed classification method would result in the vast majority of nonattainment areas being classified as Marginal. It is possible that a few areas would have a later maximum statutory attainment date for their existing classification under the 1997 ozone NAAQS than they would have for their new classification under the 2008 NAAQS. For example, an area that would be classified Marginal for the more stringent 2008 ozone NAAQS (with an anticipated maximum statutory attainment date in 2015), may have been classified as Severe for the less-stringent 1997 ozone NAAQS (with a later maximum statutory attainment date in 2019).[16] This issue did not arise when we promulgated the classification structure for the 1997 NAAQS. (*See* section III.B of this rule for additional details on how EPA intends to address previous requests for voluntary bump-ups for the 1997 ozone NAAQS.)

Many Marginal areas are expected to attain the 2008 NAAQS within 3 years of designation (e.g., in 2015) due to reductions of ozone precursors resulting from a number of federal and state emission reduction programs that have already been adopted. Such programs include more stringent emission standards for onroad and nonroad vehicles and equipment (with associated fleet turnover), regional reductions in power plant emissions to address interstate transport,[17] and potential future programs such as the boiler maximum achievable control technology standards. The EPA estimates that in about half of the Marginal areas, these reductions in conjunction with other ongoing state and federal controls should be sufficient to bring about attainment.[18] In other areas, additional control measures may be needed for timely attainment.

3. Other Classification Methods Considered

A number of interested parties have recommended to the EPA other options for classification of ozone nonattainment areas. The EPA evaluated many other methods but we are not proposing them or soliciting comment on them because we did not find them as compelling for application to the 2008 ozone NAAQS as the option discussed in this proposal. We have included in the docket all written recommendations we have received in recent years regarding classification approaches. Other options that we considered but are not proposing are also summarized in the docket.[19]

B. Reclassification of Nonattainment Areas that Have Voluntarily Requested Higher Classifications

The CAA provides three mechanisms for addressing nonattainment areas that may not be able to attain by the attainment date provided for their classification. First, section 181(a)(4) provides that within 90 days of designation and classification, the Administrator may exercise discretion to reclassify an area to a higher (or lower) classification if its DV is within 5 percent of the DV range of the higher (or lower) classification.[20] Any state interested in taking advantage of this flexibility should submit a request to the EPA in sufficient time for the Administrator to make a determination within the 90 days provided.

The second mechanism, provided in section 181(b)(2), requires that an area be reclassified to the next higher classification (i.e., ''bumped-up'') if EPA determines that the area has failed to attain the standard by the attainment date and does not qualify for the first of two possible 1-year attainment date extensions allowed under the CAA (excluding Severe to Extreme reclassification).

The third mechanism, provided in section 181(b)(3), allows a state to voluntarily request that the EPA reclassify the area to a higher classification. The EPA has no discretion to deny such requests. Once an area is reclassified to a higher classification, it becomes subject to the associated additional planning and control requirements for that higher classification as well and must attain the standard no later than the later maximum attainment date for that classification.

There are seven areas for which states requested a voluntary reclassification with respect to the 1997 NAAQS. If these areas were classified based on 2008–2010 air quality data and pursuant to the classification structure proposed here, it is likely that they would have a lower classification and an earlier maximum attainment date for the 2008 NAAQS than such areas have for the 1997 ozone NAAQS. EPA has granted voluntary reclassification requests for six of these areas; the request for one area is still pending.[21]

for Areas Designated Nonattainment for the 2008 0.075 PPM 8-Hour Ozone National Ambient Air Quality Standard. January 2012. Most hypothetical nonattainment areas include multiple counties, based on the existing 1997 8-hour ozone nonattainment areas, Combined Statistical Area, or Core Based Statistical Area boundary associated with a violating monitor. Note that these areas are used for analytical purposes only. Actual nonattainment areas and boundaries will be determined through the designations process.

[16] As indicated elsewhere in this preamble, the EPA intends to designate areas for the 2008 standard by mid-2012. Thus, a 3-year attainment deadline would be in 2015.

[17] Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals. August 8, 2011; 76 FR 48208.

[18] Technical note to docket # EPA–HQ–OAR–2010–0885, February 2012. ''The Hypothetical Nonattainment Area Projections of 2008–2010 Design Values to 2015.''

[19] Background Information Document: Additional Options Considered for Classification of Nonattainment Areas under the Proposed 2008 Ozone NAAQS. January 2012.

[20] This CAA provision also provides the same authority for reclassifying areas to a lower classification, an approach that may not be relevant where the area in question is unlikely to attain by the attainment date for the classification it receives at the time of designation.

[21] Ventura County, CA was reclassified from Moderate to Serious (Approved 05/20/2008, 73 FR Page 29073, Effective: 06/19/2008). Houston-Galveston-Brazoria, TX was reclassified from Moderate to Severe-15 (Approved 10/01/2008, 73 FR Page 56983, Effective: 10/31/2008). Reclassification of the Los Angeles-South Coast, San Joaquin Valley, Riverside County, and Sacramento Metro areas (May 5, 2010, 75 FR 24409) became effective June 4, 2010. The requested voluntary reclassification of West Mojave Desert, CA from Moderate to Severe-17 is still pending with the EPA.

TABLE 3—AREAS FOR WHICH THE STATE REQUESTED A VOLUNTARY RECLASSIFICATION UNDER THE 1997 NAAQS

Nonattainment Area	State	Original 1997 NAAQS classification	Voluntary reclassification	Potential classification under 2008 NAAQS [1]
Los Angeles-South Coast Air Basin	CA	Severe	Extreme	Serious.
San Joaquin Valley	CA	Serious	Extreme	Serious.
Riverside County (Coachella Valley)	CA	Serious	Severe	Moderate.
Sacramento Metro	CA	Serious	Severe	Serious.
Ventura County	CA	Moderate	Serious	Moderate.
Western Mojave [2]	CA	Moderate	Severe	Moderate.

Note 1: Based on thresholds proposed in this notice and 2008–2010 design values.
Note 2: This request for a reclassification is still pending.

The EPA is proposing that the approved prior voluntary reclassification requests for the 1997 ozone NAAQS would also apply for the more stringent 2008 ozone NAAQS unless the state explicitly requests otherwise. The areas to which this would apply are listed in Table 3.[22] We believe this is an appropriate mechanism to address the limited situation where an area that was voluntarily reclassified for the 1997 ozone NAAQS would have an attainment date for the more stringent 2008 ozone NAAQS that is earlier than the area's attainment date for the less stringent 1997 NAAQS. Based on discussions with affected areas, we also believe it is reasonable to expect that the areas listed in Table 3 that requested a voluntary reclassification under the less stringent 1997 NAAQS would make the same request for the 2008 NAAQS. The EPA is proposing this approach in order to minimize burden on states and obviate the need to go through the voluntary reclassification process again.

C. What are we proposing as the attainment deadlines for nonattainment areas in each classification of the 2008 ozone NAAQS?

1. Background

The CAA provides that the primary NAAQS attainment dates for areas subject to subpart 2 must be as expeditious as practicable but no later than the deadlines provided in the subpart 2 classification table. The deadlines for attainment in the subpart 2 classification table are specified in terms of a certain number of years from the date of enactment of the 1990 Amendments to the CAA (i.e., November 15, 1990). For instance, the attainment date for Moderate areas is expressed as ''6 years after November 15, 1990.'' Because these time periods are clearly inappropriate for a new standard promulgated in 2008, we must interpret the attainment deadlines in the subpart 2 classification table as they would apply to the 2008 NAAQS.

In the Phase 1 rule for implementation of the 1997 ozone NAAQS,[23] we interpreted these timeframes to run from the date that area designations and nonattainment classifications (by operation of law) became effective. We explained in the proposed and final rules for implementation of the 1997 ozone NAAQS that it was reasonable for these dates to run from the date of designation because other provisions of the CAA established the attainment date as a set period of time after designation. *See* 69 FR 23966–67; 68 FR 32817. As discussed below, we are proposing this same approach for the 2008 NAAQS and also proposing an alternate approach where the attainment dates would be at the end of the calendar year. We are proposing an alternate approach because we anticipate that designations for the 2008 NAAQS will be effective some time after the start of the 2012 ozone season [24] for most areas and possibly well into the summer. As explained in more detail below, the alternative approach would allow Marginal areas 3 full years to attain, Moderate areas 6 full years to attain, etc.

2. Proposal

The EPA is proposing two options for establishing the maximum attainment dates for areas in each nonattainment classification. Under the first option, the attainment dates would be the precise number of years specified in Table 1 with such time period running from the effective date of designation. Under the second option, the attainment dates would be December 31 of the year that is the specified number of years in Table 1 after designation. In order to fully evaluate the two options, we note that the EPA intends to complete initial area designations for the 2008 ozone NAAQS no later than May 31, 2012. We anticipate the designations will be effective 60 days following publication in the **Federal Register** and that it will take approximately 2 weeks for the designations notice to be published. Under this scenario, designations would be effective by approximately mid-August 2012.

For the first option, we are proposing that the deadlines in the subpart 2 classification table would be specified in terms of a certain number of years from the effective date of designation for the 2008 standard. This is the same approach we took for the 1997 NAAQS. In this case, we would interpret ''year'' in the subpart 2 classification table to mean consecutive 365-day periods,[25] and we would substitute ''after the effective date of designation'' for the CAA's ''after November 15, 1990'' language in the subpart 2 classification table. Under this approach the attainment deadline would fall a precise number of years after the effective date of designation. As an example, if the Administrator issued designations for the 2008 NAAQS on May 31, 2012, and the designations became effective on August 15, 2012, the attainment dates would run from August 15, 2012, such that a Marginal area would be required to attain the 2008 ozone standard by August 15, 2015.

For the second and the EPA's preferred option, the attainment date would be specified as a certain number of years from the end of the calendar year in which an area's nonattainment designation is effective. In other words, if the effective date of designations for the 2008 ozone NAAQS is August 15, 2012, the 3-year attainment deadline for Marginal areas would be December 31, 2015.

We are proposing this option as our preferred option for the 2008 ozone NAAQS because, as explained above, we believe it is likely that designations

[22] Texas also requested voluntary reclassification for the Houston-Galveston-Brazoria nonattainment area for the 1997 ozone NAAQS. Texas has already indicated that they do not wish for that request to apply to the 2008 ozone NAAQS.

[23] 69 FR 23951.

[24] The ozone season for each state is defined in 40 CFR part 58, Appendix D, and, for most areas, runs from April to October. *See* also the July 16, 2009, Proposed Monitoring Rule (74 FR 34525).

[25] Except in the case of a leap year, where the year would be a rolling 366 day period.

will be effective in August 2012, which is late in the ozone season. Where the designation is effective late in the ozone season, under the first option a Marginal area effectively would have only two ozone seasons following designation to improve its air quality in order to attain by its attainment date. This is because compliance with the standard is based on air quality during the most recent three full consecutive ozone seasons, and the most recent 3 full ozone seasons preceding the attainment deadline in this case would run through the end of the previous year's ozone season. Because attainment is based on three full ozone seasons of air quality data, in order to attain ''by'' its attainment date, the area could not consider air quality for an ozone season during which the attainment date falls. For example, in the case of the 1997 ozone NAAQS, designations became effective on June 15, 2004, and areas had an attainment date of June 15 of the year falling 3, 6, etc. years after designation. Thus, in order for a Marginal area to attain by June 15, 2007, it could not consider air quality data from the 2007 ozone season, but instead was required to demonstrate attainment based on the 3 years of air quality data from 2004–2006. In this situation, the area's attainment date effectively was December 31, 2006.

Because we anticipate designations will be effective late in the ozone season for the 2008 NAAQS, we are concerned that if a Marginal area is required to attain in August 2015, the area would effectively have only two ozone seasons (the 2013 and 2014 ozone seasons) from the date of designation to improve its air quality for the purpose of showing attainment. Accordingly, the state would need to both plan for and achieve all emission reductions necessary for the area to attain by the beginning of the 2014 ozone season, so that those reductions would be reflected in the air quality data considered for determining whether the area attained by its attainment date (i.e., attainment would be based on air quality data from 2012–2014). Similarly, a Moderate area would need to implement measures to attain by the beginning of the 2017 ozone season in order for those reductions to be reflected in the air quality data considered for purposes of determining whether the area attained (data from 2015–2017) by August 2018.

We believe this second option is consistent with the time periods provided for attainment of the 1-hour ozone NAAQS at the time the CAA was amended. The CAA Amendments were enacted on November 15, 1990, after the end of the ozone season for virtually all areas, and for the few areas that had year-round ozone seasons, EPA interpreted the Act to allow consideration of air quality in the attainment year even though the attainment date fell on November 15. Thus, when the CAA was amended in mid-November 1990, 1-hour Marginal areas had three full ozone seasons to achieve any reductions necessary for attainment, and Moderate areas had six full ozone seasons, because the attainment deadline was the anniversary of the enactment of the 1990 CAA (November 15). Table 4 summarizes for each proposed option how we would interpret the maximum attainment dates for areas in each classification under the 2008 NAAQS, using an example where the effective date of designations is August 15, 2012.

TABLE 4—EXAMPLE OF PROPOSED ATTAINMENT DATES FOR THE 2008 STANDARD IF NONATTAINMENT DESIGNATIONS ARE EFFECTIVE AUGUST 15, 2012

Classification	Option 1	Option 2
Marginal	August 15, 2015	December 31, 2015.
Moderate	August 15, 2018	December 31, 2018.
Serious	August 15, 2021	December 31, 2021.
Severe	August 15, 2027 or 2029	December 31, 2027 or 2029.
Extreme	August 15, 2032	December 31, 2032.

IV. What is the EPA proposing regarding revocation of the 1997 ozone NAAQS at this time?

At this time, the EPA is proposing to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only.[26] Revoking the 1997 ozone NAAQS for transportation conformity purposes, as described below, will bring certainty to the transportation planning process in ozone nonattainment and maintenance areas. It will also ensure that backsliding does not occur for purposes of transportation conformity as areas designated nonattainment for the 2008 ozone NAAQS will be required to use adequate or approved SIP motor vehicle emissions budgets for the 1997 ozone NAAQS or 1-hour ozone NAAQS, if the area has such SIP budgets for one of these ozone NAAQS, until SIP budgets are found adequate or are approved for the 2008 ozone NAAQS as required by recent court decisions discussed below and as required by CAA 176(c)(1).[27] Specifically, CAA section 176(c)(1) states, in part, ''No metropolitan planning organization designated under section 134 of Title 23 shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title.'' In other words, adequate or approved motor vehicle emissions budgets for a prior NAAQS must be used in transportation conformity determinations for a revised NAAQS until such time that budgets for the revised NAAQS are either found adequate or are approved. The EPA is proposing this limited revocation of the 1997 ozone NAAQS at this time to provide certainty to the transportation planning process. In a subsequent rulemaking, the EPA will consider whether to also revoke the 1997 NAAQS for other purposes.

A. What is the background for our proposal?

At the time the EPA promulgated the 2008 NAAQS, the Administrator

[26] Transportation conformity is required under CAA section 176(c) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit projects are consistent with (''conform to'') the purpose of the SIP. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant NAAQS or interim reductions and milestones. The EPA's Transportation Conformity Rule (40 CFR 51.390 and Part 93, subpart A) establishes the criteria and procedures for determining whether transportation activities conform to the SIP.

[27] A motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

determined that the 1997 ozone NAAQS was no longer sufficient to protect public health and the environment with an adequate margin of safety and that it was therefore necessary to establish a more stringent standard. 73 FR 16436 (Mar. 27, 2008). In determining how to transition from the 1997 NAAQS to the more stringent 2008 NAAQS, the EPA is now presented with the same situation that we faced with the transition from the 1-hour ozone NAAQS to the more stringent 1997 ozone NAAQS. For that transition, our Phase 1 implementation rule for the 1997 ozone NAAQS revoked the 1-hour ozone NAAQS for all purposes 1 year after the effective date of the initial area designations for the 1997 ozone NAAQS. (*See* 69 FR 23954). The Phase 1 rule also established comprehensive anti-backsliding provisions to ensure that requirements for the 1-hour ozone NAAQS would continue in place as areas transitioned to implementing the more stringent 1997 ozone standard.

The revocation of the 1-hour standard and the associated anti-backsliding provisions were the subject of litigation. In its December 2006 decision on that challenge, as modified following rehearing, the Court held with respect to the anti-backsliding approach for transportation conformity that 1-hour motor vehicle emissions budgets must be used where such budgets have been found adequate or approved, as part of 8-hour conformity determinations until 8-hour motor vehicle emissions budgets are available. (*South Coast Air Quality Management District* v. *EPA,* 472 F.3d at 882). In addition, the Court affirmed more broadly that in order for transportation conformity determinations to fulfill the requirements of CAA section 176(c)(1), motor vehicle emissions budgets for a prior NAAQS must be used in transportation conformity determinations under a revised NAAQS until emissions budgets for the revised NAAQS are either found adequate or are approved. Therefore, areas designated nonattainment for the 2008 ozone NAAQS that have adequate or approved SIP budgets for either the 1997 ozone NAAQS or the 1-hour ozone NAAQS must continue to use such budgets in transportation conformity determinations until budgets for the 2008 ozone NAAQS are found adequate or are approved.[28]

B. What is the rationale for our proposal?

At this time, we are proposing to revoke the 1997 ozone NAAQS for transportation conformity purposes only. The revocation of the 1997 ozone NAAQS for this limited purpose would occur 1 year after the effective date of initial area designations for the 2008 ozone NAAQS. Similar to our rationale in the Phase 1 rule for implementation of the 1997 ozone NAAQS, we believe this approach makes the most sense because it would result in only one ozone NAAQS—the 2008 ozone NAAQS—applying for purposes of transportation conformity, after the end of the one-year transportation conformity grace period that applies to newly designated nonattainment areas. (CAA section 176(c)(6)). If the 1997 ozone NAAQS were to remain in place after conformity applies for the 2008 ozone NAAQS, metropolitan planning organizations and other state, local, and federal transportation and air quality agencies in areas that are currently nonattainment or maintenance for the 1997 ozone NAAQS and will be designated nonattainment for the 2008 ozone NAAQS would be required to implement the transportation conformity program for both ozone NAAQS concurrently. This could lead to unnecessary complexity for conformity determinations, especially if an area's boundaries for the two ozone NAAQS differ from one another and the same test of conformity cannot be used for both ozone NAAQS. Even where an area's boundaries are unchanged, different analysis years under the conformity rules may be required for each ozone NAAQS. Furthermore, we believe that it is more important to determine conformity for the new 2008 ozone NAAQS that is more protective of health and welfare.

For transportation conformity purposes, this proposal would provide a seamless transition from demonstrating conformity for the 1997 ozone NAAQS to demonstrating conformity for the 2008 ozone NAAQS. Revoking the 1997 ozone NAAQS 1 year after the effective date of designations for the limited purpose of transportation conformity would leave no gap in conformity's application in any 2008 ozone nonattainment areas.

C. Why is it necessary to revoke the 1997 ozone NAAQS now for transportation conformity purposes?

The EPA has determined that it is necessary to establish the date for the revocation of the 1997 ozone NAAQS as it applies for transportation conformity purposes now in order to provide state and local transportation and air quality agencies with certainty as to what conformity requirements will apply after designations are finalized for the 2008 ozone NAAQS. Areas designated nonattainment for the 2008 ozone NAAQS will have 1 year after the effective date of the designation to complete a conformity determination for the 2008 ozone NAAQS. If an area does not complete the required conformity determination by the end of the 1-year grace period, the area will enter a conformity lapse until the required determination is completed.[29] Based on 2008–2010 air quality monitoring data, and as discussed elsewhere in today's notice, we anticipate that 52 areas would be designated as nonattainment areas and 44 of these areas are either nonattainment or maintenance for the 1997 ozone NAAQS. Areas designated nonattainment for the 2008 NAAQS will likely need the full 1-year grace period provided in CAA section 176(c)(6) to complete the required initial conformity determination. Those areas that are designated as either nonattainment or maintenance for the 1997 ozone NAAQS at the time they are designated as nonattainment for the 2008 ozone NAAQS will need certainty as to the specific requirements for that conformity determination. For example, they need to know what analysis years must be addressed and, if the boundaries for the two ozone NAAQS are different, they need to know whether to address conformity for both areas and which test or tests would apply.

By determining conformity for the 2008 standard, which is the more health and welfare protective standard, the EPA is both:

- Fulfilling the CAA's requirements for transportation conformity which include preventing new air quality violations, not making existing violations worse and not delaying any interim milestones; and
- Making the most efficient use of state and local resources in fulfilling those requirements.

In addition, a large number of areas that are currently required to determine conformity for the 1997 ozone NAAQS are attaining the 2008 ozone NAAQS based on 2008–2010 air quality data. If these areas are designated as attainment areas for the 2008 ozone NAAQS, they would not be required to demonstrate

[28] Areas without adequate or approved SIP budgets for either the 1997 ozone NAAQS or the 1-hour ozone NAAQS are required to demonstrate conformity using one or both of the interim emissions tests depending on their classification as required by 40 CFR 93.119.

[29] During a lapse, an area can proceed with only a limited amount of transportation projects including projects that are exempt from conformity, projects and project phases that had previously been approved and transportation control measures included in an approved SIP.

conformity for the 1997 ozone NAAQS, as of the effective date of the revocation of the 1997 ozone NAAQS. These areas would no longer have to expend resources to make conformity determinations for the 1997 ozone NAAQS.

D. Is the EPA proposing to revoke the 1997 ozone NAAQS for other purposes as part of this rulemaking?

As part of this rule, the EPA is not proposing to revoke the 1997 ozone NAAQS for purposes other than transportation conformity. Because of the necessity to quickly finalize a rule addressing nonattainment area classifications, we are not including a broad proposal here regarding revocation of the 1997 NAAQS and how anti-backsliding requirements might apply if the 1997 standard is revoked for purposes other than transportation conformity. We are developing a separate proposed rule that will address those issues and we expect to issue that proposed rule in the spring of 2012. We plan to address any comments on the issue of revocation and anti-backsliding for all requirements other than transportation conformity in the context of that future, separate rulemaking.

V. What does this rulemaking not address?

This proposed rulemaking does not propose to establish attainment or nonattainment designations for specific areas nor does it address the principles that will be considered in the designation process. Because the designations are not the subject of this proposed rule, we do not intend to respond to comments concerning designations in the context of this rulemaking.

In addition, this proposed rule does not address any specific SIP requirements associated with different classification categories. This proposed rule also does not address revocation of the 1997 ozone NAAQS for purposes other than transportation conformity. Similarly, anti-backsliding issues are not addressed in this rule. The remaining implementation requirements for the 2008 NAAQS will be addressed in a separate rulemaking. We do not intend to respond in the context of this rulemaking to comments pertaining to implementation issues that will be addressed by a future rulemaking.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates. Accordingly, EPA submitted this action to OMB for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

The EPA is proposing this Classifications Rule for the 2008 ozone NAAQS so that areas may be classified by operation of law at the time of designation as provided in section 181(a) of the CAA. This proposed rule would also revoke the 1997 ozone NAAQS for transportation conformity purposes only. The EPA is proposing this limited revocation in order to bring certainty to the transportation conformity process consistent with prior court decisions and CAA section 176(c). This rule, in conjunction with another implementation rule we plan to propose in the future, will help states identify planning requirements that apply for purposes of attaining and maintaining the 2008 ozone NAAQS. No new information needs to be collected from the states as a result of this proposed rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of these proposed regulations on small entities, small entity is defined as: (1) A small business as defined in 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.

The CAA requires the EPA to designate areas and provides for nonattainment areas to be classified by operation of law at the time of designation. This rule provides a method for establishing these classifications and interpreting the associated attainment deadlines. The CAA also requires that nonattainment and maintenance areas make transportation conformity determinations. This rule proposes to revoke the 1997 ozone NAAQS 1 year after the effective date of designations so that areas designated nonattainment for the 2008 ozone NAAQS are required to address conformity requirements for only the more protective 2008 ozone NAAQS.

After considering the economic impacts of this proposed rule on small entities, the EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, and tribal governments, in the aggregate, or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The

requirement to designate and classify nonattainment areas is imposed by the CAA as are the requirements for nonattainment and maintenance areas to make transportation conformity determinations. This proposed rule, if made final, would interpret how the classification provisions in section 181(a) will apply for purposes of the 2008 8-hour ozone NAAQS that was finalized on March 27, 2008. (*See* 73 FR 16436). It also proposes to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only. Thus, Executive Order 13132 does not apply to these proposed regulations.

Although this action does not have federalism implications as defined in Executive Order 13132, the EPA recognizes that the adoption in 2008 of the more health-protective ozone standards will result in additional effort by state agencies responsible for managing air quality programs. Under the CAA, achieving these health benefits requires the combined efforts of the federal, state, and local governments, each accomplishing the tasks for which they are best suited. In the spirit of Executive Order 13121 and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA is soliciting comments on this proposal from state and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The proposed rules do not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop classification recommendations under these proposed regulatory revisions. This proposal revokes the 1997 ozone NAAQS for transportation and does not significantly or uniquely affect the communities of Indian tribal governments, as the CAA requires transportation conformity to apply in any area that is designated nonattainment or maintenance by the EPA. Furthermore, these proposed regulation revisions do not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. The CAA and the Tribal Air Rule establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. These proposed regulations revisions do not have tribal implications. Thus, Executive Order 13175 does not apply to this action.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action would establish classifications for areas that do not attain the 2008 ozone standard.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The 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.

These proposed revisions to the regulations do not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed regulations would, if promulgated, establish classification thresholds for designated nonattainment areas for the 2008 ozone NAAQS, which are designed to protect all segments of the general populations. As such, they do not adversely affect the health or safety of minority or low-income populations and are designed to protect and enhance the health and safety of these and other populations. Today's action also proposes to revoke the 1997 ozone NAAQS for transportation conformity purposes only. Such a revocation would not lead to disproportionately high and adverse human health or environmental effects on minority or low-income populations as the CAA requires transportation conformity to apply in any area that is designated nonattainment or maintenance by the EPA. This proposed rule ensures that transportation conformity is demonstrated in all areas that are designated nonattainment for the more protective 2008 ozone NAAQS.

VII. Statutory Authority

The statutory authority for this action is provided by sections 110; 176; 181; and 301(a)(1) of the CAA, as amended (42 U.S.C. 7409; 42 U.S.C. 7506; 42 U.S.C. 7511; 42 U.S.C. 7601(a)(1)).

List of Subjects

40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 51

Air pollution control, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: February 7, 2012.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

1. The authority citation for Part 50 continues to read as follows:

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

2. Section 50.10 is amended by adding a paragraph (c) to read as follows:

§ 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.

* * * * *

(c) The 1997 ozone NAAQS set forth in paragraph (a) of this section will no longer apply to an area for transportation conformity purposes 1 year after the effective date of the designation of the area for the 2008 ozone NAAQS pursuant to section 107 of the CAA. The 1997 ozone NAAQS set forth in this section will continue to remain applicable to all areas for all other purposes notwithstanding the promulgation of the 2008 ozone NAAQS under § 50.15 or the designation of areas for the 2008 ozone NAAQS. Area designations and classifications with respect to the 1997 ozone NAAQS are codified in 40 CFR part 81.

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

3. The authority citation for Part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

4. Part 51 is amended by adding a new subpart AA to read as follows:

Subpart AA—Provisions for Implementation of the 2008 Ozone National Ambient Air Quality Standards

Sec.

51.1100 Definitions.
51.1101 Applicability of Part 51.
51.1102 Classification and nonattainment area planning provisions.
51.1103 Application of classification and attainment date provisions in section 181 of subpart 2 of the CAA to areas subject to § 51.1102(a).

Subpart AA—Provisions for Implementation of the 2008 Ozone National Ambient Air Quality Standards.

§ 51.1100 Definitions.

The following definitions apply for purposes of this subpart. Any term not defined herein shall have the meaning as defined in 40 CFR 51.100.

(a) *1-hour NAAQS* means the 1-hour primary and secondary ozone national ambient air quality standards codified at 40 CFR 50.9.

(b) *1997 NAAQS* means the 8-hour primary and secondary ozone national ambient air quality standards codified at 40 CFR 50.10.

(c) *2008 NAAQS* means the 2008 primary and secondary ozone NAAQS codified at 40 CFR 50.15.

(d) *1-hour ozone design value* is the 1-hour ozone concentration calculated according to 40 CFR part 50, Appendix H and the interpretation methodology issued by the Administrator most recently before the date of the enactment of the CAA Amendments of 1990.

(e) *8-hour ozone design value* is the 8-hour ozone concentration calculated according to 40 CFR part 50, Appendix P.

(f) *CAA* means the Clean Air Act as codified at 42 U.S.C. 7401–7671q (2010).

(g) *Attainment area* means, unless otherwise indicated, an area designated as either attainment, unclassifiable, or attainment/unclassifiable.

(h) *Attainment year ozone season* shall mean the ozone season immediately preceding a nonattainment area's maximum attainment date.

(i) *Designation for the 2008 NAAQS* shall mean the effective date of the designation for an area for the 2008 NAAQS.

(j) *Higher classification/lower classification.* For purposes of determining whether a classification is higher or lower, classifications under subpart 2 are ranked from lowest to highest as follows: Marginal; Moderate; Serious; Severe; and Extreme.

(k) *Initially designated* means the first designation that becomes effective for an area for the 2008 NAAQS and does not include a redesignation to attainment or nonattainment for the 2008 NAAQS.

(l) *Maintenance area* means an area that was designated nonattainment for a specific NAAQS and was redesignated to attainment for that NAAQS subject to a maintenance plan as required by CAA section 175A.

(m) *Nitrogen Oxides (NO_X)* means the sum of nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(n) *Ozone season* means for each state, the ozone monitoring season as defined in 40 CFR Part 58, Appendix D, section 2.5 for that state.

§ 51.1101 Applicability of Part 51.

The provisions in subparts A–X of part 51 apply to areas for purposes of the 2008 NAAQS to the extent they are not inconsistent with the provisions of this subpart.

§ 51.1102 Classification and nonattainment area planning provisions.

An area designated nonattainment for the 2008 NAAQS will be classified in accordance with CAA section 181, as interpreted in § 51.1103(a), and will be subject to the requirements of subpart 2 that apply for that classification.

§ 51.1103 Application of classification and attainment date provisions in section 181 of subpart 2 of the CAA areas subject to § 51.1102(a).

(a) In accordance with CAA section 181(a)(1), each area designated nonattainment for the 2008 ozone NAAQS shall be classified by operation of law at the time of designation. The classification shall be based on the 8-hour design value for the area at the time of designation, in accordance with Table 1. A state may request a higher or lower classification as provided in paragraphs (b) and (c) of this section. For each area classified under this section, the attainment date for the 2008 NAAQS shall be as expeditious as practicable but not later than the date provided in Table 1 as follows:

TABLE 1—CLASSIFICATION FOR 2008 8-HOUR OZONE NAAQS (0.075 PPM) FOR AREAS SUBJECT TO SECTION 51.1102(A)

Area class		8-Hour design value (ppm ozone)	Primary standard attainment date (years after designation for 2008 primary NAAQS) **
Marginal	from	0.076	3

TABLE 1—CLASSIFICATION FOR 2008 8-HOUR OZONE NAAQS (0.075 PPM) FOR AREAS SUBJECT TO SECTION 51.1102(A)—Continued

Area class		8-Hour design value (ppm ozone)	Primary standard attainment date (years after designation for 2008 primary NAAQS) **
	up to *	0.086	
Moderate	from	0.086	6
	up to *	0.100	
Serious	from	0.100	9
	up to *	0.113	
Severe-15	from	0.113	15
	up to *	0.119	
Severe-17	from	0.119	17
	up to *	0.175	
Extreme	equal to or above	0.175	20

* But not including.
** The attainment date is [Option 1: The date that is the specified number of years after the effective date of designations for the primary NAAQS. Option 2: December 31 of the calendar year].

(b) A state may request, and the Administrator must approve, a higher classification for any reason in accordance with CAA section 181(b)(3).

(c) A state may request, and the Administrator may in the Administrator's discretion approve, a higher or lower classification in accordance with CAA section 181(a)(4).

(d) Any area designated nonattainment that includes in whole or in part the following areas will be classified by operation of law for the 2008 ozone NAAQS in accordance with the voluntary classification request submitted and approved for each area for the 1997 ozone NAAQS: (For reference: Ventura Co, CA; Los Angeles-South Coast, CA; San Joaquin Valley, CA; Riverside County, CA; and Sacramento Metro, CA.)

[FR Doc. 2012–3284 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2010–0873; FRL–9630–8]

RIN 2060–AH23

Quality Assurance Requirements for Continuous Opacity Monitoring Systems at Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to establish quality assurance and quality control (QA/QC) procedures for continuous opacity monitoring systems (COMS) used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. This action is necessary because we do not currently have QA/QC procedures for COMS. This action would require COMS used to demonstrate continuous compliance to meet these procedures (referred to as Procedure 3).

DATES: Written comments must be received by March 15, 2012. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0873 by mail to U.S. Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of two copies. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Lula H. Melton, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Measurement Technology Group (Mail Code: E143–02), Research Triangle Park, NC 27711; telephone number: (919) 541–2910; fax number: (919) 541–0516; *email address: melton.lula@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Why is the EPA issuing this proposed rule?

This document proposes to add QA/QC procedures for COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. The quality assurance requirements will be added as Procedure 3 to Appendix F of 40 CFR part 60. We have published a direct final rule adding QA/QC procedures for COMS used for compliance determination with opacity standards in federally enforceable standards to the quality assurance requirements in Appendix F of 40 CFR Part 60 in the ''Rules and Regulations'' section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule, and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. Does this action apply to me?

Procedure 3 applies to a COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735,

October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). These quality assurance procedures do not add information collection requirements beyond those currently required under the applicable regulations.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of accessing the impacts of this 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 this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. This action establishes QA/QC procedures for COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations and does not impose additional regulatory requirements on sources. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Rules establishing quality assurance requirements impose no costs independent from national emission standards which require their use, and such costs are fully reflected in the regulatory impact assessment for those emission standards. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action simply establishes QA/QC procedures for COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action establishes QA/QC procedures for COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action establishes QA/QC procedures for COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. It does not add any emission limits and does not affect pollutant emissions or air quality. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

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

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, 12(d) (15 U.S.C. 272 note) directs the 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 the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rule does not relax the control measures on sources regulated by the rule and, therefore, will not cause emissions increases from these sources.

Quality Assurance Requirements for Continuous Opacity Monitoring Systems at Stationary Sources

List of Subjects in 40 CFR Part 60

Air pollution control, Environmental protection, Continuous opacity monitoring.

Dated: February 6, 2012.

Lisa P. Jackson,

Administrator.

[FR Doc. 2012–3378 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–HQ–OAR–2008–0476; FRL–9630–9]

EPA's Revised Responses to Designation Recommendations From Illinois, Indiana, and Wisconsin for the 2008 Ozone Standards: Notice of Availability and Public Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and reopening of public comment period.

SUMMARY: The EPA is reopening the public comment period on the EPA's responses to state and tribal designation recommendations for the 2008 Ozone National Ambient Air Quality Standards for the limited purpose of inviting comment on the EPA's revised responses to the ozone designation recommendations from the states of Illinois, Indiana and Wisconsin. The EPA sent the revised responses to these states on January 31, 2012. The revised responses are available in the docket and on the EPA's ozone designations Web site identified below.

DATES: Comments must be received on or before March 15, 2012. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–OAR–HQ–2008–0476, by one of the following methods:

- *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov. Attention Docket ID No. EPA–HQ–OAR–2008–0476*.
- *Fax:* 202–566–9744. *Attention Docket ID No. EPA–HQ–OAR–2008–0476*.
- *Mail:* Air Docket, *Attention Docket ID No. EPA–HQ–OAR–2008–0476,* Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, 1301 Constitution Avenue NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0476. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information or other information whose disclosure is restricted by statute. Do not submit information that you consider to be confidential business information or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA is unable to read your comment and cannot contact you for clarification due to technical difficulties, the 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 the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. For additional instructions on submitting comments, go to 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, *i.e.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For general questions concerning this action, please contact Carla Oldham, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Planning Division, C539–04, Research Triangle Park, NC 27711, telephone (919) 541–3347, email at *oldham.carla@epa.gov*. For questions about areas in the EPA Region 5, please contact Edward Doty, U.S. EPA, telephone (312) 886–6057, email at *doty.edward@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On December 9, 2011, the EPA responded by letter to all states and tribes regarding their designation recommendations for the 2008 ozone standards and posted the responses on the EPA's Internet Web site at *http://www.epa.gov/ozonedesignations*. The EPA provided a public comment period on those responses which ended on February 3, 2012. On January 31, 2012, the EPA sent revised responses to Illinois, Indiana, and Wisconsin after considering quality-assured air quality monitoring data for 2011 submitted by Illinois on December 7, 2011. Because that air quality information was submitted shortly before the EPA issued its December 9, 2011, responses, the EPA did not have time to consider the information in those initial responses. The EPA has posted the revised responses to Illinois, Indiana, and Wisconsin on the EPA's ozone designations Web site and is reopening the public comment period for the limited purpose of inviting public comments on the revised responses to Illinois, Indiana, and Wisconsin during the comment period specified in the **DATES** section. The EPA intends to make final designation determinations for the 2008 ozone standards in spring 2012.

II. General Information

A. What should I consider as I prepare my comments for the EPA?

1. *Submitting Confidential Business Information.* Do not submit this information to the EPA through

www.regulations.gov or email. Clearly mark the part or all of the information that you claim to be confidential business information. For confidential business information in a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD ROM as confidential business information and then identify electronically within the disk or CD ROM the specific information that is claimed as confidential business information. In addition to one complete version of the comment that includes information claimed as confidential business information, a copy of the comment that does not contain the information claimed as confidential business information must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as confidential business information only to the following address: Roberto Morales, U.S. EPA, Office of Air Quality Planning and Standards, Mail Code C404–02, Research Triangle Park, NC 27711, telephone (919) 541–0880, email at *morales.roberto@epa.gov,* Attention Docket ID No. EPA–HQ–OAR–2008–0476.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

B. Where can I get a copy of this document and other related information?

The EPA has established a docket for the ozone designations rulemaking for the 2008 ozone standards at EPA–HQ–OAR–2008–0476. In addition, the EPA has established a Web site for the ozone designations rulemaking at *www.epa.gov/ozonedesignations.* The Web site includes the state and tribal designation recommendations, information supporting the EPA's preliminary designation decisions, as well as the rulemaking actions and other related information that the public may find useful.

Dated: February 8, 2012.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2012–3373 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 77, No. 30
Tuesday, February 14, 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

Submission for OMB Review; Comment Request

February 8, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, Washington, DC; *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of publication of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Milk and Milk Products.

OMB Control Number: 0535–0020.

Summary of Collection: The National Agricultural Statistics Service's (NASS) primary function is to prepare and issue current official state and national estimates of crop and livestock production. Estimates of milk production and manufactured dairy products are an integral part of this program. Milk and dairy statistics are used by the U.S. Department of Agriculture (USDA) to help administer price support programs and by the dairy industry in planning, pricing, and projecting supplies of milk and milk products. The general authority for these data collection activities is granted under U.S. Code Title 7, Section 2204.

Need and Use of the Information: NASS will collect information on monthly estimates of stocks, shipments, and selling prices for such products as butter, cheese, dry whey, and nonfat dry milk. Cheddar cheese prices are collected weekly and used by USDA to assist in the determination of the fair market value of raw milk. Estimates of total milk production, number of milk cow, and milk production per cow, are used by the dairy industry in planning, pricing, and projecting supplies of milk and milk products. Collecting data less frequently would prevent USDA and the agricultural industry from keeping abreast of changes at the State and national level.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 14,768.

Frequency of Responses: Reporting: Quarterly; Weekly; Monthly; Annually.

Total Burden Hours: 8,128.

Description of Respondents: Farms.

Number of Respondents: 8,000.

Frequency of Responses: Reporting: Monthly during growing season.

Total Burden Hours: 2,820.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–3318 Filed 2–13–12; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 8, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), OIRA_Submission@OMB.EOP.GOV or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Business Service

Title: 7 CFR 1951–R, Rural Development Loan Servicing.

OMB Control Number: 0570–0015.

Summary of Collection: The Rural Development (RD) Loan Servicing was legislated in 1985 under Section 1323 of

the Food and Security Act of 1985. This action is needed to implement the provision of Section 407 of the Health and Human Services Act of 1986, which amended Section 1323 of the Food and Security Act of 1985. 7 CFR part 1951, subpart R contains regulations for servicing and liquidating existing loans previously approved and administered by the U.S. Department of Health and Human Services (HHS) under 45 CFR part 1076 and transferred from HHS to the Department of Agriculture. This subpart contains regulations for servicing and liquidating loans made by RD, successor to the Farmers Home Administration under the Intermediary Relending Program to eligible intermediaries and applies to ultimate recipients and other involved parties.

Need and Use of the Information: The Intermediary will provide RD information from, *i.e.* assets and liabilities, income statement and a summary of its lending and guarantee program. Form 1951–4 gathers information about jobs created or saved for the Intermediary Relending Program and Rural Development Loan Fund. The required financial information provided by the Intermediary is vital to RD for the Agency to make sound credit and financial analysis decisions and monitor the program.

Description of Respondents: Not-for-profit institutions; Business or other for-profit.

Number of Respondents: 465.

Frequency of Responses: Reporting: On occasion; Quarterly; Semi-annually; Annually.

Total Burden Hours: 11,992.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–3316 Filed 2–13–12; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: USDA Forest Service.

ACTION: Notice of intent to re-establish the Black Hills National Forest Advisory Board and call for nominations.

SUMMARY: The U.S. Department of Agriculture, Forest Service intends to re-establish the Black Hills National Forest Advisory Board (Board). The purpose is to obtain advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, forest health including fire management and mountain pine beetle infestations, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest wide implications. The Forest Service is also seeking nominations for individuals to be considered as committee members. The public is invited to submit nominations for membership.

DATES: Written nominations must be received by March 15, 2012. Instructions for submitting a nomination package may be found in the section below entitled, ''Advisory Committee Organization''.

ADDRESSES: Send nominations and applications to Frances Reynolds, USDA Forest Service, Rocky Mountain Region, 720 Simms Street Golden, Colorado 80401.

FOR FURTHER INFORMATION CONTACT: Craig Bobzien, Forest Supervisor, USDA, Forest Service, Rocky Mountain Region, telephone: 605–673–9201, fax: 605–673–9208, or email: *cbobzien@fs.fed.us*. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: USDA 16565–Black Hills National Forest Advisory Board is a non-scientific program advisory Board established by the Secretary of Agriculture in 2003 to provide advice and counsel to the U. S. Forest Service, Black Hills National Forest, in the wake of increasingly severe and intense wild fires and mountain pine beetle epidemics.

The purpose of the Board is to provide advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, travel management, forest monitoring and evaluation, and site-specific projects having forest-wide implications. The Board also serves to meet the needs of the Recreation Enhancement Act of 2005 as a recreation resource advisory board (RRAC) for the Black Hills of South Dakota. The Board provides timely advice and recommendations to the Secretary through the forest supervisor regarding programmatic forest issues and project-level issues that have forest-wide implications for the Black Hills National Forest.

The Board meets approximately ten times a year, with one month being a field trip, held in August and focusing on both current issues and the educational value of seeing management strategies and outcomes on the ground. This Board has been established as a truly credible entity and a trusted voice on forest management issues and is doing often astonishing work in helping to develop informed consent for forest management.

For years, the demands made on the Black Hills National Forest have resulted in conflicts among interest groups resulting in both forest-wide and site-specific programs being delayed due to appeals and litigation. The Board provides a forum to resolve these issues to allow for the Black Hills National Forest to move forward in its management activities. The Board is believed to be one of the few groups with broad enough scope to address all of the issues and include all of the jurisdictional boundaries.

Significant Contributions

The Board's most significant accomplishments include:

1. A 2004 report on the Black Hills Fuels Reduction Plan, a priority following the major fires including the 86,000 acre Jasper Fire in 2000;
2. A 2004 initial Off-Highway Vehicle Travel Management Subcommittee report;
3. A report on their findings regarding the thesis, direction, and assumptions of Phase II of our Forest Plan produced in 2005;
4. The Invasive Species Subcommittee Report in 2005 covering recommendations to better stop invasive species from infiltrating the Forest;
5. A final Travel Management Subcommittee Report in 2006 in which the Board made 11 recommendations regarding characteristics of a designated motor vehicle trail system, the basis for our initial work to prepare our Motor Vehicle Use Map in 2010–2011;
6. The Board's annual work to attract funding through grants based on the Collaborative Landscape Forest Restoration Program (CFLRP), a program of the Secretary of Agriculture *CFLR Program* to encourage the collaborative, science-based ecosystem restoration of priority forest landscapes;
7. A letter to the Secretary and the Chief of the Forest Service to work, restore and maintain open space for wildlife habitat and recreation needs like snowmobile trails; and
8. The annual reports to the Secretary detailing the Board's activities, issues, and accomplishments.

The Board is deemed to be among the most effective public involvement strategies in the Forest Service and continues to lead by example for Federal, State, and local government agencies working to coordinate and

cooperate in the Black Hills of South Dakota and Wyoming.

Background

Pursuant to the Federal Advisory Committee Act (5 U.S.C. App. II); notice is hereby given that the Secretary of Agriculture intends to re-establish the charter of the Black Hills National Forest Advisory Board. The Board provides advice and recommendations on a broad range of forest planning issues and, in accordance with the Federal Lands Recreation Enhancement Act (Pub. L. 108–447 (REA)), more specifically will provide advice and recommendations on Black Hills National Forest recreation fee issues (serving as the RRAC for the Black Hills National Forest). The Board membership consists of individuals representing commodity interests, amenity interests, and State and local government.

The Board has been determined to be in the public interest in connection with the duties and responsibilities of the Black Hills National Forest. National forest management requires improved coordination among the interests and governmental entities responsible for land management decisions and the public that the agency serves.

Advisory Committee Organization

The Board consists of 16 members that are representative of the following interests (this membership is similar to the membership outlined by the Secure Rural Schools and Community Self Determination Act for Resource Advisory Committees (16 U.S.C. 500, et seq.)):

1. Economic development;
2. Developed outdoor recreation, off-highway vehicle users, or commercial recreation;
3. Energy and mineral development;
4. Commercial timber industry;
5. Permittee (grazing or other land use within the Black Hills area);
6. Nationally recognized environmental organizations;
7. Regionally or locally recognized environmental organizations;
8. Dispersed recreation;
9. Archeology or history;
10. Nationally or regionally recognized sportsmen's groups, such as anglers or hunters;
11. South Dakota State-elected offices;
12. Wyoming State-elected offices;
13. South Dakota or Wyoming county- or local-elected officials;
14. Tribal government elected or-appointed officials;
15. South Dakota State natural resource agency official; and
16. Wyoming State natural resource agency officials.

No individual who is currently registered as a Federal lobbyist is eligible to serve as a member of the Committee. The Committee will meet approximately nine times, and will attend at least one summer field tour as designated by the Designated Federal Officer (DFO).

The appointment of members to the Board will be made by the Secretary of Agriculture. Any individual or organization may nominate one or more qualified persons to serve on the Board. Individuals may also nominate themselves. To be considered for membership, nominees must submit a:

1. Resume describing qualifications for membership to the Committee;
2. Cover letter with rationale for serving on the committee and what you can contribute; and
3. Complete form AD–755, Advisory Committee Membership Background Information.

Letters of recommendations are welcome. The AD–755 may be obtained from Forest Service contact person or from the following Web site: *http://www.fsa.usda.gov/Internet/FSA_File/ad755.pdf*. All nominations will be vetted by USDA. The Secretary of Agriculture will appoint committee members to the Board from the list of qualified applicants.

The members of the Board will elect and determine the responsibilities of the Chairperson and the Vice-Chairperson. In absence of the Chairperson, the Vice-Chairperson will act in the Chairperson's stead. The Forest Supervisor of the Black Hills National Forest serves as the Designated Federal Official under sections 10(e) and (f) of the Federal Advisory Committee Act (5 U.S.C. App. II).

Members will serve without compensation, but may be reimbursed for travel expenses while performing duties on behalf of the Board, subject to approval by the DFO.

Equal opportunity practices are followed in all appointments to the Board in accordance with USDA policies. To ensure that the recommendations of the Board have been taken into account the needs of diverse groups, served by the Black Hills National Forest, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Dated: February 2, 2012.

Pearlie S. Reed,

Assistant Secretary of Administration.

[FR Doc. 2012–3342 Filed 2–13–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Availability of the Record of Decisions (ROD) for Federal Highway Administration (FHWA) In Cooperation With the Mississippi Department of Transportation (MDOT) Project FHWA–TN–EIS–04–01–F

AGENCY: Natural Resources Conservation Service (NRCS), USDA.

ACTION: Notice of availability of the Record of Decision (ROD) for the Federal Highway Administration (FHWA) in cooperation with the Mississippi Department of Transportation (MDOT) Project FHWA–TN–EIS–04–01–F.

SUMMARY: This notice presents the Record of Decision (ROD) regarding the Natural Resources Conservation Service (NRCS) decided to subordinate its rights, acquired under the Wetland Reserve Program (WRP), to allow the Federal Highway Administration (FHWA) in cooperation with the Mississippi Department of Transportation (MDOT) to construct a limited access expressway to cross NRCS held conservation easements associated with the Federal Highway Administration (Interstate 69, Section of Independent Utility #9 Project in Desoto County, Mississippi). The project will affect approximately one NRCS held WRP easement in Mississippi. The Federal Highway Administration (FHWA) approved the re-evaluation environmental impact statement (EIS) to fulfill requirements of the National Environmental Policy Act (NEPA). FHWA issued the order of issuing certificate on June 17, 2011.

ADDRESSES: Copies of the ROD and EIS are available upon request from the Natural Resources Conservation Service, Suite 1321, Federal Building, 100 West Capitol Street, Jackson, MS 39269.

FOR FURTHER INFORMATION CONTACT: Decunda Duke-Bozeman, State WRP Coordinator, Natural Resources Conservation Service, Suite 1321, Federal Building, 100 West Capitol Street, Jackson, MS 39269, or by telephone at (601) 965–4139, extension 120.

SUPPLEMENTARY INFORMATION: The alternatives analysis is the final EIS and found no reasonable route alternatives that would be environmentally preferable to the proposed route. The final EIS determined that the proposed Project FHWA–TN–EIS–04–01–F as modified by the recommended mitigation measures is the preferred

alternative. Potential impacts to wetlands will be avoided, minimized and mitigated through Federal Highway Administration (FHWA) in cooperation with the Mississippi Department of Transportation (MDOT) of numerous route variations, implementation of agency recommendations and requirements, and development of site-specific plans.

Al Garner,

Acting State Conservationist.

[FR Doc. 2012–3313 Filed 2–13–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Certification Requirements for Distributors of NOAA Electronic Navigational Charts/NOAA Hydrographic Products.

OMB Control Number: 0648–0508.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 8.

Average Hours Per Response: Distribution reports, 1 hour; error reportings, 1 hour, 30 minutes.

Burden Hours: 328.

Needs and Uses: This request is for extension of a currently approved information collection.

The National Ocean Service (NOS) Office of Coast Survey manages the Certification Requirements for Distributors of NOAA Electronic Navigational Charts (NOAA ENCs®). The certification allows entities to download, redistribute, repackage, or in some cases reformat, official NOAA ENCs and retain the NOAA ENC's official status. The regulations for implementing the Certification are at 15 CFR part 995.

The recordkeeping and reporting requirements of 15 CFR part 995 form the basis for this collection of information. Certified ENCs report distribution data twice per year, and submit error reports whenever applicable, averaging approximately 26 reports per year per ENC. This information allows the Office of Coast Survey to administer the regulation, and to better understand the marketplace resulting in products that meet the needs of the customer in a timely and efficient manner.

Affected Public: Business or other for-profit organizations.

Frequency: Semiannually and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: February 9, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–3393 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

International Trade Administration

Request for Stakeholder Comments on ''National Travel and Tourism Strategy''

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice; request for comments.

SUMMARY: The International Trade Administration (''ITA'') seeks comments on key stakeholder priorities to be considered in the development of a national strategy, entitled ''National Travel and Tourism Strategy'' (''Strategy''), to be produced by the Task Force on Travel and Competitiveness (''Task Force'') established by Executive Order 13597 *Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness* (''Executive Order''), issued by President Barack Obama on January 19, 2012. The Task Force will consider the comments received in the development of the Strategy. All comments submitted should reference this notice.

DATES: Comments must be received on or before Tuesday, February 28, 2012.

ADDRESSES: Electronic comments are preferred and may be sent to: *TourismStrategyComment@trade.gov.* Written comments may be sent to: Jennifer Pilat, 1401 Constitution Avenue NW., Suite 4043, International Trade Administration, Washington, DC, 20230.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, 1401 Constitution Avenue NW., Suite 4043, International Trade Administration, Washington, DC 20230, *oacie@trade.gov,* (202) 482–4501.

SUPPLEMENTARY INFORMATION: Section 3, subsection (c) of the Executive Order charges the Task Force to develop a Strategy with recommendations for new federal policies and initiatives to promote domestic and international travel opportunities throughout the United States with the goal of increasing the United States market share of worldwide travel, including obtaining a greater share of long-haul travel from Brazil, China, and India.

Such recommendations shall include, among other things, strategies to promote visits to the United States public lands, waters, shores, monuments, and other iconic American destinations, thereby expanding job creation in the United States. The Task Force shall also consider recommendations to promote and expand travel and tourism opportunities in rural communities.

In addition, the Strategy shall identify any barriers to increasing the United States market share of worldwide travel, and any other related areas of concern.

The goal of the Strategy is to improve the competitive position of the United States in attracting international visitors and increasing domestic travel to promote economic growth and job creation across America over the next five years.

The Task Force is seeking comments on the following topics:

(1) What can the Federal Government do on its own to improve the competitive position of the United States, including growing domestic travel and tourism?

a. In the short term (the next year)?

b. In the long term (the next five years)?

(2) What metric(s) would you use to measure progress?

a. What can the Federal Government do with partners to improve the competitive position of the United States, including growing domestic travel and tourism? Please name potential partners or types of partners.

b. In the short term (the next year)?

c. In the long term (the next five years)?

d. What metric(s) would you use to measure progress?

Input may be submitted to: *TourismStrategyComment@trade.gov* by Tuesday, February 28, 2012. Electronic comments are preferred. Written comments may be sent to: Jennifer Pilat, 1401 Constitution Avenue NW., Suite 4043, International Trade Administration, Washington, DC, 20230.

The Executive Order is available at: *https://www.federalregister.gov/articles/2012/01/24/2012–1568/establishing-visa-and-foreign-visitor-processing-goals-and-the-task-force-on-travel-and#p-1.*

Authority: Section 3 of Executive Order 13597 *Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness Request for Comments:* ITA seeks comments on key stakeholder priorities to be considered in the development of the Strategy. Comments should include a reference to this **Federal Register** notice. The Task Force will consider the comments submitted in response to this request, as well as other inputs, in its development of the Strategy.

Dated: February 9, 2012.

Jennifer Pilat,

Deputy Director, Office of Advisory Committees and Industry Engagement.

[FR Doc. 2012–3400 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 120123059–2058–01]

Evaluating the Usability of Electronic Health Record (EHR) Systems

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: NIST is soliciting interest in supplying electronic health record (EHR) systems for use by NIST in research to develop a framework for assessing the usability of health information technology (HIT) systems, EHRs in particular, and performance-oriented user interface design guidelines for EHRs. Manufacturers interested in participating in this research will be asked to execute a Letter of Understanding. Interested parties are invited to contact NIST for information regarding participation, Letters of Understanding and shipping information.

DATES: Manufacturers who wish to participate in the program must submit a request and an executed Letter of Understanding by 5 p.m. Eastern Standard Time on March 15, 2012.

ADDRESSES: Letters of Understanding may be obtained from and should be submitted to Svetlana Lowry, National Institute of Standards and Technology, Information Access Division, Building 225, Room A232, 100 Bureau Drive, Mail Stop 8940, Gaithersburg, MD 20899–8940. Letters of Understanding may be faxed to: Svetlana Lowry at (301) 975–5287.

FOR FURTHER INFORMATION CONTACT: For further information, you may telephone Svetlana Lowry at (301) 975–4995, or email: *svetlana.lowry@nist.gov.*

SUPPLEMENTARY INFORMATION: The National Institute of Standards and Technology (NIST) will be conducting research to support the development of procedures for measuring and evaluating the usability of health information technology (HIT) systems. NIST research is designed to: (1) Develop a set of guidelines/standards for the usability of HIT/EHRs, and (2) develop a framework for assessing EHR usability in development of a report titled ''NIST Usability Guidelines and Evaluation Framework for EHR Systems.'' NIST may also examine relevant instructions, documentation and EHR error messages.

NIST is soliciting interest in supplying existing EHR systems for use by NIST in research to develop performance-oriented user interface design guidelines for EHRs, and a framework for assessing the usability of EHRs. Interested manufacturers should contact NIST at the address given above. NIST will supply a Letter of Understanding, which the manufacturer must execute and send back to NIST. The Letters of Understanding will be entered into pursuant to the authorities granted NIST under 15 U.S.C. 3710a. NIST will then provide the manufacturer with instructions for shipping the EHR system. NIST anticipates that it will take approximately one year to conduct all necessary research. No modification to the manufacturers' product is permitted during the research process. NIST may transport equipment to locations off site from NIST's main campus as required for the purpose of conducting usability studies. NIST will ensure that all off site usability testing locations have the same or higher level of security and system protection procedures as the on-site NIST labs located in the Usability Laboratory in Gaithersburg, MD. At the conclusion of the experiments, NIST will remove the EHR systems from all computers on which they were installed and return them to the manufacturers.

Information acquired during the tests regarding potential usability problems will be reported to the respective manufacturer. Usability testing results for identifiable vendor systems will not be released subject to the terms and conditions in the Letters of Understanding. Comparative information (e.g., testing results from unidentified EHR systems A, B, and C) may be released in a blind manner in a report from NIST titled ''NIST Usability Guidelines and Evaluation Framework for EHR Systems.''

Participating manufacturers should include or provide a technical tutorial on the use of the EHR system. NIST will pay all shipping costs associated with sending the EHR system installation and training materials except those not permitted by law (such as shipping insurance, which, if desired, must be purchased by the manufacturer). NIST must pay shipping costs directly and cannot reimburse manufacturers for shipping costs. Unless the manufacturer desires to pay such shipping insurance costs, there is no other cost to the manufacturer for the testing.

EHR systems that will be accepted for the experiments may include inpatient and outpatient EHRs. NIST will not accept actual personal health information as part of this project.

Dated: February 8, 2012.

Willie E. May,

Associate Director for Laboratory Programs.

[FR Doc. 2012–3415 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Documentation of Fish Harvest

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 16, 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 Rich Malinowski; telephone: (727) 824–5305 or *rich.malinowski@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

The seafood dealers who process red porgy, gag, black grouper, or greater amberjack during seasonal fishery closures must maintain documentation, as specified in 50 CFR part 300 subpart K, that such fish were harvested from areas other than the South Atlantic. The documentation includes information on the vessel that harvested the fish and where and when the fish were offloaded. The information is required for the enforcement of fishery regulations.

II. Method of Collection

The information is in the form of a paper affidavit which remains with the respondent.

III. Data

OMB Control Number: 0648–0365.

Form Number: None.

Type of Review: Regular submission (renewal of a currently approved collection).

Affected Public: Business or other for-profit organizations, individuals or households.

Estimated Number of Respondents: 25.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 50.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: February 9, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–3369 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA970

Atlantic Highly Migratory Species; Atlantic Shark Management Measures; 2012 Research Fishery

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

ACTION: Notice of public meeting.

SUMMARY: On October 31, 2011, NMFS published a notice inviting qualified commercial shark permit holders to submit an application to participate in the 2012 shark research fishery. The shark research fishery allows for the collection of fishery-dependent data for future stock assessments while also allowing NMFS and commercial fishermen to conduct cooperative research to meet the shark research objectives of the Agency. Every year, the permit terms and permitted activities (*e.g.,* number of hooks and trip, retention limits) specifically authorized for selected participants in the shark research fishery are designated depending on the scientific and research needs of the Agency as well as the number of NMFS-approved observers available. In order to inform selected participants of this year's specific permit requirements and ensure all terms and conditions of the permit are met, NMFS is holding a mandatory permit holder meeting for selected participants. In this notice, NMFS announces the date and time of that meeting.

DATES: A conference call will be held on February 17, 2012.

ADDRESSES: A conference call will be conducted. See **SUPPLEMENTARY INFORMATION** for information on how to access the conference call.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Delisse Ortiz at (301) 427–8503, or online at *http://www.nmfs.noaa.gov/sfa/hms/.*

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The 2006 Consolidated Highly Migratory species (HMS) Fishery Management Plan (FMP) is implemented by regulations at 50 CFR part 635.

The final rule for Amendment 2 to the Consolidated HMS FMP (73 FR 35778, June 24, 2008, corrected at 73 FR 40658, July 15, 2008) established, among other things, a shark research fishery to maintain time series data for stock assessments and to meet NMFS' research objectives. The shark research fishery gathers important scientific data and NMFS allows selected commercial fishermen the opportunity to earn more revenue from selling the sharks caught, including sandbar sharks. Only the commercial shark fishermen selected to participate in the shark research fishery are authorized to land/harvest sandbar sharks subject to the sandbar quota available each year. The sandbar shark base quota is 87.9 mt dw per year through December 31, 2012, although this number may be reduced in the event of overharvests, if any. The selected shark research fishery participants also have access to the non-sandbar large coastal sharks (LCS), small coastal sharks (SCS), and pelagic shark quotas subject to retention limits and quotas per §§ 635.24 and 635.27, respectively.

On October 31, 2011 (76 FR 67149), NMFS published a notice inviting qualified commercial shark permit holders to submit an application to participate in the 2012 shark research fishery. NMFS received 19 applications, of which 16 applicants were determined to meet all the qualifications. From the 16 qualified applicants, NMFS randomly selected 5 participants after considering how to meet research objectives in particular regions. During the annual application period, commercial shark permit holders (directed and incidental) are invited to submit an application to participate in the shark research fishery. NMFS expects to invite qualified commercial shark permit holders to submit an application for the 2013 shark research fishery later this year.

Every year, the permit terms and permitted activities (*e.g.,* number of

hooks and trip, retention limits) specifically authorized for selected participants in the shark research fishery are designated depending on the scientific and research needs of the Agency as well as the number of NMFS-approved observers available. In order to inform selected participants of this year's specific permit requirements and ensure all terms and conditions of the permit are met, per the requirements of § 635.32(f)(4), NMFS is holding a mandatory permit holder meeting via conference call.

The conference call will be held on February 17, 2012, from 3 to 5 p.m. Participants and interested parties should call 800–857–3903 and use the passcode 9425509. Selected participants who do not attend will not be allowed to participate in the shark research fishery. While the conference call is mandatory for selected participants, other interested parties may call in and listen to the discussion.

Dated: February 9, 2012.

James P. Burgess,

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

[FR Doc. 2012–3423 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Coastal Zone Management Program: Illinois

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce (DOC).

ACTION: Notice of Availability of Record of Decision (ROD) for Federal Approval of the Illinois Coastal Management Program (ICMP).

SUMMARY: NOAA's OCRM announces the availability of the Record of Decision (ROD) documenting Federal Approval of the Illinois Coastal Management Program (ICMP). The **Federal Register** Notice (FRN) on the Final Environmental Impact Statement (EIS) on the ICMP was published December 23, 2011 for a 30-day comment period (76 FR 80342). The comment period closed on January 23, 2012.

The ROD documents the selection of Alternative 1 (the NOAA preferred alternative) in the final EIS. NOAA makes a final determination that the ICMP constitutes an approvable program and that requirements of the Coastal Zone Management Act (CZMA) and its implementing regulations have been met. The ROD was signed by the Assistant Administrator, National Ocean Service, on January 31, 2012. Federal consistency applies to the ICMP enforceable policies as of January 31, 2012, and the State of Illinois is eligible to receive program administration grant funds.

ADDRESSES: A copy of the ROD may be obtained from Diana Olinger, Coastal Program Specialist and Interim Environmental Protection Specialist, NOAA, OCRM/CPD, N/ORM3, Station 11204, 1305 East-West Highway, Silver Spring, MD 20910, or *Diana.Olinger@noaa.gov,* (301) 563–1149 (telephone), (301) 713–4367 (facsimile). The ROD is also available on the OCRM Web site at: *http://coastalmanagement.noaa.gov/mystate/il.html*.

FOR FURTHER INFORMATION CONTACT: Diana Olinger, Coastal Program Specialist, National Oceanic and Atmospheric Administration, OCRM/CPD, N/ORM3, Station 11204, 1305 East-West Highway, Silver Spring, MD 20910, telephone (301) 563–1149, facsimile (301) 713–4367, email *Diana.Olinger@noaa.gov*.

SUPPLEMENTARY INFORMATION: The following is a summary of the ROD: The State of Illinois, Department of Natural Resources, submitted a coastal management program to NOAA for approval under the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451, *et seq.* in May 2011. The ICMP was the result of collaborative efforts on the part of Federal, State, and local agencies, regional organizations, and public and private entities. The ROD selects Final EIS Alternative 1 (Approve the Illinois Coastal Management Program). OCRM arrived at this decision taking into account environmental, economic and agency statutory mission considerations, as discussed in greater detail in the ROD. OCRM did not select Alternative 2 (Deny Approval) or Alternative 3 (Delay Approval) because those alternatives could potentially lead to negative physical and socio-economic impacts to coastal resources associated with (1) the State not being able to become eligible for federal technical and financial assistance to implement the ICMP; (2) Illinois would have no authority to review federal activities for consistency with the state's enforceable coastal policies; and (3) Illinois would be under no obligation to consider the national interest in the siting, planning, and management of regionally or nationally significant coastal facilities. These benefits are only available through participation in the national coastal management program. Alternative 3 was also not selected due to the fact further delay of federal approval would make it less likely that Illinois would enter the national coastal zone management program in the future due to resource limitations and other factors

Dated: February 6, 2012.

Donna Wieting,

Director, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2012–3362 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice of Indirect Cost Rates for the Office of National Marine Sanctuaries for Fiscal Years 2008 and 2009

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The National Oceanic and Atmospheric Administration's (NOAA's) Office of National Marine Sanctuaries (ONMS) is announcing the establishment of new indirect cost rates on the recovery of indirect costs for its component organizations involved in natural resource damage assessment and restoration activities for fiscal years (FY) 2008 and 2009. The indirect cost rates for these fiscal years and dates of implementation are provided in this notice. More information on these rates and the ONMS policy can be obtained from the address provided below.

FOR FURTHER INFORMATION CONTACT: Lisa Symons, 301–713–7275; FAX: 301–713–0404.

SUPPLEMENTARY INFORMATION: The mission of the ONMS with respect to Natural Resource Damage Assessment (NRDA) is to repair and restore injuries to sanctuary resources caused by: releases of hazardous substances or oil under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C., 9601 *et seq.*) or the Oil Pollution Act of 1990 (OPA) (33 U.S.C., 2701 *et seq.*); or physical injuries under the National Marine Sanctuaries Act (NMSA) (16 U.S.C., 1431 *et seq.*). ONMS consists of the following component organizations: thirteen national marine sanctuaries and Papahanaumokuakea Marine National

Monument within NOAA's National Ocean Service. The Natural Resources Section of the Office of NOAA General Counsel supports litigation for ONMS. ONMS conducts NRDAs as a basis for recovering damages from responsible parties and uses recovered funds to restore injured sanctuary resources.

When addressing NRDA incidents, NOAA seeks to recover the costs of the damage assessment from responsible parties who are potentially liable for an incident. Costs include direct and indirect costs. Direct costs are costs for activities that are clearly and readily attributable to a specific output. In the context of the ONMS, outputs are typically associated with damage assessment cases. Indirect costs reflect the costs for activities that collectively support the ONMS's mission and operations in support of NRDA work, but not connected to specific cases. For example, indirect costs include general administrative support and traditional overheads. Although these costs may not be readily traced back to a specific direct activity, indirect costs may be allocated to direct activities using an indirect cost distribution rate.

Consistent with standard federal accounting requirements, the ONMS is required to account for and report the full costs of its programs and activities. Further, the ONMS is authorized by law to recover reasonable costs of damage assessment and restoration activities under CERCLA, OPA, and the NMSA. Within the constraints of these legal provisions and their regulatory applications, the ONMS has the discretion to develop indirect cost rates for its component organizations and formulate policies on the recovery of indirect cost rates subject to its requirements.

The ONMS's Indirect Cost Effort

In October 2002, the ONMS hired the public accounting firm Cotton & Company (C&C) to: (1) Evaluate the cost accounting system and allocation practices; (2) recommend the appropriate indirect cost allocation methodology; and, (3) determine the indirect cost rates for the organizations that comprise the ONMS.

The ONMS requested an analysis of its indirect costs for fiscal year 2002. The goal was to develop the most appropriate indirect cost rate allocation methodology and rates for the ONMS component organizations. C&C has continued its assessment of the ONMS's indirect cost rate system and structure from FY 2002 to present.

C&C concluded that the cost accounting system and allocation practices of the ONMS and GCNR component organizations are consistent with federal accounting requirements. C&C also determined that the most appropriate indirect allocation method was the Direct Labor Cost Base for all ONMS and GCNR component organizations. The Direct Labor Cost Base is computed by allocating total indirect costs over the sum of direct labor dollars plus the application of NOAA's leave surcharge and benefits rates to direct labor. The indirect cost rates that C&C has computed for the ONMS and GCNR component organizations were further assessed as being fair and equitable. A report on C&C's effort, their assessment of the ONMS's cost accounting system and practice, and their determination respecting the most appropriate indirect cost methodology and rates can be obtained from: Lisa Symons, ONMS 1305 East West Highway, Silver Spring, MD 20910.

C&C reaffirmed that the Direct Labor Cost Base is the most appropriate indirect allocation method for the development of the FY 2008 and 2009 indirect cost rates.

The ONMS's Indirect Cost Rates and Policies

The ONMS will apply the indirect cost rates for FY 2008 and 2009 as recommended by C&C for each ONMS component as provided in the following table. The ONMS will apply the FY 2009 indirect rate to the Natural Resources Section as noted in the following table. Prior year indirect costs can be found in notices from the NOAA Office of Response and Restoration.

ONMS component	FY 2008 indirect rate (percent)
ONMS Florida Keys National Marine Sanctuary (FKNMS) ..	310.58
ONMS All sites, except FKNMS	269.34

ONMS component	FY 2009 indirect rate (percent)
ONMS Florida Keys National Marine Sanctuary (FKNMS) ..	397.63
ONMS All sites, except FKNMS	336.50
Natural Resources Section, Office of General Counsel ONMS cases only	74.01

The FY 2008 and 2009 rates identified in this policy will be applied to all damage assessment and restoration case costs incurred between October 1, 2008 and present, using the Direct Labor Cost base allocation methodology. For cases that have settled and for costs claims paid prior to the effective date of the fiscal year in question, the ONMS will not re-open any resolved matters for the purpose of applying the rates in this policy. For cases not settled and cost claims not paid prior to the effective date of the fiscal year in question, costs will be recalculated using the rates in this policy. The ONMS will use the FY 2009 rates for damage assessment and restoration case costs incurred from October 1, 2008 through future fiscal years until year-specific rates are developed.

Dated: January 31, 2012.

Daniel Basta,

Director, Office of National Marine Sanctuaries.

[FR Doc. 2012–2953 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: Public Key Infrastructure (PKI) Certificate Action Form.

Form Number(s): PTO–2042.

Agency Approval Number: 0651–0045.

Type of Request: Revision of a currently approved collection.

Burden: 2,250 hours annually.

Number of Respondents: 4,500 responses per year.

Avg. Hours per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.5 hours) to read the instructions and subscriber agreement, gather the necessary information, prepare the Certificate Action Form, and submit the completed request.

Needs and Uses: The USPTO uses Public Key Infrastructure (PKI) technology to support electronic commerce between the USPTO and its customers. In order to access secure online systems offered by the USPTO for transactions such as electronic filing of patent applications and retrieving confidential patent application information, customers must first obtain a digital certificate. The public uses this collection to request a new digital certificate, the revocation of a current

certificate, or the recovery of a lost certificate.

This collection includes the Certificate Action Form (PTO–2042), which is provided by the USPTO to ensure that customers submit the necessary information for processing certificate requests. The accompanying subscriber agreement explains the regulations governing the use of the digital certificates and the software that creates and validates the encryption keys.

Affected Public: Individuals or households; businesses or other for-profits; and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Nicholas A. Fraser, email: *Nicholas_A._Fraser@omb.eop.gov*.

Once submitted, the request will be publicly available in electronic format through the Information Collection Review page at *www.reginfo.gov*.

Paper copies can be obtained by:

• *Email: InformationCollection@uspto.gov*. Include ''0651–0045 copy request'' in the subject line of the message.

• *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before March 15, 2012 to Nicholas A. Fraser, OMB Desk Officer, via email to *Nicholas_A._Fraser@omb.eop.gov*, or by fax to 202–395–5167, marked to the attention of Nicholas A. Fraser.

Dated: February 9, 2012.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2012–3392 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination Under the Textile and Apparel Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement (''CAFTA–DR Agreement'')

AGENCY: The Committee for the Implementation of Textile Agreements.

ACTION: Determination to add a product in unrestricted quantities to Annex 3.25 of the CAFTA–DR Agreement.

DATES: *Effective Date:* February 14, 2012.

SUMMARY: The Committee for the Implementation of Textile Agreements (''CITA'') has determined that certain faux suede bonded to faux fur pile fabric, as specified below, is not available in commercial quantities in a timely manner in the CAFTA–DR countries. The product will be added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

For Further Information On-Line: http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf under ''Approved Requests,'' Reference number: 165.2012.01.09.Fabric.Alston&BirdforS Rothschild&Co,Inc.

SUPPLEMENTARY INFORMATION:

Authority: The CAFTA–DR Agreement; Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (''CAFTA–DR Implementation Act''), Public Law 109–53; the Statement of Administrative Action, accompanying the CAFTA–DR Implementation Act; and Presidential Proclamations 7987 (February 28, 2006) and 7996 (March 31, 2006).

Background: The CAFTA–DR Agreement provides a list in Annex 3.25 for fabrics, yarns, and fibers that the Parties to the CAFTA–DR Agreement have determined are not available in commercial quantities in a timely manner in the territory of any Party. The CAFTA–DR Agreement provides that this list may be modified pursuant to Article 3.25(4)–(5), when the President of the United States determines that a fabric, yarn, or fiber is not available in commercial quantities in a timely manner in the territory of any Party. *See* Annex 3.25 of the CAFTA–DR Agreement; *see also* section 203(o)(4)(C) of the CAFTA–DR Implementation Act.

The CAFTA–DR Implementation Act requires the President to establish procedures governing the submission of a request and providing opportunity for interested entities to submit comments and supporting evidence before a commercial availability determination is made. In Presidential Proclamations 7987 and 7996, the President delegated to CITA the authority under section 203(o)(4) of CAFTA–DR Implementation Act for modifying the Annex 3.25 list. Pursuant to this authority, on September 15, 2008, CITA published modified procedures it would follow in considering requests to modify the Annex 3.25 list of products determined to be not commercially available in the territory of any Party to CAFTA–DR (*Modifications to Procedures for Considering Requests Under the Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement*, 73 FR 53200) (''CITA's procedures'').

On January 9, 2012, the Chairman of CITA received a request for a Commercial Availability determination (''Request'') from Alston & Bird on behalf of S. Rothschild & Co., Inc. for certain faux suede bonded to faux fur pile fabric, as specified below. On January 11, 2012, in accordance with CITA's procedures, CITA notified interested parties of the Request, which was posted on the dedicated Web site for CAFTA–DR Commercial Availability proceedings. In its notification, CITA advised that any Response with an Offer to Supply (''Response'') must be submitted by January 24, 2012, and any Rebuttal Comments to a Response (''Rebuttal'') must be submitted by January 30, 2012, in accordance with sections 6 and 7 of CITA's procedures. No interested entity submitted a Response to the Request advising CITA of its objection to the Request and its ability to supply the subject product.

In accordance with section 203(o)(4)(C) of the CAFTA–DR Implementation Act, and section 8(c)(2) of CITA's procedures, as no interested entity submitted a Response objecting to the Request and demonstrating its ability to supply the subject product, CITA has determined to add the specified fabric to the list in Annex 3.25 of the CAFTA–DR Agreement.

The subject product has been added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities. A revised list has been posted on the dedicated Web site for CAFTA–DR Commercial Availability proceedings.

Specifications: Certain Faux Suede Bonded to Faux Fur Pile Fabric

HTS: 6001.10.2000

Note: If CBP classified the fabric based on its woven face, then it would be classifiable in one of the following subheadings within heading 5407, covering woven fabrics of synthetic filament yarn, including HTSUS 5407.52.2060, 5407.53.2060, 5407.61.9935, 5407.69.2060, 5407.60.4060, 5407.72.0060, 5407.73.2060, 5407.92.2010 or 5407.92.2090, or under one of the following subheadings within heading 5512, covering woven fabrics of synthetic staple fibers, 5512.19.00, 5512.91.00, and 5512.99.00.

Fabric Type: Faux suede bonded to faux fur pile

Fiber Content:
Faux Suede Face: 100% polyester
Faux Fur Pile Back: 50–80% polyester; 20–50% acrylic
Yarn Size:
Faux Suede Face:
Metric: 121.62 Nm to 118.42 Nm
English: 74D to 76D
Faux Fur Pile Back:
Metric: Acrylic 3600.00 Nm to 2571.42 Nm, Polyester 2250.00 Nm to 1800.00 Nm
English: Acrylic 2.5D to 3.5D, Polyester 4D to 5D

Note: The yarn size designations describe a range of yarn specifications for yarn in its greige condition before dyeing and finishing of the yarn (if applicable) and before knitting, dyeing and finishing of the fabric. They are intended as specifications to be followed by the mill in sourcing yarn used to produce the fabric. Dyeing, finishing, and knitting can alter the characteristic of the yarn as it appears in the finished fabric. This specification therefore includes yarns appearing in the finished fabric as finer or coarser than the designated yarn sizes provided that the variation occurs after processing of the greige yarn and production of the fabric.

Weight:
Metric: 515–575 grams per sq. meter after bonding
English: 15.19–16.96 ounces per sq. yard after bonding
Width:
Metric: Full width is 142.24–147.32 cm, cuttable width is 142.24 cm
English: Full width is 56–58 inches, cuttable width is 56 inches
Weave:
Faux Suede (Face): Woven
Faux Fur Pile (Back): Knit
Coloration:
Faux Suede (Face): Pieced Dyed
Faux Fur Pile (Back): Yarn Dyed
Finishing: Bonded (with sponge lamination), washed, and tumble dried

Kim Glas,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 2012–3420 Filed 2–13–12; 8:45 am]

BILLING CODE 3510–DR–P

COMMODITY FUTURES TRADING COMMISSION

Notice Requesting Nominations for the Subcommittee on Automated and High Frequency Trading

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice requesting nominations for the Subcommittee on Automated and High Frequency Trading within the Technology Advisory Committee.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is calling for nominations to the Subcommittee on Automated and High Frequency Trading (Subcommittee) under the auspices of the Technology Advisory Committee. The Subcommittee was established to develop recommendations regarding the definition of high frequency trading (HFT) in the context of the larger universe of automated trading. The definition of HFT is anticipated to serve as an initial step towards assessing the presence and impact of HFT in CFTC regulated markets for consideration of appropriate policy responses. The Subcommittee will report to the full Technology Advisory Committee. Developing a common definition of HFT and the characteristics of HFT will help inform the public debate as to the impact of such trading on markets under the jurisdiction of the CFTC. Regulators, markets, market participants, and the public will benefit from a common understanding of the activities and entities involved in HFT. All members of the Subcommittee will participate and consider possible criteria for inclusion in the definition of HFT within the context of automated trading systems (ATS) and suggest specific thresholds for each criterion. Nominations are sought for highly qualified representatives from industry, exchanges, academia, international regulatory and/or advisory bodies, groups representing interests or organizations involved in and/or affected by the development, design, and operation of ATS and HFT, and government agencies. Individuals seeking to be nominated to the Subcommittee should possess demonstrable expertise in a related field or represent a stakeholder of interest in the issue. Prospective nominees should be open to participating in an open public-private forum. Members of the Subcommittee will be appointed by a vote of the Commission as in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2, and the charter of Technology Advisory Committee.

DATES: The final deadline for nominations is 14 days from the publication date of this notice.

ADDRESSES: Nominations should be sent to Andrei Kirilenko, Chief Economist, Office of the Chief Economist, U.S. Commodity Futures Trading Commission, 1155 21st Street NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: Andrei Kirilenko, (202) 418–5587; fax: (202) 418–5660; email: *akirilenko@cftc.gov.*

SUPPLEMENTARY INFORMATION: The Subcommittee will be ongoing and will conduct at least three sessions in the calendar year 2012. The Subcommittee may prepare a series of reports, findings, and/or recommendations to the Technology Advisory Committee. The Technology Advisory Committee will consider submitted materials and determine whether and what recommendations to make to the Commission. Subcommittee participants will not be compensated or reimbursed for travel and per diem expenses. Each nomination submission should include the proposed member's name and organizational affiliation; a brief description of the nominee's qualifications and interest in serving on the Subcommittee; the organization, group, academic body, company or government agency the nominee would represent on the Subcommittee; and the curriculum vitae or resume of the nominee. Self-nominations are acceptable. The following contact information should accompany each submission: The nominee's name, address, phone number, fax number, and email address. There are no capital costs and no operating or maintenance costs associated with this notice.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2012–3409 Filed 2–13–12; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2012–OS–0017]

Proposed Collection; Comment Request

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, *the Defense Logistics Agency* announces a proposed new public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 16, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Logistics Agency Headquarters, Attn: Ms. Beverly Williams, DS–Q, 8725 John J. Kingman Rd., Ft. Belvoir, VA 22060–6221, or call (703) 767–7665.

Title; Associated Form; and OMB Number: Physical Fitness Facility/Recreation Center Membership and Use Records; OMB Control Number 0704–TBD.

Needs and Uses: To collect facility usage data to prepare monthly metrics and data management reports; to register applicants for classes; to notify users of future events or cancellations in cases of emergency; and to develop workplace wellness programs based on customer needs.

Affected Public: Individuals include those who use DLA-managed Physical Fitness Facilities and Recreation Centers. These include retired military, and families and guests of military and civilian employees, and contractor personnel.

Annual Burden Hours: 333.

Number of Respondents: 1,000.

Responses per Respondent: 1.

Average Burden per Response: 0.33 hours (20 minutes).

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The information will consist of name, duty number and emergency contact and other facility use data. The data collected will be used to contribute to metric analysis for budget processes and quality of life programming.

Dated: February 9, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–3345 Filed 2–13–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of an Invention Concerning a Computer Controlled System for Laser Energy Delivery to the Retina

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: The invention provides a computer controlled system for laser energy delivery to the retina. Information is received from a user interface, wherein the information includes a duration, intensity, and/or wavelength of treatment. Announcement is made of the availability for licensing of the invention set forth in U.S. Patent Application Serial No. 13/130,380, entitled ''Computer Controlled System for Laser Energy Delivery to the Retina,'' filed on May 20, 2011. The United States Government, as represented by the Secretary of the Army, has rights to this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, Attn: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to laser retina injury hazards in a variety of military settings. Incident reports abound from adversarial cockpit illumination to battlefield laser rangefinders and target designators as well as episodes of laser injury in government laboratories involved with high energy physics research or other scientific pursuits.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–3348 Filed 2–13–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF EDUCATION

Applications for New Awards; National Institute on Disability and Rehabilitation Research—Disability and Rehabilitation Research Projects and Centers Program, etc.

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information

National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Disability and Rehabilitation Research Project (DRRP)—Center on Knowledge Translation for Disability and Rehabilitation Research (KTDRR Center)

Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133A–13.

DATES:

Applications Available: February 14, 2012.

Date of Pre-Application Meeting: March 6, 2012.

Deadline for Transmittal of Applications: April 16, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Disability and Rehabilitation Research Projects and Centers Program is to plan and conduct research, demonstration projects, training, and related activities, including international activities, to develop methods, procedures, and rehabilitation technology, that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities, and to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act).

Disability and Rehabilitation Research Projects (DRRPs)

The purpose of DRRPs, which are funded under NIDRR's Disability and

Rehabilitation Research Projects and Centers Program, is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: research, training, demonstration, development, dissemination, utilization, and technical assistance. Additional information on DRRPs can be found at: *www.ed.gov/rschstat/research/pubs/res-program.html#DRRP.*

Priorities: This competition includes two absolute priorities. Absolute Priority 1 is from the notice of final priorities for the Disability and Rehabilitation Research Projects and Centers Program, published in the **Federal Register** on April 28, 2006 (71 FR 25472). Absolute Priority 2 is from the notice of final priority for this program, published elsewhere in this issue of the **Federal Register**.

Absolute Priorities: For FY 2012 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet these priorities.

These priorities are:

Absolute Priority 1—General Disability Rehabilitation Research Projects (DRRP) Requirements

Absolute Priority 2—Center on Knowledge Translation for Disability and Rehabilitation Research (KTDRR Center)

Note: The full text of these priorities is included in the pertinent notices of final priority or priorities published in the **Federal Register** and in the application package for this competition.

Program Authority: 29 U.S.C. 762(g) and 764(a).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The notice of final priority for the Disability and Rehabilitation Research Projects and Centers program, published in the **Federal Register** on April 28, 2006 (71 FR 25472). (d) The notice of final priority for this program, published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $750,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Maximum Award: We will reject any application that proposes a budget exceeding $750,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; institutions of higher education; and Indian tribes and tribal organizations.

2. *Cost Sharing or Matching:* Cost sharing is required by 34 CFR 350.62(a) and will be negotiated at the time of award.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this competition as follows: CFDA number 84.133A–13.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 100 pages, using the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1′ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative budget justification; other required forms; an abstract, Human Subjects narrative, Part III project narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*

Applications Available: February 14, 2012.

Pre-Application Meeting: Interested parties are invited to participate in a pre-application meeting and to receive information and technical assistance through individual consultation with NIDRR staff. The pre-application meeting will be held March 6, 2012. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1:00 p.m. and 3:00 p.m.,

Washington, DC time. NIDRR staff also will be available from 3:30 p.m. to 4:30 p.m., Washington, DC time, on the same day, by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to participate in the meeting via conference call or for an individual consultation, contact either Lynn Medley or Marlene Spencer as follows:

Lynn Medley, U.S. Department of Education, 400 Maryland Avenue SW., room 5140, (Potomac Center Plaza) PCP, Washington, DC 20202–2700. Telephone: (202) 245–7338 or by email: *Lynn.Medley@ed.gov.*

Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue SW., room 5133, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7532 or by email: *Marlene.Spencer@ed.gov.*

Deadline for Transmittal of Applications: April 16, 2012.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the Center on Knowledge Translation for Disability and Rehabilitation Research (KTDRR Center), CFDA number 84.133A–13, must be submitted electronically using the Governmentwide Grants.gov Apply site at www.Grants.gov. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Center on Knowledge Translation for Disability and Rehabilitation Research (KTDRR Center) at www.Grants.gov. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.133, not 84.133A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition

to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*

- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue SW., room 5133, PCP, Washington, DC 20202–2700. FAX: (202) 245–7323.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133A–13), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133A–13), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8

a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 350.54 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant program, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through a review of grantee performance and products. Each year, NIDRR examines a portion of its grantees to determine:

- The number of products (e.g., new or improved tools, methods, discoveries, standards, interventions, programs, or devices developed or tested with NIDRR funding) that have been judged by expert panels to be of high quality and to advance the field.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new NIDRR grants that assess the effectiveness of interventions, programs, and devices using rigorous methods.

NIDRR uses information submitted by grantees as part of their Annual Performance Reports (APRs) for these reviews.

Department of Education program performance reports, which include information on NIDRR programs, are available on the Department's Web site: *www.ed.gov/about/offices/list/opepd/sas/index.html*.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Lynn Medley or Marlene Spencer as follows:

Lynn Medley, U.S. Department of Education, 400 Maryland Avenue SW., room 5140, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7338 or by email: *Lynn.Medley@ed.gov*.

Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue SW., room 5133, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7532 or by email: *Marlene.Spencer@ed.gov*.

If you use a TDD call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD call the FRS, toll-free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys*. At this site you can view this document, as well as all

other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: February 9, 2012.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2012–3414 Filed 2–13–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Developing Hispanic-Serving Institutions Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

Overview Information: Developing Hispanic-Serving Institutions (HSI) Program Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.031S.

DATES:

Applications Available: February 14, 2012. Deadline for Transmittal of Applications: March 15, 2012. Deadline for Intergovernmental Review: May 14, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program

The HSI Program provides grants to assist HSIs to expand educational opportunities for, and improve the academic attainment of, Hispanic students. The HSI Program grants also enable HSIs to expand and enhance their academic offerings, program quality, and institutional stability.

General Background

In 2008, the Higher Education Act of 1965 (HEA) was amended by the Higher Education Opportunity Act of 2008 (HEA). The HEOA made a number of changes to the HSI program. The regulations for the HSI Program in 34 part 606 have not been updated since before the HEA was amended by the HEOA. Therefore, we encourage applicants to carefully read this notice, which references the statutory provisions when the corresponding regulatory provisions for this program have not been updated.

For example, section 501 of the HEOA amended section 503(b) of the HEA to include, among the authorized activities under the HSI Program—

(1) Activities to improve student services, including innovative and customized instruction courses designed to help retain students and move the students into core courses;

(2) Articulation agreements and student support programs designed to facilitate the transfer of students from 2-year to 4-year institutions; and

(3) Providing education, counseling services, or financial information designed to improve the financial and economic literacy of students or their families.

(4) The list of authorized activities in section 503(b) of the HEA was also amended to use the term ''distance education technologies'' in place of ''distance learning academic instruction capabilities.'' Therefore, notwithstanding the description of authorized activities in § 606.10, applicants may include these activities in their proposals under this competition.

Priorities

This notice contains three competitive preference priorities. These priorities are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637).

Competitive Preference Priorities

For FY 2012, and any subsequent year in which we make awards from the list of unfunded applicants from the competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 9 points total to an application, depending on how well the application meets all competitive preference priorities. Applicants must address all competitive preference priorities in order to receive any additional points. Applicants who do not address all three competitive preference priorities will not receive any additional points.

These priorities are:

Competitive Preference Priority 1: Increasing Postsecondary Success.

Projects that are designed to increase the number and proportion of high-need students (as defined in this notice) who persist in and complete college or other postsecondary education and training.

Competitive Preference Priority 2: Enabling More Data-Based Decision-Making.

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area: improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

Competitive Preference Priority 3: Improving Productivity.

Projects that are designed to significantly increase efficiency in the use of time, staff, money, or other resources while improving student learning or other educational outcomes (*i.e.,* outcome per unit of resource). Such projects may include innovative and sustainable uses of technology, modification of school schedules and teacher compensation systems, use of open educational resources (as defined in this notice), or other strategies.

Note: The types of projects identified in Competitive Preference Priority 3 are suggestions for ways to improve productivity. The Department recognizes that some of these examples, such as modification of teacher compensation systems, may not be relevant for the context of this program. Accordingly, applicants might want to consider responding to this competitive preference priority in a way that improves productivity in a relevant, higher education context.

Definitions

The following definitions are from the notice of final supplemental priorities and definitions for discretionary grant programs published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637), and apply to the priorities in this notice:

High-need children and high-need students means children and students at risk of educational failure, such as children and students who are living in poverty, who are English learners, who are far below grade level, or who are not on track to becoming college- or career-ready by graduation, who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who are pregnant or parenting teenagers, who have been incarcerated,

who are new immigrants, who are migrant, or who have disabilities.

Open educational resources (OER) means teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or repurposing by others.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State, and local requirements regarding privacy.

Program Authority: 20 U.S.C. 1101–1101d; 1103–1103g.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 606. (c) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants. Five-year Individual Development Grants and Five-year Cooperative Arrangement Development Grants will be awarded in FY 2012. Planning grants will not be awarded in FY 2012.

Estimated Available Funds: $11,676,476.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $535,000–$775,000.

Estimated Average Size of Awards: Individual Development Grants: $560,000. Cooperative Arrangement Development Grants: $640,000.

Maximum Awards: Individual Development Grants: $650,000. Cooperative Arrangement Development Grants: $775,000. We will not fund any application at an amount exceeding these maximum amounts for a single budget period of 12 months. We may choose not to further consider or review applications with budgets that exceed the maximum amounts specified, if we conclude, during our initial review of the application, that the proposed goals and objectives cannot be obtained with the specified maximum amount. The Assistant Secretary for the Office of Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: Individual Development Grants: 14. Cooperative Arrangement Development Grants: 6.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the HSI program Web site for further information. The address is: www.ed.gov/programs/idueshsi/index.html.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs that qualify as eligible HSIs are eligible to apply for new Individual Development Grants and Cooperative Arrangement Development Grants under the HSI program. To be an eligible HSI, an IHE must—

(a) Have an enrollment of needy students, as defined in section 502(b) of the HEA (section 502(a)(2)(A)(i) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(i));

(b) Have, except as provided in section 522(b) of the HEA, average educational and general expenditures that are low, per full-time equivalent (FTE) undergraduate student, in comparison with the average educational and general expenditures per FTE undergraduate student of institutions that offer similar instruction (section 502(a)(2)(A)(ii) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(ii));

Note: To demonstrate an enrollment of needy students and low average educational and general expenditures per FTE undergraduate student, an IHE must be designated as an ''eligible institution'' in accordance with 34 CFR 606.3 through 606.5 and the notice inviting applications for designation as an eligible institution for the fiscal year for which the grant competition is being conducted.

For purposes of establishing eligibility for this competition, the Notice Inviting Applications for Designation as Eligible Institution for FY 2012 was published in the **Federal Register** on December 15, 2011 (76 FR 77982). Only institutions that submitted the required application and received designation through this process are eligible to submit applications for this competition.

(c) Be accredited by a nationally recognized accrediting agency or association that the Secretary has determined to be a reliable authority as to the quality of education or training offered, or making reasonable progress toward accreditation, according to such an agency or association (section 502(a)(2)(A)(iv) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(iv));

(d) Be legally authorized to provide, and provide within the State, an educational program for which the institution awards a bachelor's degree (section 502(a)(2)(A)(iii) of the HEA or a junior or community college; 20 U.S.C. 1101a(a)(2)(A)(iii)); and

(e) Have an enrollment of undergraduate FTE students that is at least 25 percent Hispanic students at the end of the award year immediately preceding the date of application (section 502(a)(5)(B) of the HEA; 20 U.S.C. 1101a(a)(5)(B)).

Note 1: Funds for the HSI Program will be awarded each fiscal year; thus, for this program, the ''end of the award year immediately preceding the date of application'' refers to the end of the fiscal year prior to the application due date. The end of the fiscal year occurs on September 30 for any given year.

Note 2: In considering applications for grants under this program, the Department will compare the data and documentation the institution relied on in its application with data reported to the Department's Integrated Postsecondary Education Data System (IPEDS), the IHE's State-reported enrollment data, and the institutional annual report. If different percentages or data are reported in these various sources, the institution must, as part of the 25 percent assurance verification, explain the reason for the differences. If the IPEDS data show that less than 25 percent of the institution's undergraduate FTE students are Hispanic, the burden is on the institution to show that the IPEDS data are inaccurate. If the IPEDS data indicate that the institution has an undergraduate FTE less than 25 percent, and the institution fails to demonstrate that the IPEDS data are inaccurate, the institution will be considered ineligible.[1]

Relationship Between HSI and Title III, Part A Programs

Note 1: A grantee under the HSI Program, which is authorized by Title V of the HEA, may not receive a grant under any HEA, Title III, Part A or Part B Program (section 505 of the HEA; 20 U.S.C. 1101D). The Title III, Part A Programs include: the Strengthening Institutions Program; the American Indian Tribally Controlled Colleges and Universities Program; the Alaska Native and Native Hawaiian-Serving Institutions Programs; the Asian American and Native American Pacific Islander-Serving Institutions Program; and the Native American-Serving Non-Tribal Institutions Program. Furthermore, a current HSI Program grantee may not give up its HSI

[1] For purposes of making the determination described in paragraph (e) of the Eligibility Criteria for this competition, IHEs must report their undergraduate Hispanic FTE percent based on the student enrollment count closest to, but not after, September 30, 2010.

grant in order to receive a grant under any Title III, Part A Program (§ 606.2(c)(1)).

Note 2: An HSI that does not fall within the limitation described in Note 1 may apply for a FY 2012 grant under all Title III, Part A Programs, for which it is eligible, as well as under the HSI Program. However, a successful applicant may receive only one grant.

Note 3: An eligible HSI that submits multiple applications may only be awarded one Individual Development Grant *and/or* one Cooperative Arrangement Development Grant in a fiscal year (34 CFR 606.9 and 606.13). In addition, the Secretary will not award a second Individual Development Grant to an HSI with a current five-year Individual Development Grant as described in 34 CFR 606.9(b)(1).

Note 4: An eligible HSI that submits a Cooperative Arrangement Development Grant with a partnering branch campus that is a part of the same institution will not be awarded a grant (34 CFR 606.7(b)).

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching requirements unless the grantee uses a portion of its grant for establishing or improving an endowment fund. If a grantee uses a portion of its grant for endowment fund purposes, it must match those grant funds with non-Federal funds (section 503(c)(2) of the HEA; 20 U.S.C. 1101b(c)(2)).

IV. Application and Submission Information

1. *Address to Request Application Package:* Carnisia M. Proctor, U.S. Department of Education, 1990 K Street, NW., Room 6060, Washington, DC 20006–8513. Telephone: (202) 502–7606 or by email: Carnisia.Proctor@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limits: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria and the competitive priorities that reviewers use to evaluate your application. We have established mandatory page limits for both the Individual Development Grant and the Cooperative Arrangement Development Grant applications. You must limit the application narrative (Part III) to no more than 55 pages for the Individual Development Grant application and no more than 75 pages for the Cooperative Arrangement Development Grant application.

Note: Please include a separate heading when responding to the competitive priorities. If you do not wish to address the competitive priorities, you must limit your application narrative to no more than 50 pages for the Individual Development Grant application and no more than 70 pages for the Cooperative Arrangement Development Grant application using the following standards:

- A ''page'' is 8.5'' x 11'', on one side only, with 1'' margins at the top, bottom, and both sides.

Note: For purposes of determining compliance with the page limits, each page on which there are words will be counted as one full page.

- Double space (no more than three lines per vertical inch) all text in the application narrative, *except* titles, headings, footnotes, quotations, references, captions and all text in charts, tables, and graphs. These items may be single-spaced. Charts, tables, figures, and graphs in the application narrative count toward the page limit.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the Application for Federal Assistance (SF 424); the Department of Education Supplemental Information form (SF 424); Part II, Budget Information—Non-Construction Programs (ED 524); Part IV, the assurances and certifications; or the one-page project abstract, program activity budget detail form and supporting narrative, and the five-year plan. However, the page limit does apply to all of the application narrative section (Part III), including the budget narrative of the selection criteria and the competitive priorities. If you include any attachments or appendices not specifically requested in the application package, these items will be counted as part of your application narrative (Part III) for purposes of the page limit requirement. You must include your complete response to the selection criteria in the application narrative.

Note: The narrative response to the budget selection criteria is not the same as the activity detail budget form and supporting narrative. The supporting narrative for the activity detail budget form lists the requested budget items line by line.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: February 14, 2012.

Deadline for Transmittal of Applications: March 15, 2012.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice. Deadline for Intergovernmental Review: May 14, 2012.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide you DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your

application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: www.grants.gov/applicants/get_registered.jsp.

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications:*

Applications for grants under the HSI Program, CFDA Number 84.031S, must be submitted electronically using the Governmentwide Grants.gov Apply site at www.Grants.gov. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Developing Hispanic-Serving Institutions at www.Grants.gov. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.031, not 84.031S).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (ED 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department). The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an

explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Carnisia M. Proctor, U.S. Department of Education, 1990 K Street, NW., Room 6060, Washington, DC 20006–8513. FAX: (202) 502–7861.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.031S), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.031S), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are in 34 CFR 606.22. In addition to these selection criteria, we evaluate an applicant's performance under a previous development grant under 34 CFR 606.24.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

Additional factors we consider in selecting an application for an award are as follows:

(A) *Documentation of at least 25 Percent Hispanic Undergraduate FTE students.* Applicants must provide, as an attachment to the application, the documentation the IHE relied upon in determining that at least 25 percent of the IHE's undergraduate FTE students are Hispanic.

Note: The 25 percent requirement applies only to *undergraduate* Hispanic students and is calculated based upon FTE students as defined in section 502(a)(4) of the HEA. Instructions for formatting and submitting the verification documentation to Grants.gov are in the application package for this competition.

(B) *Tiebreaker for Development Grants.* In tie-breaking situations for development grants described in 34 CFR 606.23(b), the HSI Program regulations require that we award one additional point to an application from an IHE that has an endowment fund of which the current market value, per FTE enrolled student, is less than the average current market value of the endowment funds, per FTE enrolled student, at comparable institutions that offer similar instruction. We also award one

additional point to an application from an IHE that had expenditures for library materials per FTE enrolled student that are less than the average expenditures for library materials per FTE enrolled student at comparable institutions that offer similar instruction.

For the purpose of these funding considerations, we use 2009–2010 data.

If a tie remains after applying the tiebreaker mechanism above, priority will be given (a) for Individual Development Grants, to applicants that addressed the statutory priority found in section 521(d) of the HEA, as amended; and (b) for Cooperative Arrangement Development Grants, to applicants in accordance with section 524(b) of the HEA, under which the Secretary determines that the cooperative arrangement is geographically and economically sound or will benefit the applicant HSI.

If a tie still remains after applying the additional point(s) and the relevant statutory priority, we will determine the ranking of applicants based on the lowest endowment values per FTE enrolled student.

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms.html.*

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the HSI program:

1. The percentage change, over the five-year grant period, of the number of full-time degree-seeking undergraduate students enrolled at HSIs.

2. The percentage of first-time, full-time degree-seeking undergraduate students who were in their first year of postsecondary enrollment in the previous year and are enrolled in the current year at the same two-year Hispanic-serving institution.

3. The percentage of first-time, full-time degree-seeking undergraduate students who were in their first year of postsecondary enrollment in the previous year and are enrolled in the current year at the same four-year Hispanic-serving institution.

4. The percentage of first-time, full-time degree-seeking undergraduate students enrolled at four-year HSIs graduating within six years of enrollment.

5. The percentage of first-time, full-time degree-seeking undergraduate students enrolled at two-year HSIs graduating within three years of enrollment.

6. Federal cost per undergraduate and graduate degree at institutions in the HSI Program.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

For Further Information Contact: Carnisia M. Proctor, U.S. Department of Education, 1990 K Street, NW., Room 6060, Washington, DC 20006–8513. Telephone: (202) 502–7606 or by email: *Carnisia.Proctor@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under *For Further Information Contact* in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: February 9, 2012.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2012–3421 Filed 2–13–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Institute on Disability and Rehabilitation Research—Disability and Rehabilitation Research Projects and Centers Program, etc.

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of final priority.

Overview Information:

National Institute on Disability and Rehabilitation Research—Disability and Rehabilitation Research Projects and Centers Program—Disability and Rehabilitation Research Project—Center on Knowledge Translation for Disability and Rehabilitation Research.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133A–13.

SUMMARY: The Assistant Secretary for Special Education and Rehabilitative Services announces a priority for the Disability and Rehabilitation Research Projects and Centers Program—Disability and Rehabilitation Research Project (DRRP) administered by the National Institute on Disability Rehabilitation Research (NIDRR). Specifically, this notice announces a priority for a center on knowledge translation for disability and rehabilitation research (KTDRR Center). The Assistant Secretary may use this priority for a competition in fiscal year (FY) 2012 and later years. We take this action to focus research attention on areas of national need.

DATES: *Effective Date:* This priority is effective March 15, 2012.

FOR FURTHER INFORMATION CONTACT: Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue SW., room 5133, Potomac Center Plaza (PCP), Washington, DC 20202–2700. Telephone: (202) 245–7532 or by email: *marlene.spencer@ed.gov*.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

This notice of final priority (NFP) is in concert with NIDRR's currently approved Long-Range Plan (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8166), can be accessed at the following Web site: *www.ed.gov/about/offices/list/osers/nidrr/policy.html*.

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) determine effective methods to improve community living, employment, and health outcomes for underserved populations; (3) identify research gaps; (4) identify mechanisms of integrating research and practice; and (5) disseminate findings.

This notice announces a priority that NIDRR intends to use for a DRRP competition in FY 2012 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities, if needed. Furthermore, NIDRR is under no obligation to make an award for this priority. The decision to make an award will be based on the quality of applications received and available funding.

Purpose of Program:

The purpose of the Disability and Rehabilitation Research Projects and Centers Program is to plan and conduct research, demonstration projects, training, and related activities, including international activities, to develop methods, procedures, and rehabilitation technology that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities, and to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act).

Disability and Rehabilitation Research Projects (DRRPs)

The purpose of DRRPs, which are funded under NIDRR's Disability and Rehabilitation Research Projects and Centers Program, is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: research, training, demonstration, development, dissemination, utilization, and technical assistance. Additional information on DRRPs can be found at: *www.ed.gov/rschstat/research/pubs/res-program*.

Program Authority: 29 U.S.C. 762(g) and 764(a).

Applicable Program Regulations: 34 CFR part 350.

We published a notice of proposed priority for this program in the **Federal Register** on June 7, 2011 (76 FR 32971). That notice contained background information and our reasons for proposing this particular priority.

Public Comment: In response to our invitation in the notice of proposed priority, four parties submitted comments on the proposed priority.

Generally, we do not address technical and other minor changes. In addition, we do not address general comments that raised concerns not directly related to the proposed priority.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priority since publication of the notice of proposed priority follows.

Comment: Two commenters suggested that the priority focus on activities to promote the use of research findings to shape service delivery systems and to improve outcomes for individuals with disabilities. One of these commenters suggested that the priority focus specifically on service delivery systems for individuals with developmental disabilities.

Discussion: NIDRR agrees that service delivery systems for individuals with disabilities should be informed and shaped by disability and rehabilitation research in order to improve outcomes for individuals with disabilities. Nothing in the priority precludes applicants from specifically focusing on service delivery systems—including service delivery systems for individuals with developmental disabilities—in their knowledge translation work. Given the wide range of intended audiences of disability and rehabilitation research listed in the priority, NIDRR does not have a sufficient basis for requiring all applicants to focus specifically on service delivery systems or service delivery systems for individuals with developmental disabilities.

Changes: None.

Comment: Two commenters suggested that the priority be restructured as a network of smaller grants with the goal of disseminating disability and rehabilitation research to meet the information needs of a wide range of audiences.

Discussion: NIDRR does not agree that a network of smaller grants would better serve the wide range of intended audiences of disability and rehabilitation research. NIDRR intends the KTDRR Center to serve as the main knowledge translation (KT) resource for other NIDRR grantees, including NIDRR grantees that serve as KT Centers. NIDRR grantees conduct research on a broad range of disability and rehabilitation topics, and the results of NIDRR research are applicable to a wide range of audiences. Smaller grants would not be sufficient to ensure that

grantees have the resources and levels of KT expertise that are necessary to increase the use of disability and rehabilitation research results by the wide range of intended audiences.

Changes: None.

Comment: One commenter suggested that the KTDRR Center actively consider business-specific information needs in order to promote employment for people with disabilities.

Discussion: NIDRR agrees that businesses and other types of employers are important audiences for a wide range of disability and rehabilitation research and that KT efforts should take their information needs into account. A significant percentage of NIDRR grants focus on employment of individuals with disabilities. The findings from these and other NIDRR grants are relevant to businesses and other types of employers and can potentially be used to promote employment among individuals with disabilities.

Changes: In the relevant paragraphs, paragraphs (a) and (b)(3), NIDRR has added ''employers'' to the suggested list of intended audiences of disability and rehabilitation research.

Comment: None

Discussion: NIDRR has determined that the requirement for the provision of technical assistance under paragraph (b)(1) is redundant with the more broadly stated technical assistance requirement under paragraph (b)(6).

Changes: NIDRR has deleted paragraph (b)(1), and re-numbered paragraph (b) accordingly.

Final Priority:

Priority—Center on Knowledge Translation for Disability and Rehabilitation Research (KTDRR Center)

The Assistant Secretary for Special Education and Rehabilitative Services announces a priority for a center on knowledge translation for disability and rehabilitation research (KTDRR Center). The purpose of the KTDRR Center is to promote the use of high-quality disability and rehabilitation research that is relevant to the needs of intended audiences by serving as the main knowledge translation (KT) resource for other NIDRR grantees, including NIDRR grantees that serve as KT centers (NIDRR KT Centers). The KTDRR Center's work will also be available to researchers who are not NIDRR grantees, as well as to the public.

For purposes of this priority, KT refers to a multidimensional, active process of ensuring that new knowledge and products gained via research and development reach intended audiences; are understood by these audiences; and are used to improve participation of individuals with disabilities in society. KT encompasses all steps from the creation of new knowledge to the synthesis, dissemination, and implementation of such knowledge, and is built upon continuing interactions and partnerships within and between different groups of knowledge creators and users.

Under this priority, the KTDRR Center must contribute to the following outcomes:

(a) Increased use of valid and relevant disability and rehabilitation research findings to inform decision-making by individuals with disabilities and their family members, disability advocates, service providers, researchers, educators, employers, administrators, policy-makers, and others. The KTDRR Center must contribute to this outcome by—

(1) Identifying standards, guidelines, and methods that are appropriate for conducting systematic reviews and developing research syntheses on disability and rehabilitation research. NIDRR grantees must be able to use these standards, guidelines, and methods to systematically assess and describe the rigor of the research, and the quality and relevance of the evidence being considered. The standards used to assess and describe the rigor of the research and the quality of the evidence must be consistent with the definitions of strong and moderate evidence in the notice of final supplemental priorities and definitions for discretionary grant programs published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637);

(2) Providing NIDRR grantees with technical assistance on conducting systematic reviews and developing research syntheses in the grantee's area of expertise, using standards, guidelines, and methods that the KTDRR Center identifies pursuant to paragraph (a)(1) of this priority. In so doing, the KTDRR Center must choose appropriate standards, guidelines, or methods, taking into account the types of research and stages of knowledge development in the substantive area(s) being reviewed; and

(3) Providing NIDRR grantees with technical assistance on how to use KT practices that are appropriate for their intended audiences, to promote the use of systematic reviews and research syntheses in the grantee's area of expertise.

(b) Increased knowledge of KT principles and use of current KT practices among NIDRR grantees, including NIDRR KT Centers. The KTDRR Center must contribute to this outcome by—

(1) Synthesizing and disseminating information from the KT literature that can be used to improve KT practices used by NIDRR grantees, including other NIDRR KT Centers;

(2) Identifying and showcasing promising KT practices employed by NIDRR KT Centers, other NIDRR grantees, and other entities to increase the use of disability and rehabilitation research findings by individuals with disabilities and their family members, disability advocates, service providers, researchers, educators, employers, administrators, policy-makers, and others;

(3) Facilitating the exchange of KT information among other NIDRR grantees, including other NIDRR KT Centers;

(4) Organizing and sponsoring events (e.g., conferences, workshops, Webinars, and other appropriate training events) to build KT capacity among NIDRR grantees; and

(5) Providing technical assistance on KT to other NIDRR KT Centers and other NIDRR grantees, upon request of those centers and grantees.

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose

to use this priority, we invite applications through a notice in the **Federal Register**.

Executive Order 12866: This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this final regulatory action.

The potential costs associated with this final regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this final regulatory action, we have determined that the benefits of the final priority justify the costs.

Summary of potential costs and benefits:

The benefits of the Disability and Rehabilitation Research Projects and Centers Programs have been well established over the years in that similar projects have been completed successfully. This final priority will generate new knowledge through research and development. Another benefit of this final priority is that the establishment of new DRRPs will improve the lives of individuals with disabilities. The new DRRP will provide support and assistance for NIDRR grantees as they generate, disseminate, and promote the use of new information that will improve the options for individuals with disabilities to perform activities of their choice in the community.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: February 9, 2012.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2012–3416 Filed 2–13–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: U.S. Department of Education, National Assessment Governing Board.

ACTION: Notice of open and closed meeting sessions.

SUMMARY: This notice sets forth the schedule and proposed agenda for the upcoming meeting of the National Assessment Governing Board (Board) and also describes the specific functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This notice is issued to provide members of the general public with an opportunity to attend and/or provide comments. Individuals who will need special accommodations in order to attend the meeting (*e.g.* interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than February 17, 2012. We will attempt to meet requests after this date but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

DATES: February 29, 2012 and March 1–3, 2012.

Times: February 29: *Committee Meeting: Assessment Development Committee (ADC):* Closed Session: 9 a.m.–3 p.m.

Open Session: 3 p.m.–5 p.m.

March 1

Committee Meetings

Ad Hoc Committee: Open Session 2:30 p.m.–4 p.m.

Executive Committee: Open Session: 4:30 p.m.–5 p.m.; Closed Session: 5 p.m.–6 p.m.

March 2

Full Board: Open Session: 8:15 a.m.–9:30 a.m.; Closed Session: 12:15 p.m.–1:30 p.m.; Open Session: 1:45 p.m.–4:30 p.m.

Committee Meetings

Assessment Development Committee (ADC): Open Session: 9:45 a.m.–11:30 a.m.; Closed Session: 11:30 a.m.–12:15 p.m.

Committee on Standards, Design and Methodology (COSDAM): Open Session: 9:45 a.m. –11:30 a.m. Closed Session: 11:30 a.m.–12:15 p.m.

Reporting and Dissemination Committee (R&D): Open Session: 9:45 a.m.–12:15 p.m.

March 3

Nominations Committee: Closed Session: 7:30 a.m.–8:15 a.m.

Full Board: Closed Session: 8:30 a.m.–9 a.m.; Open Session: 9 a.m.–11:30 a.m.

Location: Hyatt Regency New Orleans, 601 Loyola Avenue, New Orleans, LA 70113.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street NW., Suite 825, Washington, DC, 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board (Board) is established under section 412 of the National Education Statistics Act of 1994, as amended.

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include the following: selecting subject areas to be assessed, developing assessment frameworks and specifications, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

On February 29, 2012, the Assessment Development Committee (ADC) will meet in closed session from 9 a.m. to 3 p.m. to review secure items for three NAEP assessments—the NAEP 2013 NAEP operational Reading assessment at grades 4 and 8; secure items for the NAEP 2014 Pilot Civics Assessment at grades 4, 8, and 12; and computer-based tasks for the NAEP 2014 Technology and Engineering Literacy Assessment. During the closed session, ADC members will be provided specific test materials for review which are not yet releasable to the general public. Premature disclosure of these secure test items and materials would compromise the integrity and substantially impede

implementation of the NAEP assessments and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 of the United States Code. This same committee will meet in an open session from 3 p.m. to 5 p.m. to review background questions for the NAEP 2014 pilot tests in U.S. History, Geography, and Civics at grades 4, 8, and 12

On March 1, 2012, two committee meetings will occur.

From 2:30 p.m. to 4 p.m. the Ad Hoc Committee on NAEP Parent Engagement will meet in open session. The Executive Committee will meet in open session from 4:30 p.m. to 5 p.m., and thereafter in closed session from 5 p.m. to 6 p.m. During the closed session, the Executive Committee will receive a briefing on government cost estimates for the NAEP budget during FY 2013 and beyond for various options for the NAEP schedule of assessments, and the impact of these options on the NAEP contracts. The discussion of assessment schedules and costs will address the congressionally mandated goals and Board policies on NAEP assessments. This portion of the meeting will be conducted in closed session because public discussion of this information would disclose independent government cost estimates and contracting options, adversely impacting the confidentiality of the contracting process. In addition, public disclosure of information discussed would reduce future contract competition and significantly impede implementation of the NAEP contracts and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 of the United States Code.

On March 2, 2012 the full Board will meet in open session from 8:15 a.m. to 10 a.m. The Board will review and approve the meeting agenda and meeting minutes from the December 2011 Board meeting, followed by the Chairman's remarks and a welcome from New Orleans Board member Doris Hicks and Patrick Dobard, Superintendent, Recovery School District of Louisiana. On March 2, from 9 a.m. to 9:10 a.m. the Executive Director of the Governing Board will provide a report to the Board, followed by updates from the Commissioner of the National Center for Education Statistics (NCES) and the Director of the Institute of Education Sciences (IES) from 9:10 a.m. to 9:30 a.m. Following these sessions, the Board will recess for Committee meetings from 9:45 a.m. to 12:15 p.m.

The Reporting and Dissemination Committee will meet in open session from 9:45 a.m. to 12:15 p.m.

The Assessment Development Committee (ADC) will meet in open session from 9:45 a.m. to 11:30 a.m. and thereafter in closed session from 11:30 a.m. to 12:15 p.m. During the closed session, the ADC will receive a briefing on preliminary findings from the NAEP 2011 computer-based mathematics special study. The Board will be provided with study results that cannot be discussed/disclosed in an open meeting prior to public release. Premature disclosure of these findings would significantly compromise the integrity and significantly impede implementation of the NAEP assessments, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 United States Code.

The Committee on Standards, Design and Methodology will meet in open session from 9:45 a.m. to 11:30 a.m. and in closed session from 11:30 a.m. to 12:15 p.m. During the closed session, the Committee will receive a briefing on secure data collected from the NAEP writing achievement levels-setting pilot study, second field trial, and operational studies. The Board will be provided with specific assessment data and achievement levels results that have not been approved for release by the NCES Commissioner and therefore cannot be disclosed to the public at this time. Premature disclosure of these secure test results would significantly impede implementation of the NAEP assessments and reporting, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On March 2, 2012 from 12:15 p.m. to 1:30 p.m. the full Board will meet in closed session to receive a briefing from NCES and engage in discussions on the Hands-On and Interactive Computer Tasks from the 2009 NAEP Science Assessment. The Board will be provided with embargoed data and results that cannot be discussed in an open meeting prior to their official release by the National Center for Education Statistics on a date to be determined. Premature disclosure of these results would significantly impede implementation of the NAEP assessment program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 United States Code.

Following the closed session, the Board will meet in open sessions as follows: From 1:45 p.m. to 2:30 p.m., the Board will receive a briefing on NCES's initiative on the Future of NAEP. From 2:30 p.m. to 3:15 p.m. ., the Board will receive a report of the Expert Panel on NAEP Background Questions. The Board will receive a report from the Ad Hoc Committee on Parent Engagement from 3:30 p.m. to 4 p.m., followed by a discussion session on Board initiatives on *Making a Difference* from 4 p.m. to 4:30 p.m. The March 2, 2012 session of the Board meeting is scheduled to conclude at 4:30 p.m.

On March 3, 2011, the Nominations Committee will meet in closed session from 7:30 p.m. to 8:15 a.m. to review the proposed slates of finalists for Board terms beginning in October 2012. Thereafter, the full Board will meet in closed session from 8:30 a.m. to 9 a.m. to receive and take action on the recommendations from the Nominations Committee on final candidates for Board vacancies for submission to the Office of Secretary of Education. Both the Committee and full Board discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of Title 5 of the United States Code.

On March 3, from 9 a.m. to 10:15 a.m. the Board will receive a briefing on the Program for International Student Assessment. From 10:15 a.m. to 11 a.m. the Board will receive briefings and discuss 12th grade Preparedness Reporting. The Board will receive Committee reports and take action on Committee recommendations from 11 a.m. to 11:30 a.m. upon which the March 3, 2011 meeting will conclude.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street, NW., Washington, DC, from 9 a.m. to 5 p.m. Eastern Time, Monday through Friday.

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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.*

Dated:February 8, 2011.

Cornelia S. Orr,

Executive Director, National Assessment Governing Board, U.S. Department of Education.

[FR Doc. 2012–3314 Filed 2–13–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–023]

Notice of Petition for Waiver of GE Appliances From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes the GE Appliances (GE) petition for waiver (hereafter, ''petition'') from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of certain specific electric refrigerators and refrigerator-freezers. In its petition, GE provides an alternate test procedure and DOE solicits comments, data, and information concerning GE's petition and the suggested alternate test procedure. Today's notice also grants GE an interim waiver from the electric refrigerator and refrigerator-freezer test procedure, subject to use of the alternative test procedure set forth in this notice.

DATES: DOE will accept comments, data, and information with respect to the GE Petition until March 15, 2012.

ADDRESSES: You may submit comments, identified by case number ''RF–023,'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. RF–023] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC, 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE waivers and rulemakings regarding similar refrigerator-freezer products. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. E-mail: *AS_Waiver_Requests@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. E-mail: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the electric refrigerators and refrigerator-freezers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure the energy efficiency, energy use, or estimated annual operating costs of a covered product, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for automatic electric refrigerators and refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A1.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered products under certain conditions. In particular, the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver if it is determined that (1) the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

Any interested person who has submitted a petition for waiver may also file an application for interim waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary may grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(g). If granted, an interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner. DOE may extend an interim waiver for an additional 180 days. 10 CFR 430.27(h).

II. Petition for Waiver of Test Procedure and Application for Interim Waiver

On January 26, 2012, GE submitted a petition for waiver from the test procedure applicable to residential electric refrigerators and refrigerator-

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

freezers set forth in 10 CFR part 430, Subpart B, Appendix A1. GE is designing new refrigerator-freezers that incorporate multiple defrost cycles. In its petition, GE seeks a waiver from the procedure provided in Appendix A1 because that test procedure does not account for products that use multiple defrost cycles. Therefore, GE has asked to use an alternate test procedure that is the same as the test procedure provisions for products with long time or variable defrost DOE published in an interim final rule (75 FR 78810, December 16, 2010). On January 27 and July 19, 2011, Samsung submitted similar petitions for waiver and requests for interim waiver for basic models of refrigerator-freezers that incorporate multiple defrost cycles. After initially granting these interim waiver requests, DOE ultimately granted Samsung with a waiver for the products specified in those petitions through a final decision and order that adopted a modified version of the interim final rule's procedure. 77 FR 1474 (Jan. 10, 2012). That modified procedure was also adopted by DOE as part of a recently published rule that finalized the test procedures that electric refrigerator and refrigerator-freezer manufacturers must use starting in 2014. *See* 77 FR 3559 (Jan. 25, 2012).

GE also requests an interim waiver from the existing DOE test procedure. An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. (10 CFR 430.27(g).

DOE has determined that GE's application for interim waiver does not provide sufficient market, equipment price, shipments and other manufacturer impact information to permit DOE to evaluate the economic hardship GE might experience absent a favorable determination on its application for interim waiver. DOE has determined, however, that it is likely GE's petition will be granted, and that it is desirable for public policy reasons to grant GE relief pending a determination on the petition. Previously, DOE granted a waiver to Samsung for other basic models incorporating multiple defrost technology (77 FR 1474, Jan. 10, 2012), and DOE has determined that it is desirable to have similar basic models tested in a consistent manner.

GE's petition requested an alternate test procedure to account for the energy consumption of its refrigerator-freezer models with multiple defrost cycles. The alternate test procedure requested by GE is the same as the test procedure published in the interim final rule referenced above. As noted above, DOE recently published a final test procedure for refrigerators, refrigerator-freezers, and freezers (77 FR 3559, Jan. 25, 2012). The alternate test procedure sought by GE is identical to the interim final rule test procedure provisions for products with long-time or variable defrost adopted in the final test procedure rule. Because DOE has finalized a test procedure that accounts for products that employ these long-time or variable defrost control strategies, DOE is granting GE's request but requiring that the company use the more recently finalized procedure in order to ensure testing consistency for all manufacturers when measuring the energy consumption of these types of products.

For the reasons stated above, DOE grants GE's application for interim waiver from testing of its refrigerator-freezer product line containing multiple defrost cycles. Therefore, *it is ordered that:*

The application for interim waiver filed by GE is hereby granted for the specified GE refrigerator-freezer basic models that incorporate multiple defrost cycles, subject to the specifications and conditions below. GE shall be required to test or rate the specified refrigerator-freezer products according to the alternate test procedure as set forth in section III, ''Alternate Test Procedure.''

The interim waiver applies to the following basic model groups:

CYE24T******
CFE29T******
DFE29J******
GNE26G******
GFE27G******
GFE27H******
GFE29H******
PWE23K******
PYE24K******
PYE24P******
PFE27K******
PFE29P******
PFH29P******

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. GE may submit a subsequent petition for waiver and request for grant of interim waiver, as appropriate, for additional models of refrigerator-freezers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

III. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures to make representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27, DOE will consider setting an alternate test procedure for GE in a subsequent Decision and Order.

During the period of the interim waiver granted in this notice, GE shall test the products listed above according to the test procedures for residential electric refrigerator-freezers prescribed by DOE at 10 CFR art 430, Subpart B, Appendix A1, except that, for the GE products listed above only, include:

1. In section 1, Definitions, the following definition:

''Defrost cycle type'' means a distinct sequence of control whose function is to remove frost and/or ice from a refrigerated surface. There may be variations in the defrost control sequence such as the number of defrost heaters energized. Each such variation establishes a separate distinct defrost cycle type. However, defrost achieved regularly during the compressor ''off'' cycles by warming of the evaporator without active heat addition is not a defrost cycle type.

2. In section 4, Test Period, the following:

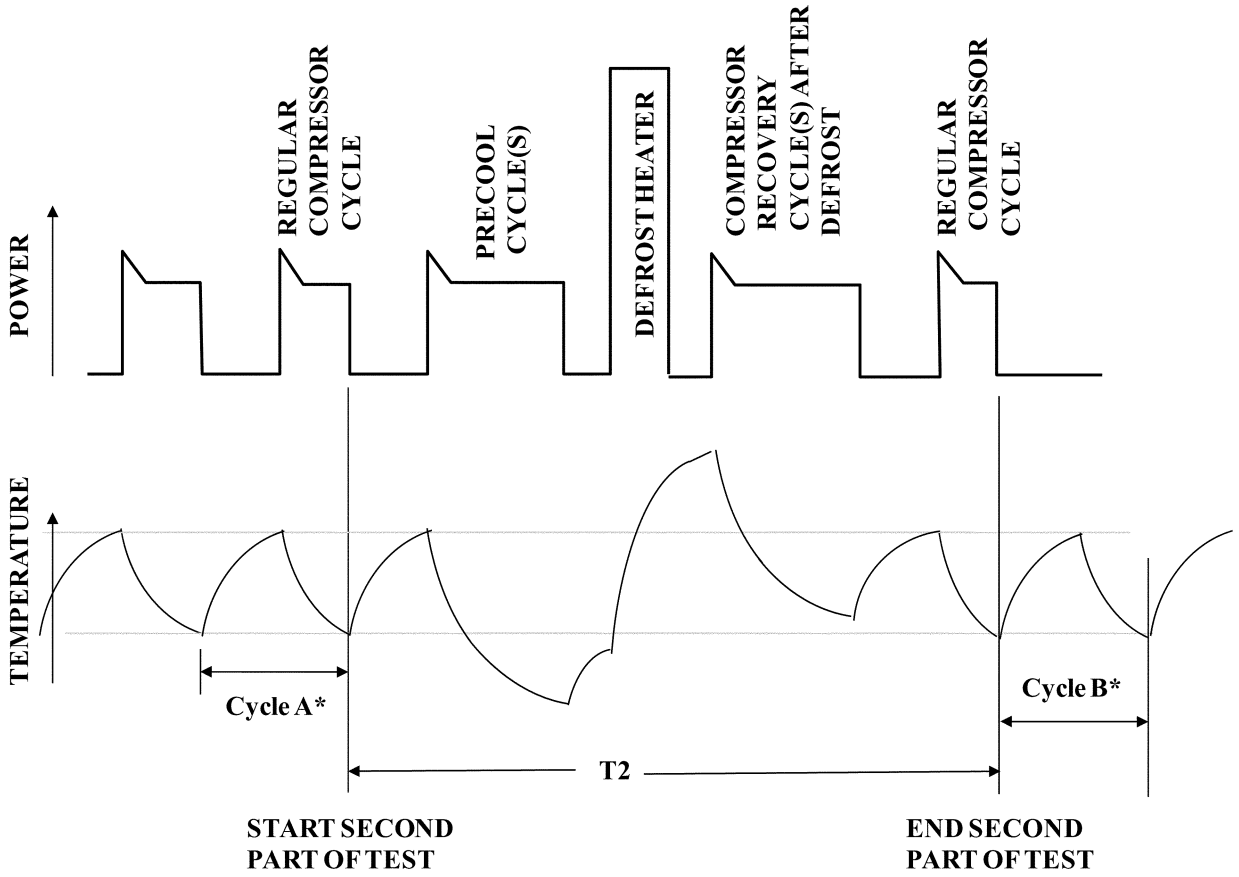
4.2.1 Long-time Automatic Defrost. If the model being tested has a long-time automatic defrost system, the two-part test described in this section may be used. The first part is a stable period of compressor operation that includes no portions of the defrost cycle, such as precooling or recovery, that is otherwise the same as the test for a unit having no defrost provisions (section 4.1). The second part is designed to capture the energy consumed during all of the events occurring with the defrost control sequence that are outside of stable operation.

4.2.1.1 Cycling Compressor System. For a system with a cycling compressor, the second part of the test starts at the termination of the last regular compressor ''on'' cycle. The average

temperatures of the fresh food and freezer compartments measured from the termination of the previous compressor ''on'' cycle to the termination of the last regular compressor ''on'' cycle must both be within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test. If any compressor cycles occur prior to the defrost heater being energized that cause the average temperature in either compartment to deviate from its average temperature for the first part of the test by more than 0.5 °F (0.3 °C), these compressor cycles are not considered regular compressor cycles and must be included in the second part of the test. As an example, a ''precooling'' cycle, which is an extended compressor cycle that lowers the temperature(s) of one or both compartments prior to energizing the defrost heater, must be included in the second part of the test. The test period for the second part of the test ends at the termination of the first regular compressor ''on'' cycle after both compartment temperatures have fully recovered to their stable conditions. The average temperatures of the compartments measured from this termination of the first regular compressor ''on'' cycle until the termination of the next regular compressor ''on'' cycle must both be within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test. See Figure 1.

Figure 1

Long-time Automatic Defrost Diagram for Cycling Compressors



***Average compartment temperature(s) during cycles A & B must be within 0.5 ˚F of the average temperature(s) for the first part of the test.**

4.2.4 Systems with Multiple Defrost Frequencies. This section applies to models with long-time automatic or variable defrost control with multiple defrost cycle types, such as models with single compressors and multiple evaporators in which the evaporators have different defrost frequencies. The two-part method in 4.2.1 shall be used. The second part of the method will be conducted separately for each distinct defrost cycle type.

3. In section 5, Test Measurements, the following:

5.2.1.5 Long-time or Variable Defrost Control for Systems with Multiple Defrost cycle Types. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$$ET = (1440 \times EP1 / T1) + \sum_{i=1}^{D} \left[\left(EP2_i - (EP1 \times T2_i / T1) \right) \times (12 / CT_i) \right]$$

Where:

1440 is defined in 5.2.1.1 and EP1, T1, and 12 are defined in 5.2.1.2;

i is a variable that can equal 1, 2, or more that identifies the distinct defrost cycle types applicable for the refrigerator or refrigerator-freezer;

$EP2_i$ = energy expended in kilowatt-hours during the second part of the test for defrost cycle type i;

$T2_i$ = length of time in minutes of the second part of the test for defrost cycle type i;

CT_i is the compressor run time between instances of defrost cycle type i, for long-time automatic defrost control equal to a fixed time in hours rounded to the nearest tenth of an hour, and for variable defrost control equal to $(CT_{Li} \times CT_{Mi})/(F \times (CT_{Mi} \sim CT_{Li}) + CT_{Li})$;

CT_{Li} = least or shortest compressor run time between instances of defrost cycle type i in hours rounded to the nearest tenth of an hour (CT_L for the defrost cycle type with the longest compressor run time between defrosts must be greater than or equal to 6 but less than or equal to 12 hours);

CT_{Mi} = maximum compressor run time between instances of defrost cycle type i in hours rounded to the nearest tenth of an hour (greater than CT_{Li} but not more than 96 hours);

For cases in which there are more than one fixed CT value (for long-time defrost models) or more than one CT_M and/or CT_L value (for variable defrost models) for a given defrost cycle type, an average fixed CT value or average CT_M and CT_L values shall be selected for this cycle type so that 12 divided by this value or values is the frequency of occurrence of the defrost cycle type in a 24 hour period, assuming 50% compressor run time.

F = default defrost energy consumption factor, equal to 0.20.

For variable defrost models with no values for CT_{Li} and CT_{Mi} in the algorithm, the default values of 6 and 96 shall be used, respectively.

D is the total number of distinct defrost cycle types.

IV. Summary and Request for Comments

Through today's notice, DOE announces receipt of GE's petition for waiver from certain parts of the test procedure that apply to clothes washers and grants an interim waiver to GE. DOE is publishing GE's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains confidential information. The petition includes a suggested alternate test procedure to measure the energy consumption of refrigerator-freezer basic models that incorporate multiple defrost cycles.

DOE solicits comments from interested parties on all aspects of the petition. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is: David N. Baker, Counsel, Government Regulations & Regulatory Compliance, GE Appliances, Appliance Park, AP2–225, Louisville, KY 40225. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC, on February 7, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

BILLING CODE 6450–01–P

GE Appliances

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PUBLIC DISCLOSURE VERSION

January 26, 2012

Dr. Henry Kelly
Acting Assistant Secretary
Energy Efficiency and Renewable Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Re: Petition for Waiver and Application for Interim Waiver
DOE Test Procedures for Refrigerator-Freezers with Multiple Defrost Cycles

Dear Assistant Secretary Kelly:

GE Appliances, a business unit of General Electric Company, (''GE'') respectfully submits this Petition for Waiver ("Petition") and Application for Interim Waiver ("Application") to the Department of Energy (''DOE'' or the "Department'') from test procedures for single compressor refrigerator-freezers with multiple defrost cycles that are manufactured by GE.

Authority

10 CFR 430.27 (a)(1) allows a person to seek a waiver from the test procedure requirements for a particular basic model for a covered consumer product when (1) The petitioner's basic model contains one or more design characteristics that prevents testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

10 CFR 430.27 (a)(2) also provides for a petitioner to file an application for Interim Waiver of the applicable test procedure requirements. Petitioners make such request on the grounds

that they will experience economic hardship if the interim waiver is denied, as competitive disadvantage will otherwise likely result. Additional and/or alternative grounds for the Assistant Secretary to grant an interim waiver are if it appears likely that the petitioned-for waiver will be granted and/or it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27 (g).

The current test procedure prescribed in Appendix A1 to Subpart B of Part 430 (''Appendix A1'') does not adequately provide a way for GE to accurately represent the energy consumption of its refrigerator-freezers with multiple defrost cycles. See 75 FR 78810. DOE so acknowledged when it granted a waiver for similar products to Samsung Electronics America, Inc. ("Samsung") on January 10, 2012 [1] and when it issued its Final Rule on the 2014 test procedures ("Final Rule"), published on January 25, 2012.[2]

GE is planning to launch [redacted] new refrigerator-freezers with multiple defrost cycles. It must, therefore, seek a waiver from current test procedures from the Department. GE believes that a grant of Interim Waiver and Waiver is warranted. GE plans refrigerator-freezer models that will utilize multiple defrost cycles. Without an Interim Waiver, GE will face economic hardship due to the inability to market products that were designed and manufactured with a [redacted] investment. Moreover, unless GE is able to sell refrigerators that compete with the Samsung models and those of other manufacturers, GE will lose market share and revenue and consumers' purchasing options will be limited.

Alternative Test Procedure

10 CFR 430.27 (b)(1)(iii) requires petitioners to propose an alternate test procedure to evaluate in a representative manner the energy consumption characteristics of the basic model. GE therefore submits that the 2014 test procedures, as amended by DOE in its Final Rule, is the appropriate alternative test procedure to use in measuring its refrigerator-freezers with multiple defrost cycles.[3] GE also notes that DOE effectively approved the same relief to Samsung in its recent grant of Samsung's Petition for Waiver.[4]

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[1] Case Nos. RF-018 and RF-019 Samsung Electronics America, Inc. 77 FR 1474 (January 10, 2012).

[2] Docket No. EERE-2009-BT-TP-0003, 77 FR 3559 (January 25, 2012).

[3] *Id. See also* 75 FR 78810 *et seq.*

[4] The waiver granted to Samsung is based on the current test procedure (10 CFR part 430, Subpart B, Appendix A1) amended so as to effectively incorporate the 2014 test procedure. 77 FR at 1476-1478.
See also 76 FR 16760 (March 25, 2011) and 76 FR 54456 (September 1, 2011), Granting of Applications for Interim Waiver of Samsung.

GE's Petition and Application cover the following basic models[5,6]:

CYE24T******
CFE29T******
DFE29J******
GNE26G******
GFE27G******
GFE27H******
GFE29H******
PWE23K******
PYE24K******
PYE24P******
PFE27K******
PFE29P******
PFH29P******

Conclusion

Based on the above, GE requests that the Assistant Secretary expeditiously grant GE's Petition for Waiver and Application for Interim Waiver. Relief is warranted to enable GE to market its new products and to compete with a manufacturer that has been granted the same relief for similar products.

Please feel free to contact me if you have any questions regarding this Petition for Waiver and Application for Interim Waiver.

Sincerely,



David N. Baker
Counsel, Government Relations
& Regulatory Compliance
GE Appliances

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[5] On February 16, 2011, the Office of Hearings and Appeals (OHA) issued a decision granting an Application for Exception filed by GE to establish an energy efficiency standard for refrigerators of the type covered by this Petition and Application. OHA Case No. TEE-0074.

[6] Asterisks, or wild cards, denote color or other features that do not affect energy performance.

[FR Doc. 2012–3371 Filed 2–13–12; 8:45 am]
BILLING CODE 6450–01–C

FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. IC12–5–000]

Commission Information Collection Activities (FERC–65, FERC–65A, and FERC–65B); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 USC 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collections, FERC–65, FERC–65A, and FERC–65B (Notification of Holding Company Status, Exemption Notification of Holding Company Status, and Waiver Notification of Holding Company Status).

DATES: Comments on the collections of information are due April 16, 2012.

ADDRESSES: You may submit comments (identified by Docket No. IC12–5–000) by either of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/efiling.asp*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp*. For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov*, or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp*.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov*, telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Title: Notification of Holding Company Status (FERC–65), Exemption Notification of Holding Company Status (FERC–65A), and Waiver Notification of Holding Company Status (FERC–65B).

OMB Control No.: 1902–0218 (FERC–65), 1902–0216 (FERC–65A), and 1902–0217 (FERC–65B).[1]

Type of Request: Three-year extension of the FERC–65, FERC–65A, and FERC–65B information collection requirements with no changes to the current reporting requirements.

Abstract:

FERC–65 (Notification of Holding Company Status)

The FERC–65 is a one-time informational filing outlined in the Commission's regulations at 18 Code of Federal Regulations (CFR) 366.4. The FERC–65 must be submitted within 30 days of becoming a holding company. The Commission does not require the information to be reported in a specific format. The filing consists of the name of the holding company, the name of public utilities, the name of natural gas companies in the holding company system, and the names of service companies. The Commission requires the filing to include the names of special-purpose subsidiaries (which provide non-power goods and services) and the names of all affiliates and subsidiaries (and their corporate interrelationship) to each other. Filings may be submitted in hardcopy or electronically through the Commission's eFiling system.

FERC–65A (Exemption Notification of Holding Company Status)

While noting the previously outlined requirements of the FERC–65, the Commission has allowed for an exemption from the requirement of providing the Commission with a FERC–65 if the books, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company; or if any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company. Companies seeking this exemption file the FERC–65A. Commission regulations within 18 CFR 366.3 describe the criteria in more specificity.

FERC–65B (Waiver Notification of Holding Company Status)

Entities may file a FERC–65B pursuant to the notification procedures contained in 18 CFR 366.4 to obtain a waiver from the requirement of providing the Commission with a FERC–65 if they meet the requirements in 18 CFR 366.3(c). Specifically, the Commission waives the requirement of providing it with a FERC 65 for any holding company with respect to one or more of the following: (1) Single-state holding company systems; (2) holding companies that own generating facilities that total 100 MW or less in size and are used fundamentally for their own load or for sales to affiliated end-users; or (3) investors in independent transmission-only companies. Filings may be made in hardcopy or electronically through the Commission's Web site.

Type of Respondents: Public utility companies, natural gas companies, electric wholesale generators, foreign utility holding companies.

Estimate of Annual Burden[2]: The Commission estimates the total Public Reporting Burden for this information collection as:

FERC–65, FERC–65A, AND FERC–65B (IC12–5–000): NOTIFICATION OF HOLDING COMPANY STATUS, EXEMPTION NOTIFICATION, AND WAIVER NOTIFICATION

	Number of respondents	Number of responses per respondent	Total number of responses	Average burden hours per response	Estimated total annual burden (hours)
	(A)	(B)	(A) × (B) = (C)	(D)	(C) × (D)
FERC–65 Notification of Holding Company Status	8	1	8	3	24
FERC–65A Exemption Notification	1	1	1	1	1

[1] In conjunction with the renewal process, the Commission intends to request OMB approval to combine all three collections under one OMB Control Number. This should simplify the FERC administrative burden of processing these information collection requirements.

[2] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 CFR 1320.3.

FERC–65, FERC–65A, AND FERC–65B (IC12–5–000): NOTIFICATION OF HOLDING COMPANY STATUS, EXEMPTION NOTIFICATION, AND WAIVER NOTIFICATION—Continued

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A) × (B) = (C)	Average burden hours per response (D)	Estimated total annual burden (hours) (C) × (D)
FERC–65B Waiver Notification	0	1	0	1	0
Total	[3] N/A	[3] N/A	9	[3] N/A	25

The total estimated annual cost burden to respondents is $1,725.35. [25 hours ÷ 2080 [4] hours/year = 0.01202 years * $143,540/year [5] = $1,725.35]

The estimated annual cost of filing the FERC–65, FERC–65A, and FERC–65B per response is $191.71. [$1725.31 ÷ 9 responses = $191.71/response]

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3407 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 349–173]

Alabama Power Company; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

[3] Not applicable.

[4] 2080 hours = 40 hours/week * 52 weeks (1 year).

[5] Average annual salary per employee.

a. *Type of Application:* New Major License.

b. *Project No.:* 349–173.

c. *Date filed:* June 8, 2011.

d. *Applicant:* Alabama Power Company (Alabama Power)

e. *Name of Project:* Martin Dam Hydroelectric Project.

f. *Location:* The existing Martin Dam Project is located on the Tallapoosa River in northeast Alabama, in Tallapoosa, Coosa, and Elmore Counties, Alabama, near the cities of Alexander City and Dadeville, Alabama. The project occupied 1.36 acres of federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r)

h. *Applicant Contacts:* Theodore J. McCullough, Senior Vice President and Senior Production Officer, Alabama Power Company, 600 North 18th Street, P.O. Box 2641, Birmingham, AL 35291, telephone (205) 257–8180; James F. Crew, Manager, Hydro Services, Alabama Power Company, 600 North 18th Street, P.O. Box 2641, Birmingham, AL 35291, telephone (205) 257–4265.

i. *FERC Contact:* Jennifer Adams, (202) 502–8087 or *jennifer.adams@ferc.gov*.

j. Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary prescriptions: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

Motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. *Project Description:* The existing Martin Dam Project is located at river mile 420.0 on the Tallapoosa River near the cities of Alexander City and Dadeville, Alabama. Martin dam impounds about 31 miles of the Tallapoosa River, forming Martin reservoir (or Lake Martin), a 41,150-acre reservoir with (a) 880 miles of shoreline, (b) a gross storage capacity of 1,622,000 acre-feet, and (c) active storage of 1,381,077 acre-feet at a 45.5-foot drawdown.

The Martin Dam Project consists of: (1) A 2,000-foot-long, 168-foot-high concrete gravity dam and an earth dike section, and includes (a) a 720-foot-long gated spillway section with 20 vertical lift spillway gates, each measuring 30 feet wide by 16 feet high; (b) a 250-foot-long concrete gravity intake structure, (c) a 255-foot-long concrete gravity non-overflow section, and (d) an approximately 1,000-foot-long earth embankment; (2) a reservoir with a surface area of 41,150 acres at normal full pool elevation of 491 feet mean sea level (msl); (3) headworks containing four steel penstocks and 12 intake gates,

each fitted with trash racks; (4) a 307.9-foot-long, 58-foot-wide, and 99-foot-high brick and concrete, steel-frame powerhouse; (5) four vertical Francis turbines that power four generating units with a total installed capacity of 182.5 megawatts; (6) two 450-foot-long transmission lines; and (7) appurtenant facilities. The project generates about 33,000,000 megawatt-hours annually.

The Martin Dam Project operates as a peaking project using a multipurpose storage reservoir (Lake Martin), in which the water levels fluctuate seasonally. Under its normal peaking operations, the project operates between elevations 481 and 491 feet msl. Flows from the dam vary from leakage during periods of non-generation to 17,900 cubic feet per second (cfs) during generation. The Martin Dam Project typically generates Monday through Friday for eight hours per day. Releases from Martin dam are made directly into Alabama Power's Yates and Thurlow Hydroelectric Project No. 2407. The Thurlow dam is required to release a minimum flow of 1,200 cfs. Releases from Martin dam are often necessary to maintain the 1,200-cfs minimum flow requirement.

Alabama Power uses three guide curves for the Martin Dam Project: (1) A flood control guide; (2) an operating guide; and (3) a drought contingency curve. The flood control guide maximizes lake elevations for flood control purposes. The operating guide limits fluctuations in Lake Martin to water levels that stakeholders deemed acceptable during the previous relicensing process for the Martin Dam Project. The area between the flood control guide and operating guide represents the range that Alabama Power operates the project under normal inflow conditions. The drought contingency plan provides an indication of impending hydrologic drought conditions.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''PRELIMINARY TERMS AND CONDITIONS,'' or ''PRELIMINARY FISHWAY PRESCRIPTIONS''; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. Procedural Schedule: The application will be processed according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Deadline for filing comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions.	April 2012.
Draft EIS issued	October 2012.
Comments on draft EIS due.	December 2012.
Deadline for filing modified terms and conditions.	December 2012.
Final EIS issued	March 2013.

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. A license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provided for in 18 CFR 5.22: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

r. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant named in this public notice.

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3402 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–55–000]

Tennessee Gas Pipeline Company, L.L.C. Notice of Application

Take notice that on February 2, 2012, Tennessee Gas Pipeline Company, L.L.C. (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed an application in Docket No. CP12–55–000 pursuant to section 7(b) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, requesting authorization to abandon in place and by removal certain inactive supply pipelines and associated appurtenances located in the Eugene Island and Ship Shoal Areas in Federal offshore waters of the Outer Continental Shelf, Louisiana.

Specifically, the facilities to be abandoned include: (1) The southern portion of Line No. 523M–2300 (Triple T Line) consisting of approximately 16.67 miles of 30-inch diameter pipeline extending from Eugene Island Block (EI) 349 to EI 299; (2) Line No. 523M–8600 consisting of approximately 7.03 miles of 14-inch diameter pipeline extending from Ship Shoal Block (SS) 295 to a connection with the Triple T Line in EI 302; and (3) Line No. 523M–8700 consisting of approximately 2.19 miles of 6-inch diameter pipeline extending from EI 342 to a connection with the Triple T Line in EI 342. Tennessee states that the facilities have been out of service since January 27, 2011 due to uncontrollable corrosion that has resulted in ongoing leakage incidents.

Any questions concerning this application may be directed to Thomas G. Joyce, Manager, Certificates, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Houston, Texas 77002, by telephone at (713) 420–3299, by facsimile at (713) 420–1473, or by email at *tom.joyce@elpaso.com*; Susan T. Halbach, Senior Counsel, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Houston, Texas 77002, by telephone at (713) 420–5751, by facsimile at (713) 420–1601, or by email at *susan.halbach@elpaso.com*; or Debbie Kalisek, Regulatory Analyst, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Houston, Texas 77002, by telephone at (713) 420–3292, by facsimile at (713) 420–1473, or by email at *debbie.kalisek@elpaso.com*.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit an original and 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: February 29, 2012.

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3405 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–51–000]

Bluewater Gas Storage, LLC; Notice of Application

Take notice that on January 27, 2012, Bluewater Gas Storage, LLC (Bluewater), 333 Clay Street, Suite 1500, Houston, Texas 77002, filed an application in Docket No. CP12–51–000 under Section 3 of the Natural Gas Act (NGA), and Part 153 of the Commission's regulations requesting authorization to construct and operate new natural gas facilities to replace leased capacity with facilities Bluewater will own. These cross-border facilities will provide for the importation and exportation of up to 300 million cubic feet per day (MMcf/d) of natural gas at the United States-Canada border, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to Eileen Wilson Kisluk, Senior Attorney, Bluewater Gas Storage, LLC, 333 Clay Street, Suite 1500, Houston, Texas 77002, or by calling (713) 993–5203 (telephone) or (713) 652–3700 (fax) *ewkisluk@pnglp.com.*

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of

all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: February 29, 2012.

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3404 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–622–001.

Applicants: PJM Interconnection, L.L.C., Virginia Electric and Power Company.

Description: Dominion submits Compliance Filing correcting Metadata Section Title SA No. 3151 to be effective 1/1/2012.

Filed Date: 2/7/12.

Accession Number: 20120207–5083.

Comments Due: 5 p.m. ET 2/28/12.

Docket Numbers: ER12–995–000.

Applicants: Cherokee County Cogeneration Partners, LLC.

Description: Amendment to Market-Based Rate Application to be effective 1/7/2012.

Filed Date: 2/3/12.

Accession Number: 20120203–5174.

Comments Due: 5 p.m. ET 2/17/12.

Docket Numbers: ER12–1012–000.

Applicants: Midwest Independent Transmission System Operator, Inc., ITC Midwest LLC.

Description: ITCM–ComEd CAIC agreement to be effective 2/8/2012.

Filed Date: 2/7/12.

Accession Number: 20120207–5032.

Comments Due: 5 p.m. ET 2/28/12.

Docket Numbers: ER12–1013–000.

Applicants: Physical Systems Integration, LLC.

Description: Physical Systems Integration, LLC—MBR Application to be effective 3/1/2012.

Filed Date: 2/7/12.

Accession Number: 20120207–5033.

Comments Due: 5 p.m. ET 2/28/12.

Docket Numbers: ER12–1014–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Original Service Agreement No. 3188; Queue No. W3–135 to be effective 1/16/2012.

Filed Date: 2/7/12.

Accession Number: 20120207–5058.

Comments Due: 5 p.m. ET 2/28/12.

Docket Numbers: ER12–1016–000.

Applicants: Appalachian Power Company.

Description: 20120207 Attachment K and L Revision to be effective 3/2/2012.

Filed Date: 2/7/12.

Accession Number: 20120207–5082.

Comments Due: 5 p.m. ET 2/28/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 pm Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 7, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3383 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–65–000.

Applicants: Sunoco Power Generation, LLC.

Description: Application for Approval Pursuant to Section 203 of the Federal Power Act of Sunoco Power Generation, LLC.

Filed Date: 2/6/12.

Accession Number: 20120206–5179.

Comments Due: 5 p.m. ET 2/27/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–996–000.

Applicants: Crafton LLC.

Description: Crafton Tariff Cancellation to be effective 2/17/2012.

Filed Date: 2/6/12.

Accession Number: 20120206–5000.

Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–997–000.
Applicants: Lilabell Energy LLC.
Description: Lilabell Energy LLC, FERC Electric Tariff to be effective 4/6/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5070.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–998–000.
Applicants: Southwestern Electric Power Company.
Description: 20120206 TexLa Compliance Filing to be effective 12/17/2010.
Filed Date: 2/6/12.
Accession Number: 20120206–5089.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–999–000.
Applicants: AP Gas & Electric (MD), LLC.
Description: AP Gas & Electric (MD), LLC—Petition for Approval of Market-Based Rate—Clone to be effective 4/6/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5098.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1000–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3197; PJM Queue Position No. V3–045 to be effective 1/1/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5103.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1001–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3184; Queue No. W3–032 to be effective 1/16/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5105.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1002–000.
Applicants: AP Gas & Electric (NJ), LLC.
Description: AP Gas & Electric (NJ), LLC—Petition for Approval of Market-Based Ra—Clone to be effective 4/6/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5108.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1003–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3183; Queue No. W3–029 to be effective 1/16/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5111.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1004–000.
Applicants: Southwestern Electric Power Company.
Description: 20120206 ETEC Compliance Filing to be effective 12/17/2010.
Filed Date: 2/6/12.
Accession Number: 20120206–5112.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1005–000.
Applicants: AP Gas & Electric (IL), LLC.
Description: AP Gas & Electric (IL), LLC—Petition for Approval of Market-Based Ra—Clone to be effective 4/6/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5113.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1006–000.
Applicants: AP Gas & Electric (OH), LLC.
Description: AP Gas & Electric (OH), LLC—Petition for Approval of Market-Based Rates to be effective 4/6/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5116.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1007–000.
Applicants: AP Gas & Electric (NY), LLC.
Description: AP Gas & Electric (NY), LLC—Petition for Approval of Market-Based Rates to be effective 4/6/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5118.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1008–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3186; Queue No. W4–072 to be effective 1/16/2012.
Filed Date: 2/6/12.
Accession Number: 20120206–5136.
Comments Due: 5 p.m. ET 2/27/12.

Docket Numbers: ER12–1009–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits limited waiver request of CAISO tariff provisions.
Filed Date: 2/7/12.
Accession Number: 20120207–5021.
Comments Due: 5 p.m. ET 2/28/12.

Docket Numbers: ER12–1010–000.
Applicants: Florida Power Corporation.
Description: Service Agreement No. 151 under Florida Power Corporation OATT to be effective 1/1/2012.
Filed Date: 2/7/12.
Accession Number: 20120207–5022.
Comments Due: 5 p.m. ET 2/28/12.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–22–000.
Applicants: Cross-Sound Cable Company, LLC.
Description: Cross-Sound Cable Company, LLC's Application for Authorization under Section 204 of the Federal Power Act and Request for Confidential Treatment.
Filed Date: 2/3/12.
Accession Number: 20120203–5207.
Comments Due: 5 p.m. ET 2/24/12.

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 7, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3382 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–4580–000]

California Independent System Operator Corporation; Notice Establishing Comment Periods

On February 2, 2012, Federal Energy Regulatory Commission staff held a technical conference to discuss issues related to the California Independent System Operator Corporation's proposal to eliminate convergence bidding at intertie scheduling points.[1] This notice establishes the comment periods for parties wishing to submit comments following the technical conference. All parties are invited to submit initial comments on or before Friday, March 9, 2012, and initial comments are requested to be no longer than 25 pages. Reply comments are due on or before Friday, March 23, 2012, and are requested to be no longer than 15 pages.

For more information, please contact Colleen Farrell at

[1] *Cal. Indep. Sys. Operator Corp.,* 137 FERC ¶ 61,157 at P 1 (2011).

Colleen.Farrell@ferc.gov or (202) 502–6751 or Moon Athwal at *Moon.Athwal@ferc.gov.*

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3406 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–973–000]

Verus Energy Trading, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Verus Energy Trading, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 28, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 8, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3384 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–979–000]

Rocky Ridge Wind Project, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Rocky Ridge Wind Project, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 28, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 8, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3381 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14355–000]

John B. Crockett; Notice of Preliminary Permit Application Accepted for Filingand Soliciting Comments, Motions to Intervene, and Competing Applications

On January 20, 2012, John B. Crockett filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the East Fork Ditch Hydroelectric Project (East Fork Ditch project) to be located on East Fork Ditch in the vicinity of Council, in Adams County, Idaho. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) A concrete intake structure on the East Fork Ditch with a trash rack and steel stand pipe; (2) 11,150-foot-long, 24-inch-diameter penstock from the East Fork Ditch

intake structure; (3) a 28-foot by 32-foot concrete powerhouse containing one turbine/generator unit with a capacity of 1.35 megawatts; (4) an approximately 1,900-foot-long, 69-kV transmission line which will tie into an undetermined interconnection; and (5) appurtenant facilities. The estimated annual generation of the East Fork Ditch project would be 4.0 gigawatt-hours.

Applicant Contact: John B. Crockett, 3296 Snowflake Way, Boise, ID 83706; phone: (208) 344–5319.

FERC Contact: Ryan Hansen (202) 502–8074 or *ryan.hansen@ferc.gov*.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14355–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3401 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14344–000]

The International Consortium of Energy Managers; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 6, 2012, The International Consortium of Energy Managers filed an application, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Blue Diamond Pumped Storage Project to be located in Clark County, Nevada. The proposed project would be closed loop and would not be located on any existing water body. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A new embankment creating an upper reservoir with a maximum elevation of 4,810 feet above mean sea level (MSL), and a storage capacity of 4,900 acre-feet; (2) a new embankment creating a lower reservoir with a maximum elevation of 3,320 feet MSL, and a storage capacity of 4,900 acre-feet; (3) a 21-foot-diameter, 4,300-foot-long concrete and steel penstock; (4) a powerhouse containing two pump/turbine units with a total installed capacity of 450 megawatts; (5) a 132-kilovolt, 3.5-mile-long transmission line; and (6) appurtenant facilities. The proposed project would produce about 4,500 megawatt hours (MWh) of energy daily, and use about 5,600 MWh daily to pump water from the lower to the upper reservoir.

Applicant Contact: Rexford Wait, International Consortium of Energy Managers, 2416 Cades Way, Vista, CA 92083; (760) 599–0086.

FERC Contact: Jim Fargo; phone: (202) 502–6095.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14344) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: February 8, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3403 Filed 2–13–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R10–OAR–2011–0820; FRL–9631–2]

Adequacy Status of the Anchorage, Alaska, Carbon Monoxide Maintenance Plan for Transportation Conformity Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy determination.

SUMMARY: In this action, EPA is notifying the public of its finding that the new motor vehicle emissions budget (MVEB) in the Anchorage, Alaska, Carbon Monoxide (CO) Maintenance Plan, submitted by the State of Alaska on September 20, 2011, is adequate for conformity purposes. EPA made this finding pursuant to the adequacy process established at 40 CFR 93.118(f)(1). As a result of this finding, the Municipality of Anchorage, Alaska, Department of Transportation & Public Facilities, and the U.S. Department of Transportation will be required to use

this motor vehicle emissions budget for future transportation conformity determinations.

DATES: This finding is effective February 29, 2012.

FOR FURTHER INFORMATION CONTACT: The finding will be available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.* You may also contact Wayne Elson, U.S. EPA, Region 10 (OAWT–107), 1200 Sixth Ave, Suite 900, Seattle WA 98101; (206) 553–1463 or *elson.wayne@epa.gov.*

SUPPLEMENTARY INFORMATION: This action provides notice of EPA's adequacy finding regarding the motor vehicle emissions budget (MVEB) in the carbon monoxide Maintenance Plan for Anchorage, Alaska. EPA's finding was made pursuant to the adequacy review process for implementation plan submissions delineated at 40 CFR 93.118(f)(1) under which EPA reviews the adequacy of an implementation plan submission prior to EPA's final action on the implementation plan.

On September 20, 2011, Alaska Department of Environmental Conservation submitted a CO maintenance plan revision to EPA. Pursuant to 40 CFR 93.118(f)(1), EPA notified the public of its receipt of this plan that would be reviewed for an adequacy determination on EPA's Web site and requested public comment by no later than November 7, 2011. EPA received no comments on the plan during that comment period. As part of our review, we also reviewed comments submitted to the Alaska Department of Environmental Conservation on the Maintenance Plan during the public hearing process. There were no adverse comments submitted during the State hearing process regarding the new MVEB. EPA Region 10 sent a letter to the Alaska Department of Environmental Conservation on December 16, 2011, subsequent to the close of the comment period stating EPA found the new MVEB in the submitted Anchorage CO Maintenance Plan to be adequate for use in transportation conformity. The new MVEB that EPA determined to be adequate for purposes of transportation conformity is 156.5 tons of CO per winter day.

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule requires transportation plans, programs, and projects to conform to SIPs and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The minimum criteria by which we determine whether a SIP's motor vehicle emission budget is adequate for conformity purposes are specified at 40 CFR 93.118(e)(4). EPA's analysis of how the state's submission satisfies these criteria is found in the Technical Support Document. EPA's MVEB adequacy review is separate from EPA's SIP completeness review and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find the budget adequate, the SIP could later be disapproved.

Authority: 42 U.S.C. 7401–7671q.

Dated: February 2, 2012.

Dennis J. McLerran,

Regional Administrator, Region 10.

[FR Doc. 2012–3389 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9631–3]

Notice of Proposed Settlement Agreement and Opportunity for Public Comment: Hidden Lane Landfill Superfund Site

ACTION: Notice.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9622(h)(i), notice is hereby given of a proposed settlement that is intended to resolve the potential liability under CERCLA of two parties for response costs incurred by the Environmental Protection Agency (''EPA'') or by the United States Department of Justice (''DOJ'') on behalf of EPA, in connection with the Hidden Lane Landfill Superfund Site, Sterling, Loudoun County, Virginia (''Site'').

DATES: Written comments on the proposed settlement agreement must be received by March 14, 2012.

ADDRESSES: Submit your comments, identified by Docket No. CERC–03–2012–0073–CR, by mail to: Docket Clerk (3RC00), United States Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029.

FOR FURTHER INFORMATION CONTACT: Ben Joseph (3HS22), U.S. EPA, 1650 Arch Street, Philadelphia, PA 19103–2029, Telephone: (215) 814–3373, Fax number (215)814–3002, Email address: *ben.joseph@epa.gov.* Patricia C. Miller, U.S. EPA, 1650 Arch Street, Philadelphia, PA 19103–2010, Telephone: (215) 814–2662, Fax Number (215) 814–2603, Email address: *miller.patricia-c@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreement

Notice is hereby given of a proposed Administrative Settlement Agreement for the Recovery of Response Costs among the United States Environmental Protection Agency, the Estate of Philip W. Smith and the Philip W. Smith Revocable Trust that has been approved, subject to public comment, pursuant to Section 122(h)(1) of CERCLA. The Administrative Settlement Agreement was signed by the Director, Hazardous Site Cleanup Division, U.S. EPA Region III, on January 20, 2012. The proposed settlement provides for recovery of $33,057.67 from the Estate of Philip W. Smith and the Philip W. Smith Revocable Trust, which effectively represents the remaining assets in accounts, to resolve the liability for costs incurred by EPA and DOJ on behalf of EPA in connection the Site. The proposed settlement was approved by the Acting Assistant Attorney General for the Environment and Natural Resources Division of DOJ.

The United States Environmental Protection Agency will receive written comments on the proposed settlement for a period of thirty (30) days from the date of publication of this Notice. EPA or the DOJ may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of CERCLA. Unless EPA or DOJ determines, based on any comments which may be submitted, that consent to the settlement agreement should be withdrawn, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the settlement agreement?

A copy of the proposed Settlement Agreement for Recovery of Response Costs may be obtained from the United States Environmental Protection Agency, Region III, Office of Regional Counsel (3RC00), 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029 by contacting Patricia C. Miller, Senior Assistant Regional Counsel, at (215) 814–2662, or via email at

miller.patricia-c@epa.gov. It is important to note that it is EPA's policy to make public comments, whether submitted electronically or in paper, available to the public, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment. If EPA cannot read your comments due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Dated: January 20, 2012.

Kathryn Hodgkiss,

Acting Director, Hazardous Site Cleanup Division, Region III.

[FR Doc. 2012–3427 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2011–0542; FRL–9631–4]

Notice of Data Availability Concerning Renewable Fuels Produced From Palm Oil Under the RFS Program; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing an extension in the public comment period for the ''Notice of Data Availability Concerning Renewable Fuels Produced From Palm Oil Under the RFS Program'' (the notice is herein referred to as the ''palm oil NODA''). EPA published a NODA, which included a request for comment, in the **Federal Register** on January 27, 2012 (77 FR 4300). The public comment period was to end on February 27, 2012—30 days after publication in the **Federal Register**. The purpose of this document is to extend the comment period an additional 30 days until March 28, 2012. This extension of the comment period is provided to allow the public additional time to provide comment on the NODA.

DATES: Comments must be received on or before March 28, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0542, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0542. 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 *asdinfo@epa.gov.* 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 in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Aaron Levy, Office of Transportation and Air Quality, Transportation and Climate Division, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460 (MC: 6041A); telephone number: 202–564–2993; fax number: 202–564–1177; email address: *levy.aaron@epa.gov*.

SUPPLEMENTARY INFORMATION:

Background: In a separate notice of data availability, EPA provided an opportunity to comment on EPA's analyses of palm oil used as a feedstock to produce biodiesel and renewable diesel under the Renewable Fuel Standard (RFS) program. EPA's analysis of palm oil-based biofuels is a supplement to the final rule published on March 26, 2010, which made changes to the RFS program (75 FR 14670). EPA's analysis of the two types of biofuel shows that biodiesel and renewable diesel produced from palm oil have estimated lifecycle greenhouse gas (GHG) emission reductions of 17% and 11%, respectively, for these biofuels compared to the statutory baseline petroleum-based diesel fuel used in the RFS program. This analysis indicates that both palm-oil-based biofuels would not qualify as meeting the minimum

20% GHG performance threshold for renewable fuel under the RFS program.

Extension of Comment Period: EPA received requests for an extension of the palm oil NODA comment period from various parties. After considering all of these comments, EPA has determined that an extension of the comment period would provide the public adequate time to provide meaningful comment on the NODA. However, this need must be balanced against our desire to finalize our analysis in a timely manner. EPA believes that an additional 30 days is an appropriate amount of time to balance these needs. Accordingly, the public comment period for the palm oil NODA is extended until March 28, 2012. EPA does not anticipate any further extension of the comment period at this time.

Dated: February 7, 2012.

Margo Tsirigotis Oge,

Director, Office of Transportation and Air Quality.

[FR Doc. 2012–3413 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[CERCA–04–2012–3761, FRL–9631–1]

Constitution Road Drum Superfund Site, Atlanta, Dekalb County, GA; Notice of Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of Settlement.

SUMMARY: Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement for past response costs concerning the Constitution Road Drum Superfund Site located in Atlanta, Dekalb County, Georgia.

DATES: The Agency will consider public comments on the settlement until March 15, 2012. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlement are available from Ms. Paula V. Painter. Submit your comments by Site name Constitution Road Drum Superfund Site by one of the following methods:

- *http://www.epa.gov/region4/superfund/programs/enforcement/enforcement.html.*
- *Email: Painter.Paula@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Dated: January 27, 2012.

Anita L. Davis,

Chief, Superfund Enforcement & Information Management Branch, Superfund Division.

[FR Doc. 2012–3426 Filed 2–13–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 16, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0202.

Title: Section 87.37, Developmental License.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 10 respondents; 10 responses.

Estimated Time per Response: 8 hours.

Frequency of Response: On occasion and annual reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151, 303(g) and 307(e) of the Communications Act of 1934, as amended.

Total Annual Burden: 80 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is seeking OMB approval for an extension of this expiring information collection in order to obtain the full three year approval from them. There are no changes in the reporting requirements. There are no changes to the Commission's previous burden estimates.

Section 87.37 requires that a report, which shall include comprehensive and detailed information on:

(a) The results of the operation to date;

(b) Analysis of the results obtained;

(c) Copies of any published reports;

(d) Need for continuation of the program; and

(e) Number of hours of operation on each authorized frequency during the term of the license to the date of the report, on the results of a developmental program shall be filed with and made a part of each application for renewal of authorization.

This showing must be signed by the applicant. In cases where no renewal is

requested, such report shall be filed within 60 days of the expiration of such authorization. Matters which the applicant does not wish to disclose publicly may be so labeled, and not be publicly disclosed without permission of the applicant. The data is required to determine whether such developmental authorizations should be renewed and/or whether rulemaking proceedings should be initiated to provide generally for such operations in the Aviation Service.

The information is used by the Commission to determine the merits of the program for which a developmental authorization was granted. If such information was not collected, the value of developmental programs in the Aviation Service would be severely limited. The Commission would have little, if any information available regarding the advantages and disadvantages of the subject developmental operations, and therefore, would be handicapped in determining whether developmental authorizations should be renewed or a rulemaking proceeding initiated to accommodate new operations in this radio service.

OMB Control Number: 3060–0222.

Title: Section 97.213, Telecommand of an Amateur Station.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households.

Number of Respondents: 500 respondents; 500 responses.

Estimated Time per Response: 12 minutes.

Frequency of Response: Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151–155, 301–609 of the Communications Act of 1934, as amended.

Total Annual Burden: 100 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: Yes.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is seeking OMB approval for an extension of this expiring information collection in order to obtain the full three year approval from them. There are no changes in the third party disclosure requirement. There are no changes to the Commission's previous burden estimates.

The third party disclosure requirement contained in 47 CFR section 97.213 consists of posting a photocopy of the amateur station license, a label with the name, address and telephone number of the station licensee, and the name of at least one authorized control operator in a conspicuous place at the station location. This requirement is necessary so that quick resolution of any harmful interference problems can be identified and to ensure that the station is operating in accordance with the Communications Act of 1934, as amended.

The information is used by FCC personnel during inspections and investigations to assure that remotely controlled amateur radio stations are licensed in accordance with applicable rules, statutes and treaties. In the absence of this third party disclosure requirement (posting requirement), field inspections and investigations related to harmful interference could be severely hampered and needlessly prolonged due to inability to quickly obtain vital information about a remotely controlled station.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–3320 Filed 2–13–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 16, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Judith B.Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–1003.

Title: Communications Disaster Information Reporting System (DIRS).

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions, Federal Government, and state, local or tribal government.

Number of Respondents: 6,750 respondents; 6,750 responses.

Estimated Time per Response: 0.7 hours per response.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in 47 U.S.C. Sections 154(i), 218 and 303(r) of the Communications Act of 1934, as amended.

Total Annual Burden: 4,725 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission acknowledges and agrees that is is consistent with the primary objective of the DIRS to treat filings as confidential. We will work with respondents to ensure that their concerns regarding the confidentiality of DIRS filings are resolved in a manner consistent with Commission rules.

Needs and Uses: The Commission will submit this information collection

to the Office of Management and Budget (OMB) as a revision after this comment period to obtain the three year clearance from them.

In response to the events of September 11, 2001, the Federal Communications Commission (Commission or FCC) created an Emergency Contact Information System to assist the Commission in ensuring rapid restoration of communications capabilities after disruption by a terrorist threat or attack, and to ensure that public safety, public health, and other emergency and defense personnel have effective communications services available to them in the immediate aftermath of any terrorist attack within the United States. The Commission submitted, and OMB approved, a collection through which key communications providers could voluntarily provide contact information.

The Commission's Public Safety and Homeland Security Bureau (PSHSB) updated the Emergency Contact Information system with a Disaster Information Reporting System (DIRS) that uses electronic forms to collect Emergency Contact Information forms and through which participants may inform the Commission of damage to communications infrastructure and facilities and may request resources for restoration. The Commission updated the process by increasing the number of reporting entities to ensure inclusion of wireless, wireline, broadcast, cable and satellite communications providers.

The Commission is now requesting revision of the currently approved collection. In recent years, communications have evolved from a circuit-switched network infrastructure to broadband networks. The Commission is seeking to extend the Disaster Information Reporting System to include interconnected Voice over Internet Protocol and broadband Internet Service Providers. Increasing numbers of consumers, businesses, and government agencies rely on broadband and interconnected VoIP services for everyday and emergency communications needs, including vital 9–1–1 services. It is therefore imperative that the Disaster Information Reporting System be expanded to include these new technologies in order for the Commission the gain an accurate picture of communications landscape during disasters. The Commission has revised its DIRS screen shots and is including a copy of the DIRS user manual for which the Commission is requesting OMB approval.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–3321 Filed 2–13–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Open Commission Meeting

Date: February 8, 2012.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Wednesday, February 15, 2012 which is scheduled to commence at 10:30 a.m. in Room TW–C305, at 445 12th Street SW., Washington, DC.

Item Nos.	*Bureau*	*Subject*
1	Consumer & Governmental Affairs	*Title:* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket No. 02–278) *Summary:* The Commission will consider a Report and Order that protects consumers from unwanted autodialed or prerecorded calls (''robocalls'') by adopting rules that ensure consumers have given prior express consent before receiving robocalls, can easily opt out of further robocalls, and will experience ''abandoned'' telemarketing calls only in strictly limited instances.
2	Wireless Tele-Communications	*Title:* Amendment of Parts 1 and 22 of the Commission's Rules With Regard to the Cellular Service, Including Changes in Licensing of Unserved Area (RM 11510); Amendment of the Commission's Rules With Regard to Relocation of Part 24 to Part 27 and Interim Restrictions and Procedures for Cellular Service Applications *Summary:* The Commission will consider, as part of its ongoing efforts to remove outdated regulations and reduce unnecessary regulatory burdens, a Notice of Proposed Rulemaking and Order proposing a staged approach to revising the licensing model for the Cellular Service from site-based to geographically-based licensing. The proposal will offer greater flexibility and reduce regulatory requirements, while enabling greater rural deployment of wireless service. The item also includes several other proposals to update the Cellular Service rules, as well as interim procedures for Cellular Service applications.
3	Public Safety and Homeland Security	*Title:* The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers (PS Docket No. 11–82) *Summary:* The Commission will consider a Report and Order to extend outage reporting under Part IV of the rules to interconnected Voice over Internet Protocol (VoIP) service providers. Extended reporting will enable the Commission to fulfill statutory E9–1–1 obligations and help protect the growing number of Americans who rely on VOIP phone service.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an email to: fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or Meribeth McCarrick, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be

broadcast live with open captioning over the Internet from the FCC Live Web page at *www.fcc.gov/live*.

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to www.capitolconnection.gmu.edu.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by email at *FCC@BCPIWEB.com*.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–3590 Filed 2–10–12; 4:15 pm]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting Notice

AGENCY: Federal Election Commission.

DATE AND TIME: Monday, February 13, 2012 at 2 p.m.

PLACE: 999 E Street NW., Washington, DC.

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, *Telephone:* (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2012–3532 Filed 2–10–12; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 29, 2012.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Moishe Gubin, Hillside, Illinois, and Mark Orenstein,* Chicago, Illinois; to collectively acquire voting shares of OptimumBank Holdings, Inc., Ft. Lauderdale, Florida, and thereby indirectly acquire voting shares of OptimumBank, Plantation, Florida.

Board of Governors of the Federal Reserve System, February 9, 2012.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2012–3358 Filed 2–13–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 29, 2012.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Gateway Financial Holdings of Florida, Inc.,* Daytona Beach, Florida; to engage through its subsidiary, Gateway Asset Holdings, Daytona Beach, Florida, in making, acquiring, brokering, or servicing loans, or other extensions of credit, pursuant to section 225.28(b)(1), and activities related to extending credit, pursuant to section 225.28(b)(2).

2. *CertusHoldings, Inc.,* Atlanta, Georgia; through its newly formed wholly owned subsidiary, Certus Investment Advisors, LLC, Atlanta, Georgia, to engage in investment advisory activities, pursuant to section 225.28(b)(6)(i).

Board of Governors of the Federal Reserve System.

Dated: February 9, 2012.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2012–3357 Filed 2–13–12; 8:45 am]

BILLING CODE; P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Availability of ICCVAM Evaluation Report and Recommendations on the Usefulness and Limitations of the LUMI–CELL® ER (BG1Luc ER TA) Test Method, An In Vitro Assay for Identifying Human Estrogen Receptor Agonist and Antagonist Activity of Chemicals

AGENCY: Division of the National Toxicology Program (DNTP), National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH), HHS.

ACTION: Availability of report and recommendations; Notice of Transmittal.

SUMMARY: The NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM) announces availability of an Interagency Coordinating Committee on the

Validation of Alternative Methods (ICCVAM) test method evaluation report (TMER) that includes recommendations on the usefulness and limitations of the LUMI–CELL® estrogen receptor (ER) transcriptional activation (TA) test method (hereafter referred to as the BG1Luc ER TA test method) to identify human ER agonist and antagonist activity of chemicals. The report also provides (1) performance standards that can be used to evaluate functionally and mechanistically similar test methods, (2) recommended test method protocols, (3) a final background review document (BRD) describing the current validation status of this test method, and (4) recommendations for future studies.

ICCVAM recommends that the BG1Luc ER TA test method can be used as a screening test to identify substances with *in vitro* estrogen agonist and antagonist activity. This use is based on an evaluation of results from an international validation study and corresponding accuracy and reliability.

The report and recommendations have been transmitted to Federal agencies to review and respond to ICCVAM in accordance with the provisions of the ICCVAM Authorization Act of 2000 (42 U.S.C. 285l–2).

FOR FURTHER INFORMATION CONTACT: Dr. William S. Stokes, Director, NICEATM, NIEHS, P.O. Box 12233, Mail Stop: K2–16, Research Triangle Park, NC, 27709, (telephone) 919–541–2384, (fax) 919–541–0947, (email) *niceatm@niehs.nih.gov*. Courier address: NICEATM, NIEHS, Room 2034, 530 Davis Drive, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Background

In January 2004, Xenobiotic Detection Systems, Inc. (XDS, Durham, NC) nominated the BG1Luc ER TA test method for an interlaboratory validation study. ICCVAM and the Scientific Advisory Committee on Alternative Toxicological Methods (SACATM) recommended a high priority for the nominated study, based on the lack of adequately validated test methods and the regulatory and public health need for such test methods. NICEATM subsequently led and coordinated an international validation study with its counterparts in Japan (Japanese Center for the Validation of Alternative Methods) and Europe (European Centre for the Validation of Alternative Methods) in laboratories sponsored by each validation organization. ICCVAM also proposed the development of BG1Luc ER TA test method performance standards. ICCVAM assigned the activities a high priority after considering comments from the public and endorsement from SACATM.

ICCVAM established an interagency Endocrine Disruptor Working Group (EDWG) composed of scientists from the 15 Federal agencies represented on ICCVAM to work with NICEATM to carry out the relevant evaluation activities. Following completion of the validation study, NICEATM, ICCVAM, and the EDWG prepared a draft BRD and draft test method recommendations. NICEATM released the ICCVAM draft documents to the public for comment and convened an international independent scientific peer review panel (hereafter referred to as the Panel) in public session on March 29–30, 2011, to provide their conclusions on the draft BRD and draft ICCVAM test method recommendations (76 FR 4113). Stakeholders from the public were provided opportunities to comment throughout the review process, including the opportunity for oral comments at the Panel meeting. The Panel considered these comments, as well as public comments submitted prior to the meeting, before concluding its deliberations. The Panel report was published and made available to the public for review and comment (76 FR 28781). The draft test method recommendations, the draft BRD, the draft Panel report, and all public comments were made available to SACATM, which provided comments at its public meeting on June 16–17, 2011 (76 FR 23323).

ICCVAM considered the peer review panel report and all public and SACATM comments in preparing the ICCVAM final test method recommendations. Detailed ICCVAM recommendations are provided in the ICCVAM TMER, *The LUMI–CELL® ER (BG1Luc ER TA) Test Method: An In Vitro Assay for Identifying Human Estrogen Receptor Agonist and Antagonist Activity of Chemicals* (NIH Publication No. 11–7850, available at *http://iccvam.niehs.nih.gov/methods/endocrine/ERTA–TMER.htm*). ICCVAM recommends that the BG1Luc ER TA test method can be used as a screening test to identify substances with in vitro estrogen agonist activity. This use is based on an evaluation of available validation study data and corresponding accuracy and reliability. ICCVAM recommends that the accuracy of this assay is at least equivalent to the current ER TA assay included in regulatory testing guidance. The ICCVAM TMER also includes the updated ICCVAM-recommended BG1Luc ER TA test method protocol, performance standards that are applicable to functionally and mechanistically similar test methods, the final BRD, relevant endocrine disruptor testing regulations and testing guidelines, applicable **Federal Register** notices, the Panel report, public comments, and SACATM meeting minutes.

Background Information on ICCVAM, NICEATM, and SACATM

ICCVAM is an interagency committee composed of representatives from 15 Federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods with regulatory applicability and promotes the scientific validation and regulatory acceptance of toxicological and safety testing methods that more accurately assess the safety and hazards of chemicals and products and that reduce, refine (decrease or eliminate pain and distress), or replace animal use. The ICCVAM Authorization Act of 2000 (42 U.S.C. 285l–3) established ICCVAM as a permanent interagency committee of the NIEHS under NICEATM. NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts independent validation studies to assess the usefulness and limitations of new, revised, and alternative test methods and strategies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies applicable to the needs of Federal agencies. Additional information about NICEATM and ICCVAM can be found on the NICEATM–ICCVAM Web site (*http://iccvam.niehs.nih.gov*).

SACATM was established in response to the ICCVAM Authorization Act (Section 285*l*–3[d]) and is composed of scientists from the public and private sectors (67 FR 11358). SACATM advises ICCVAM, NICEATM, and the Director of the NIEHS and NTP regarding statutorily mandated duties of ICCVAM and activities of NICEATM. SACATM provides advice on priorities and activities related to the development, validation, scientific review, regulatory acceptance, implementation, and national and international harmonization of new, revised, and alternative toxicological test methods. Additional information about SACATM, including the charter, roster, and records of past meetings, can be found at *http://ntp.niehs.nih.gov/go/167*.

References

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ICCVAM. 2002b. Background Review Document. Current Status of Test Methods for Detecting Endocrine Disruptors: *In Vitro* Androgen Receptor Binding Assays. NIH Publication No. 03–4506. Research Triangle Park, NC: National Institute of Environmental Health Sciences. Available: *http://iccvam.niehs.nih.gov/methods/endocrine/end_bckgnd.htm#ARBnd.*

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Dated: February 7, 2012.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2012–3437 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10421]

Agency Information Collection Activities: Proposed Collection; Comment Request

Correction

In notice document 2012–2821 appearing on pages 6123–6124 in the issue of February 7, 2012, make the following correction:

On page 6124, in the first column, in the last line, ''April 9, 2012'' should read ''April 3, 2012''.

[FR Doc. C1–2012–2821 Filed 2–13–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0110]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Reporting: Manufacturer, Importer, User Facility, and Distributor Reporting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on medical device reporting (MDR); manufacturer, importer, user facility, and distributor reporting.

DATES: Submit either electronic or written comments on the collection of information by April 16, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and

assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Device Reporting: Manufacturer, Importer, User Facility, and Distributor Reporting—21 CFR Part 803 (OMB Control Number 0910–0437)—Extension

Section 519(a)(1) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360i(a)(1)) requires every manufacturer or importer to report ''whenever the manufacturer or importer receives or otherwise becomes aware of information that reasonably suggests that one of its marketed devices: (A) May have caused or contributed to a death or serious injury, or (B) has malfunctioned and that such device or a similar device marketed by the manufacturer or importer would be likely to cause or contribute to a death or serious injury if the malfunction were to recur.''

Section 519(b)(1)(A) of the FD&C Act requires ''whenever a device user facility receives or otherwise becomes aware of information that reasonably suggests that a device has or may have caused or contributed to the death or serious illness, of a patient of the facility, the facility shall, as soon as practicable but not later than 10 working days after becoming aware of the information, report the information to the Secretary and, if the identity of the manufacturer is known, to the manufacturer of the device.''

Section 519(b)(1)(B) of the FD&C Act requires ''whenever a device user facility receives or otherwise becomes aware of: (i) Information that reasonably suggests that a device has or may have caused or contributed to the serious illness of, or serious injury to, a patient of the facility * * *, shall, as soon as practicable but not later than 10 working days after becoming aware of the information, report the information to the manufacturer of the device or to the Secretary if the identity of the manufacturer is not known.''

Complete, accurate, and timely adverse event information is necessary for the identification of emerging device problems. Information from these reports will be used to evaluate risks associated with medical devices which will enable FDA to take appropriate regulatory measures in protection of the public health under section 519 of the FD&C Act. Thus FDA is requesting approval for these information collection requirements which are being implemented under part 803 (21 CFR part 803).

Respondents to this collection of information are businesses or other for-profit and nonprofit organizations including user facilities, manufacturers, and importers of medical devices.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section/ form FDA No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
803.19	57	4	228	3	684
803.30 and .32	393	2	777	1	777
803.33 Form FDA 3419	393	1	393	1	393
803.40 and .42	73	37	2,682	1	2,682
803.50 and .52	1,601	104	166,271	1	166,271
803.56	1,200	63	76,186	1	76,186
Total					246,993

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
803.17	220	1	220	10	2,200
803.18 (c) & (d)	30,000	1	30,000	1.5	45,000
Total					47,200

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Part 803 requires user facilities to report to the device manufacturer and to FDA in case of a death, incidents where a medical device caused or contributed to a death or serious injury. Additionally, user facilities are required to annually submit the number and summary of advents reported during the calendar year, using Form FDA 3419. Manufacturers of medical devices are required to report to FDA when they become aware of information indicating that one of their devices may have caused or contributed to death or serious injury or has malfunctioned in such a way that should the malfunction recur it would be likely to cause or contribute to a death or serious injury. Device importers report deaths and serious injuries to the manufacturers and FDA. Importers report malfunctions only to the manufacturers, unless they are unknown, then the reports are sent to FDA.

The number of respondents for each CFR section in table 1 of this document is based upon the number of respondents entered into FDA's internal databases. FDA estimates, based on its experience and interaction with the medical device community, that all reporting CFR sections are expected to take 1 hour to complete, with the exception of § 803.19. Section 803.19 is expected to take approximately 3 hours to complete, but is only required for reporting the summarized data quarterly to FDA. By summarizing events, the total time used to report for this section

is reduced because the respondents do not submit a full report for each event they report in a quarterly summary report.

The Agency believes that the majority of manufacturers, user facilities, and importers have already established written procedures to document complaints and information to meet the MDR requirements as part of their internal quality control system. There are an estimated 30,000 medical device distributors. Although they do not submit MDR reports, they must maintain records of complaints, under § 803.18(d).

The Agency has estimated that on average 220 user facilities, importers, and manufacturers would annually be required to establish new procedures, or revise existing procedures, in order to comply with this provision.

Therefore, FDA estimates the one-time burden to respondents for establishing or revising procedures under § 803.17 to be 2,200 hours (220 respondents x 10 hours). For those entities, a one-time burden of 10 hours is estimated for establishing written MDR procedures. The remaining manufacturers, user facilities, and importers, not required to revise their written procedures to comply with this provision, are excluded from the burden because the recordkeeping activities needed to comply with this provision are considered ''usual and customary'' under 5 CFR 1320.3(b)(2).

Under § 803.18, 30,000 respondents represent distributors, importers, and other respondents to this information collection. FDA estimates that it should take them approximately 1.5 hours to complete the recordkeeping requirement for this section. Total hours for this section equal 45,000 hours.

Dated: February 9, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3344 Filed 2–13–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0081]

Draft Guidance on Investigational New Drug Applications for Positron Emission Tomography Drugs; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled ''Investigational New Drug Applications for Positron Emission Tomography (PET) Drugs.'' The draft guidance is intended to assist manufacturers of PET drugs in submitting investigational new drug applications (INDs).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by May 14, 2012.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kyong (Kaye) Kang, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2352, Silver Spring, MD 20993, 301–796–2050.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance entitled ''Investigational New Drug Applications for Positron Emission Tomography (PET) drugs.'' The draft guidance summarizes the IND process for PET drugs, makes recommendations for how to submit an IND, provides advice on expanded access options for investigational PET drugs, and describes the process for requesting permission to charge for an investigational PET drug.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on the submission of INDs for PET drugs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). INDs and requests to charge for a drug under an IND are submitted to FDA under part 312 (21 CFR part 312). NDAs and ANDAs are submitted to FDA under §§ 314.50 and 314.94 (21 CFR 314.50 and 3.14.94). The collections of information in part 312 and in §§ 314.50 and 314.94 have been approved under OMB control numbers 0910–0014, 0910–0653, 0910–0651, and 0910–0001.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm or http://www.regulations.gov.*

Dated: February 8, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3319 Filed 2–13–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0805]

Dermatologic and Ophthalmic Drugs Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

The Food and Drug Administration (FDA) is announcing an amendment to the notice of the meeting of the Dermatologic and Ophthalmic Drugs

Advisory Committee. This meeting was announced in the **Federal Register** of November 17, 2011 (76 FR 71349). The amendment is being made to reflect a change in the *Date and Time, Agenda,* and *Procedure* portions of the document. We are cancelling (Topic 1), the portion of the meeting relating to the appropriate types of clinical evidence for developing anti-inflammatory drugs for the treatment of postoperative inflammation and reduction of ocular (eye) pain in patients who have undergone ocular surgery. The portion of the meeting (Topic 2), relating to the appropriateness of marketing a single bottle of anti-inflammatory ophthalmic products for use in both eyes for post-surgical indications as it relates to the potential risk for infection will still be held on the same date (February 27, 2012), the time for the meeting has been changed to 9 a.m. to 3 p.m.

FOR FURTHER INFORMATION CONTACT: Yvette Waples, 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: *DODAC@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.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 17, 2011, FDA announced that a meeting of the Dermatologic and Ophthalmic Drugs Advisory Committee would be held on February 27, 2012. On page 71349, in the first column, the *Date and Time* portion of the document is changed to read as follows:

Date and Time: The meeting will be held on February 27, 2012, from 9 a.m. to 3 p.m.

On page 71349, in the second column, the *Agenda* portion of the document is changed to read as follows:

Agenda: The committee will be asked to comment on the appropriateness of marketing a single bottle of anti-inflammatory ophthalmic products for use in both eyes for post-surgical indications as it relates to the potential risk for infection. The FDA's Center for Drug Evaluation and Research would like the advisory committee to provide advice on the potential risk and approaches to mitigating that risk, including limits to fill size where appropriate.

On page 71349, in the third column, the third sentence in the Procedure portion of the document is changed to read as follows:

Procedure: Oral presentations from the public will be scheduled between approximately 11:30 a.m. and 12:30 p.m.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to the advisory committees.

Dated: February 8, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–3343 Filed 2–13–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: The Development of Anti-mesothelin Targeted Immunotoxins for the Treatment of Cancer

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR Part 404.7(a)(1)(i), that the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the inventions embodied in US Patent application 61/535,668 entitled ''Pseudomonas Exotoxin A with Less Immunogenic B Cell Epitopes'' [HHS Ref. E–263–2011/0–US–01], US Patent application 61/495,085 entitled ''Pseudomonas Exotoxin A with Less Immunogenic T Cell Epitopes'' [HHS Ref. E–174–2011/0–US–01], US Patent application 61/483,531 entitled ''Recombinant Immunotoxin Targeting Mesothelin'' [HHS Ref. E–117–2011/0–US–01], U.S. Patent Application 61/241,620 entitled ''Development of an Immunotoxin in Which All B–Cell Epitopes Have Been Removed and Which Has High Cytotoxic Activity'' [HHS Ref. E–269–2009/0–US–01], U.S. Patent Application 60/969,929 entitled ''Deletions in Domain II of Pseudomonas Exotoxin A That Reduce Non-Specific Toxicity'' [HHS Ref. E–292–2007/0–US–01], U.S. Patent Application 60/703,798 entitled ''Mutated Pseudomonas Exotoxins with Reduced Antigenicity'' [HHS Ref. E–262–2005/0–US–01], U.S. Patent Application 60/160,071 entitled ''Immunoconjugates Having High Binding Affinity'' [HHS Ref. E–139–1999/0–US–01], U.S. Patent Application 60/067,175 entitled ''Antibodies, Including Fv Molecules, and Immunoconjugates Having High Binding Affinity for Mesothelin and Methods for Their Use'' [HHS Ref. E–021–1998/0–US–01], U.S. Patent Application 60/010,166 entitled ''Molecular Cloning of Mesothelin, a Differentiation Antigen Present on Mesothelium, Mesotheliomas and Ovarian Cancers'' [HHS Ref. E–002–1996/0–US–01], PCT Application PCT/US97/00224 entitled ''Mesothelin Antigen and Methods and Kits for Targeting It'' [HHS Ref. E–002–1996/1–PCT–01], U.S. Patent 5,747,654 entitled ''Recombinant Disulfide-Stabilized Polypeptide Fragments Having Binding Specificity'' [HHS Ref. E–163–1993/0–US–01], PCT application PCT/US96/16327 entitled ''Immunotoxin Containing A Disulfide-Stabilized Antibody Fragment'' [HHS Ref. E–163–1993/2–PCT–01], and all continuing applications and foreign counterparts, to Hoffman-La Roche, Inc. The patent rights in these inventions have been assigned to and/or exclusively licensed to the Government of the United States of America.

The prospective exclusive license territory may be worldwide, and the field of use may be limited to:

The use of anti-mesothelin targeted immunotoxins for the treatment of mesothelin-expressing cancers, wherein the immunotoxins have: (1) A targeting domain containing the complementary determining regions (CDR) of the SS1 antibody and (2) a *Pseudomonas* exotoxin A (''PE'') toxin domain that is (a) lysosomal protease resistant (PE–LR) and (b) lacks at least one major B-cell epitope due to the alteration of an amino acid. The immunotoxin may include additional alterations to B-cell and T-cell epitopes for reduction of immunogenicity, as well as a peptide linker sequence.

DATES: Only written comments and/or applications for a license which are received by the NIH Office of Technology Transfer on or before March 15, 2012 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, comments, and other materials relating to the contemplated exclusive license should be directed to: David A. Lambertson, PhD, Senior Licensing and Patenting Manager, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–4632; Facsimile: (301) 402–0220; Email: *lambertsond@od.nih.gov.*

SUPPLEMENTARY INFORMATION: These inventions concern immunotoxins which are targeted to mesothelin-expressing cancer cells, and methods of

using the immunotoxins for the treatment of mesothelin-expressing cancers (such as mesothelioma, ovarian cancer and pancreatic cancer). The specific immunotoxin will have an antibody targeting domain that contains the CDRs of the antibody identified as SS1, which was invented at the NIH. The specific immunotoxin will also have a toxin domain derived from PE that is resistant to lysosomal proteases due to the deletion of a large portion of the exotoxin, and which lacks at least one major B-cell epitope due to the alteration an amino acid. Ultimately, the PE used in the immunotoxin may lack multiple B-cell epitopes, as well as multiple T-cell epitopes, in an effort to minimize immunogenicity.

Alterations to the toxin that reduce immunogenicity improve the therapeutic value of the immunotoxin while maintaining its ability to trigger cell death. Since mesothelin is preferentially expressed on certain types of cancer cells, the immunotoxins selectively bind and kill only those cancer cells, allowing healthy, essential cells to remain unharmed. This results in an effective therapeutic strategy with fewer side effects.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR Part 404.7. The prospective exclusive license may be granted unless the NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR Part 404.7 within thirty (30) days from the date of this published notice.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: February 8, 2012.

Richard U. Rodriguez,

Director, Division of Technology Development & Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2012–3410 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301–496–7057; fax: 301–402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Encapsulated N–Acetylmannosamine or N–Acetylneuraminic Acid as a Therapeutic Agent for Increasing Sialylation in Certain Muscular Atrophies, Kidney Disorders, Cancers or Poor Immune Function

Description of Technology: N-acetylmannosamine is a precursor for the synthesis of sugar molecules known as sialic acids, which play an important role in specific biological processes such as cellular adhesion, cellular communication and signal transduction. Lack of sialic acids also plays a crucial role in disease processes such as inflammation, immune responses, as well as certain muscular atrophies (including hereditary inclusion body myopathy (HIBM) and distal myopathy with rimmed vacuoles (DMRV or Nonaka myopathy)), certain kidney disorders with proteinuria and hematuria (including minimal change nephrosis and focal segmental glomerulosclerosis), and certain cancers (including bladder cancer and myeloid leukemia).

This technology relates to methods of administering liposome-encapsulated N-acetylmannosamine, N-acetylneuraminic acid, or their derivatives to treat human disorders of hyposialylation (by increasing sialic acid production in patients who are deficient in that sugar molecule). Liposome-encapsulated delivery of these monosaccharides enhances successful systemic delivery, including to the central nervous system (crossing the blood-brain barrier), and liposome encapsulation protects against gastrointestinal tract degradation.

Potential Commercial Applications:

- Treatment of rare diseases such as HIBM and Nonaka myopathy (or DMRV).
- Treatment of kidney conditions involving sialic acid deficiencies, resulting in proteinuria and hematuria.
- Treatment of other diseases involving sialic acid deficiencies.
- Use as immune stimulant since adequate sialic acid is important for robust immune function.

Competitive Advantages:

- N-acetylmannosamine is the only uncharged sugar in the sialic acid biosynthesis pathway (thus making it easier to deliver than charged sugars) and is located after the rate-limiting step.
- N-acetyl mannosamine and N-acetylneuraminic acid have been shown to rescue hyposialylation in mouse models of HIBM.
- Encapsulated N-acetylmannosamine or N-acetylneuraminic acid crosses the blood-brain barrier and prevents gastrointestinal tract degradation more efficiently than unencapsulated drug.

Development Stage:

- Pre-clinical
- In vitro data available
- In vivo data available (animal)

Inventors: Marjan Huizing et al. (NHGRI).

Publications:

1. Galeano B, *et al.* Mutation in the key enzyme of sialic acid biosynthesis causes severe glomerular proteinuria and is rescued by N-acetylmannosamine. J Clin Invest. 2007 Jun;117(6):1585–1594. [PMID 17549255]

2. Nemunaitis G, *et al.* Hereditary inclusion body myopathy: single patient response to intravenous dosing of GNE gene lipoplex. Hum Gene Ther. 2011 Nov;22(11):1331–1341. [PMID 21517694]

3. Kakani S, *et al.* The Gne M712T mouse as a model for human glomerulopathy. Am J Pathol., in press (Dec 2011) (available online in Feb 2012)

Intellectual Property: HHS Reference No. E–270–2011/0 — U.S. Application No. 61/531,934 filed 07 Sep 2011.

Licensing Contact: Tara L. Kirby, Ph.D.; 301–435–4426; *tarak@mail.nih.gov.*

Chimeric Antigen Receptors to CD22 for Treating Hematological Cancers

Description of Technology: Chimeric antigen receptors (CARs) are hybrid proteins consisting of an antibody binding fragment fused to protein signaling domains that cause some T-cells to become cytotoxic. Once activated, these cytotoxic T-cells can selectively eliminate the cells which they recognize. Thus, by engineering a T-cell to express a CAR that is specific for a certain cell surface protein, it is possible to selectively target cells for destruction. This is a promising new therapeutic approach known as adoptive cell therapy.

CD22 is a cell surface protein that is expressed on a large number of B-cell lineage hematological cancers. Several promising therapies are being developed which target CD22, including therapeutic antibodies and immunotoxins. This technology concerns the use of a high affinity antibody binding fragment to CD22 as the targeting moiety of a CAR, adding adoptive cell therapy as a new prospective treatment for certain leukemias and lymphomas.

Potential Commercial Applications:

- Treatment of diseases associated with increased or preferential expression of CD22
- Specific diseases include hematological cancers such as chronic lymphocytic leukemia, hairy cell leukemia and pediatric acute lymphoblastic leukemia

Competitive Advantages:

- Targeted therapy decreases non-specific killing of healthy, essential cells, resulting in fewer non-specific side-effects and healthier patients
- Hematological cancers are susceptible to cytotoxic T-cells for treating because they are present in the bloodstream
- Expression of CD22 only on mature cells allows the avoidance of stem cell elimination during treatment
- High affinity of the antibody binding fragment for CD22 increases the likelihood of successful targeting

Development Stage:

- Pre-clinical
- In vitro data available
- In vivo data available (animal)

Inventors: Rimas J. Orentas et al. (NCI).

Intellectual Property: HHS Reference No. E–265–2011/0–US–01—US provisional application 61/549,516.

Related Technology: HHS Reference No. E–129–2001/0–US–03—US Patent 7,355,012.

Licensing Contact: David A. Lambertson, Ph.D.; 301–435–4632; *lambertsond@mail.nih.gov.*

Collaborative Research Opportunity: The National Cancer Institute is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize Chimeric Antigen Receptor for CD22, High Affinity. A gene vector to target T cells to B cell leukemia and lymphoma. For collaboration opportunities, please contact John Hewes, Ph.D. at *hewesj@mail.nih.gov.*

Increased Therapeutic Effectiveness of Immunotoxins That Use Toxin Domains Lacking Both T-Cell and B-Cell Epitopes

Description of Technology: Immunotoxins can kill cancer cells while allowing healthy, essential cells to survive. As a result, patients receiving an immunotoxin are less likely to experience the deleterious side-effects associated with non-discriminate therapies such as chemotherapy or radiation therapy. Unfortunately, the continued administration of immunotoxins often leads to a reduced patient response due to the formation of neutralizing antibodies against immunogenic B-cell and T-cell epitopes contained within PE. To improve the therapeutic effectiveness of PE-containing immunotoxins through multiple rounds of drug administration, NIH inventors have sought to remove the B-cell and T-cell epitopes within PE. Previous work demonstrated that the removal of the major B-cell epitopes from PE reduced the immunogenicity of PE. This technology involves the identification of major T-cell epitopes on PE, and the removal of the primary T-cell epitope by mutation or deletion. By combining the T-cell epitope mutations with modifications that remove B-cell epitopes, it is possible to create PE-based immunotoxins that have even greater resistance to the formation of neutralizing antibodies. Immunotoxins containing these new PE-variants are expected to have improved therapeutic efficacy.

Potential Commercial Applications:

- Essential component of immunotoxins
- Treatment of any disease associated with increased or preferential expression a specific cell surface receptor
- Specific diseases include hematological cancers, lung cancer, ovarian cancer, breast cancer, and head and neck cancers

Competitive Advantages:

- PE variants now include the removal of both B-cell and T-cell epitopes, further reducing the formation of neutralizing antibodies against immunotoxins which contain the PE variants.
- Less immunogenic immunotoxins result in improved therapeutic efficacy by permitting multiple rounds of administration.
- Targeted therapy decreases non-specific killing of healthy, essential cells, resulting in fewer non-specific side-effects and healthier patients.

Development Stage: Pre-clinical.

Inventors: Ira H. Pastan et al. (NCI).

Patent Status:

- HHS Reference No. E–174–2011/0–US–01 — U.S. Provisional Application 61/495,085.

Related Technologies:

- HHS Reference No. E–269–2009/0–PCT–02 — PCT Patent Publication WO 2011/032022
- HHS Reference No. E–292–2007/0–US–06 — US Patent Publication US 20100215656 A1
- HHS Reference No. E–262–2005/0–US–06 — US Patent Publication US 20090142341 A1
- HHS Reference No. E–139–1999/0–US–07 — US Patent 7,081,518
- Multiple additional patent families

Licensing Contact: David A. Lambertson, Ph.D.; 301–435–4632; *lambertsond@mail.nih.gov.*

Ketamine Metabolites for the Treatment of Depression and Pain

Description of Technology: The market continues to have a need for therapeutics for treating pain and depression that have efficacy in a high percentage of patients but have reduced anaesthetic properties and reduced abuse liability. Ketamine, a drug currently used in human anesthesia and veterinary medicine, has been shown in clinical studies to be effective in the treatment of several conditions, including the of treatment-resistant bipolar depression, major depressive disorder, neuropathic pain, and chronic pain, including complex regional pain syndrome (CRPS). However the routine use of the drug is hindered by unwanted central nervous system (CNS) effects and a patient response rate of ~70%. New data suggests that ketamine metabolites can be used with similar results but with an increase in patient response rates and a decrease in undesirable side effects.

Potential Commercial Applications: Treatment of pain and depression.

Competitive Advantages:

- Increased number of patients able to respond to the treatment because it

bypasses the human metabolic machinery needed to convert the drug into its active metabolite(s).

- Decreased CNS side effects.

Development Stage: In vivo data available (animal).

Inventors: Irving W. Wainer, Ph.D. (NIA), Carlos A. Zarate, M.D. (NIMH), Ruin Moaddel, Ph.D. (NIA), Michel Bernier (NIA), Michael E. Goldberg, M.D., Marc C. Toriman, Ph.D.

Publications:

1. Moaddel R, *et al.* A parallel chiral-achiral liquid chromatographic method for the determination of the stereoisomers of ketamine and ketamine metabolites in the plasma and urine of patients with complex regional pain syndrome. Talanta. 2010 Oct. 15;82(5):1892–1904. [PMID 20875593]
2. Zarate CA Jr., *et al.* Relationship of Ketamine's Plasma Metabolites with Response and Diagnosis, and Side Effects in Major Depression. Manuscript in preparation.
3. Ibrahim L, *et al.* Course of Improvement in Depressive Symptoms to a Single Intravenous Infusion of Ketamine vs. Add-on Riluzole: Results from a Four-Week, Double-Blind, Placebo-Controlled Study. Neuropsychopharmacology, in press.
4. Zhao X, *et al.* Population Pharmacokinetic Modeling of Ketamine and Three Major Metabolites in Patients with Treatment-Resistant Bipolar Depression. Br. J. Clin. Phamaco., in press.

Intellectual Property: HHS Reference No. E–092–2011/0—U.S. Provisional Application No. 61/547,336 filed 14 Oct. 2011.

Related Technologies: HHS Reference No. E–174–2006/0—

- U.S. Patent Application No. 11/688,603 filed 20 Mar. 2007
- Related international applications

Licensing Contact: Jaime M. Greene, M.S.; 301–435–5559; *greenejaime@mail.nih.gov.*

Collaborative Research Opportunity: The National Institute on Aging, Laboratory of Clinical Investigation, Bioanalytical Chemistry and Drug Discovery Section, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this technology. For collaboration opportunities, please contact Nicole Guyton, Ph.D. at *darackn@mail.nih.gov.*

Improved DNA-Protein Vaccination Protocols

Description of Technology: Nucleic acid based vaccines are attractive alternatives to conventional vaccines for a number of reasons. One of the issues with nucleic acid based vaccines is the poor immunogenicity in humans. The subject technology is a method for eliciting improved immune responses with DNA based vaccines. The method involves co-administration of a nucleic acid vaccine with a protein vaccine for the same antigen of interest that is encoded by the DNA vaccine in a prime-boost protocol. This methodology increased the immune responses in a SIV macaque model to examine DNA based vaccines of HIV and vaccine protocols. The methodology can potentially be applied to other disease indications to elicit greater immune responses.

Potential Commercial Applications: Improve immunogenicity of nucleic acid based vaccines.

Competitive Advantages: The methodology increases the immune response of DNA based vaccines.

Development Stage:

- Early-stage
- Pre-clinical
- In vitro data available
- In vivo data available (animal)

Intellectual Property: HHS Reference No. E–239–2009/0—International PCT Application No. PCT/US2011/026325 filed 25 Feb. 2011.

Licensing Contact: Kevin W. Chang, Ph.D.; 301–435–5018; *changke@mail.nih.gov.*

Dated: February 8, 2012.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2012–3412 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 section 552b(c)(6), Title 5 U.S.C., as amended, for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Eye Institute, including consideration of personnel qualifications and performances, 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, National Eye Institute.

Date: March 4–5, 2012.

Time: 7:00 PM to 5:00 PM.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Sheldon S. Miller, Ph.D., Scientific Director, National Institutes of Health, National Eye Institute, Bethesda, MD 20892, (301) 451–6763.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nei.nih.gov,* where an agenda and any additional information will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: February 8, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3432 Filed 2–13–12; 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 Continuous Receipt.
Date: February 29, 2012.
Time: 1 p.m. to 4 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: Michael M. Sveda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Fellowship: Surgical Sciences, Biomedical Imaging and Bioengineering.
Date: March 7, 2012.
Time: 12 p.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: Weihua Luo, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, 301–435–1170, *luow@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Xenopus Genetics.
Date: March 8, 2012.
Time: 1 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Richard Panniers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, (301) 435–1741, *pannierr@csr.nih.gov.*

Name of Committee: Center for Scientific Review. Special Emphasis Panel Member Conflict: Epidemiology and Genetics of Chronic Diseases.
Date: March 8, 2012.
Time: 2 p.m. to 3:30 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: Fungai Chanetsa, MPH, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3135, MSC 7770, Bethesda, MD 20892, 301–408–9436, *fungai.chanetsa@nih.hhs.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Fellowships: Behavioral Neuroscience.
Date: March 12–13, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Palomar, 2121 P Street, NW, Washington, DC 20037.
Contact Person: Kristin Kramer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5205, MSC 7846, Bethesda, MD 20892, (301) 437–0911, *kramerkm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Small Business: Nephrology.
Date: March 12–13, 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: Atul Sahai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, 301–435–1198, *sahaia@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Clinical Neurophysiology, Devices, Neuroprosthetics, and Biosensors.
Date: March 12–13, 2012.
Time: 8 a.m. to 3 p.m.
Agenda: To review and evaluate grant applications
Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.
Contact Person: Keith Crutcher, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–435–1278, *crutcherka@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Cancer Drug Developments and Therapeutics.
Date: March 12–13, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance DC Dupont Circle Hotel, 1143 New Hampshire Avenue NW., Washington, DC 20037.
Contact Person: Lilia Topol, Ph.D. Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, 301–451–0131, *ltopol@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Small Business: Biochemistry, Biophysics, and Drug Discovery.
Date: March 12, 2012.
Time: 8:30 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.
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 Biological Chemistry and Macromolecular Biophysics B.
Date: March 12–13, 2012.
Time: 9 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: 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 Epilepsy: Imaging, Surgery and Sleep Disorders.
Date: March 12–13, 2012.
Time: 10 a.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Suzan Nadi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217B, MSC 7846, Bethesda, MD 20892, 301–435–1259, *nadis@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Fellowships: Risk, Health and Healthcare.
Date: March 13–14, 2012.
Time: 8 a.m. to 5 p.m..
Agenda: To review and evaluate grant applications.
Place: Residence Inn Bethesda Downtown, 7335 Wisconsin Avenue, Bethesda, MD 20814.
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: Center for Scientific Review Special Emphasis Panel PAR–09–220 and PAR–09–221: Innovations in Biomedical Computational Science and Technology Initiative.
Date: March 13, 2012.
Time: 3 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.
Contact Person: Keith Crutcher, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–435–1278, *crutcherka@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 7, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3434 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Advisory Board, February 27, 2012, 6:30 PM to February 29, 2012, 12:00 PM, National Institutes of Health, Building 31, 31 Center Drive, 10, Bethesda, MD 20892 which was published in the **Federal Register** on January 18, 2012, 77 FR 2557–2558.

This notice is being amended to add the NCAB Subcommittee on Clinical Investigations meeting on February 27, 2012, 5 p.m. to 6:30 p.m. at the Hyatt Regency Bethesda Hotel, One Metro Center, Bethesda, MD 20814. The NCAB Ad Hoc Subcommittee on Global Cancer Research will still convene on February 27, 2012, 6:30 p.m. to 8 p.m. The National Cancer Advisory Board meeting has been changed to February 28, 2012 from 9 a.m. to 5 p.m., instead of February 28–29, 2012. The meeting is partially closed to the public.

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3430 Filed 2–13–12; 8:45 a.m.]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Clinical Trial SEP.

Date: March 2, 2012.

Time: 6 p.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco, 700 F Street NW., Washington, DC 20001.

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, 301–435–6033, *Rajarams@mail.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; K99R00 Conflict Review.

Date: March 6, 2012.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 F Street NW., Washington, DC 20037.

Contact Person: JoAnn McConnell, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, 301–496–5324, *McConnej@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: February 7, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3438 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & 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 U01 application Review.

Date: March 7, 2012.

Time: 12:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 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 8, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3449 Filed 2–13–12; 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: Center for Inherited Disease Research Access Committee.

Date: March 8, 2012.

Time: 11:30 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Human Genome Research Institute, 5635 Fisher's Lane, Room 4076, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Camilla E. Day, Ph.D., Scientific Review Officer, CIDR, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite

4075, Bethesda, MD 20892, 301–402–8837, *camilla.day@nih.gov*.

Name of Committee: National Human Genome Research Institute Special Emphasis Panel; ENCODE Data Center and Analysis Center.

Date: March 9, 2012.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: NHGRI Twinbrook Conference Room, 5635 Fishers Lane, Room 4076, Rockville, MD 20852, (Telephone Conference Call),

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*

Name of Committee: National Human Genome Research Institute Special Emphasis Panel; Computational Analysis of the Encyclopedia of DNA Elements—ENCODE (M2).

Date: March 16, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Dulles Airport Marriott, 42020 Aviation Drive, Dulles View, Dulles, VA 20166.

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 8, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3448 Filed 2–13–12; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Review Meeting.

Date: March 2, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Gregory P. Jarosik, Ph.D., Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, (301) 496–0695, *gjarosik@niaid.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 8, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3447 Filed 2–13–12; 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: AIDS and Related Research Integrated Review Group; AIDS Molecular and Cellular Biology Study Section.

Date: March 7, 2012.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

Contact Person: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Rare Diseases.

Date: March 7, 2012.

Time: 1 p.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: Richard Panniers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, (301) 435–1741, *pannierr@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Dermatology, Rheumatology and Inflammation.

Date: March 9, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Aruna K. Behera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, (301) 435–6809, *beheraak@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Understanding and Promoting Health Literacy.

Date: March 9, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Rebecca Henry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3222, MSC 7808, Bethesda, MD 20892, (301) 435–1717, *henryrr@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Review of Neuroscience AREA Grant Applications.

Date: March 9, 2012.

Time: 8 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Toby Behar, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4136, MSC 7850, Bethesda, MD 20892, (301) 435–4433, *behart@csr.nih.gov*.

Name of Committee: AIDS and Related Research Integrated Review Group; AIDS Clinical Studies and Epidemiology Study Section.

Date: March 9, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin Seattle, 1900 5th Avenue, Seattle, WA 98101.

Contact Person: Hilary D. Sigmon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222, MSC 7852, Bethesda, MD 20892, (301) 594–6377, *sigmonh@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Health Informatics.

Date: March 9, 2012.

Time: 8:30 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: 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.*

(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 7, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3443 Filed 2–13–12; 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: Alcohol and Toxicology.

Date: March 1–2, 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: Christine L Melchior, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, (301) 435–1713, *melchioc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Molecular and Cellular Substrates of Complex Brain Disorders.

Date: March 2, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW, Washington, DC 20036.

Contact Person: Deborah L Lewis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4183, MSC 7850, Bethesda, MD 20892, 301–408–9129, *lewisdeb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation: High End Mass Spectrometers.

Date: March 2, 2012.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: GSA Government Building, 2200 Crystal Drive, Arlington, VA 22202.

Contact Person: David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4150, MSC 7806, Bethesda, MD 20892, (301)-435–1722, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Neurodevelopment, Synaptic Plasticity and Neurodegeneration.

Date: March 8–9, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Westin St. Francis Hotel, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Mary Schueler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7846, Bethesda, MD 20892, 301–451–0996, *marygs@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Brain Disorders, Language, Communication and Related Neurosciences.

Date: March 8–9, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington, DC Dupont Circle Hotel, 1143 New Hampshire Avenue NW, Washington, DC 20037.

Contact Person: Vilen A Movsesyan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040M, MSC 7806, Bethesda, MD 20892, 301–402–7278, *movsesyanv@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Diabetes, Obesity and Reproductive Sciences.

Date: March 8, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, Bethesda, MD 20892, 301–435–1154, *dianne.hardy@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Sensory and Motor Neuroscience, Cognition and Perception.

Date: March 8–9, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Yuan Luo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–827–7915, *luoy2@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 7, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3441 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Recombinant DNA Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Recombinant DNA Advisory Committee.

Date: March 7–8, 2012.

Time: March 7, 2012, 3:30 p.m. to 5:30 p.m.

Agenda: The NIH Recombinant DNA Advisory Committee (RAC) will review and discuss selected human gene transfer protocols and related data management activities. Please check the meeting agenda at

OBA Meetings Page (available at the following URL: *http://oba.od.nih.gov/rdna_rac/rac_meetings.html*) for more information.

Place: National Institutes of Health, Building 31C, 9000 Rockville Pike, Conference Room 6 & 8, Bethesda, MD 20892.

Time: March 8, 2012, 8:30 a.m. to 3:00 p.m.

Agenda: The NIH Recombinant DNA Advisory Committee (RAC) will review and discuss selected human gene transfer protocols and related data management activities. Please check the meeting agenda at OBA Meetings Page (available at the following URL: *http://oba.od.nih.gov/rdna_rac/rac_meetings.html*) for more information.

Place: National Institutes of Health, Building 31C, 9000 Rockville Pike, Conference Room 6 & 8, Bethesda, MD 20892.

Contact Person: Chezelle George, Office of Biotechnology Activities, Office of Science Policy/OD, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892, 301–496–9838, *georgec@od.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

OBA will be piloting a new system to offer those members of the public viewing the meeting via webcast (see link on *OBA Meetings Page*) the opportunity to submit comments to be read during the scheduled public comment periods. Individuals wishing to submit comments should use the comment form, which will accommodate comments up to 1500 characters, and will be available on the *OBA Meetings Page* during the meeting. Please submit your comment prior to the start of the public comment period. Please limit your comment to a statement that can be read in one to two minutes. Please include your name and affiliation with your comment.

OBA will read comments into the record during the public comment periods that are specified on the agenda. Please note, while every effort is made to keep the meeting discussions to the times stated on the agenda, it is not unusual for the meeting to run ahead or behind schedule due to changes in the time needed to review a protocol. It is advisable to monitor the webcast to determine when public comments will be read. Comments submitted electronically will follow any comments by individuals attending the meeting in person. Comments will be read in the order received and your name and affiliation will be read with the comment. Please note OBA may not be able to read every comment received in the time allotted for public comment. Comments not read will become part of the public record.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://oba.od.nih.gov/rdna/rdna.html,* where an agenda and any additional information for the meeting will be posted when available.

OMB's ''Mandatory Information Requirements for Federal Assistance Program Announcements'' (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: February 7, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3440 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Reproduction, Andrology, and Gynecology Subcommittee.

Date: March 5, 2012.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Dennis E. Leszczynski, Ph.D. Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–2717, *leszcyd@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 7, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3439 Filed 2–13–12; 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 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Planning Studies for Rare Thrombotic and Hemostatic Disorders.

Date: March 6, 2012.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael P. Reilly, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892, 301–496–9659, *reillymp@nhlbi.nih.gov.*

Name of Committe: National Heart, Lung, and Blood Institute Special Emphasis Panel; U24 Resource-Related Research Project Application Review Meeting.

Date: March 6, 2012.

Time: 12:30 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific, view/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892, 301–435–0287, *Pintuccig@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 8, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3435 Filed 2–13–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0024; OMB No. 1660–0087]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, PrepCAST.

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before March 15, 2012.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: PrepCAST.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0087.

Form Titles and Numbers: None.

Abstract: PrepCAST is a collection instrument that will collect preparedness information at the State, Local and Tribal jurisdiction level. It also collects National Incident Management System (NIMS) compliance information. It is used to eliminate the redundant data calls on National preparedness to reduce the burden on respondents. This system will provide insight into the overall preparedness level of the Nation.

Affected Public: State, Local or Tribal Government.

Estimated Number of Respondents: 56.

Frequency of Response: Annually.

Estimated Average Hour Burden per Respondent: 5 hours.

Estimated Total Annual Burden Hours: 19,630.

Estimated Cost: There is an annual reporting and recordkeeping cost associated with this collection.

John G. Jenkins, Jr.,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2012–3444 Filed 2–13–12; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0033; OMB No. 1660–0024]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, Federal Assistance for Offsite Radiological Emergency Planning

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the following information collection to the Office of Management and Budget (OMB) for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before March 15, 2012.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Federal Assistance for Offsite Radiological Emergency Planning.

OMB Number: 1660–0024.

Type of information collection: Revision of a currently approved collection.

Abstract: This collection of information establishes policies and procedures for submission by a

commercial nuclear power plant licensee of a certification for Federal assistance under Executive Order 12657. It contains policies and procedures for FEMA's determinations, with respect to a certification. It also establishes a framework for providing Federal assistance to licensees, and procedures for review and evaluation of the adequacy of licensee offsite radiological emergency planning and preparedness.

Affected Public: Business or other for profit.

Estimated Number of Respondents: 1.

Frequency of Response: Once.

Estimated Average Hour Burden per Respondent: 40 hours.

Estimated Total Annual Burden Hours: 40 hours.

Estimated Cost: There are no annual record keeping, capital, startup, nor maintenance costs associated with this information collection.

John G. Jenkins, Jr.,

Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2012–3452 Filed 2–13–12; 8:45 am]

BILLING CODE 9110–21–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0034; OMB No. 1660–0086]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, National Flood Insurance Program-Mortgage Portfolio Protection Program

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before March 15, 2012.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATON:

Collection of Information

Title: National Flood Insurance Program-Mortgage Portfolio Protection Program.

OMB Number: 1660–0086.

Type of information collection: Revision of a currently approved information collection.

Abstract: A Write Your Own (WYO) company that wishes to participate in the Mortgage Portfolio Protection Program (MPPP) must review the information listed in the MPPP Agreement and complete the acknowledgement to participate in the MPPP or elect to continue under just the WYO guidelines. A lender wishing to obtain flood insurance through a MPPP participating insurance company must review the Financial Assistance/ Subsidy Arrangement and acknowledge the terms so that they can properly apply for flood insurance thought this program.

Affected Public: Businesses or other non-profits.

Estimated Number of Respondents: 341.

Frequency of Response: Annually.

Estimated Average Hour Burden per Respondent: .5 hours.

Estimated Total Annual Burden Hours: 171 hours.

Estimated Cost: There are no record keeping, capital start-up, or maintenance cost associated with this information collection.

John G. Jenkins, Jr.,

Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2012–3454 Filed 2–13–12; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–10]

Notice of Submission of Proposed Information Collection to OMB; Capture Energy Efficiency Measures for PIH (CEEMP)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD is creating the Capture Energy Efficiency Measures for PIH (CEEMP) data system to track the amount and types of Energy Conservation Measures (ECMs) being implemented within Public and Indian (PIH) units. The CEEMP data system is necessary in order to support the Department's Agency Performance Goals (APGs), specifically APG #13 which sets precise targets for completing green retrofits and creating energy efficient units. In addition to the direct support of HUD APG #13, the implementation of the CEEMP data system will enable HUD to provide reports to OMB on the progress of ECMs completed with PIH funding. Without the approval of the CEEMP data system, HUD will not be able to track PIH ECMs and will be unable to support the Department's APG #13 or provide OMB with ECM information.

DATES: *Comments Due Date:* March 15, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577-New) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov;* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Capture Energy Efficiency Measures for PIH (CEEMP).

OMB Approval Number: 2577-New.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: HUD is creating the Capture Energy Efficiency Measures for PIH (CEEMP) data system to track the amount and types of Energy Conservation Measures (ECMs) being implemented within Public and Indian (PIH) units. The CEEMP data system is necessary in order to support the Department's Agency Performance Goals (APGs), specifically APG #13 which sets precise targets for completing green retrofits and creating energy efficient units. In addition to the direct support of HUD APG #13, the implementation of the CEEMP data system will enable HUD to provide reports to OMB on the progress of ECMs completed with PIH funding. Without the approval of the CEEMP data system, HUD will not be able to track PIH ECMs and will be unable to support the Department's APG #13 or provide OMB with ECM information.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden:	3,150	16		3	151,200

Total Estimated Burden Hours: 151,200.

Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: February 8, 2012.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–3386 Filed 2–13–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–11]

Notice of Submission of Proposed Information Collection to OMB—Local Appeals to Single-Family Mortgage Limits

AGENCY: Office of the Chief Information Officer, HUD

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Housing industry groups may appeal for increases in FHA's maximum mortgage limits for specific counties or metropolitan statistical areas (MSAs).

DATES: *Comments Due Date: March 15, 2012.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0302) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: (202) 395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Local Appeals to Single-Family Mortgage Limits.

OMB Approval Number: 2502–0302.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: Housing industry groups may appeal for increases in FHA's maximum mortgage limits for specific counties or metropolitan statistical areas (MSAs).

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden	17	1		7	119

Total Estimated Burden Hours: 119.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: February 8, 2012.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–3385 Filed 2–13–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO200–LLCOF00000–L16520000–XX0000]

Notice of Meeting, Rio Grande Natural Area Commission

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Rio Grande Natural Area Commission will meet as indicated below.

DATES: The meeting will be held from 10 a.m. to 3 p.m. on March 14, 2012.

ADDRESSES: Hampton Inn Alamosa, 710 Mariposa Street, Alamosa, CO 81101.

FOR FURTHER INFORMATION CONTACT: Denise Adamic, Public Affairs Specialist, BLM Front Range District Office, 3028 East Main, Canon City, CO 81212. Phone: (719) 269–8553. Email: *dadamic@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Rio Grande Natural Area Commission was established in the Rio Grande Natural Area Act (16 U.S.C. 460rrr–2). The nine-member Commission advises the Secretary of the Interior, through the BLM, concerning the preparation and implementation of a management plan relating to non-Federal land in the Rio Grande Natural Area, as directed by law. Planned agenda topics include: discussing resource concerns and goals that should be addressed in the management plan, and how the area's boundaries should be defined. In addition, the BLM will give a presentation on Cadastral Survey and present the State Director's Volunteer of the Year Award. This meeting is open to the public. The public may offer oral comments at 2:15 p.m. or written statements may be submitted for the Commission's consideration. Please send written comments to Denise Adamic at the address above by March 12, 2012. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Summary minutes for the Commission Meeting will be maintained in the San Luis Valley Field Office and will be available for public inspection and reproduction during regular business hours within 30 days following the meeting. Meeting minutes and agenda are also available at: *http://www.blm.gov/co/st/en/fo/slvfo.html.*

Dated: February 7, 2012.

Helen M. Hankins,

State Director.

[FR Doc. 2012–3372 Filed 2–13–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF JUSTICE

National Advisory Committee on Violence Against Women; Notice of Meeting

AGENCY: Office on Violence Against Women, United States Department of Justice.

ACTION: Notice of Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming public meeting of the National Advisory Committee on Violence Against Women (hereinafter ''NAC'').

DATES: The meeting will take place on Monday, February 27, 2012 from 9 a.m. to 5:30 p.m. and Tuesday, February 28, 2012 from 1 p.m. to 5:30 p.m.

ADDRESSES: The meeting will take place at the Office on Violence Against Women, United States Department of Justice, Conference Room 1W.1201, 145 N Street NE., Washington, DC 20530.

The public is asked to pre-register by February 21, 2012 for the meeting due to security considerations and so that there is adequate space (see below for information on pre-registration).

FOR FURTHER INFORMATION CONTACT: Catherine Poston, Attorney Advisor, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 514–5430; email: *Catherine.poston@usdoj.gov;* or fax: (202) 305–2589. You may also view information about the NAC on the Office on Violence Against Women Web site at: *http://www.ovw.usdoj.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. The National Advisory Committee on Violence Against Women (NAC) was re-chartered on March 3, 2010 by the Attorney General. The purpose of this federal advisory committee is to provide advice and recommendations to the Department of Justice and the Department of Health and Human Services on how to improve the Nation's response to violence against women, with a specific focus on successful interventions with children and teens who witness and/or are victimized by domestic violence, dating violence, and sexual assault. The NAC brings together experts, advocates, researchers, and criminal justice professionals for the exchange of innovative ideas and the development of practical solutions to help the federal government address and prevent these serious problems. This federal advisory committee will develop recommendations for successful interventions with children and teens who witness and/or are victimized by domestic violence, dating violence, and sexual assault. The NAC members will also examine the relationship between children and teens who are witnesses to or victims of such violence and the overall public safety of communities across the country.

This is the fourth meeting of the NAC and will include facilitated discussions on the development of advice and recommendations to be presented by this federal advisory committee. The Director of the Office on Violence Against Women, the Honorable Susan B. Carbon, serves as the Designated Federal Official of the NAC. Lori Crowder will serve as a facilitator at this meeting.

The NAC is also welcoming public oral comment at this meeting and has reserved an estimated 30 minutes for this purpose. Time will be reserved for public comment on February 27 at 4:45 p.m. and on February 28 at 4:30 p.m. See the section below for information on reserving time for public comment.

ACCESS: This meeting will be open to the pubic but registration on a space available basis and for security reasons is required. All members of the public who wish to attend must register in advance of the meeting by February 21, 2012 by contacting Catherine Poston,

Attorney Advisor, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 514–5430; email: *Catherine.poston@usdoj.gov;* or fax: (202) 305–2589. All attendees will be required to sign in and be processed through Security at the Lobby Visitors Desk. Please bring photo identification and allow extra time prior to the start of the meeting.

All members of the press who wish to attend and/or record any part of the meeting must register in advance of the meeting by February 21, 2012 by contacting Joan LaRocca, Public Affairs Specialist, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 307–6873; email: *Joan.LaRocca@usdoj.gov.* In addition to being processed through Security at the Lobby Visitors Desk, all members of the press are required to sign in at NAC meeting registration and must present government-issued photo I.D. (such as a driver's license) as well as valid media credentials. Please allow extra time prior to the start of the meeting for registering.

The meeting site is accessible to individuals with disabilities. Individuals who require special accommodation in order to attend the meeting should notify Catherine Poston no later than February 21, 2012.

Written Comments

Interested parties are invited to submit written comments by February 21, 2012 to Catherine Poston, Attorney Advisor, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 514–5430; email: *Catherine.poston@usdoj.gov;* or fax: (202) 305–2589.

Public Comment

Persons interested in participating during the public comment periods of the meeting are requested to reserve time on the agenda by contacting Catherine Poston, Attorney Advisor, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 514–5430; email: *Catherine.poston@usdoj.gov;* or fax: (202) 305–2589. Requests must include the participant's name, organization represented, if appropriate, and a brief description of the subject of the comments and should be made by February 21, 2012. Each participant will be permitted approximately 3 to 5 minutes to present comments, depending on the number of individuals reserving time on the agenda. Participants are also encouraged to submit written copies of their comments. Comments that are submitted to Catherine Poston, Attorney Advisor, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 514–5430; email: *Catherine.poston@usdoj.gov;* or fax: (202) 305–2589 will be circulated to NAC members prior to the meeting.

Given the expected number of individuals interested in presenting comments at the meeting, reservations should be made as soon as possible. Persons unable to obtain reservations to speak during the meeting are encouraged to submit written comments, which will be accepted at the meeting location or may be mailed to the NAC, to the attention of Catherine Poston, Attorney Advisor, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W 121, Washington, DC 20530; by telephone at: (202) 514–5430; email: *Catherine.poston@usdoj.gov;* or fax: (202) 305–2589.

Dated: February 7, 2012.

Susan B. Carbon,

Director, Office on Violence Against Women.

[FR Doc. 2012–3374 Filed 2–13–12; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0061]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Certificate of Compliance

ACTION: 60-Day Notice of Information Collection.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until April 16, 2012. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments (especially on the estimated public burden or associated response time), suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Tracey Robertson, Acting Chief, Federal Firearms Licensing Center, 244 Needy Road, Martinsburg, WV 25405 or via email at *tracey.robertson@atf.gov*

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Certificate of Compliance With 18 U.S.C. 922(g)(5)(B).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5330.20. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* None.

Need for Collection:

The law of 18 U.S.C. 922(g)(5)(B) makes it unlawful for any nonimmigrant alien to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has shipped or transported in interstate or foreign commerce. ATF F 5330.20 is for the

purpose of ensuring that nonimmigrant aliens certify their compliance according to the law at 18 U.S.C. 922(g)(5)(B).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 37,826 respondents will complete the form in 3 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1891.3 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–508, 145 N Street NE., Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2012–3395 Filed 2–13–12; 8:45 am]

BILLING CODE 4810–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0079]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Transactions Among Licensee/Permittees and Transactions Among Licensees and Holders of User Permits

ACTION: 60-day notice of information collection.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until April 16, 2012. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, 202–648–7120, *eipb@atf.gov,* Chief, Explosives Industry Programs Branch, Room 6E–405, 99 New York Avenue NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Transactions Among Licensee/Permitees and Transactions Among Licensees and Holders of User Permits.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None.

Need for Collection

The Safe Explosives Act requires an explosives distributor must verify the identity of the purchaser; an explosives purchaser must provide a copy of the license/permit to distributor prior to the purchase of explosive materials; possessors of explosive materials must provide a list of explosives storage locations; purchasers of explosive materials must provide a list of representatives authorized to purchase on behalf of the distribute; and an explosive purchaser must provide a statement of intended use for the explosives.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 50,000 respondents will take 30 minutes to comply with the required information.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 25,000 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street NW., Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012–3396 Filed 2–13–12; 8:45 am]

BILLING CODE 4810–FY–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0325]

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: 60-day notice of information collection under review: Extension of a currently approved collection: Research to support the National Crime Victimization Survey (NCVS).

The Department of Justice (DOJ), Office of Justice Programs (OJP), Bureau of Justice Statistics (BJS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until April 16, 2012. This process is in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Shannan Catalano, Statistician (202) 616–3502, Bureau of Justice Statistics, 810 Seventh St. NW., Washington, DC 20531.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of

information should address one or more of the following four points:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

Overview of This Information Collection:

(1) *Type of information collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Methodological research to support the redesign of the National Crime Victimization Survey (NCVS).

(3) *Agency form number, if any, and the applicable component of the department sponsoring the collection:* Form numbers not available for generic clearance, Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract. Primary:* Persons ages 12 or older in sampled households in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* Approximately 50,200 persons ages 12 or older will be interviewed for some aspect of the redesign research. The average length of interview will vary by the type of interview conducted. Completing the crime screener and incident report is estimated to take 15–30 minutes, while a cognitive interview for testing alternative methods for measuring sexual violence may take 1–2 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total respondent burden is approximately 18,341 hours.

If additional information is required, contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Suite 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2012–3394 Filed 2–13–12; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0142]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Extension of a Currently Approved Collection; Victims of Crime Act, Crime Victim Assistance Grant Program Performance Report

ACTION: 30-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Office of Justice Programs (OJP), Office for Victims of Crime (OVC) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 20, page 4833, on January 31, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 15, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Victims of Crime Act, Crime Victim Assistance Grant Program, Subgrant Award Report.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is 1121–0142. Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice is sponsoring the collection.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State government. Other: None. The VOCA, Crime Victim Assistance Grant Program, Subgrant Award Report is a required submission by state grantees, within 90 days of their awarding a subgrant for the provision of crime victim services. VOCA and the Program Guidelines require each state victim assistance office to report to OVC on the impact of the Federal funds, to certify compliance with the eligibility requirements of VOCA, and to provide a summary of proposed activities. This information will be aggregated and serve as supporting documentation for the Director's biennial report to the President and to the Congress on the effectiveness of the activities supported by these grants. This request is for an extension of a currently approved reporting instrument, with no revisions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* The number of VOCA-funded victim assistance programs varies widely from State to State. A review of information currently available to this Office on the number of active victim assistance programs in 15 states selected for variance in size and

population revealed that a State would be responsible for entering subgrant data for as many as 499 programs (California) to as few as 9 programs (District of Columbia).

The estimated time to enter a record via the Grants Management System is three minutes (.05 hour). Therefore, the estimated clerical time can range from 27 minutes to 25 hours, based on the number of records that are entered. It would take 265 hours to enter 5,300 responses electronically [5,300 × .05 hour].

(6) *An estimate of the total public burden (in hours) associated with the collection:* The current estimated burden is 265 (5,300 responses × .05 hour per response = 265 hours). There is no increase in the annual recordkeeping and reporting burden.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Room 2E–508, Washington, DC 20530

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012–3370 Filed 2–13–12; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,097]

Kimberly-Clark Worldwide, Inc., a Subsidiary of Kimberly-Clark Corporation, Everett Mill, Including On-Site Leased Workers From Injury Free, Incorporated, Ventilation Power Cleaning, Inc., Covenant Security Services, Healthforce, Uniseve Corporation, Jacobs Engineering and Stafflogix Corporation, Everett, WA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 14, 2011, applicable to workers of Kimberly-Clark Worldwide, Inc., a subsidiary of Kimberly-Clark Corporation, Everett Mill, including on-site leased workers from Injury Free, Incorporated, Ventilation Power Cleaning, Inc., Covenant Security Services, Healthforce, UNISEVE Corporation and Jacobs Engineering, Everett, Washington. The workers are engaged in activities related to the production of tissue products (paper towels, toilet paper, wipes) and wood pulp. The notice was published in the **Federal Register** on December 29, 2011 (76 FR 81988).

At the request of Washington State and a company official, the Department reviewed the certification for workers of the subject firm. New information from the company shows that workers leased from STAFFLOGIX Corporation were employed on-site at the Everett, Washington location of Kimberly-Clark Worldwide, Inc., a subsidiary of Kimberly-Clark Corporation, Everett Mill. The Department has determined that these workers were sufficiently under the control of Kimberly-Clark Worldwide, Inc., a subsidiary of Kimberly-Clark Corporation, Everett Mill to be considered leased workers.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by increased company imports of tissue products (paper towels, toilet paper, wipes) and wood pulp.

Based on these findings, the Department is amending this certification to include workers leased from STAFFLOGIX Corporation working on-site at the Everett, Washington location of the subject firm.

The amended notice applicable to TA–W–81,097 is hereby issued as follows:

All workers from Kimberly-Clark Worldwide, Inc., a subsidiary of Kimberly-Clark Corporation, Everett Mill, including on-site leased workers from Injury Free, Incorporated, Ventilation Power Cleaning, Inc., Covenant Security Services, Healthforce, UNISEVE Corporation, Jacobs Engineering and STAFFLOGIX Corporation, Everett, Washington, who became totally or partially separated from employment on or after February 13, 2010, through December 16, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1074, as amended.

Signed at Washington, DC, this 25th day of January 2012.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3325 Filed 2–13–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of *January 9, 2012 through January 13, 2012.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the Following Must Be Satisfied

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the Following Must Be Satisfied

(1) A significant number or proportion of the workers in such workers' firm

have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
80,488	Plexus Services Corp., Plexus Corp., Adecco	Nampa, ID	July 24, 2011.
81,079	Sierrapine	Rocklin, CA	February 13, 2010.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
80,467	Covad Communications Company, d/b/a Megapath	Seattle, WA	September 23, 2010.
81,075	Advanced Micro Devices, Inc. (AMD), Volt and HCL America, Inc.	Austin, TX	February 13, 2010.
81,075A	Advanced Micro Devices, Inc. (AMD), Volt and HCL America, Inc.	Sunnyvale, CA	February 13, 2010.
81,105	WellPoint, Inc., Colorado/Nevada Utilization Management Intake Division.	Denver, CO	February 13, 2010.
81,120	Euclid Industries Inc,, A Subsidiary of M & R Corporate Services, LLC.	Bay City, MI	February 13, 2010.
81,126	Argo Group International Holdings, Ltd (Portland Office), Argonaut Management Services Division, including home-based workers.	Portland, OR	February 13, 2010.
81,126A	Argo Group International Holdings, Ltd, Argo Group International Division.	Chicago, IL	February 13, 2010.

TA–W No.	Subject firm	Location	Impact date
81,126B	Argo Group International Holdings, Ltd, Argo Group International Division.	Geneva, IL	February 13, 2010.
81,126C	Argo Group International Holdings, Ltd, Argo Group International Division.	Peoria, IL	February 13, 2010.
81,126D	Argo Group International Holdings, Ltd, Argo Group International Division.	Denver, CO	February 13, 2010.
81,126E	Argo Group International Holdings, Ltd, Argo Group International Division.	Fresno, CA	February 13, 2010.
81,126F	Argo Group International Holdings, Ltd, Argo Group International Division.	Redwood City, CA	February 13, 2010.
81,126G	Argo Group International Holdings, Ltd, Argo Group International Division.	Los Angeles, CA	February 13, 2010.
81,126H	Argo Group International Holdings, Ltd, Argo Group International Division.	San Antonio, TX	February 13, 2010.
81,126I	Argo Group International Holdings, Ltd, Argo Group International Division.	Dallas, TX	February 13, 2010.
81,126J	Argo Group International Holdings, Ltd, Argo Group International Division.	Greenfield, MA	February 13, 2010.
81,126K	Argo Group International Holdings, Ltd, Argo Group International Division.	Boston, MA	February 13, 2010.
81,126L	Argo Group International Holdings, Ltd, Argo Group International Division.	Jersey City, NJ	February 13, 2010.
81,126M	Argo Group International Holdings, Ltd, Argo Group International Division.	New York, NY	February 13, 2010.
81,126N	Argo Group International Holdings, Ltd, Argo Group International Division.	Richmond, VA	February 13, 2010.
81,126O	Argo Group International Holdings, Ltd, Argo Group International Division.	Scottsdale, AZ	February 13, 2010.
81,138	Keystone Automotive Operations, Inc., Accounts Payable and Accounts Receivable, All Star Staffing Group.	Exeter, PA	February 13, 2010.
81,151	Ahlstrom Glass Nonwovens LLC	Bishopville, SC	February 13, 2010.
81,170	Thomson Reuters Markets, LLC	Boston, MA	February 13, 2010.
81,175	Albany International, PMC Division	Menasha, WI	February 13, 2010.
81,193	Segue Manufacturing Services, LLC, On-Site Leased Workers From Additional Contract Services, Express, and Tech.	Lowell, MA	February 13, 2010.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
81,146	L.A. Darling Company, LLC, Wood Division, Staffmark	Piggott, AR	February 13, 2010.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
80,432	Infuscience South Carolina, LLC	North Charleston, SC.	
81,047	ERA Systems LLC (Formerly ERA Systems Corporation), a Subsidiary of SRA Corporation.	Syracuse, NY.	
81,135	Peninsula Daily News	Port Angeles, WA.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determination terminating an investigation was issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
81,168	Lightspeed Technologies	Tualatin, OR.	

I hereby certify that the aforementioned determinations were issued during the period of *January 9, 2012 through January 13, 2012.* These determinations are available on the Department's Web site at tradeact/taa/taa search form.cfm under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll-free at 888–365–6822.

Dated: January 23, 2012.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3323 Filed 2–13–12; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of January 16, 2012 through January 20, 2012.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the Following Must Be Satisfied

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) All of the Following Must Be Satisfied

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
80,443	Olympic Panel Products LLC	Shelton, WA	December 13, 2010.
80,487	Stimson Lumber Company, Arden Division	Colville, WA	September 27, 2010.
81,039	HDM Furniture Industries, Inc., Henredon Plant 10, Furniture Brands International, Furniture Brands Resource.	Mt. Airy, NC	April 16, 2011.
81,039A	HDM Furniture Industries, Inc., Henredon/Maitland, Furniture Brands International, Furniture Brands Resource.	High Point, NC	March 31, 2011.
81,039B	Workforce Carolina Working On-Site, at HDM Furniture Industries, Inc.	Mt. Airy, NC	February 13, 2010.
81,039C	The Personnel Center, Inc. and Onin Staffing, Working On-Site at HDM Furniture Industries, Inc.	High Point, NC	February 13, 2010.
81,054	High Cotton Enterprises, Inc.	Fort Payne, AL	February 13, 2010.
81,118	Matrix IV Inc., The Agency Staffing	Woodstock, IL	February 13, 2010.
81,125	1SolTech, Inc.	Farmers Branch, TX	February 13, 2010.
81,207	American Axle & Mfg. (AAM), Detroit Manufacturing Complex (DMC)	Detroit, MI	November 25, 2010.
81,207A	MSX International, American Axle & Mfg., Detroit Manufacturing Complex, Detroit Manufacturing.	Detroit, MI	February 13, 2010.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
80,448	Hampton Lumber Mills, Randle Division	Randle, WA	September 14, 2010.
81,024	Atmel Corporation, Colorado Springs, Colorado Division, Planning and Assembly Groups.	Colorado Springs, CO	February 13, 2010.
81,040	HDM Furniture Industries, Inc., Drexel Heritage Plant 75, Furniture Brands International.	Morganton, NC	January 24, 2011.
81,040A	HDM Furniture Industries, Inc., Drexel Heritage Plant 60, Furniture Brands International.	Morganton, NC	January 24, 2011.
81,040B	Friday Staffing Services Working On-Site at Drexel Heritage, Plant 60 and Drexel Heritage Plant 75, HDM Furniture Industries, Inc.	Lenoir, NC	February 13, 2010.
81,137	Wellpoint, Inc., Credentialing: CDO and CPC Division, Aerotek, Kelly Services, etc.	Andover, MA	February 13, 2010.
81,140	Bureau Veritas Consumer Products Services, Inc., Global Quality Assurance Department.	Amherst, NY	February 13, 2010.
81,149	CQMS Razer, Jean Simpson Personnel Services, Inc.	Mansfield, LA	February 13, 2010.
81,171	The Seydel Companies, Seydel-Woolley & Co., Inc. Division, Spherion Staffing, LLC.	Pendergrass, GA	February 13, 2010.
81,177	Heartland Bakery Company, LLC, Maplehurst Bakeries, LLC, Selectremedy.	Du Quoin, IL	February 13, 2010.
81,178	Sunpower Corporation, Systems, Pluto Acquisition Co., LLC., Aerotek, Bayside Solutions, Robert Half, etc.	Richmond, CA	February 13, 2010.
81,191	Bristol, Inc., A Business Unit of Emerson Electric Co, dba Emerson Process, etc.	Watertown, CT	August 19, 2011.
81,208	American Axle & Manufacturing (AAM), Metal Forming Division	Cheektowaga, NY	July 18, 2010.

I hereby certify that the aforementioned determinations were issued during the period of January 16, 2012 through January 20, 2012. These determinations are available on the Department's Web site *tradeact/taa/taa search form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll-free at 888–365–6822.

Dated: January 25, 2012.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3322 Filed 2–13–12; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,949]

Western Digital Technologies, Inc., Hard Drive Development Engineering Group Irvine (Formerly at Lake Forest), CA; Notice of Negative Determination on Remand

On November 22, 2011, the U. S. Court of International Trade (USCIT) granted the Department of Labor's second request for voluntary remand to conduct further investigation in *Former Employees of Western Digital Technologies, Inc.* v. *United States Secretary of Labor* (Court No. 11–00085).

On November 25, 2009, former workers of Western Digital Technologies, Inc., Hard Drive Development Engineering Group, Lake Forest, California (subject firm) filed a petition for Trade Adjustment Assistance (TAA) on behalf of workers at the subject firm. AR 1. The worker group covered under this petition (subject worker group) consists of workers engaged in the supply of engineering functions for the development of hard disk drives.

The initial investigation revealed that the subject firm had not shifted abroad the supply of services like or directly competitive with those provided by the subject worker group, that the subject firm had not acquired such services from abroad, and there had not been an increase in imports of articles or services like or directly competitive with those produced or supplied by the subject firm. AR 72–77. Further, the initial investigation revealed that the subject firm could not be considered a Supplier or Downstream Producer to a firm that employed a worker group eligible to apply for TAA. AR 72–77. On August 5, 2010, the Department of Labor (Department) issued a Negative Determination regarding eligibility to apply for TAA applicable to workers and former workers of the subject firm. The Department's Notice of Negative Determination was published in the **Federal Register** on August 23, 2010 (75 FR 51849). AR 82.

The group eligibility requirements for workers of a Firm under Section 222(a) of the Act, 19 U.S.C. 2272(a), can be satisfied if the following criteria are met:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated; and

(2)(A)(i) The sales or production, or both, of such firm have decreased absolutely;

(ii)(I) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(II) Imports of articles like or directly competitive with articles—

(aa) Into which one or more component parts produced by such firm are directly incorporated, or

(bb) Which are produced directly using services supplied by such firm, have increased; or

(III) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased; and

(iii) The increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

(B)(i)(I) There has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or

(II) Such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; and

(ii) The shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.

By application dated September 14, 2010, the petitioning workers requested administrative reconsideration of the Department's negative determination. AR 83. In the request, the petitioners alleged that increased imports of articles that were produced using the services supplied by the subject worker group contributed importantly to worker separations at the subject firm. AR 83.

To investigate the petitioners' claim, the Department issued a Notice of Affirmative Determination Regarding Application for Reconsideration on October 7, 2010. AR 84. The Department's Notice of Affirmative Determination was published in the **Federal Register** on October 25, 2010 (75 FR 65517). AR 286.

During the reconsideration investigation, the Department obtained information from the subject firm regarding the petitioners' claims and collected data from the U.S. International Trade Commission regarding imports of articles like or directly competitive with those produced using the services supplied by the subject worker group. AR 89–125, 126, 127.

Based on the findings of the reconsideration investigation, the Department concluded that worker separations at the subject firm were not caused by a shift in services abroad or increased imports of services like or directly competitive with those provided by the subject worker group. AR 89–125. Further, the reconsideration investigation revealed that the subject firm did not import articles like or directly competitive with those produced directly using services supplied by the subject worker group, AR 89–125, and U.S. aggregate imports of articles like or directly competitive with hard disk drives declined in the relevant time period. AR 126, 134–136, 137, 141–142, 143–145. Consequently, the Department issued a Notice of Negative Determination on Reconsideration on February 4, 2011. AR 129–130. The Department's Notice of determination was published in the **Federal Register**, on February 24, 2011 (75 FR 10403). AR 287.

First Remand Investigation

On April 11, 2011, Plaintiffs filed a complaint with the USCIT in which they claimed that their separations were directly caused by the subject firm's foreign operations and increased imports of hard disk drives, and provided information in support of these claims. The Plaintiffs stated that the subject firm trained foreign engineers at the Lake Forest, California facility, who then returned to their respective countries to perform the same services as the Plaintiffs, and provided a list of job announcements for engineers posted by the subject firm in Malaysia at the same time as the domestic layoffs. Further, the Plaintiffs provided import statistics pertaining to hard disk drives, specifically pointing to increased imports of these articles from Malaysia.

In a letter submitted to the Department on June 13, 2011, Plaintiffs provided additional information

surrounding the layoffs of the workers, including supporting information relating to the allegations made in the complaint to the USCIT. AR 154–182. Plaintiffs provided a list of several engineering positions and functions that allegedly shifted to Asia from the Lake Forest, California facility and included statements on how engineering functions were transferred abroad, presenting details regarding the training of foreign workers who returned overseas to perform the same functions as Plaintiffs. AR 154–182.

The Department requested voluntary remand to address the allegations made by the Plaintiffs, to determine whether the subject worker group is eligible to apply for TAA under the Trade Act of 1974, as amended (hereafter referred to as the Act), and to issue an appropriate determination.

At the time of the first remand investigation, the subject firm was in the process of transferring the corporate headquarters facility from Lake Forest, California to Irvine, California. AR 213. During the first remand investigation, the Department confirmed all previously collected information, obtained additional information from the subject firm regarding domestic and foreign operations, solicited input from the Plaintiffs, and addressed all of Plaintiffs' allegations.

The information the Department received during the first remand investigation contained more detail regarding the operations of the subject firm domestically and abroad. In order to determine whether there was a shift abroad of the engineering services provided by the subject worker group, the Department had to first determine whether the subject firm employs engineers at its facilities in Asia who supply engineering services like or directly competitive with those supplied by the subject worker group.

The first remand investigation revealed that the business model of the subject firm is to develop new products domestically and carry out the manufacturing at its facilities overseas. AR 152, 212–218, 228–231, 244, 245–246, 271–279. After the design and development of the products is provided by the subject worker group, the production takes place at the foreign facilities—a process that the subject firm asserted did not change during the relevant time period for the investigation of this petition. AR 152, 212–218, 228–231, 244, 245–246, 271–279.

Although Plaintiffs declared that the subject firm shifted abroad the supply of engineering services which are like or directly competitive with those provided by the subject worker group (AR 154–182), based upon the data collected during the first remand investigation, the Department determined that the engineers employed at foreign facilities of the subject firm and the engineers employed at domestic facilities of the subject firm do not perform like or directly competitive functions. AR 152, 212–218, 228–231, 244, 245–246, 271–279. Because of the stage of production at which the workers' functions are performed, the work performed by the engineers domestically and the engineers abroad is not interchangeable; hence, the activities of the subject firm at the manufacturing facilities overseas could not have impacted the subject worker group. AR 152, 212–218, 228–231, 244, 245–246, 271–279.

According to the subject firm, the engineering work performed abroad not only requires the engineers to be present at the manufacturing location, but is also different and less complex than the development work performed by the domestic engineers. AR 152, 212–218, 228–231, 244, 245–246, 271–279. Therefore, the Department determined that the work performed overseas did not contribute importantly to worker separations domestically because the services are not like or directly competitive.

Regarding Plaintiffs' allegation that the subject firm brought foreign workers to be trained at the Lake Forest, California facility, the subject firm asserted that the firm's business model calls for the development of products domestically and for manufacturing at foreign facilities. AR 152, 212–218, 228–231, 244, 245–246, 271–279. The subject firm also stated that the foreign engineers must be knowledgeable about the new products in order to carry out their work; hence, they visit the domestic facilities of the subject firm in order to train on the new products to oversee the production at the manufacturing facilities. Given the nature of these visits, the training of foreign workers in the U.S. does not show that the roles of the domestic and foreign engineers are interchangeable. AR 152, 212–218, 228–231, 244, 245–246, 271–279.

Plaintiffs submitted a list of job announcements posted by the subject firm in Malaysia. AR 154–182. The subject firm maintained that at the time of the domestic reduction in force (RIF) in late 2008 and early 2009, hiring efforts on a global level were suspended. AR 208–218. The Department collected employment numbers of engineers at Lake Forest, California, Malaysia, and Thailand. AR 271–285. The numbers revealed that employment of engineers decreased from December 2008 to June 2009, but started to increase at all three locations in late 2009. AR 241, 242, 243, 271–285. Based on the findings pertaining to the work performed by the domestic and foreign engineers, the Department did not consider the services of the domestic engineers like or directly competitive with those provided by the engineers at the production facilities overseas. Therefore, the employment levels in these groups were not pertinent to the outcome of the investigation.

Plaintiffs also alleged that increased imports of hard disk drives contributed to worker separations. AR 154–182. Aggregate U.S. import data of hard disk drives or articles like or directly competitive showed a decline in the period under investigation. Nonetheless, the Department determined that increased imports of articles could not have contributed to worker separations because the subject firm develops hard disk drives domestically and manufactures them at the facilities in Asia. Therefore, an increase in imports of articles could not have contributed to a decline in the engineering services supplied by the subject worker group.

For Section 222(a)(A)(ii)(II)(bb) of the Act to be met, imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, must have increased. Because the subject firm does not produce articles like or directly competitive with hard disk drives domestically, this criterion was not met.

Based on careful consideration of all previously submitted information and new facts obtained during the first remand investigation, the Department determined that the subject worker group did not meet the eligibility criteria of the Act and issued a Negative Determination on Remand on September 23, 2011. AR 301. The Notice of Determination was published in the **Federal Register** on October 5, 2011 (76 FR 61746). SAR 1.

Second Remand Investigation

On October 25, 2011, one of the Plaintiffs filed comments with the USCIT regarding the negative remand determination. In the comments, the Plaintiff made new allegations, stating that the Department's determination was erroneous because engineers at the subject firm's foreign facilities provide engineering services like or directly competitive with those of the domestic engineers and that the subject firm manufactures hard disk drives domestically. In particular, the Plaintiffs alleged that the subject worker group

was engaged in activity related to the production of hard disk drives—''white label'' pilot products—and attached seven exhibits.

In response to the Plaintiffs' comments, the Department requested a second voluntary remand to review previously collected information and conduct further investigation to address the new allegations raised by the Plaintiff.

The comments contained statements intended to support the Plaintiff's claim that engineers at the foreign facilities engage in design work and domestic engineers engage in production. The comments included a list of job vacancies at the subject firm's facilities in Asia for engineering positions involving production, design, and development work. In addition, the Plaintiff stated that during his employment with the subject firm, he provided services related to the domestic production of hard disk drives. Further, the Plaintiff claimed that he trained foreign engineers to perform design and development work, and asserted that the employment data collected by the Department during the first remand investigation demonstrated a shift of engineering services abroad. AR 241, 242, 243, 271–285. The comments highlighted that the subject firm manufactures hard disk drives domestically through a pilot, or prototype, hard disk drive production line, which produces hard disk drives for sale to customers and that the hard disk drives imported from Malaysia are like or directly competitive with the ones produced by Western Digital domestically. Lastly, the Plaintiff commented that the Department failed to collect import data of disk drives during the first remand investigation.

In support of the allegations, the Plaintiff provided seven exhibits. The first exhibit was a statement, which included the Plaintiff's position description at the subject firm and information intended to establish that the Department had based its negative determinations on erroneous findings that (1) the work of the subject firm's foreign and domestic engineers was not interchangeable and that (2) the subject firm did not produce hard disk drives, domestically.

In the first exhibit, the Plaintiff pointed to the list of positions, submitted with the initial complaint to the USCIT, of engineering services that appear to relate to production and design work and one position advertised by Western Digital in Malaysia that called for co-development of new product ''with U.S. counterpart''. The Plaintiff compared his job duties to those advertised in Malaysia in an effort to show that the duties overlapped. The Plaintiff added that he was engaged in New Product Integration (NPI) work, which was considered production work. The Plaintiff also stated that he trained foreign engineers to perform the same development functions that he performed during his employment with the subject firm, noting that he worked directly with a foreign engineer who returned to the subject firm's Malaysian facility to perform the same work. In addition, the Plaintiff claimed that the subject firm produces hard disk drives domestically for sale to customers and that much of its pilot hard disk drive production was transferred to Asia, along with the associated engineering services.

In addition, the Plaintiff stated that the majority of the job vacancies identified in the complaint to the USCIT involved production and development work. However, according to the position descriptions, none of the vacant positions involved the design or development of hard disk drives. Further, careful examination of the duties listed for each position establishes that the work of these engineers relates to manufacturing. For example, positions include duties such as ''Willing to travel to Asia QC Manufacturing-Drive'' and ''Communicate with US counterpart to resolve factory issues.'' The subject firm confirmed that the engineering teams in Asia have never performed new product design and their duties extend to sustaining production. AR 152, 212–218, 228–231, 244, 245–246, 271–279.

Exhibit 1 also contained additional Asian job postings. However, those vacancies were posted in October 2011, which is almost three years after the reduction in force from which this proceeding arose. Since that time, employment at the subject firm has increased, both domestically and abroad. AR 241, 242, 243, 271–285. Therefore, the posting of these positions, almost three years after worker separations occurred, could not have contributed to the layoffs.

The Plaintiff stated that during his employment with Western Digital he engaged in work related to domestic production of hard disk drives. Based on the Plaintiff's position description in Exhibit 1, the Plaintiff had no work duties related to production, other than program management support, which did not specify location. Additionally, the Plaintiff was employed at the headquarters facility of the subject firm, where no production lines are operated. (Domestic manufacturing and the role of the subject worker group in that production are discussed below.)

The Plaintiff also stated that the Department had ignored employment data which demonstrated a shift in engineering services abroad. Because, as determined during the initial remand investigation, the functions of the subject worker group were not like or directly competitive with those of the engineers at Western Digital's foreign facilities, the employment data in question could not demonstrate that a relative increase in employment abroad contributed to layoffs at the subject facility. AR 292–300. During the second remand investigation, the subject firm provided information which confirmed that domestic engineers are solely responsible for the development and design of hard disk drives. SAR 20.

The Plaintiff also claimed that the Department failed to collect import data of hard disk drives. As explained in the first remand determination, above, because there is no domestic production of these products (see below for more information on domestic production), any increases in imports of hard disk drives would not have contributed to layoffs in the subject worker group. As such, import statistics of hard disk drives were irrelevant to the determination.

During the second remand investigation, the Department contacted the subject firm to obtain more information regarding the Plaintiff's involvement in any domestic pilot hard disk drive production. SAR 6. In response to the claim that the Plaintiff was part of the New Product Integration team (NPI) and provided work related to domestic production, the subject firm responded that the NPI team handles the initial design work before mass production takes place in Asia. SAR 8, 20, 26. The NPI team also administers the pilot hard disk drive production at the San Jose, California facility of the subject firm (see below for more information on domestic production). As this team plays a role in validating the design of a product before production, this part of the process is considered part of the design and development work. SAR 8, 20, 26. Therefore, the Department has concluded that Exhibit 1 does not support a finding that the plaintiffs have met the criteria for TAA eligibility.

The second exhibit consisted of a list of 17 positions posted by Western Digital in Malaysia. The listings are dated October 19, 2011, which is almost three years after the separations in the subject worker group were announced in December 2008. Close examination of the listings showed that only one

position called for ''co-develop new product and channel feature with U.S. counterpart''. In any event, the position description does not specify that the ''co-development'' refers to hard disk drives. None of the other positions listed call for development work of hard disk drives or any other products. Also, out of the 17 listings, only three contain the words ''develop'' or ''design'' and these three positions call for the development and design of software and code applications, not hard disk drives, which the subject firm has ascertained is the function of the domestic engineers. AR 152, 212–218, 228–231, 244, 245–246, 271–279 and SAR 8, 20, 26. Also, none of the positions provided by the Plaintiffs with the complaint contained the words ''develop'' or ''design''.

The third exhibit consisted of a job announcement and position description of ''Western Digital Senior Engineer/Staff Engineer—Asia R&D—Advance Read Channel Engineering''. The description of this position does not mention new product design or any related duties. The description, however, mentions ''failure analysis'', which is a duty that the subject firm has explained that occurs both domestically and in Asia, depending on the life stage of a product. AR 208, 292 and SAR 8, 20, 26. Additionally, this position was posted in August 2011, more than two and a half years after the RIF was announced at the subject firm.

The fourth exhibit consisted of a position description of a Product Engineer. This position announcement mentions that the position may include failure analysis and research and development but it does not include a specific description of duties. The work duties listed in this announcement are consistent with those described by the subject firm. In particular, the subject firm has stated that the work of the engineers overseas is designed to carry out the manufacturing process and sustain the work performed on existing hard disk drives. AR 152, 212–218, 228–231, 244, 245–246, 271–279.

The fifth exhibit consisted of the profile, as listed on an online social network, of an engineer employed at one of the subject firm's facilities in Asia. Although the profile shows that the engineer was employed at the Lake Forest, California facility and then transferred to Malaysia, the profile does not include a description of job duties performed at either location.

The sixth exhibit consisted of Western Digital's career opportunities page from the subject firm's Web site which shows that there are manufacturing facilities in California. As the findings of the first remand investigation showed, the subject firm operates two domestic manufacturing sites in California. The articles produced at the domestic locations are component parts used for internal purposes. The second remand investigation found that one of the domestic facilities also manufactures pilot hard disk drives (see below).

The last exhibit consisted of the subject firm's company profile from an employment Web site. The profile does not list any specifics related to positions domestically or abroad but mentions that the subject firm operates manufacturing facilities in California. The domestic manufacturing operations of the subject firm are addressed above.

The second remand investigation produced further explanation of the process by which the subject firm produces hard disk drives. As discussed above, the subject worker group designs the hard disk drives domestically. Before the design is sent overseas for mass production, the subject firm manufactures prototype hard disk drives to ensure that the new designs are functional. SAR 8, 20, 26. The subject firm stated that prototype creation is part of the design of hard drives because a prototype must be created, tested, and validated before sending the product for mass production. SAR 8, 20, 26.

Although the pilot hard disk drives produced are used mainly for development purposes, the subject firm operates a White Label program via which it sells a portion of the pilot hard disk drives externally. SAR 8, 20, 26. The subject firm has three prototype production lines located in San Jose, California, Malaysia, and Thailand. SAR 20, 26. In response to Plaintiff's allegation that prototype production has shifted abroad, the subject firm substantiated that no domestic production of the pilot drives has shifted overseas in the period under investigation. SAR 20, 26.

The Department collected information from the subject firm related to the size of each operation and the number of prototypes that are sold. The numbers revealed that the domestic production of the pilot drives constitutes a small number of the prototypes sold under the White Label program and a negligible portion of overall hard disk drive production. SAR 8, 20, 26.

It is well-established that a negligible shift of production to a foreign country cannot be a basis for TAA certification. In Barry Callebaut USA, Inc., Van Leer Division, Jersey City, New Jersey (TA–W–37,000; USCIT No. 03–1113; February 10, 2004), the Department determined that a three percent shift of production was not sufficient basis to satisfy the criteria for certification. Appling the same analysis in the present case, the Department has determined that because the pilot hard disk drive production at the subject firm is not significant relative to overall hard disk drive production, any trade impact on the pilot hard disk drive production line could not have contributed to separations in the subject worker group.

Upon review of the facts collected during the earlier investigations and the additional information procured through the second remand investigation, the Department has determined that the services provided by engineers at the subject firm's Asian facilities are not like or directly competitive with the services of the engineers located at the subject facility. Additionally, the domestic production of hard disk drives is de minimus relative to the subject firm's overall operations, such that any trade impact could not have contributed to worker separations at the subject firm. Accordingly, the Department reaffirms that the petitioning workers have not met the eligibility criteria of section 222(a) of the Act.

Conclusion

After careful consideration of the record, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance applicable to workers and former workers of Western Digital Technologies, Inc., Hard Drive Development Engineering Group, Irvine (formerly at Lake Forest) California.

Signed at Washington, DC, this 23rd day of January, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3324 Filed 2–13–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,041]

Quad/Graphics, a Subdivision of Quad Graphics, Inc., Including On-Site Leased Workers From SPS Temporaries, Depew, NY; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on March 15, 2011, on behalf of workers of Quad/Graphics, a Subdivision of Quad Graphics, Inc., Depew, New York. The negative

determination was published in the **Federal Register** on July 8, 2011 (76 FR 40402). The worker group includes on-site leased workers from SPS Temporaries.

As required by the Trade Adjustment Assistance (TAA) Extension Act of 2011 (the TAAEA), the investigation into this petition was reopened for a reconsideration investigation to apply the requirements for worker group eligibility under chapter 2 of title II of the Trade Act of 1974, as amended by the TAAEA, to the facts of this petition.

The worker group on whose behalf the petition was filed is covered under a certification (TA–W–73,441G) applicable to workers and former workers of Quad Graphics, Inc., a wholly-owned subdivision of Quad Graphics, Inc., including leased workers from SPS Temporaries, Depew, New York, who were totally or partially separated or threatened with such separation from February 9, 2009 through September 27, 2013. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 20th day of January, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3326 Filed 2–13–12; 8:45 am]

BILLING CODE ;P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

State's Mine Health and Safety Grants

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of posting of the Solicitation for Grant Applications for the Fiscal Year 2012 State grant program.

Announcement Type: New.

Funding Opportunity Number: MSHA 2012–1.

Catalog of Federal Domestic Assistance Number: 17,600.

Types of Assistance: Discretionary Grants.

Number of awards: 50 to States or other eligible applicants.

Start date of project period: October 1, 2011.

End date of project period: September 30, 2012.

Estimated amount of funds to be awarded: $8,441,000.

SUMMARY: The United States Department of Labor, Mine Safety and Health Administration (MSHA), has posted its solicitation for grant applications (SGA) for the States Grants Program on *http://www.grants.gov.* The SGA contains all of the necessary information needed to apply for grant funding.

Applicants for these grants are States or State-designated entities. The purpose of these grants is to improve and secure safe and healthy workplaces for U.S. miners. The final amount of each individual grant will be determined by the formula in Section 503(h) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 953(h)) and MSHA's final Fiscal Year 2012 appropriation.

DATES: All applications must be received on April 1, 2012 by Midnight, Eastern Daylight Saving Time.

FOR FURTHER INFORMATION CONTACT: Robert Glatter at *glatter.robert@dol.gov,* at 202–693–9570 (voice), or 202–693–9571 (facsimile) or Valoree Lilley at *lilley.valoree@dol.gov,* 202–693–9831. These are not toll-free numbers.

Authority: 30 U.S.C. 953.

Dated: *February 8, 2012.*

Patricia W. Silvey,

Deputy Assistant Secretary for Mine Safety and Health.

[FR Doc. 2012–3341 Filed 2–13–12; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL SCIENCE FOUNDATION

Astronomy and Astrophysics Advisory Committee; 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: Astronomy and Astrophysics Advisory Committee (#13883).

DATE AND TIME: March 2, 2012 12 p.m.–5 p.m. EST Teleconference.

PLACE: National Science Foundation, Room 680, Stafford I Building, 4201 Wilson Blvd., Arlington, VA, 22230.

TYPE OF MEETING: Open.

CONTACT PERSON: Dr. James Ulvestad, Division Director, Division of Astronomical Sciences, Suite 1045, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: 703–292–8820.

PURPOSE OF MEETING: To provide advice and recommendations to the National Science Foundation (NSF), the National Aeronautics and Space Administration (NASA) and the U.S. Department of Energy (DOE) on issues within the field of astronomy and astrophysics that are of mutual interest and concern to the agencies.

AGENDA: To discuss the Committee's draft annual report due 15 March 2011 and to receive an update on the FY13 agency budgets.

Dated: February 8, 2012.

Susanne E. Bolton,

Committee Management Officer.

[FR Doc. 2012–3285 Filed 2–13–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0016]

Applications and Amendments to Facility Operating Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; opportunity for comments, request for hearing and petition for leave to intervene, and order.

DATES: Comments must be filed by March 15, 2012. A request for a hearing must be filed by April 16, 2012. Any potential party as defined in Title 10 of the *Code of Federal Regulations* (10 CFR) 2.4, who believes access to Sensitive Unclassified Non-Safeguards Information (SUNSI) is necessary to respond to this notice must request document access by February 24, 2012.

ADDRESSES: Please include Docket ID NRC–2012–0016 in the subject line of your comments. For additional instructions on submitting comments and instructions on accessing documents related to this action, see ''Submitting Comments and Accessing Information'' in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2012–0016. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax Comments to:* RADB at 301–492–3446.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document using the following methods:

• *NRC's Public Document Room (PDR):* The public may examine, and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*

• *Federal Rulemaking Web Site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2012–0016.

Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing SUNSI.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of

which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in the NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if

the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from February 14, 2012. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: October 28, 2011.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendment would revise the Minimum Critical Power Ratio Safety Limit (MCPR SL) values for both two-loop and single-loop operation in Technical Specification (TS) 2.1.1.2 in accordance with the requirements set forth in GE Nuclear Energy topical report NEDC–33173P, ''Applicability of GE Methods to Expanded Operating Domains,'' Revision 0, dated February 2006.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The Bases to TS 2.1.1.2 states that: ''The MCPR SL ensures sufficient conservatism in the operating MCPR limit that, in the event of an AOO [Anticipated Operational Occurrence] from the limiting condition of operation, at least 99.9% of the fuel rods in the core would be expected to avoid boiling transition.''

Certain limitations and conditions referenced in the NRC Safety Evaluation for GE Nuclear Energy, ''Applicability of GE Methods to Expanded Operating Domains,'' NEDC–33173P, Revision 0, February 2006 are applicable for extended power uprate operation. The proposed change addresses the following limitation and condition stated in the NRC SE [safety evaluation] for NEDC–33173P:

For EPU [extended power uprate] operation, a 0.02 value shall be added to the cycle-specific SLMCPR value. This adder is applicable to SLO [single-loop operation], which is derived from the dual loop SLMCPR value.

Based on the application of Global Nuclear Fuels' NRC approved MCPR SL methodology, the conclusions of the Cycle 19 reload analyses indicate that the values for two-loop and single-loop MCPR SL should be increased to account for this 0.02 margin. The resulting values add additional margin to the MCPR SLs and continue to ensure the conservatism described in the Bases to TS 2.1.1.2.

The requested Technical Specification change does not involve any plant modifications or operational changes that could affect system reliability or performance or that could affect the probability of operator error. The requested change does not affect any postulated accident precursors, any accident mitigating systems, or introduce any new accident initiation mechanisms.

Therefore, the proposed change to increase the MCPR SLs does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve any new modes of operation, any changes to setpoints, or any plant modifications. The proposed change to the MCPR SLs accounts for the 0.02 adder specified in the NRC Safety Evaluation limitations and conditions associated with NEDC–33173P. Compliance with the criterion for incipient boiling transition continues to be ensured. The core operating limits will continue to be developed using NRC approved methods. The proposed MCPR SLs do not result in the creation of any new precursors to an accident.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The MCPR SLs have been evaluated in accordance with Global Nuclear Fuels NRC approved cycle-specific safety limit methodology to ensure that during normal operation and during AOOs at least 99.9% of the fuel rods in the core are not expected to experience transition boiling. The proposed revision to the MCPR SLs accounts for the 0.02 adder specified in the NRC Safety Evaluation limitations and conditions associated with NEDC–33173P, which results in additional margin above that specified in the TS Bases.

Therefore, the proposed change to the MCPR SLs does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Northern States Power Company—Minnesota, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota

Date of amendment request: August 19, 2011.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendments would revise Technical Specification (TS) 3.7.17, ''Spent Fuel Pool Storage;'' and TS 4.3.1, ''[Fuel Storage] Criticality,'' to correct non-conservatisms in the Spent Fuel Pool (SFP) criticality analysis-of-record, which have translated into non-conservative TS. Additionally, the amendments would revise the licensing basis to change the regulatory basis for the SFP criticality analysis from Title 10 of the *Code of Federal Regulations* (10 CFR) 70.24, to 10 CFR 50.68(b), and to change the evaluation methodology used for the SFP criticality analysis.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendments do not change or modify the fuel, fuel handling processes,

fuel storage racks, number of fuel assemblies that may be stored in the spent fuel pool (SFP), decay heat generation rate, or the SFP cooling and cleanup system. The proposed amendment was evaluated for impact on the following previously-evaluated events and accidents: (1) Fuel handling accident (FHA), (2) fuel assembly misloading, (3) seismically-induced movement of spent fuel storage racks, (4) loss of spent fuel pool cooling, and (5) spent fuel boron dilution.

Although implementation of the proposed amendment will require handling of fuel assemblies to achieve the new configurations, the probability of a FHA is not increased because the implementation of the proposed amendment will employ the same equipment and procedures to handle fuel assemblies that are currently used. Therefore, the proposed amendments do not increase the probability for occurrence of a FHA. In that the proposed amendment does not involve changes to the radiological source term of any fuel assembly, the amendment would not increase the radiological consequences of a FHA. With regard to the potential criticality consequences of a dropped assembly coming to rest adjacent to a storage rack or on top of a storage rack, the results are bounded by the fuel assembly misloading event which is analyzed to provide sufficient margin to criticality. The fuel configuration caused by a dropped assembly resting on top of loaded storage racks is inherently bounded by the assembly misloaded in the storage rack because the misloaded assembly is in closer proximity to other assemblies along its entire fuel length.

Operation in accordance with the proposed amendment will not change the probability of a fuel assembly misloading because fuel movement will continue to be controlled by approved fuel selection and fuel handling procedures. These procedures continue to require identification of the initial and target locations for each fuel assembly and fuel assembly insert that is moved. The consequences of a fuel misloading event are not changed because the reactivity analysis demonstrates that the same subcriticality criteria and requirements continue to be met for the worst-case fuel misloading event.

Operation in accordance with the proposed amendment will not change the probability of occurrence of a seismic event, which is considered an Act of God. Also, the consequences of a seismic event are not changed because the proposed amendment involves no change to the types of material stored in SFP storage racks or their mass. In this manner, the forcing functions for seismic excitation and the resulting forces are not changed. Also, particular to criticality, the supporting criticality analysis takes no credit for gaps between rack modules so any seismically-induced movement of racks into a closer proximity would not result in an unanalyzed condition with consequences worse than those analyzed. In summary, the proposed amendment will not increase the probability or consequence of a seismic event.

Operation in accordance with the proposed amendment will not change the probability of a loss of spent fuel pool cooling because the change in fuel loading configurations has no bearing on the systems, structures, and components involved in initiating such an event. The proposed amendment does not change the heat load imposed by spent fuel assemblies nor does it change the flow paths in the spent fuel pool. Finally, a new criticality analysis of the limiting fuel loading configuration confirmed that the condition would remain subcritical at the resulting temperature value.

Therefore, the accident consequences are not increased for the proposed amendment.

Operation in accordance with the proposed amendment will not change the probability of a boron dilution event because the change in fuel loading configurations has no bearing on the systems, structures, and components involved in initiating or sustaining the intrusion of unborated water to the spent fuel pool. The consequences of a boron dilution event are unchanged because the proposed amendment has no bearing on the systems that operators would use to identify and terminate a dilution event. Also, implementation of the proposed amendment will not affect any of the other key parameters of the boron dilution analysis which includes SFP water inventory, volume of SFP contents, initial boron concentration requirement, and the sources of dilution water. Finally, a new criticality analysis of the limiting fuel loading configuration confirmed that the dilution event would be terminated at a soluble boron concentration value that ensured a subcritical condition.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No

The proposed amendments involve new SFP loading configurations for current and legacy fuel designs of the nuclear plant. The proposed amendments do not change or modify the fuel, fuel handling processes, fuel storage racks, number of fuel assemblies that may be stored in the pool, decay heat generation rate, or the spent fuel pool cooling and cleanup system. As such, the proposed changes introduce no new material interactions, man-machine interfaces, or processes that could create the potential for an accident of a new or different type. This determination is based on the review of the two significant SFP loading changes proposed by the amendment: (1) New storage arrays, and (2) use of Rod Cluster Control Assemblies (RCCAs) in one new proposed array.

Operation with the proposed fuel storage arrays will not create a new or different kind of accident because fuel movement will continue to be controlled by approved fuel handling procedures. These procedures continue to require identification of the initial and target locations for each fuel assembly that is moved. There are no changes in the criteria or design requirements pertaining to fuel storage safety, including subcriticality requirements, and analyses demonstrate that the proposed storage arrays meet these requirements and criteria with adequate margins. Thus, the proposed storage arrays cannot cause a new or different kind of accident.

Implementation of the proposed new storage array that credits an RCCA inserted into a center assembly does not create the potential for a new or different type of accident because the operation is controlled with procedural controls comparable to those used for fuel assembly placement in the SFP and because the inadvertent RCCA removal was explicitly evaluated in the revised criticality analysis. RCCAs are installed in spent fuel assemblies in accordance with approved procedures, and movement is controlled in accordance with approved fuel transfer logs that identify and then independently verify their placement. The inadvertent removal of an RCCA from an array has been evaluated with acceptable results. The effects are bounded by the fuel assembly misloading event.

Thus, the use of RCCAs in the proposed array does not create the possibility of a new or different kind of accident.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No

The proposed change was evaluated for its effect on current margins of safety as they relate to criticality. The margin of safety for subcriticality required by 10 CFR 50.68 (b)(4) is unchanged. The new criticality analysis confirms that operation in accordance with the proposed amendment continues to meet the required subcriticality margin. Also, revised loading restrictions in the proposed TS have actually reduced the soluble boron requirements for the limiting normal configuration, thereby increasing the margin for the postulated boron dilution event.

Therefore, the proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

NRC Acting Branch Chief: Shawn A. Williams.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Date of amendment request: July 29, 2011. This amendment request contains sensitive unclassified non-safeguards information (SUNSI).

Description of amendment request: The amendments would revise a number of Technical Specification (TS) requirements, to allow the licensee to use the AREVA 16x16 reactor fuel on a

permanent basis in San Onofre Nuclear Generating Station (SONGS), Units 2 and 3. These changes include revising TS 5.7.1.5, Core Operating Limits Report (COLR), to update the methodology reference list to support the core design with the new AREVA fuel; revising TS 4.2.1, Fuel Assemblies, to include the description of the new fuel cladding material (M5); revising TS 2.1.1.2, Reactor Core Safety Limits, to identify a fuel centerline melt safety limit for the AREVA fuel with corresponding adjustments made to account for the burnable absorber fuel rods; and incorporating fuel burnup limits consistent with AREVA M5 clad fuel assemblies into the SONGS licensing basis.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated. The reactor fuel and the analyses associated with the fuel are not accident initiators. The response of the fuel to an accident is analyzed using conservative techniques and the results are compared to the approved acceptance criteria. These evaluation results will show that the fuel response to an accident is within approved acceptance criteria for both cores loaded with the new AREVA CE [Combustion Engineering]-HTP (High Thermal Performance) fuel and for cores loaded with both AREVA and Westinghouse design fuel. Therefore, the change in fuel design does not affect accident or transient initiation or consequences.

The proposed change to Technical Specification 2.1.1.2 (Reactor Core Safety Limits) does not require any physical change to any plant system, structure, or component. The change to establish the peak fuel centerline temperature is consistent with existing approved analysis methodology.

The proposed change to Technical Specification 4.2.1 (Fuel Assemblies) includes M5 [TM] cladding. The change in cladding materials and fuel assembly design such as grids has been evaluated in this submittal and all acceptance criteria are met.

Topical Reports have been reviewed and approved by the NRC for use in determining core operating limits. The core operating limits to be developed using the new methodologies will be established in according with the applicable limitations as documented in the appropriate NRC Safety Evaluation reports. The proposed change to Technical Specification 5.7.1.5 (Core Operating Limits Report (COLR)) enables the use of appropriate methodologies to analyze accidents. The proposed methodologies will ensure that the plant continues to meet applicable design criteria and safety analysis acceptance criteria.

The proposed change to the list of NRC-approved methodologies listed in Technical Specification 5.7.1.5 has no impact on any plant configuration or system performance relied upon to mitigate the consequences of an accident. The proposed change will update the listing of NRC-approved methodologies to allow analysis of both AREVA and Westinghouse fuel designs. Changes to the calculated core operating limits may only be made using NRC-approved methods, must be consistent with all applicable safety analysis limits and are controlled by the 10 CFR 50.59 process. The list of methodologies in Technical Specification 5.7.1.5 does not impact either the initiation of an accident or the mitigation of its consequences.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Use of AREVA CE–HTP fuel in SONGS reactor cores is consistent with the current plant design bases and does not adversely affect any fission product barrier, nor does it alter the safety function of safety systems, structures, or components, or their roles in accident prevention or mitigations. The operational characteristics of AREVA CE–HTP fuel are bounded by the safety analyses. The AREVA CE–HTP fuel design performs within fuel design limits and does not create the possibility of a new or different accident.

The proposed change to the Technical Specification 2.1.1.2 does not require any physical change to any plant system, structure, or component, nor does it require any change in safety analysis methods or results. The existing analyses remain unchanged and do not affect any accident initiators that would create a new accident.

The proposed change to Technical Specification 4.2.1 does not create any new accident initiators. For example, postulated pipe breaks and valve motions are unaffected by the fuel design. Possible impacts such as postulated CEA [control element assembly] motions are unaffected because the interface between the fuel assembly and the CEA has been designed to be unchanged.

The proposed change to the list of NRC-approved methodologies listed in Technical Specification 5.7.1.5 has no impact on any plant configuration or system performance. It updates the list of NRC-approved topical reports used to develop the core operating limits. There is no change to the parameters within which the plant is normally operated. The possibility of a new or different accident is not created.

Therefore, the proposed change does not create the possibility of a new or different kind of accident [from] any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not involve a significant reduction in a margin of safety. The margin of safety as defined in the basis for any technical specification will not be reduced by the proposed change to the computer programs used for physics calculations for nuclear design analyses.

Use of AREVA CE–HTP fuel in SONGS reactor cores is consistent with the current plant design bases and does not adversely affect any fission product barrier, nor does it alter the safety function of safety systems, structures, or components, or their roles in accident prevention or mitigation. The operational characteristics of AREVA CE–HTP fuel in SONGS reactor cores are evaluated by the safety analyses and meet the safety analysis criteria. The AREVA CE–HTP fuel in SONGS reactor cores performs within fuel design limits. The proposed changes do not result in exceeding design basis limits. Therefore, all licensed safety margins are maintained.

The proposed change to Technical Specification 2.1.1.2 does not require any physical change to any plant system, structure, or component, nor does it require any change in safety analysis methods or results. Therefore, by changing the peak fuel centerline temperature adjustment for burnable poisons, the margin as established in the current licensing basis remains unchanged.

The proposed change to Technical Specification 4.2.1 has been evaluated in this submittal and all acceptance criteria are met.

The proposed change to the list of NRC-approved methodologies listed in Technical Specification 5.7.1.5 has no impact on any plant configuration or system performance. Topical Reports have been reviewed and approved by the NRC for use in determining core operating limits. The proposed methodologies will ensure that the plant continues to meet applicable design criteria and safety analysis acceptance criteria.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Douglas K. Porter, Esquire, Southern California Edison Company, 2244 Walnut Grove Avenue, Rosemead, California 91770.

NRC Branch Chief: Michael T. Markley.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of amendment request: August 29, 2011, as supplemented by letter dated November 9, 2011.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI) (security-related). The amendment would permit the Union Electric Company (the licensee) to adopt a new fire protection licensing basis based on National Fire Protection Association (NFPA) Standard 805, ''Performance-Based Standard for Fire Protection for Light Water Reactor Generating Plants (2001 Edition),'' that complies with the requirements of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.48(a) and (c) and the guidance in Revision 1 of Regulatory Guide 1.205, ''Risk Informed Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the transition to NFPA 805 involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Operation of Callaway Plant in accordance with the proposed amendment does not increase the probability or consequences of accidents previously evaluated. Engineering analyses, which may include engineering evaluations, probabilistic safety assessments, and fire modeling calculations, have been performed to demonstrate that the performance-based requirements of NFPA 805 have been satisfied. The Final Safety Analysis Report (FSAR) documents the analyses of design basis accidents (DBA) at Callaway Plant. The proposed amendment does not affect accident initiators, nor does it alter design assumptions, conditions, or configurations of the facility that would increase the probability of accidents previously evaluated. Further, the changes to be made for fire hazard protection and mitigation do not adversely affect the ability of structures, systems, or components (SSCs) to perform their design functions for accident mitigation, nor do they affect the postulated initiators or assumed failure modes for accidents described and evaluated in the FSAR. SSCs required to safely shutdown the reactor and to maintain it in a safe shutdown condition will remain capable of performing their design functions.

The purpose of the proposed amendment is to permit [the licensee] to adopt a new fire protection licensing basis which complies with the requirements of 10 CFR 50.48(a) and (c) and the guidance in Regulatory Guide 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify fire protection requirements that are an acceptable alternative to the 10 CFR 50 Appendix R required fire protection features (69 FR 33536, June 16, 2004). Engineering analyses, which may include engineering evaluations, probabilistic safety assessments, and fire modeling calculations, have been performed to demonstrate that the performance-based requirements of NFPA 805 have been met.

NFPA 805 taken as a whole, provides an acceptable alternative for satisfying General Design Criterion 3 (GDC 3) of Appendix A to 10 CFR 50, meets the underlying intent of the NRC's existing fire protection regulations and guidance, and provides for defense-in-depth. The goals, performance objectives, and performance criteria specified in Chapter 1 of the standard ensure that, if there are any increases in core damage frequency (CDF) or risk, the increase will be small and consistent with the intent of the Commission's Safety Goal Policy.

Based on this, the implementation of the proposed amendment does not increase the probability of any accident previously evaluated. Equipment required to mitigate an accident remains capable of performing the assumed function(s). The proposed amendment will not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. The applicable radiological dose criteria will continue to be met.

Therefore, the consequences of any accident previously evaluated are not increased with the implementation of the proposed amendment.

2. Does the transition to NFPA 805 create the possibility of a new or different kind of accident from any kind of accident previously evaluated?

Response: No.

Operation of Callaway Plant in accordance with the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change does not alter the requirements or functions for systems required during accident conditions. Implementation of the new fire protection licensing basis which complies with the requirements of 10 CFR 50.48(a) and (c) and the guidance Regulatory Guide 1.205 will not result in new or different accidents.

The proposed amendment does not introduce new or different accident initiators, nor does it alter design assumptions, conditions, or configurations of the facility. The proposed amendment does not adversely affect the ability of SSCs to perform their design function. SSCs required to safely shutdown the reactor and maintain it in a safe shutdown condition remain capable of performing their design functions.

The purpose of the proposed amendment is to permit [the licensee] to adopt a new fire protection licensing basis which complies with the requirements of 10 CFR 50.48(a) and (c) and the guidance in Regulatory Guide 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and appropriate performance criteria for licensees to identify fire protection systems and features that are an acceptable alternative to the 10 CFR 50, Appendix R required fire protection features (69 FR 33536, June 16, 2004).

The requirements of NFPA 805 address only fire protection and the impacts of fire on the plant that have previously been evaluated. Based on this, implementation of the proposed amendment would not create the possibility of a new or different kind of accident from any kind of accident previously evaluated. No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures will be introduced as a result of this amendment. There will be no adverse effect or challenges imposed on any safety-related system as a result of this amendment.

Therefore, the possibility of a new or different kind of accident from any kind of accident previously evaluated is not created with the implementation of this amendment.

3. Does the transition to NFPA 805 involve a significant reduction in the margin of safety?

Response: No.

Operation of Callaway Plant in accordance with the proposed amendment does not involve a significant reduction in the margin of safety. The proposed amendment does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed amendment does not adversely affect existing plant safety margins or the reliability of equipment assumed to mitigate accidents in the FSAR. The proposed amendment does not adversely affect the ability of SSCs to perform their design function. SSCs required to safely shut down the reactor and to maintain it in a safe shutdown condition remain capable of performing their design functions.

The purpose of the proposed amendment is to permit [the licensee] to adopt a new fire protection licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Regulatory Guide 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify fire protection systems and features that are an acceptable alternative to the 10 CFR 50 Appendix R required fire protection features (69 FR 33536, June 16, 2004). Engineering analyses, which may include engineering evaluations, probabilistic safety assessments, and fire modeling calculations, have been performed to demonstrate that the performance based requirements of NFPA 805 do not result in a significant reduction in the margin of safety.

The proposed changes are evaluated to ensure that risk and safety margins are kept within acceptable limits. Therefore, the transition to NFPA 805 does not involve a significant reduction in the margin of safety.

The requirements of NFPA 805 are structured to implement the NRC's mission to protect public health and safety, promote the common defense and security, and

protect the environment. NFPA 805 is also consistent with the key principles for evaluating license basis changes, as described in Regulatory Guide 1.174, is consistent with the defense-in-depth philosophy, and maintains sufficient safety margins.

Based on the evaluations noted in items 1, 2 and 3 above [the licensee] has concluded that the proposed amendment presents no significant hazards consideration per the requirements set forth in 10 CFR 50.92(c), and, accordingly a finding of ''no significant hazards consideration'' is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: John O'Neill, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street NW., Washington, DC 20037.

NRC Branch Chief: Michael T. Markley.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Northern States Power Company—Minnesota, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 2nd day of February, 2012.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of FEDERAL REGISTER notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 requestor/petitioner reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information). If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for requestor/petitioner to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2012–2865 Filed 2–13–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0002]

Notice of Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of February 13, 20, 27, March 5, 12, 19, 2012.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of February 13, 2012

There are no meetings scheduled for the week of February 13, 2012.

Week of February 20, 2012—Tentative

Wednesday, February 22, 2012

9 a.m. Briefing on Fort Calhoun (Public Meeting), (Contact: Jeff Clark, 817–860–8147).

This meeting will be webcast live at the Web address—*www.nrc.gov.*

Week of February 27, 2012—Tentative

Tuesday, February 28, 2012

9:30 a.m. Briefing on the Threat Environment Assessment (Closed—Ex. 1).

Week of March 5, 2012—Tentative

There are no meetings scheduled for the week of March 5, 2012.

Week of March 12, 2012—Tentative

There are no meetings scheduled for the week of March 12, 2012.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

Week of March 19, 2012—Tentative

There are no meetings scheduled for the week of March 19, 2012.

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* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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Dated: February 9, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–3527 Filed 2–10–12; 4:15 pm]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collection for OMB Review; Comment Request; Survey of Nonparticipating Single Premium Group Annuity Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (''PBGC'') is requesting that the Office of Management and Budget (''OMB'') extend approval, under the Paperwork Reduction Act, of a collection of information (OMB control number 1212–0030; expires March 31, 2012). This voluntary collection of information is a quarterly survey of insurance company rates for pricing annuity contracts. The American Council of Life Insurers conducts the survey for PBGC. This notice informs the public of PBGC's request and solicits public comment on the collection of information.

DATES: Comments should be submitted by March 15, 2012

ADDRESSES: Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974.

Copies of the request (including the collection of information) may be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel of PBGC at the above address, visiting the Disclosure Division, faxing a request to 202–326–4042, or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.) The Disclosure Division will email, fax, or mail the requested information to you, as you request.

FOR FURTHER INFORMATION CONTACT: Thomas H. Gabriel, Attorney, or Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulations prescribe actuarial valuation methods and assumptions (including interest rate assumptions) to be used in determining the actuarial present value of benefits under single-employer plans that terminate (29 CFR part 4044) and under multiemployer plans that undergo a mass withdrawal of contributing employers (29 CFR part 4281). Each month PBGC publishes the interest rates to be used under those regulations for plans terminating or undergoing mass withdrawal during the next month.

The interest rates are intended to reflect current conditions in the annuity markets. To determine these interest rates, PBGC gathers pricing data from insurance companies that are providing annuity contracts to terminating pension plans through a quarterly ''Survey of Nonparticipating Single Premium Group Annuity Rates.'' The American Council of Life Insurers distributes the survey and provides PBGC with ''blind'' data (*i.e.,* PBGC is unable to match responses with the companies that submitted them). PBGC also uses the information from the survey in determining the interest rates it uses to value benefits payable to participants and beneficiaries in PBGC-trusteed plans for purposes of PBGC's financial statements.

The survey is directed at insurance companies that have volunteered to participate, most or all of which are members of the American Council of Life Insurers. The survey is conducted quarterly and will be sent to approximately 22 insurance companies. Based on experience under the current approval, PBGC estimates that 6 insurance companies will complete and return the survey. PBGC further estimates that the average annual burden of this collection of information is 12 hours and $360.

The collection of information has been approved by OMB under control number 1212–0030 through March 31, 2012. PBGC is requesting that OMB extend its approval for another three years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Issued in Washington, DC, this 6th day of February 2012.

John H. Hanley,

Director, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation.

[FR Doc. 2012–3417 Filed 2–13–12; 8:45 am]

BILLING CODE 7709–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 6c–7; SEC File No. 270–269; OMB Control No. 3235–0276.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission

plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 6c–7 (17 CFR 270.6c–7) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''1940 Act'') provides exemption from certain provisions of Sections 22(e) and 27 of the 1940 Act for registered separate accounts offering variable annuity contracts to certain employees of Texas institutions of higher education participating in the Texas Optional Retirement Program. There are approximately 50 registrants governed by Rule 6c–7. The burden of compliance with Rule 6c–7, in connection with the registrants obtaining from a purchaser, prior to or at the time of purchase, a signed document acknowledging the restrictions on redeemability imposed by Texas law, is estimated to be approximately 3 minutes of professional time per response for each of approximately 2400 purchasers annually (at an estimated $67 per hour),[1] for a total annual burden of 120 hours (at a total annual cost of $8,040).

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules or forms. The Commission does not include in the estimate of average burden hours the time preparing registration statements and sales literature disclosure regarding the restrictions on redeemability imposed by Texas law. The estimate of burden hours for completing the relevant registration statements are reported on the separate PRA submissions for those statements. (See the separate PRA submissions for Form N–3 (17 CFR 274.11b) and Form N–4 (17 CFR 274.11c.)

The Commission requests written comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will 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 collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: February 8, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3335 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

[1] $67/hour figure for a Compliance Clerk is from SIFMA's Office Salaries in the Securities Industry 2010, modified by Commission staff to account for an 1800-hour work year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 11a–2; SEC File No. 270–267; OMB Control No. 3235–0272.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 11a–2 (17 CFR 270.11a–2) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) permits certain registered insurance company separate accounts, subject to certain conditions, to make exchange offers without prior approval by the Commission of the terms of those offers. Rule 11a–2 requires disclosure, in certain registration statements filed pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) of any administrative fee or sales load imposed in connection with an exchange offer.

There are currently 693 registrants governed by Rule 11a–2. The Commission includes the estimated burden of complying with the information collection required by Rule 11a–2 in the total number of burden hours estimated for completing the relevant registration statements and reports the burden of Rule 11a–2 in the separate PRA submissions for those registration statements (see the separate PRA submissions for Form N–3 (3235–0316), Form N–4 (3235–0318) and Form N–6 (3235–0503). The Commission is requesting a burden of one hour for Rule 11a–2 for administrative purposes.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules or forms. With regard to Rule 11a–2, the Commission includes the estimate of burden hours in the total number of burden hours estimated for completing the relevant registration statements and reported on the separate PRA submissions for those statements (see the separate PRA submissions for Form N–3, Form N–4 and Form N–6). The information collection requirements imposed by Rule 11a–2 are mandatory. Responses to the collection of information will not be kept confidential.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

February 8, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3336 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor

Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12d1–1; SEC File No. 270–526; OMB Control No. 3235–0584.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

An investment company (''fund'') is generally limited in the amount of securities the fund (''acquiring fund'') can acquire from another fund (''acquired fund''). Section 12(d) of the Investment Company Act of 1940 (the ''Investment Company Act'' or ''Act'') [1] provides that a registered fund (and companies it controls) cannot:

- Acquire more than three percent of another fund's securities;
- Invest more than five percent of its own assets in another fund; or
- Invest more than ten percent of its own assets in other funds in the aggregate.[2]

In addition, a registered open-end fund, its principal underwriter, and any registered broker or dealer cannot sell that fund's shares to another fund if, as a result:

- The acquiring fund (and any companies it controls) owns more than three percent of the acquired fund's stock; or
- All acquiring funds (and companies they control) in the aggregate own more than ten percent of the acquired fund's stock.[3]

Rule 12d1–1 under the Act provides an exemption from these limitations for ''cash sweep'' arrangements in which a fund invests all or a portion of its available cash in a money market fund rather than directly in short-term instruments.[4] An acquiring fund relying on the exemption may not pay a sales load, distribution fee, or service fee on acquired fund shares, or if it does, the acquiring fund's investment adviser must waive a sufficient amount of its advisory fee to offset the cost of the loads or distribution fees.[5] The acquired fund may be a fund in the same fund complex or in a different fund complex. In addition to providing an exemption from section 12(d)(1) of the Act, the rule provides exemptions from section 17(a) of the Act and rule 17d–1 thereunder, which restrict a fund's ability to enter into transactions and joint arrangements with affiliated persons.[6] These provisions would otherwise prohibit an acquiring fund from investing in a money market fund in the same fund complex,[7] and prohibit a fund that acquires five percent or more of the securities of a money market fund in another fund complex from making any additional investments in the money market fund.[8]

The rule also permits a registered fund to rely on the exemption to invest in an unregistered money market fund that limits its investments to those in which a registered money market fund may invest under rule 2a–7 under the Act, and undertakes to comply with all the other provisions of rule 2a–7.[9] In addition, the acquiring fund must reasonably believe that the unregistered money market fund (i) operates in compliance with rule 2a–7, (ii) complies with sections 17(a), (d), (e), 18, and 22(e) of the Act [10] as if it were a registered open-end fund, (iii) has adopted procedures designed to ensure that it complies with these statutory provisions, (iv) maintains the records required by rules 31a–1(b)(1), 31a–1(b)(2)(ii), 31a–1(b)(2)(iv), and 31a–1(b)(9); [11] and (v) preserves permanently, the first two years in an easily accessible place, all books and records required to be made under these rules.

Rule 2a–7 contains certain collection of information requirements. An unregistered money market fund that complies with rule 2a–7 would be subject to these collection of information requirements. In addition, the recordkeeping requirements under rule 31a–1 with which the acquiring fund reasonably believes the unregistered money market fund complies are collections of information for the unregistered money market fund. The adoption of procedures by unregistered money market funds to ensure that they comply with sections 17(a), (d), (e), 18, and 22(e) of the Act also constitute collections of information. By allowing funds to invest in registered and unregistered money market funds, rule 12d1–1 is intended to provide funds greater options for cash management. In order for a registered fund to rely on the exemption to invest in an unregistered money market fund, the unregistered money market fund must comply with certain collection of information requirements for registered money market funds. These requirements are intended to ensure that the unregistered money market fund has established procedures for collecting the information necessary to make adequate credit reviews of securities in its portfolio, as well as other recordkeeping requirements that will assist the acquiring fund in overseeing the unregistered money market fund (and Commission staff in its examination of the unregistered money market fund's adviser).

The number of unregistered money market funds that would be affected by the proposal is an estimate based on the number of Commission exemptive applications that the Commission received in the past that sought relief for registered funds to purchase shares in an unregistered money market fund in excess of the section 12(d)(1) limits. The hour burden estimates for the condition that an unregistered money market fund comply with rule 2a–7 are based on the burden hours included in the Commission's 2009 and 2010 PRA submissions regarding rule 2a–7 (''rule 2a–7 submissions'').[12] The estimated average burden hours in this collection of information are made solely for

[1] *See* 15 U.S.C. 80a.

[2] *See* 15 U.S.C. 80a–12(d)(1)(A). If an acquiring fund is not registered, these limitations apply only with respect to the acquiring fund's acquisition of registered funds.

[3] *See* 15 U.S.C. 80a–12(d)(1)(B).

[4] *See* 17 CFR 270.12d1–1.

[5] *See* rule 12d1–1(b)(1).

[6] *See* 15 U.S.C. 80a–17(a), 15 U.S.C. 80a–17(d); 17 CFR 270.17d–1.

[7] An affiliated person of a fund includes any person directly or indirectly controlling, controlled by, or under common control with such other person. *See* 15 U.S.C. 80a–2(a)(3) (definition of ''affiliated person''). Most funds today are organized by an investment adviser that advises or provides administrative services to other funds in the same complex. Funds in a fund complex are generally under common control of an investment adviser or other person exercising a controlling influence over the management or policies of the funds. *See* 15 U.S.C. 80a–2(a)(9) (definition of ''control''). Not all advisers control funds they advise. The determination of whether a fund is under the control of its adviser, officers, or directors depends on all the relevant facts and circumstances. *See* Investment Company Mergers, Investment Company Act Release No. 25259 (Nov. 8, 2001) [66 FR 57602 (Nov. 15, 2001)], at n. 11. To the extent that an acquiring fund in a fund complex is under common control with a money market fund in the same complex, the funds would rely on the rule's exemptions from section 17(a) and rule 17d–1.

[8] *See* 15 U.S.C. 80a–2(a)(3)(A), (B).

[9] *See* 17 CFR 270.2a–7.

[10] *See* 15 U.S.C. 80a–17(a), 15 U.S.C. 80a–17(d), 15 U.S.C. 80a–17(e), 15 U.S.C. 80a–18, 15 U.S.C. 80a–22(e).

[11] *See* 17 CFR 270.31a–1(b)(1), 17 CFR 270.31a–1(b)(2)(ii), 17 CFR 270.31a–1(b)(2)(iv), 17 CFR 270.31a–1(b)(9).

[12] Securities and Exchange Commission, Request for OMB Approval of Extension for Approved Collection for Rule 2a–7 under the Investment Company Act of 1940 (OMB Control No. 3235–0268) (approved October 13, 2009); Securities and Exchange Commission, Request for OMB Approval of Revision for Approved Collection for Rule 2a–7 under the Investment Company Act of 1940 (OMB Control No. 3235–0268) (approved April 18, 2010).

purposes of the Paperwork Reduction Act and are not derived from a quantitative, comprehensive or even representative survey or study of the burdens associated with Commission rules and forms.

In the rule 2a–7 submissions, Commission staff made the following estimates with respect to aggregate annual hour and cost burdens for collections of information for each existing registered money market fund:

Documentation of credit risk analyses, and determinations regarding adjustable rate securities, asset backed securities, and securities subject to a demand feature or guarantee:

81 responses
410 hours of professional time
Cost: $79,130

Public Web site posting of monthly portfolio information:

12 responses
4.4 burden hours of professional time
Cost: $12,584

The staff estimates that registered funds currently invest in 30 unregistered money market funds in excess of the statutory limits under rule 12d1–1.[13] Each of these unregistered money market funds engages in the collections of information described above. Accordingly, the staff estimates that unregistered money market funds complying with the collections of information described above engage in a total of 2790 annual responses under rule 12d1–1,[14] the aggregate annual burden hours associated with these responses is 12,432,[15] and the aggregate annual cost to funds is $2.75 million.[16]

In the rule 2a–7 submissions, Commission staff further estimated the aggregate annual hour and cost burdens for collections of information for fund complexes with registered money market funds as follows:

Review and revise procedures concerning stress testing:
1 response
7 burden hours of professional and director time
Cost: $5650
Draft, compile, and provide stress testing reports to board of directors:
10 responses
27 burden hours of director, professional, and support staff time
Cost: $69,990
Maintain records of stress testing reports to board of directors:
10 responses
0.2 burden hours of support staff time
Cost: $103
Maintain records of creditworthiness evaluations of repurchase counterparties:
1 response
2 burden hours of support staff time
Cost: $124
Reporting of rule 17a–9 transactions:[17]
1 response
1 burden hour of legal time
Cost: $305

In the rule 2a–7 submissions, Commission staff estimated that there are 163 fund complexes with 719 registered money market funds subject to rule 2a–7. The staff estimates that there are 30 fund complexes with unregistered money market funds invested in by mutual funds in excess of the statutory limits under rule 12d1–1.[18] Each of these fund complexes engages in the collections of information described above. Accordingly, the staff estimates that these fund complexes complying with the collections of information described above engage in a total of 690 annual responses under rule 12d1–1,[19] the aggregate annual burden hours associated with these responses is 1116,[20] and the aggregate annual cost to funds is $2,285,160.[21]

In the rule 2a–7 submissions, the staff further estimated the aggregate annual burdens for registered money market funds that amend their board procedures as follows:

Amendment of procedures designed to stabilize the fund's net asset value:
1 response
2.4 burden hours of director time
Cost: $2340

Consistent with the estimate in the rule 2a–7 submissions, Commission staff estimates that approximately ¼, or 8, unregistered money market funds review and amend their board procedures each year. Accordingly, the staff estimates that unregistered money market funds complying with this collection of information requirement engage in a total of 8 annual responses under rule 12d1–1,[22] the aggregate annual burden hours associated with these responses is 19,[23] and the aggregate annual cost to funds to comply with this collection of information is $18,720.[24]

In the rule 2a–7 submissions, Commission staff further estimated the aggregate annual burdens for registered money market funds that experience an event of default or insolvency as follows:

Written record of board determinations and actions related to failure of a security to meet certain eligibility standards or an event of default of default or insolvency:

2 responses
1 burden hour of legal time
Cost: $270

Notice to Commission of an event of default or insolvency:

[13] This estimate is based on the number of applications seeking exemptions to invest in unregistered money market funds filed with the Commission in 2005 (40), adjusted by the percentage change in registered money market funds from 2005 to November 2011 (870 to 641, according to the Investment Company Institute). This estimate may be understated because applicants generally did not identify the name or number of unregistered money market funds in which registered funds intended to invest, and each application also applies to unregistered money market funds to be organized in the future. Because the Commission adopted rule 12d1–1 in June 2006, 2005 is the last full year in which the Commission received applications seeking an exemption to invest in unregistered money market funds.

[14] The estimate is based on the following calculations: (30 funds × 81 responses for documentation of credit analyses and other determinations) = 2340 responses. (30 funds × 12 responses for public Web site posting) = 360 responses. 2340 responses + 360 responses = 2790 responses.

[15] This estimate is based on the following calculations: (30 funds × 410 hours for documentation of credit analyses and other determinations) = 12,300 hours. (30 funds × 4.4 hours for public Web site posting) = 132 hours. 12,300 hours + 132 hours = 12,432 hours.

[16] This estimate is based on the following calculations: (30 funds × $79,130) = $2,373,900. (30 funds × $12,584) = $377,520. $2,373,900 + $377,520 = $2,751,420.

[17] *See* 17 CFR 270.17a–9.

[18] Given the fact that exemptive applications are generally filed on behalf of fund complexes rather than individual funds, the staff estimates that each of the exemptive applications upon which its estimates of the number of unregistered money market funds is based represents a separate fund complex. *See supra* note 13.

[19] The estimate is based on the following calculations: (30 fund complexes × 1 response for revision of procedures concerning stress testing) = 30 responses. (30 fund complexes × 10 responses to provide stress testing reports) = 300 responses. (30 fund complexes × 10 responses to maintain stress testing reports) = 300 responses. (30 fund complexes × 1 response to maintain records of creditworthiness) = 30 responses. (30 fund complexes × 1 response for reporting of rule 17a–9 transactions) = 30 responses. 30 responses + 300 responses + 300 responses + 30 responses + 30 responses = 690 responses.

[20] This estimate is based on the following calculations: (30 fund complexes × 7 hours for revision of procedures concerning stress testing) = 210 hours. (30 fund complexes × 27 hours to provide stress testing reports) = 810 hours. (30 fund complexes × 0.2 hours to maintain stress testing reports) = 6 hours. (30 fund complexes × 2 hours to maintain records of creditworthiness) = 60 hours. (30 fund complexes × 1 hour for reporting of rule 17a–9 transactions) = 30 hours. 210 hours + 810 hours + 6 hours + 60 hours + 30 hours = 1116 hours.

[21] This estimate is based on the following calculations: (30 fund complexes × $5650 for revision of procedures concerning stress testing) = $169,500. (30 fund complexes × $69,990 to provide stress testing reports) = $2,099,700. (30 fund complexes × $103 to maintain stress testing reports) = $3090. (30 fund complexes × $124 to maintain records of creditworthiness) = $3720. (30 fund complexes × $305 for reporting of rule 17a–9 transactions) = $9150. $169,500 + $2,099,700 + $3090 + $3720 + $9150 = $2,285,160.

[22] The estimate is based on the following calculation: (8 funds × 1 response for board review and amendment of procedures) = 8 responses.

[23] This estimate is based on the following calculation: (8 funds × 2.4 hours for review and amendment of procedures) = 19.2 hours.

[24] This estimate is based on the following calculation: (8 funds × $2340) = $18,720.

1 response
1.5 burden hours of legal time
Cost: $405

Consistent with the estimate in the rule 2a–7 submissions, Commission staff estimates that approximately 2 percent, or 1, unregistered money market fund experiences an event of default or insolvency each year. Accordingly, the staff estimates that one unregistered money market fund will comply with these collection of information requirements and engage in 3 annual responses under rule 12d1–1,[25] the aggregate annual burden hours associated with these responses is 2.5,[26] and the aggregate annual cost to funds is $675.[27]

In the rule 2a–7 submissions, Commission staff further estimated the aggregate annual burdens for newly registered money market funds as follows:

Establishment of written procedures designed to stabilize the fund's net asset value and guidelines for delegating board authority for determinations under the rule:
1 response
15.5 hours of director, legal, and support staff time
Cost: $5610

Adopt procedures concerning stress testing:
1 response per fund complex
8.33 burden hours of professional and director time per fund complex
Cost: $6017 per fund complex

Commission staff estimates that the proportion of unregistered money market funds that intend to newly undertake the collection of information burdens of rule 2a–7 will be similar to the proportion of money market funds that are newly registered. Because of the recent decrease in registered money market funds and the lack of newly registered money market funds, the staff believes that there will be no unregistered money market funds that will undertake the collections of information required for newly registered money market funds.[28] As a result, the staff estimates that there will be no burdens associated with these collection of information requirements.

Accordingly, the estimated total number of annual responses under rule 12d1–1 for the collections of information described in the rule 2a–7 submissions is 3491, the aggregate annual burden hours associated with these responses is 13,570, and the aggregate cost to funds is $5.1 million.[29]

Rules 31a–1(b)(1), 31a–1(b)(2)(ii), 31a–1(b)(2)(iv), and 31a–1(b)(9) require registered funds to keep certain records, which include journals and general and auxiliary ledgers, including ledgers for each portfolio security and each shareholder of record of the fund. Most of the records required to be maintained by the rule are the type that generally would be maintained as a matter of good business practice and to prepare the unregistered money market fund's financial statements. Accordingly, Commission staff estimates that the requirements under rules 31a–1(b)(1), 31a–1(b)(2)(ii), 31a–1(b)(2)(iv), and 31a–1(b)(9) would not impose any additional burden because the costs of maintaining these records would be incurred by unregistered money market funds in any case to keep books and records that are necessary to prepare financial statements for shareholders, to prepare the fund's annual income tax returns, and as a normal business custom.

Rule 12d1–1 also requires unregistered money market funds in which registered funds invest to adopt procedures designed to ensure that the unregistered money market funds comply with sections 17(a), (d), (e), and 22(e) of the Act. This is a one-time collection of information requirement that applies to unregistered money market funds that intend to comply with the requirements of rule 12d1–1. As discussed above, Commission staff estimates that because of the recent decrease in registered money market funds and the lack of newly registered money market funds there will be no unregistered money market funds that will undertake the collections of information required for newly registered money market funds.[30] For similar reasons, the Commission staff estimates that there will be no registered money market funds that will adopt procedures designed to ensure that the unregistered money market funds comply with sections 17(a), (d), (e), and 22(e) of the Act. The staff concludes that there will be no burdens associated with these collection of information requirements.

Commission staff further estimates that unregistered money market funds will incur costs to preserve records, as required under rule 2a–7. These costs will vary significantly for individual funds, depending on the amount of assets under fund management and whether the fund preserves its records in a storage facility in hard copy or has developed and maintains a computer system to create and preserve compliance records. In the rule 2a–7 submissions, Commission staff estimated that the amount an individual money market fund may spend ranges from $100 per year to $300,000. We have no reason to believe the range is different for unregistered money market funds. The Commission does not have specific information on the amount of assets managed by unregistered money market funds or the proportion of those assets held in small, medium-sized, or large unregistered money market funds. Accordingly, Commission staff estimates that unregistered money market funds in which registered funds invest in reliance on rule 12d1–1 are similar to registered money market funds in terms of amount and distribution of assets under management.[31] Based on a cost of $0.0051295 per dollar of assets under management for small funds, $0.0005041 per dollar of assets under management for medium-sized funds and $0.0000009 per dollar of assets under management for large funds, the staff estimates compliance with rule 2–7 for these unregistered money market funds totals $3.9 million annually.[32]

Consistent with estimates made in the rule 2a–7 submissions, Commission staff estimates that unregistered money market funds also incur capital costs to create computer programs for maintaining and preserving compliance records for rule 2a–7 of $0.0000132 per dollar of assets under management. Based on the assets under management figures described above, staff estimates

[25] The estimate is based on the following calculations: (1 fund × 2 responses) + (1 fund × 1 response) = 3 responses.

[26] This estimate is based on the following calculations: (1 fund × 1 hour) + (1 fund × 1.5 hours) = 2.5 hours.

[27] This estimate is based on the following calculations: (1 fund × $270) + (1 fund × $405) = $675.

[28] *See supra* note 13.

[29] These estimates are based upon the following calculations: 2790 + 690 + 8+ 3 = 3491 annual responses; 12,432 + 1116 + 19 + 2.5 = 13,569.5 burden hours; and $2,751,420 + $2,285,160 + $18,720 + 675 = $5,055,975.

[30] *See supra* text accompanying note 28.

[31] In the rule 2a–7 submissions, the staff estimated that 757 registered money market funds have $3.8 trillion in assets under management, or $5 billion in assets under management per registered money market fund. The staff further estimated that 0.2% of those assets are held in small money market funds (funds with less than $50 million in assets under management), 3% are held in medium-sized money market funds (funds with $50 million to $1 billion in assets under management), and the remaining assets are held in large money market funds (funds with more than $1 billion in assets under management).

[32] This estimate is based on the following calculations: 30 unregistered money market funds × $5 billion = $150 billion. ($150 billion × 0.2% × $0.0051295) = $1.5 million for small funds. ($150 billion × 3% x 0.0005041) = $2.3 million for medium-sized funds. ($150 billion × 96.8% × 0.0000009) = $0.1 million for large funds. $1.5 million + $2.3 million + $0.1 million = $3.9 million. The estimate of cost per dollar of assets is the same as that used in the rule 2a–7 submissions. *See supra* note 12.

annual capital costs for all unregistered money market funds of $1.98 million.[33]

Commission staff further estimates that, even absent the requirements of rule 2a–7, money market funds would spend at least half of the amounts described above for record preservation ($2.0 million) and for capital costs ($0.99 million). Commission staff concludes that the aggregate annual costs of compliance with the rule are $2.0 million for record preservation and $0.99 million for capital costs.

The collections of information required for unregistered money market funds by rule 12d1–1 are necessary in order for acquiring funds to be able to obtain the benefits described above. Notices to the Commission will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will 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 collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

February 8, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3340 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

[33] This estimate is based on the following calculation: $150 billion × 0.0000132 = $1.98 million.

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form 13F, SEC File No. 270–22, OMB Control No. 3235–0006.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Section 13(f) [1] of the Securities Exchange Act of 1934 [2] (the ''Exchange Act'') empowers the Commission to: (1) Adopt rules that create a reporting and disclosure system to collect specific information; and (2) disseminate such information to the public. Rule 13f–1 [3] under the Exchange Act requires institutional investment managers that exercise investment discretion over accounts that have in the aggregate a fair market value of at least $100,000,000 of certain U.S. exchange-traded equity securities, as set forth in rule 13f–1(c), to file quarterly reports with the Commission on Form 13F.[4]

The information collection requirements apply to institutional investment managers that meet the $100 million reporting threshold. Section 13(f)(6) of the Exchange Act defines an ''institutional investment manager'' as any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person. Rule 13f–1(b) under the Exchange Act defines ''investment discretion'' for purposes of Form 13F reporting.

The reporting system required by Section 13(f) of the Exchange Act is intended, among other things, to create in the Commission a central repository of historical and current data about the investment activities of institutional investment managers, and to improve the body of factual data available to regulators and the public.

The Commission staff estimates that 4,286 respondents make approximately 17,144 responses under the rule each year. The staff estimates that on average, Form 13F filers spend 98.8 hours/year to prepare and submit the report. In addition, the staff estimates that 171 respondents file approximately 684 amendments each year. The staff estimates that on average, Form 13F filers spend 4 hours/year to prepare and submit amendments to Form 13F. The total annual burden of the rule's requirements for all respondents therefore is estimated to be 424,141 hours ((4,286 filers × 98.8 hours) + (171 filers × 4 hours)).

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: February 8, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3339 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78m(f).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.13f–1.

[4] 17 CFR 249.325.

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 35d–1; SEC File No. 270–491; OMB Control No. 3235–0548.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 35d–1 (17 CFR 270.35d–1) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) defines as ''materially deceptive and misleading'' for purposes of Section 35(d), among other things, a name suggesting that a registered investment company or series thereof (a ''fund'') focuses its investments in a particular type of investment or investments, in investments in a particular industry or group of industries, or in investments in a particular country or geographic region, unless, among other things, the fund adopts a certain investment policy. Rule 35d–1 further requires either that the investment policy is fundamental or that the fund has adopted a policy to provide its shareholders with at least 60 days prior notice of any change in the investment policy (''notice to shareholders''). The rule's notice to shareholders provision is intended to ensure that when shareholders purchase shares in a fund based, at least in part, on its name, and with the expectation that it will follow the investment policy suggested by that name, they will have sufficient time to decide whether to redeem their shares in the event that the fund decides to pursue a different investment policy.

The Commission estimates that there are approximately 8,800 open-end and closed-end funds that have names that are covered by the rule. The Commission estimates that of these 8,800 funds, approximately 29 will provide prior notice to shareholders pursuant to a policy adopted in accordance with this rule per year. The Commission estimates that the annual burden associated with the notice to shareholders requirement of the rule is 20 hours per response, for an annual total of 580 hours per year.

Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms. The collection of information under rule 35d–1 is mandatory. The information provided under rule 35d–1 will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will 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 collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: February 8, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3338 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17g–1; SEC File No. 270–208; OMB Control No. 3235–0213.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17g–1 (17 CFR 270.17g–1) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a–17(g)) governs the fidelity bonding of officers and employees of registered management investment companies (''funds'') and their advisers. Rule 17g–1 requires, in part, the following:

Independent Directors' Approval

The form and amount of the fidelity bond must be approved by a majority of the fund's independent directors at least once annually, and the amount of any premium paid by the fund for any ''joint insured bond,'' covering multiple funds or certain affiliates, must be approved by a majority of the fund's independent directors.

Terms and Provisions of the Bond

The amount of the bond may not be less than the minimum amounts of coverage set forth in a schedule based on the fund's gross assets; the bond must provide that it shall not be cancelled, terminated, or modified except upon 60-days written notice to the affected party and to the Commission; in the case of a joint insured bond, 60-days written notice must also be given to each fund covered by the bond; a joint insured bond must provide that the fidelity insurance company will provide all funds covered by the bond with a copy of the agreement, a copy of any claim on the bond, and notification of the terms of the settlement of any claim prior to execution of that settlement; and a fund that is insured by a joint bond must enter into an agreement with all other parties insured by the joint bond regarding recovery under the bond.

Filings With the Commission

Upon the execution of a fidelity bond or any amendment thereto, a fund must file with the Commission within 10 days a copy of the executed bond or any amendment to the bond, the independent directors' resolution approving the bond, and a statement as to the period for which premiums have been paid on the bond. In the case of a joint insured bond, a fund must also file (i) a statement showing the amount the fund would have been required to maintain under the rule if it were insured under a single insured bond and (ii) the agreement between the fund and all other insured parties regarding recovery under the bond. A fund must also notify the Commission in writing within five days of any claim or settlement on a claim under the fidelity bond.

Notices to Directors

A fund must notify by registered mail each member of its board of directors of (i) any cancellation, termination, or modification of the fidelity bond at least 45 days prior to the effective date, and (ii) the filing or settlement of any claim under the fidelity bond when notification is filed with the Commission.

Rule 17g–1's independent directors' annual review requirements, fidelity bond content requirements, joint bond agreement requirement and the required notices to directors seek to ensure the safety of fund assets against losses due to the conduct of persons who may obtain access to those assets. These requirements also seek to facilitate oversight of a fund's fidelity bond. The rule's required filings with the Commission are designed to assist the Commission in monitoring funds' compliance with the fidelity bond requirements.

Based on conversations with representatives in the fund industry, the Commission staff estimates that for each of the estimated 3479 active funds,[1] the average annual paperwork burden associated with rule 17g–1's requirements is two hours, one hour each for a compliance attorney and the board of directors as a whole. The time spent by compliance attorney includes time spent filing reports with the Commission for any fidelity losses (if any) as well as paperwork associated with any notices to directors, and managing any updates to the bond and the joint agreement (if one exists). The time spent by the board of directors as a whole includes any time spent initially establishing the bond, as well as time spent on annual updates and approvals. The Commission staff therefore estimates the total ongoing paperwork burden hours per year for all funds required by rule 17g–1 to be 6958 hours (3479 funds × 2 hours = 6958 hours).

These estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of Commission rules. The collection of information required by rule 17g–1 is mandatory and will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are requested on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

February 8, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3337 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

[1] Based on statistics compiled by Commission staff, we estimate that there are approximately 3479 funds that must comply with the collections of information under rule 17g–1 and have made a filing within the last 12 months.

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting Notice

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, February 16, 2012 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, February 16, 2012 will be:

Formal order of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: February 9, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3478 Filed 2–10–12; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66348; File No. SR–CBOE–2011–122]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Related to Trading of FLEX Options

February 7, 2012.

I. Introduction

On December 12, 2011, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') 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 amend rules pertaining to the electronic trading of Flexible Exchange Options (''FLEX Options'') and to eliminate certain European-Capped style settlement and currency provisions with the FLEX rules that pertain to both electronic and open outcry trading. The proposed rule change was published for comment in the **Federal Register** on December 29, 2011.[3] On February 7, 2012, the Exchange filed an Amendment No. 1 to the proposed rule change.[4] The Commission received one comment letter regarding the proposal.[5] This order approves the proposed rule change, as modified by Amendment No. 1.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 66035 (December 22, 2011), 76 FR 82017 (''Notice'').

[4] Amendment No. 1 amended the proposed rule change to provide an implementation plan of the proposed rule changes. The Exchange intends to begin implementation by no later than March 30, 2012, with the specific implementation schedule to be announced via Regulatory Circular. Since Amendment No. 1 does not alter the substance of the proposal, it is not subject to notice and comment.

[5] *See* letter from Todd Weingart, Spot On Brokerage Services, Division of Trading Block, William O'Keefe, Spot On Brokerage Services, Division of Trading Block, and Steve Stepanek, The SJS Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated January 20, 2012.

II. Description of the Proposal

The Exchange is in the process of enhancing the FLEX Hybrid Trading System platform (''FLEX System'') to further integrate it with the Exchange's existing technology platform for non-FLEX trading. Accordingly, the Exchange proposes to make certain modifications to the existing electronic trading processes utilized on the FLEX System platform. The Exchange does not propose any changes to the open outcry trading processes for FLEX Options, except for proposed changes pertaining to foreign currencies as described below.

A. Opening Trading in Existing Series

The Exchange proposes to revise the procedure for opening FLEX Option series with existing open interest. Currently there are no trading rotations conducted at the opening of trading.[6] Instead, an initial FLEX Request for Quote (''RFQ'') process is required to open a particular series for trading each day. Once an RFQ is completed, the series is established in the FLEX System for the day and FLEX Orders [7] may be entered directly into the FLEX electronic book throughout the day.[8]

Under the proposal, FLEX Option series with existing open interest will be automatically opened by the Exchange at a randomly selected time within a number of seconds after 8:30 a.m. (Central Time), at which point in time FLEX Orders may be entered directly into the electronic book (if available) and/or FLEX RFQ auctions may be initiated pursuant to Rule 24B.5. New FLEX Option series will continue to be subject to the existing requirement that there be an initial RFQ to initiate trading in the FLEX series on a given trading day.

B. Trade Conditions

Under Rule 24B.1, a ''Trade Condition'' means a contingency that has been placed on an RFQ, RFQ Order [9] or FLEX Order. There are currently six Trade Conditions available in the FLEX System.[10] The Exchange proposes to eliminate the Fill-or-Kill, Minimum Fill, Lots Of, and Intent to Cross Trade Conditions, as their functions will not be supported under the FLEX System enhancements. In addition, the Exchange represents that these Trade Conditions have generally not been actively used by FLEX Traders. The Exchange also proposes to adopt a new Immediate-or-Cancel Trade Condition. ''Immediate-or-Cancel'' will be defined as a condition to execute an RFQ Order or FLEX Order in its entirety or in part as soon as it is represented or cancel it. Thus, under the proposal, there will only be three Trade Conditions: Immediate-or-Cancel, All-or-None, and Hedge.

C. Foreign Currency Provisions

The Exchange also proposes to eliminate the provisions in the FLEX Rules that permit (i) FLEX Options to be designated with a European-Capped style exercise and (ii) FLEX Index Options to be designated for settlement in foreign currencies. In addition, related index multiplier provisions for foreign currencies will also be eliminated. The changes will apply to all FLEX trading on the Exchange, whether electronic or open outcry. According to the Exchange, these European-Capped style and foreign currency provisions have generally not been actively utilized, and the Exchange no longer plans to support foreign currency settlements in the enhanced FLEX System.

D. Electronic Allocation Algorithms

Further, the Exchange proposes to modify and simplify the allocation algorithms applicable to the FLEX electronic book and to the FLEX electronic RFQ process. Generally, the algorithms will be based on price-time priority, subject to public customer and non-Trading Permit Holder broker-dealer (''non-TPH broker-dealer'') priority and, if applicable, any applicable entitlement priority. The specific allocation algorithms for the FLEX electronic book and the FLEX electronic RFQ process are described below.

1. FLEX Electronic Book

Currently, for the FLEX electronic book, all FLEX Orders are ranked and matched based on price-time priority, unless a FLEX Appointed Market-Maker is quoting at the best bid (offer) and a FLEX Appointed Market-Maker participation entitlement has been established.[11] If a FLEX Appointed Market-Maker participation entitlement has been established, priority among multiple bids (offers) at the same price is as follows: (i) All FLEX Orders for the account of a public customer ranked ahead of the FLEX Appointed Market-Maker, based on time priority; (ii) any FLEX Orders that are subject to the FLEX Appointed Market-Maker participation entitlement, based on a participation entitlement formula specified in Rule 24B.5(d)(2)(ii); then (iii) all other FLEX Orders, based on time priority.

As proposed, priority for the FLEX electronic book with multiple bids (offers) at the same price would be: (i) Public customer and non-TPH broker-dealers will participate in the execution based on time priority; (ii) any FLEX Orders that are subject to the FLEX Appointed Market-Maker participation entitlement, based on a participation entitlement formula specified in Rule 24B.5(d)(2)(ii); then (iii) all other FLEX Orders will participate in the execution, based on time priority.

2. FLEX Electronic RFQs

Pursuant to the current electronic RFQ process, executions of RFQ Orders occur at a single price that will leave bids and offers which cannot trade with each other (referred to as the ''BBO clearing price''). In determining the priority of bids and offers, the FLEX System gives priority to FLEX Quotes [12] and FLEX Orders whose price is better than the BBO clearing price, then to FLEX Quotes and FLEX Orders at the BBO clearing price. Priority among multiple FLEX Quotes and FLEX Orders priced at the BBO clearing price is generally as follows: (i) Any FLEX Quotes subject to a FLEX Appointed Market-Maker participation entitlement; (ii) FLEX Orders resting in the electronic book, based on the current book priority algorithm; (iii) FLEX Quotes for the account of public customers and non-TPH broker-dealers, based on time priority; and then (iv) all other FLEX Quotes, based on time priority.

The Exchange proposes to eliminate the concept of a ''BBO clearing price'' except in the limited scenario where the RFQ Market is locked or crossed. Thus, an incoming FLEX electronic RFQ Order would be eligible to trade with FLEX Quotes and FLEX Orders at the best price(s) (*i.e.,* an incoming RFQ Order could trade at multiple price points). In general, priority among multiple FLEX Quotes and FLEX Orders at the same price would be: (i) FLEX Quotes and FLEX Orders for the account of public customers and non-TPH broker-dealers, based on time priority; (ii) any FLEX Quotes and FLEX Orders subject to a

[6] *See* Rule 24B.3.

[7] *See* Rule 24B.1(j).

[8] Resting FLEX Orders may only be entered in the electronic book as ''day orders'' and are cancelled at the close of each trade day if unexecuted. Therefore, there would be no orders resting in the book from the prior day.

[9] *See* Rule 24B.1(t).

[10] *See* Rule 24B.1(y)(1)–(6).

[11] The Exchange may establish from time to time a participation entitlement formula that is applicable to FLEX Appointed Market Makers on a class-by-class basis with respect to open outcry RFQs, electronic RFQs and/or electronic book transactions. *See* Rule 24B.5(d)(2)(ii).

[12] *See* Rule 24B.1(k).

FLEX Appointed Market-Maker participation entitlement; and then (iii) all other FLEX Quotes and FLEX Orders, based on time priority.

a. Lock/Crossed Markets

Currently, in the event the RFQ Market [13] is locked or crossed (*e.g.,* $1.25–$1.20), priority among multiple FLEX Quotes and FLEX Orders that are priced at the BBO clearing price and are on the same side of the market as the RFQ Order is as follows: (i) FLEX Orders resting in the electronic book, based on the current book priority algorithm; (ii) if applicable, an RFQ Order for the account of a public customer or non-TPH broker-dealer, then any FLEX Quotes subject to a FLEX Appointed Market-Maker participation entitlement; (iii) FLEX Quotes for the account of public customers and non-TPH broker-dealers, based on time priority; (iv) if applicable, an RFQ Order for the account of a Trading Permit Holder, then any FLEX Quotes that are subject to a FLEX Appointed Market-Maker participation entitlement; and then (v) all other FLEX Quotes, based on time priority.

As noted above, the Exchange proposes to eliminate the concept of a ''BBO clearing price'' except in the limited scenario where the RFQ Market is locked or crossed. Under the proposal, in the event the RFQ Market is locked or crossed, FLEX Quotes and FLEX Orders would be eligible to trade at a single BBO clearing price pursuant to the existing BBO clearing price process. The priority among multiple FLEX Quotes and FLEX Orders that are priced at the same price and are on the same side of the market as the RFQ Order will be: (i) FLEX Quotes and FLEX Orders for the account of public customers and non-TPH broker-dealers, based on time priority; (ii) an RFQ Order, then any FLEX Quotes and FLEX Orders that are subject to a FLEX Appointed Market-Maker participation entitlement; and then (iii) all other FLEX Quotes and FLEX Orders, based on time priority.

b. Intent to Cross Trade Condition

Currently, in the event the Submitting Trading Permit Holder has indicated an Intention to Cross in its RFQ request, the Submitting Trading Permit Holder may obtain a crossing participation entitlement if certain conditions are met. The incoming RFQ Order will then be eligible to trade with the FLEX Quotes and FLEX Orders at the BBO clearing price. Priority among multiple FLEX Quotes and FLEX Orders that are priced at the BBO clearing price and on the same side of the market as the crossing participation entitlement is as follows: (i) FLEX Orders resting in the electronic book based on the current book priority algorithm; (ii) FLEX Quotes for the account of public customers and non-TPH broker-dealers, based on time priority; (iii) the crossing participation entitlement; (iv) any FLEX Quotes subject to a FLEX Appointed Market-Maker participation entitlement; and then (v) all other FLEX Quotes, based on time priority.

Under the proposal, the Exchange would eliminate the ''Intent to Cross'' Trade Condition. As a result, the Intent to Cross/Crossing Participation Entitlement scenario under the electronic RFQ process described above would no longer be applicable.[14]

E. Electronic RFQ Processing of Complex Orders

Finally, the Exchange proposes to adopt a new Interpretation and Policy under Rule 24B.5 to more fully describe the electronic processing of complex orders. Specifically, complex orders will only be eligible to electronically trade with other complex orders through the electronic RFQ process described in Rule 24B.5(a)(1). To the extent the Exchange determines to make an electronic book available for simple, resting FLEX Orders, there will be no ''legging'' of complex orders represented in the electronic RFQ process with FLEX Orders that may be represented in the individual series legs represented in the electronic book. In the event there are bids (offers) in any of the individual component series legs represented in the electronic book when an electronic RFQ for a complex order strategy is submitted to the System, the electronic RFQ will not commence. In the event an unrelated FLEX Order in any of the individual series legs is received during the duration of an electronic RFQ, such FLEX Order will not be considered in the electronic RFQ allocation. Further, to the extent that a complex RFQ Order or responsive FLEX Quote is not executed, any remaining balance of the complex order or FLEX Quote will be automatically cancelled if not traded at the conclusion of the electronic RFQ process.

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange [15] and, in particular, the requirements of Section 6 of the Act.[16] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[17] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposal should benefit FLEX Traders and investors by providing a more simplified and efficient trading functionality that competes with the over-the-counter market in customized options.

The Exchange proposes to revise the process for opening electronic trading in FLEX Option series with existing open interest. The Commission believes that the proposal to automatically open FLEX Option series with existing open interest could make the opening process more efficient for FLEX users. In addition, the Commission notes that new FLEX Option series will continue to be subject to the existing requirement that there be an initial RFQ to initiate trading in the FLEX series.

In addition, the Exchange proposes to eliminate the Fill-or-Kill, Minimum Fill, Lots Of, and Intent to Cross Trade Conditions, and to adopt a new Immediate-or-Cancel Trade Condition. Furthermore, the Exchange proposes to eliminate European-Capped exercise style and foreign currency provisions for FLEX Options. The Commission notes that the proposed changes help to clarify the procedures utilized in the Exchange's enhanced FLEX System and should help encourage further use of FLEX Options. The Commission notes that the eliminated Trade Conditions and foreign currency settlement provisions will not be supported under the FLEX System enhancements. Also, according to the Exchange, the eliminated Trade Conditions, as well as the European-Capped style and foreign currency provisions have generally not been actively used by FLEX Traders.

The Exchange also proposes to adopt a new Interpretation and Policy to Rule 24B.5 to describe the electronic

[13] The ''RFQ Market'' means the bids or offers, or both, as applicable, entered in response to an electronic Request for Quotes and FLEX Orders resting in the electronic book. *See* Rule 24B.1(s).

[14] *See* proposed changes to Rule 24B.5(a)(1)(iii)(D) and (d)(2)(i).

[15] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(5).

processing of complex orders. The Commission believes that such a provision will clarify application of Exchange rules and processes for CBOE Trading Permit Holders and investors.

The Exchange further proposes to modify the priority algorithms applicable to the FLEX electronic book and to the FLEX electronic RFQ process. The Commission believes that the proposed changes will simplify the allocation algorithms for FLEX Traders and investors. Under the proposal, allocation will be based on price-time priority, subject to public customer and non-TPH broker-dealer priority and, if applicable, any applicable entitlement priority. The Commission believes that the priority and allocation rules are reasonable and consistent with the Act and applies a more consistent allocation algorithm across these FLEX electronic processes.[18] Moreover, the proposed changes regarding public customer priority/non-TPH broker-dealer priority and price-time priority have previously been found consistent with the Act.[19]

The Commission received one comment letter regarding the proposed rule change.[20] The comment suggested that there be an additional phase, the Decision Phase, in the RFQ process. During this Decision Phase, the initiator of an RFQ would have a brief period of time, during which no changes of any type to market quotes would be permitted, in order to decide to trade or cancel their RFQ.[21] According to the Exchange, it previously proposed an RFQ process with a ''locked up RFQ Market,'' similar to the one suggested in the comment letter, during the Reaction Phase. However the Exchange amended the process to allow FLEX Quotes and FLEX Orders to be entered, modified or cancelled during the Reaction Phase.[22] The Exchange stated that the amendment was the result of feedback received concerning the risk of market movements that might occur during the ''locked up RFQ Market.'' [23] The Commission agrees with the Exchange that the five-minute RFQ Reaction Period should be sufficient time for the Submitting Trading Permit Holder to determine whether to trade against the RFQ Market while at the same time not exposing those who respond to an RFQ to any unreasonable risks of market movements that may occur during the RFQ Reaction Period.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (File No. SR–CBOE–2011–122), as amended by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3328 Filed 2–13–12; 8:45 am]

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[18] The Commission also believes that the amended priority and allocation rules for electronic FLEX trading are consistent with Section 11(a) of the Act. 15 U.S.C. 78k(a) Section 11(a)(1) prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion unless an exception applies. The Commission believes, however, that neither a Submitting Trading Permit Holder who trades against an electronic RFQ Market nor any other FLEX Trader who itself submits an RFQ Quote electronically qualifies for the ''effect-versus execute'' exception to Section 11(a). 17 CFR 240.11a2–2(T). Nevertheless, the Commission believes that other exceptions may apply. FLEX Market-Makers qualify for the market-maker exception. With respect to non-market-maker members, the new System appears reasonably designed to cause RFQ Quotes constituting the RFQ Market and the RFQ Order that trades against the RFQ Market to yield to non-member interest, consistent with the ''G'' exception. *See* 15 U.S.C. 78k(a)(1)(G) (setting forth all requirements for the ''G'' exception).

[19] *See e.g.,* Securities Exchange Act Release Nos. 51822 (June 10, 2005), 70 FR 35321 (June 17, 2005) (SR–CBOE–2004–87) (Adopting rules pertaining to priority and allocation of trades for index options) and 56792 (November 15, 2007), 72 FR 65776 (November 23, 2007) (SR–CBOE–2006–99) (Adopting rules providing for the trading of FLEX Options on an electronic platform).

[20] *See supra* note 4.

[21] *Id.*

[22] *See* Securities Exchange Act Release No. 56792, *supra* note 19.

[23] *See* SR–CBOE–2006–99 Amendment No. 2, *http://www.cboe.com/publish/RuleFilingsSEC/SR-CBOE-2006-099.a2.pdf.*

[24] 15 U.S.C. 78s(b)(2).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66359; File No. SR–BX–2012–008]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX BX, Inc. Relating to Fidelity Bonds

February 8, 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 February 1, 2012, NASDAQ OMX BX, Inc. (''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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 3020 to reflect recent changes to a corresponding rule of the Financial Industry Regulatory Authority (''FINRA'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=BXRulefilings,* 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

Many of BX's rules are based on rules of FINRA (formerly the National Association of Securities Dealers (''NASD'')). Beginning in 2008, FINRA embarked on an extended process of moving rules formerly designated as ''NASD Rules'' into a consolidated FINRA rulebook. In most cases, FINRA has renumbered these rules, and in some cases has substantively amended them. Accordingly the Exchange also has initiated a process of modifying its rulebook to ensure that the Exchange rules corresponding to FINRA/NASD rules continue to mirror them as closely as practicable.

This proposed rule change concerns BX Rule 3020 entitled ''Fidelity Bonds,'' which follows and incorporates by reference former NASD Rule 3020.[3]

[3] The purpose of the fidelity bond is to protect a member against certain types of losses, including,

Continued

FINRA recently amended its rules to adopt former NASD Rule 3020, relating to Fidelity Bonds, with certain changes, into the consolidated FINRA rulebook as FINRA Rule 4360.[4] Exchange Rule 3020 provides that a ''A member designated to the Exchange for oversight pursuant to SEC Rule 17d–1 shall comply with NASD Rule 3020 as if such Rule were part of the Rules of the Exchange.'' The Exchange proposes to amend this text to reference new FINRA Rule 4360, which replaced NASD Rule 3020.

NASD Rule 3020(a) generally provides that each member required to join the Securities Investor Protection Corporation (''SIPC'') that has employees and that is not a member in good standing of one of the enumerated national securities exchanges must maintain fidelity bond coverage. FINRA Rule 4360 requires each member that is required to join SIPC to maintain blanket fidelity bond coverage with specified amounts of coverage based on the member's net capital requirement, with certain exceptions. NASD Rule 3020(a)(1) requires members to maintain a blanket fidelity bond in a form substantially similar to the standard form of Brokers Blanket Bond promulgated by the Surety Association of America. New FINRA Rule 4360 requires members to maintain fidelity bond coverage that provides for per loss coverage without an aggregate limit of liability. Also, pursuant to FINRA Rule 4360, a member's fidelity bond must provide against loss and have Insuring Agreements covering at least the following: Fidelity, on premises, in transit, forgery and alteration, securities and counterfeit currency. The rule change modified the descriptive headings for these Insuring Agreements, in part, from NASD Rule 3020(a)(1) and NYSE Rule 319(d) to align them with the headings in the current bond forms available to broker-dealers. FINRA Rule 4360 also eliminates the specific coverage provisions in NASD Rule 3020(a)(4) and (a)(5), and NYSE Rule 319(d)(ii)(B) and (C), and (e)(ii)(B) and (C), that permit less than 100 percent of coverage for certain Insuring Agreements (*i.e.,* fraudulent trading and securities forgery) to require that coverage for all Insuring Agreements be equal to 100 percent of the firm's minimum required bond coverage.[5]

Further, FINRA Rule 4360 requires that a member's fidelity bond include a cancellation rider providing that the insurer will use its best efforts to promptly notify FINRA in the event the bond is cancelled, terminated or ''substantially modified.'' Also, the rule change adopted the definition of ''substantially modified'' in NYSE Rule 319 and would incorporate NYSE Rule 319.12's standard that a firm must *immediately* advise FINRA in writing if its fidelity bond is cancelled, terminated or substantially modified.[6] FINRA added supplementary material to FINRA Rule 4360 requiring members that do not qualify for a bond with per loss coverage without an aggregate limit of liability to secure alternative coverage. Specifically, a member that does not qualify for blanket fidelity bond coverage as required by FINRA Rule 4360(a)(3) is required to maintain substantially similar fidelity bond coverage in compliance with all other provisions of the rule, provided that the member maintains written correspondence from two insurance providers stating that the member does not qualify for the coverage required by FINRA Rule 4360(a)(3).

FINRA Rule 4360 requires each member to maintain, at a minimum, fidelity bond coverage for any person associated with the member, except directors or trustees of a member who are not performing acts within the scope of the usual duties of an officer or employee. As further detailed below, the rule change eliminated the exemption in NASD Rule 3020 for sole stockholders and sole proprietors. The rule change also increased the minimum required fidelity bond coverage for members, while continuing to base the coverage on a member's net capital requirement. To that end, FINRA Rule 4360 required a member with a net capital requirement that is less than $250,000 to maintain minimum coverage of the greater of 120 percent of the firm's required net capital under Exchange Act Rule 15c3–1 or $100,000. The increase to $100,000 modifies the present minimum requirement of $25,000.

Under the new FINRA Rule 4360, members with a net capital requirement of at least $250,000 must use a table in the rule to determine their minimum fidelity bond coverage requirement. The table is a modified version of the tables in NASD Rule 3020(a)(3) and NYSE Rule 319(e)(i). The identical NASD and NYSE requirements for members that have a minimum net capital requirement that exceeds $1 million are retained in the new Rule; however, the rule adopts the higher requirements in NYSE Rule 319(e)(i) for a member with a net capital requirement of at least $250,000, but less than $1 million. Under the new rule, the entire amount of a member's minimum required coverage must be available for covered losses and may not be eroded by the costs an insurer may incur if it chooses to defend a claim. Specifically, any defense costs for covered losses must be in addition to a member's minimum coverage requirements. A member may include defense costs as part of its fidelity bond coverage, but only to the extent that it does not reduce a member's minimum required coverage under the rule.

Under prior NASD Rule 3020(b), a deductible provision may be included in a member's bond of up to $5,000 or 10% of the member's minimum insurance requirement, whichever is greater. If a member desires to maintain coverage in excess of the minimum insurance requirement, then a deductible provision may be included in the bond of up to $5,000 or 10% of the amount of blanket coverage provided in the bond purchased, whichever is greater. The excess of any such deductible amount over the maximum permissible deductible amount based on the member's minimum required coverage must be deducted from the member's net worth in the calculation of the member's net capital for purposes of Exchange Act Rule 15c3–1. Where the member is a subsidiary of another member, the excess may be deducted from the parent's rather than the subsidiary's net worth, but only if the parent guarantees the subsidiary's net capital in writing.[7] FINRA Rule 4360 provides for an

but not limited to, those caused by the malfeasance of its officers and employees, and the effect of such losses on the member's capital.

[4] *See* Securities Exchange Act Release No. 63961 (February 24, 2011), 76 FR 11542 (March 2, 2011) (SR–FINRA–2010–059) (a rule change to adopt a rule of the National Association of Securities Dealers, Inc. (''NASD'') as part of the consolidation of the FINRA rulebook). This new rule took into account Incorporated NYSE Rule 319 (Fidelity Bonds) and its Interpretation.

[5] Members may elect to carry additional, optional Insuring Agreements not required by FINRA Rule 4360 for an amount less than 100 percent of the minimum required bond coverage.

[6] NYSE Rule 319 defines the term ''substantially modified'' as any change in the type or amount of fidelity bonding coverage, or in the exclusions to which the bond is subject, or any other change in the bond such that it no longer complies with the requirements of the rule.

[7] Under NYSE Rule 319(b), each member organization may self-insure to the extent of $10,000 or 10% of its minimum insurance requirement as fixed by the NYSE, whichever is greater, for each type of coverage required by the rule. Self-insurance in amounts exceeding the above maximum may be permitted by the NYSE provided the member or member organization certifies to the satisfaction of the NYSE that it is unable to obtain greater bonding coverage, and agrees to reduce its self-insurance so as to comply with the above stated limits as soon as possible, and appropriate charges to capital are made pursuant to Exchange Act Rule 15c3–1. This provision also contains identical language to the NASD rule regarding net worth deductions for subsidiaries.

allowable deductible amount of up to 25% of the fidelity bond coverage purchased by a member. Any deductible amount elected by the firm that is greater than 10% of the coverage purchased by the member [8] would be deducted from the member's net worth in the calculation of its net capital for purposes of Exchange Act Rule 15c3–1.[9] Like the NASD and NYSE rules, if the member is a subsidiary of another FINRA member, this amount may be deducted from the parent's rather than the subsidiary's net worth, but only if the parent guarantees the subsidiary's net capital in writing.

Consistent with NASD Rule 3020(c) and NYSE Rule 319.10, FINRA Rule 4360 requires a member (including a firm that signs a multi-year insurance policy), annually as of the yearly anniversary date of the issuance of the fidelity bond, to review the adequacy of its fidelity bond coverage and make any required adjustments to its coverage, as set forth in the rule. Under FINRA Rule 4360(d), a member's highest net capital requirement during the preceding 12-month period, based on the applicable method of computing net capital (dollar minimum, aggregate indebtedness or alternative standard), is used as the basis for determining the member's minimum required fidelity bond coverage for the succeeding 12-month period. The ''preceding 12-month period'' includes the 12-month period that ends 60 days before the yearly anniversary date of a member's fidelity bond. This would give a firm time to determine its required fidelity bond coverage by the anniversary date of the bond.

Further, FINRA Rule 4360 allows a member that has only been in business for one year and elected the aggregate indebtedness ratio for calculating its net capital requirement to use, solely for the purpose of determining the adequacy of its fidelity bond coverage for its second year, the 15 to 1 ratio of aggregate indebtedness to net capital in lieu of the 8 to 1 ratio (required for broker-dealers in their first year of business) to calculate its net capital requirement. Notwithstanding the above, such member would not be permitted to carry less minimum fidelity bond coverage in its second year than it carried in its first year.

Based in part on NASD Rule 3020(a), FINRA Rule 4360 exempts from the fidelity bond requirements members in good standing with a national securities exchange that maintain a fidelity bond subject to the requirements of such exchange that are equal to or greater than the requirements set forth in Rule 4360. Additionally, consistent with NYSE Rule Interpretation 319/01, FINRA Rule 4360 continues to exempt from the fidelity bond requirements any firm that acts solely as a Designated Market Maker (''DMM''),[10] floor broker or registered floor trader and does not conduct business with the public. FINRA Rule 4360 does not maintain the exemption in NASD Rule 3020(e) for a one-person firm.[11] Historically, a sole proprietor or sole stockholder member was excluded from the fidelity bond requirements based upon the assumption that such firms were one-person shops and, therefore, could not obtain coverage for their own acts. FINRA has determined that sole proprietors and sole stockholder firms can and often do acquire fidelity bond coverage, even though it is currently not required, since all claims (irrespective of firm size) are likely to be paid or denied on a facts-and-circumstances basis. Also, certain coverage areas of the fidelity bond benefit a one-person shop (*e.g.,* those covering customer property lost in transit).

The Exchange also proposes to delete text [sic] the following text from Exchange Rule 3020, ''FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3020 are transferred into the FINRA rulebook, then Equity Rule 3020 shall be construed to require Exchange members designated to the Exchange for oversight pursuant to SEC Rule 17d–1 to comply with the FINRA rule corresponding to NASD Rule 3010 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.'' The text is not necessary as the Exchange is proposing to update the text to reflect the current FINRA Rule.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(5) of the Act [13] 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, by updating and clarifying the requirements governing fidelity bonds. The Exchange believes that the proposed requirements of Rule 4360, including, but not limited to, requiring each member that is required to join SIPC to maintain blanket fidelity bond coverage, increasing the minimum requirement fidelity bond coverage and maintaining a fidelity bond that provides for per loss coverage without an aggregate limit of liability promotes investor protection by protecting firms from unforeseen losses. The proposed amendments will conform BX Rule 3020 to recent changes made to a corresponding FINRA rule, to promote application of consistent regulatory standards.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Commission believes that BX members are currently subject to FINRA Rule 4360 because of the text of the rule as written. 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 Section 19(b)(3)(A) of the

[8] FINRA notes that a member may elect, subject to availability, a deductible of less than 10 percent of the coverage purchased.

[9] NASD Rule 3020 bases the deduction from net worth for an excess deductible on a firm's minimum required coverage, while FINRA Rule 4360 would base such deduction from net worth on coverage *purchased* by the member.

[10] *See* Exchange Act Release No. 58845 (Oct. 24, 2008), *73 FR 64379* (Oct. 29, 2008) (Order Approving File No. SR–NYSE–2008–46). In this rule filing, the role of the specialist was altered in certain respects and the term ''specialist'' was replaced with the term ''Designated Market Maker.''

[11] A one-person member (that is, a firm owned by a sole proprietor or stockholder that has no other associated persons, registered or unregistered) has no ''employees'' for purposes of NASD Rule 3020, and therefore such a firm currently is not subject to the fidelity bonding requirements. Conversely, a firm owned by a sole proprietor or stockholder that has other associated persons has ''employees'' for purposes of NASD Rule 3020, and currently is, and will continue to be, subject to the fidelity bonding requirements.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

Act[14] and Rule 19b–4(f)(6)[15] thereunder.

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposed rule change presents no novel issues, and the BX members are currently subject to FINRA Rule 4360. Therefore, the Commission designates the proposal operative upon filing.[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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2012–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2012–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2012–008 and should be submitted on or before March 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3333 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 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.

[16] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66358; File No. SR–BATS–2012–006]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

February 8, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 1, 2012, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') 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 Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes [sic] amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes will become operative on February 1, 2012.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the ''Options Pricing'' section of its fee schedule to change pricing with respect to orders routed to NASDAQ OMX PHLX LLC (''PHLX''). PHLX has recently introduced increases to its rates to remove liquidity in specified symbols[6] identified by the Exchange as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] *See* Securities Exchange Act Release No. 66100 (January 4, 2012), 77 FR 1532 (January 10, 2012) (SR–Phlx–2011–185) (notice of filing and immediate effectiveness of proposal to modify fees, including an increase to the Customer Fee for Removing Liquidity from $0.29 per contract to $0.31 per contract); Securities Exchange Act Release No. 65940 (December 12, 2011), 76 FR 78322 (December 16, 2011) (SR–Phlx–2011–162) (notice of filing and immediate effectiveness of proposal to modify fees, including an increase to the Customer

Make/Take issues (identified as ''Select Symbols'' at PHLX).[7] Further, PHLX has recently announced an increase to its current fee of $0.31 per contract to $0.39 per contract for customer orders that remove liquidity in Make/Take issues.[8] The Exchange currently charges certain flat rates for routing to other options exchanges that have been placed into three groups based on the approximate cost of routing to such venues. The grouping of away options exchanges is based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (*i.e.,* clearing fees, infrastructure costs, etc.). The Exchange currently assesses fees of $0.30 per contract for Customer [9] orders and $0.55 per contract for Professional,[10] Firm or Market Maker [11] orders routed to PHLX in Make/Take issues.[12] At the current rates, the Exchange is not currently covering its costs on Customer orders routed to PHLX in Make/Take issues, based on the existing base rate of $0.31 per contract plus additional costs incurred by the Exchange. With the proposal by PHLX to increase fees for Customer orders that remove liquidity to $0.39 per share, the Exchange will be even further from the cost of routing customer orders to PHLX if the Exchange continues to charge $0.30 per contract. In order to better approximate the cost to the Exchange of routing Customer orders to PHLX, the Exchange proposes to place PHLX in the away options exchange grouping along with the Nasdaq Options Market (''NOM''), C2 Options Exchange, Incorporated (''C2''), and NYSE Arca Options (''Arca'') in Make/Take issues. Accordingly, the Exchange proposes to charge a fee of $0.50 per contract for Customer orders and to continue to charge $0.55 per contract for Professional, Firm, or Market Maker orders routed to and executed at PHLX.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[13] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[14] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange also notes that with respect to the change proposed in this filing, although routing options are available to all Users, Users are not required to use the Exchange's routing services, but instead, the Exchange's routing services are completely optional. Members can manage their own routing to different options exchanges or can utilize a myriad of other routing solutions that are available to market participants.

The Exchange believes that its proposal to modify routing fees to PHLX is reasonable because the modified fee is a better approximation of the cost to the Exchange for routing Customer orders to PHLX. The Exchange believes that its flat fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at groups of away options exchanges. Under its flat fee structure, the Exchange has previously operated at a slight loss for Customer orders routed to and executed at PHLX. The Exchange believes that the proposed change will allow it to recoup and better cover its costs of providing routing services going forward. The Exchange also believes that the proposed fees for orders routed to and executed at PHLX are fair and equitable and not unreasonably discriminatory in that they apply equally to all Exchange Users.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act [15] and Rule 19b–4(f)(2) thereunder,[16] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2012–006 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–BATS–2012–006. 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

Fee for Removing Liquidity from $0.25 per contract to $0.29 per contract).

[7] As defined on the fee schedule, Make/Take pricing refers to executions at the identified exchange under which ''Post Liquidity'' or ''Maker'' rebates (''Make'') are credited by that exchange and ''Take Liquidity'' or ''Taker'' fees (''Take'') are charged by that exchange.

[8] *See* Options Trader Alert #2012–4, ''PHLX and NOM Announce Updated Pricing for Customer Orders,'' January 25, 2012.

[9] As defined on the Exchange's fee schedule, a Customer order refers to an order identified by a Member for clearing in the Customer range at the Options Clearing Corporation (''OCC''), excluding any transaction for a ''Professional'' as defined in Exchange Rule 16.1.

[10] The term ''Professional'' is defined in Exchange Rule 16.1 to mean any person or entity that (A) is not a broker or dealer in securities, and (B) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[11] As defined on the Exchange's fee schedule, the terms ''Firm'' and ''Market Maker'' apply to any transaction identified by a member for clearing in the Firm or Market Maker range, respectively, at the OCC.

[12] As defined on the fee schedule, Make/Take pricing refers to executions at the identified exchange under which ''Post Liquidity'' or ''Maker'' rebates (''Make'') are credited by that exchange and ''Take Liquidity'' or ''Taker'' fees (''Take'') are charged by that exchange.

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also 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 No. SR–BATS–2012–006 and should be submitted on or before March 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3332 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66360; File No. SR–NASDAQ–2012–022]

Self-Regulatory Organizations; NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Options Fees

February 8, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2012, The 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 NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASDAQ Stock Market LLC proposes to modify Chapter XV, entitled ''Option Fees,'' at Sec. 2 governing pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options. Specifically, NOM proposes to amend the applicability of the Customer Rebate to Add Liquidity and Fee for Removing Liquidity for the Penny Pilot [3] Options (''Penny Options'').

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2012.

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. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ proposes to modify Chapter XV, entitled ''Option Fees,'' at Sec. 2 governing the rebates and fees assessed for option orders entered into NOM. Specifically, the Exchange is proposing to modify the four tier structure for paying Customer Rebates to Add Liquidity in Penny Pilot Options. The Exchange proposes to increase the tiers to five tiers and further incentivize NOM Participants to route Customer orders to the Exchange by paying an additional rebate for certain orders after the NOM Participant has met a volume criteria. The Exchange believes that incentivizing NOM Participants to send additional Customer orders to the Exchange will benefit all market participants by adding liquidity to the market.

Specifically, the Exchange currently pays a Customer Rebate to Add Liquidity in Penny Pilot Options based on the following tier structure:

	Monthly volume	Rebate to add liquidity
Tier 1	Participant adds Customer liquidity of up to 49,999 contracts per day in a month	$0.26
Tier 2	Participant adds Customer liquidity of 50,000 or more contracts per day in a month	0.42
Tier 3 [a]	Participant adds (1) Customer liquidity of 100,000 or more contracts per day in a month, and (2) NOM Market Maker liquidity of 40,000 or more contracts per day in a month.	0.43

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through June 30, 2012. *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR–NASDAQ–2009–097) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010) (SR–NASDAQ–2010–013) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR–NASDAQ–2010–053) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 65969 (December 15, 2011, 76 FR 79268 (December 21, 2011) (SR–NASDAQ–2011–169) (notice of filing and immediate effectiveness extension and replacement of Penny Pilot). *See also* Exchange Rule Chapter VI, Section 5.

	Monthly volume	Rebate to add liquidity
Tier 4 [b]	Participant adds (1) Customer liquidity of 25,000 or more contracts per day in a month, and (2) the Participant has certified for the Investor Support Program set forth in Rule 7014; and (3) the Participant executed at least one order on NASDAQ's equity market.	0.40

[a] For purposes of Tier 3, the Exchange will aggregate the trading activity of separate NOM Participants when computing average daily volumes where 75 percent common ownership or control exists between NOM Participants.
[b] For purposes of Tier 4, the Exchange will allow a NOM Participant to qualify for the rebate if a NASDAQ member under common ownership with the NOM Participant has certified for the Investor Support Program and executed at least one order on NASDAQ's equity market. Common ownership is defined as 75 percent common ownership or control.

The Exchange proposes to amend the Customer Rebate to Add Liquidity in Penny Pilot Options to a five tier structure as follows:

	Monthly volume	Rebate to add liquidity
Tier 1	Participant adds Customer liquidity of up to 14,999 contracts per day in a month	$0.26
Tier 2	Participant adds Customer liquidity of 15,000 to 49,999 contracts per day in a month	0.38
Tier 3	Participant adds Customer liquidity of 50,000 or more contracts per day in a month	0.42
Tier 4 [a]	Participant adds (1) Customer liquidity of 100,000 or more contracts per day in a month, and (2) NOM Market Maker liquidity of 40,000 or more contracts per day in a month.	0.43
Tier 5 [b]	Participant adds (1) Customer liquidity of 25,000 or more contracts per day in a month, (2) the Participant has certified for the Investor Support Program set forth in Rule 7014; and (3) the Participant executed at least one order on NASDAQ's equity market.	0.40

[a] For purposes of Tier 4, the Exchange will aggregate the trading activity of separate NOM Participants when computing average daily volumes where 75 percent common ownership or control exists between NOM Participants.
[b] For purposes of Tier 5, the Exchange will allow a NOM Participant to qualify for the rebate if a NASDAQ member under common ownership with the NOM Participant has certified for the Investor Support Program and executed at least one order on NASDAQ's equity market. Common ownership is defined as 75 percent common ownership or control.

Currently, Tier 1 firms that add up to 49,999 contracts per day in a month of liquidity, in a Penny Pilot Option, receive a rebate of $0.26 per contract. The Exchange is proposing to amend Tier 1 to change the contract amount to 14,999 contracts with the same $0.26 per contract rebate. Based on past experience, the Exchange anticipates that all firms currently receiving the $0.26 rebate will maintain their current level of rebate or achieve a higher rebate in Tier 2.

The Exchange is proposing a new Tier 2 with a $0.38 per contract rebate for firms that add Customer liquidity in Penny Pilot Options between 15,000 to 49,999 contracts per day in a month. This proposed new tier would result in a greater rebate for current Tier 1 Participants who add liquidity between 15,000 and 49,999 contracts.

The Exchange is not proposing any changes to current Tiers 2, 3 and 4 other than to rename them as Tiers 3, 4 and 5, respectively. The Exchange would also make conforming amendments to current notes ''a'' and ''b'' to reference newly named Tiers 4 and 5, respectively, as well.

The Exchange currently pays an additional $0.01 per contract rebate on each Customer order of 5,000 or more, displayed or non-displayed contracts, which adds liquidity in a Penny Pilot Option, as long as that NOM Participant has qualified for a rebate in Tier 2, 3 or 4 for that month.[4] The Exchange proposes to amend the language in the rule text to include ''Tier 5'' as well. The Exchange would continue to apply this additional $0.01 per contract rebate on all tiers except Tier 1.

The Exchange also proposes to further incentivize NOM Participants by reducing the Customer Fee for Removing Liquidity in a Penny Pilot Option from $0.45 per contract to $0.44 per contract. The Exchange believes that this decrease in the amount assessed a Customer to remove liquidity will also attract additional order flow to the Exchange.

The Exchange is also proposing to make a typographical correction to the Fee Schedule to remove unnecessary punctuation. While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2012.

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the Act,[6] 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.

The Exchange believes that the proposed new pricing tiers are reasonable, equitable and not unfairly discriminatory because they continue an existing program [7] to encourage broker-dealers acting as agent for Customer orders to select the Exchange as a venue to post Customer orders. The Exchange believes that its success at attracting Customer order flow benefits all market participants by improving the quality of order interaction and executions at the Exchange. The Exchange believes the existing monthly volume thresholds have incentivized firms that route Customer orders to the Exchange to increase Customer order flow to the Exchange. The Exchange desires to continue to encourage firms that route Customer orders to increase Customer order flow to the Exchange by offering greater Customer rebates for greater liquidity added to the Exchange.

Specifically, the Exchange believes that the increased rebates would further incentivize firms to continue to send more Customer volume to the Exchange.

[4] This rebate is in addition to the rebate for the qualifying tier.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] The Exchange adopted these monthly volume achievement tiers in September 2011. *See* Securities Exchange Act Release Nos. 65317 (September 12, 2011), 76 FR 57778 (September 16, 2011) (SR–NASDAQ–2011–124), 65317 (September 12, 2011), 76 FR 61129 (October 3, 2011) (SR–NASDAQ–2011–127) and 66126 (January 10, 2012), 77 FR 2335 (January 17, 2012) (SR–NASDAQ–2012–003).

Today, the Exchange pays any Customer order up to 49,999 contracts per day in a given month a rebate of $0.26 per contract for adding liquidity in Penny Pilot Options. The Exchange would continue to pay this same rebate for Tier 1 for any Customer order up to 14,999 contracts per day in a given month that adds liquidity in Penny Pilot Options. Any Participant that adds between 15,000 and 49,999 contracts per day in a month would receive an increased rebate of $0.38 per contract with this proposal (up from $0.26 per contract). The Exchange believes that its proposal to create a new Tier 2 and pay a greater rebate for certain Tier 1 orders is reasonable, equitable and not unfairly discriminatory because a greater rebate would incentivize NOM Participants to send a greater number of Customer orders that add liquidity in Penny Pilot Options between 15,000 and 49,999 contracts, which in turn would benefit all market participants by increasing liquidity on NOM. Also, all NOM Participants transacting Customer orders continue to have the ability to earn a rebate on NOM because there is no minimum order requirement.

The Exchange believes that it continues to be reasonable to offer a rebate of $0.01 per contract on each Customer order of 5,000 or more displayed or non-displayed contracts, which adds liquidity in a Penny Pilot Option, as long as that NOM Participant has qualified for a rebate in Tier 2, 3, 4 and now 5 for that month. This $0.01 per contract rebate is in addition to the rebate for the qualifying tier. With this proposal, more participants that are currently in Tier 1 would qualify for the additional rebate if they transacted a Customer order of 5,000 or more displayed or non-displayed contracts, which adds liquidity in Penny Pilot Options.[8] The Exchange believes that this enhanced incentive, which will be available to a greater number of NOM Participants, will encourage those NOM Participants to send larger orders to the Exchange, which in turn would also assist those Participants that send Customer orders in Penny Pilot Options to earn higher rebates by qualifying for a higher tier as well as bringing additional liquidity to the Exchange. The Exchange further believes that continuing to limit the enhanced $0.01 per contract rebate to firms qualifying for Tiers 2, 3, 4 or 5 (and not those that qualify for Tier 1) is equitable and not unfairly discriminatory because generally NOM Participants in proposed Tier 1 that add up to 14,999 contracts per day in a month are not sending Customer orders of 5,000 or more contracts. If those Participants in Tier 1 sent three Customer orders of 5,000 or more per day in a given month to the Exchange, they would qualify for the Tier 2 rebate as well as the additional enhanced rebate. The Exchange believes that it is equitable and not unfairly discriminatory to incentivize those NOM Participants that qualify for higher volume tiers as they are the most likely to obtain the enhanced rebate and continue to send larger orders, which provides more liquidity to the Exchange. Finally, the Exchange would pay the enhanced rebate uniformly to those NOM Participants that qualify for Tiers 2, 3, 4 or 5 and meet the Customer order volume discussed herein for Penny Pilot Options.

The Exchange also believes that it is reasonable to lower the Customer Fee for Removing Liquidity in Penny Pilot Options because a lower fee will attract more NOM Participants to remove Customer orders. The Exchange also believes that it is equitable and not unfairly discriminatory to lower the fee for Customers, as compared to other market participants, because encouraging NOM Participants to transact Customer orders will benefit all market participants by increasing liquidity on NOM. Also, all NOM Participants that transact Customer orders would be uniformly impacted by the proposal.

The Exchange's proposal to correct a typographical error within the Rule is reasonable, equitable and not unfairly discriminatory because it will make the Rule more consistent with the current text.

The Exchange operates in a highly competitive market comprised of nine U.S. options exchanges in which sophisticated and knowledgeable market participants can and do send order flow to competing exchanges if they deem fee levels at a particular exchange to be excessive or rebate opportunities to be inadequate. The Exchange believes that the proposed fee and rebate scheme are competitive and similar to other fees, rebates and tier opportunities in place on other exchanges. The Exchange believes that this competitive marketplace materially impacts the fees and rebates present on the Exchange today and substantially influences the proposal set forth above.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[9] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2012–022 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–2012–022. 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

[8] Specifically, those Participants adding between 15,000 and 49,999 contracts per day in a month.

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

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–2012–022 and should be submitted on or before March 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3334 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66357; File No. SR–BATS–2012–004]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Listing and Trading of Shares of the iShares® MSCI Denmark Capped Investable Market Index Fund

February 8, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 24, 2012, BATS Exchange, Inc. (''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the iShares® MSCI Denmark Capped Investable Market Index Fund as Index Fund Shares pursuant to Exchange Rule 14.11(c).

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.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 parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the following fund of the iShares Trust (''Trust''): iShares® MSCI Denmark Capped Investable Market Index Fund (''Fund'') pursuant to Exchange Rule 14.11(c) related to Index Fund Shares.[5]

According to the registration statement,[6] the Fund seeks investment results that correspond generally to the price and yield performance, before fees and expenses, of the MSCI Denmark IMI 25/50 Index (''Index''). The Index is sponsored by MSCI, Inc. (''Index Provider''),[7] which is independent of the Fund, and BlackRock Fund Advisors is the investment adviser to the Fund. The Index Provider determines the composition and relative weightings of the securities in the Index and publishes information regarding the market value of the Index. The Index is a custom, free float-adjusted market capitalization weighted index designed to measure the performance of equity securities of companies whose market capitalization represents the top 85% of companies in the Danish securities market. The Index consists of stocks traded primarily on the Danish stock market, NASDAQ OMX Copenhagen. Component companies include financial, health care, and industrial companies.

The Exchange is submitting this proposed rule change because the Index for the Fund does not meet all of the ''generic'' listing requirements of Exchange Rule 14.11(c) applicable to the listing of Index Fund Shares based on international or global indexes. The Index meets all such requirements except for those set forth in Rule 14.11(c)(3)(A)(ii)(b). Specifically, the Index fails to meet the requirement that component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares. As of January 13, 2012, 83.22% of the Index weight had at least 250,000 shares traded during each of the previous six months. Accordingly, the Index only narrowly misses satisfaction of the monthly trading volume requirement of Rule 14.11(c)(3)(A)(ii)(b). The Exchange notes that other products have become immediately effective based on

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] An Index Fund Share is a security ''(i) that is issued by an open-end management investment company based on a portfolio of stocks or fixed income securities or a combination thereof, that seeks to provide investment results that correspond generally to the price and yield performance or total return performance of a specified foreign or domestic stock index, fixed income securities index or combination thereof; (ii) that is issued by such an open-end management investment company in a specified aggregate minimum number in return for a deposit of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above, with a value equal to the next determined net asset value; and (iii) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof, with a value equal to the next determined net asset value.'' *See* Exchange Rule 14.11(c).

[6] *See* the Trust's Registration Statement for the Fund on Form N–1A, dated December 16, 1999 (File Nos. 333–92935 and 811–09729) (''Registration Statement'').

[7] The Index Provider, MSCI, Inc., is not a broker-dealer or fund advisor. The Exchange notes that pursuant to the Exchange's rules ''any advisory committee, supervisory board, or similar entity * * * that makes decisions on 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.'' *See* Rule 14.11(c)(3)(B)(i) and (iii).

relatively narrow misses that are similar in nature.[8] The Exchange also notes that average volumes exceeded 250,000 shares for 90.73% of the Index weight when volumes are considered as an average over the past 6 months rather than looking at each of the past 6 months individually.

The Exchange represents that: (1) The Shares of the Fund currently satisfy all of the generic listing standards for Index Fund Shares except for the volume requirement under Rule 14.11(c)(3)(A)(ii)(b), as described above; (2) the continued listing standards under Exchange Rule 14.11(c)(9)(B) applicable to Index Fund Shares shall apply to the Shares; and (3) the Trust is required to comply with Rule 10A–3 under the Act for the initial and continued listing of the Shares.[9] In addition, the Exchange represents that the Shares will comply with all other requirements applicable to Index Fund Shares including, but not limited to, requirements relating to the dissemination of key information such as the Index value and intraday indicative value, the rules governing the trading of equity securities, trading hours, trading halts, surveillance,[10] and the Information Circulars to members of the Exchange, as set forth in Exchange rules applicable to exchange traded funds (Index Fund Shares) and in the Commission's order approving the generic listing rules applicable to the listing and trading of exchange traded funds (Index Fund Shares).[11] Detailed descriptions of the Fund, the Index, the Index Provider, procedures for creating and redeeming Shares, transaction fees and expenses, risks, dividends, distributions, taxes, and reports to be distributed to beneficial owners of the Shares can be found in the Trust's Registration Statement and/or on the Web site for the Fund (*http://www.ishares.com*), as applicable.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[12] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act[13] because it is designed to prevent fraudulent and manipulative acts and practices, 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 believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and is generally designed to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(c). As noted above, the Shares of the Fund currently satisfy all of the generic listing standards for Index Fund Shares except for the volume requirement under Rule 14.11(c)(3)(A)(ii)(b), which the Index only narrowly misses. The Exchange also reiterates that the continued listing standards under Exchange Rule 14.11(c)(9)(B) applicable to Index Fund Shares shall apply to the Shares, and the Trust is required to comply with Rule 10A–3 under the Act for the initial and continued listing of the Shares.[14] In addition, the Exchange represents that the Shares will comply with all other requirements applicable to Index Fund Shares including, but not limited to, requirements relating to the dissemination of key information such as the Index value and intraday indicative value, the rules governing the trading of equity securities, trading hours, trading halts, surveillance, and the Information Circulars to members of the Exchange, as set forth in Exchange rules applicable to exchange traded funds (Index Fund Shares) and in the Commission's order approving the generic listing rules applicable to the listing and trading of exchange traded funds (Index Fund Shares). The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The Exchange notes that the Index component stocks are listed and traded on NASDAQ OMX Copenhagen A/S, which is a member of the ISG.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. The Consolidated Tape Association will disseminate real time trade and quote information for the Shares. In addition, the current Index value will be widely disseminated by one or more major market data vendors at least every 60 seconds during the Exchange's regular market session. Moreover, prior to the commencement of trading, the Exchange will inform its Members in an Information Circular of the special characteristics and risks associated with trading the Shares. The Exchange will halt trading in the Shares in accordance with Exchange Rules. The grounds for a halt include a halt because the intraday indicative value of the security and/or the value of its underlying index are not being disseminated as required, a halt for other regulatory reasons or due to other conditions or circumstances deemed to be detrimental to the maintenance of a free and orderly market. In addition, as noted above, investors will have ready access to information regarding the Fund, the current Index value, the intraday indicative value, and quotation and last sale information for the Shares.

The Exchange believes that the proposed rule change is designed to remove impediments to, and perfect the mechanism of, a free and open market and a national market system in that the listing and trading of the Fund on the Exchange will enhance competition among market participants, which the Exchange believes will benefit investors and the marketplace. The Exchange is commencing a listings business at a time when there are two dominant primary listing venues, the New York Stock Exchange and Nasdaq. Because the proposal will allow the Fund to list and trade on the Exchange, and without the proposal the Fund would likely be listed on another market, the Exchange believes that the proposal will provide companies with another option for raising capital in the public markets, thereby promoting the aforementioned principles discussed in Section 6(b)(5) of the Act.[15] In addition, as noted above, investors will have ready access to information regarding the Fund's

[8] *See, e.g.,* Securities Exchange Act Release No. 59471 (March 6, 2009), 74 FR 9862 (February 27, 2009) (SR–NYSEArca–2009–13).

[9] 17 CFR 240.10A–3.

[10] The Exchange may obtain information for surveillance purposes via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of ISG. The Exchange notes that the Index component stocks are listed and traded on NASDAQ OMX Copenhagen A/S, which is a member of the ISG. For a list of the current members of ISG, see www.isgportal.org.

[11] *See* Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 17 CFR 240.10A–3.

[15] 15 U.S.C. 78f(b)(5).

holdings, the current Index value, the intraday indicative value, and quotation and last sale information for the Shares.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[16] and Rule 19b–4(f)(6) thereunder.[17] Because the foregoing proposed rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given 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,[18] the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20]

The Commission believes that the proposed rule change is properly designated as ''non-controversial'' under Rule 19b–4(f)(6) because the Index for the Fund fails to meet the requirements set forth in Rule 14.11(c)(3)(A)(ii)(b) by a small amount, and the Shares of the Fund currently satisfy all of the other applicable generic listing standards under Rule 14.11(c)(3)(A)(ii) and all other requirements applicable to Index Fund Shares, as set forth in the Exchange's rules. As described above, 83.22% of the Fund is comprised of component stocks with over 250,000 shares traded in each of the last six months. The Exchange represents that the Shares of the Fund currently satisfy all of the generic listing standards for Index Fund Shares except for the volume requirement under Rule 14.11(c)(3)(A)(ii)(b), the continued listing standards under Exchange Rule 14.11(c)(9)(B) applicable to Index Fund Shares shall apply to the Shares, and the Trust is required to comply with Rule 10A–3 under the Act[21] for the initial and continued listing of the Shares. In addition, the Exchange represents that the Shares will comply with all other requirements applicable to Index Fund Shares including, but not limited to, requirements relating to the dissemination of key information such as the Index value and intraday indicative value, the rules governing the trading of equity securities, trading hours, trading halts, surveillance, and the Information Circulars to members of the Exchange, as set forth in Exchange rules applicable to Index Fund Shares and in the Commission's order approving the generic listing rules applicable to the listing and trading of Index Fund Shares.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[22] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked that the Commission waive the 30 day operative delay so that the proposed rule change may become immediately effective in accordance with Section 19(b)(3)(A) of the Act[23] and Rule 19b–4(f)(6) thereunder.[24] The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. The Commission notes that the Index narrowly misses only one component of the criteria applicable to Index Fund Shares and that the Shares of the Fund currently satisfy all of the other generic listing standards under Exchange Rule 14.11(c) and all other requirements applicable to Index Fund Shares, as set forth in Exchange rules and prior Commission orders approving the generic listing rules applicable to the listing and trading of Index Fund Shares. The Commission believes that the listing and trading of the Shares do not present any novel regulatory issues or impose any significant burden on competition, and that waiving the 30-day operative delay would benefit the market and investors by providing market participants with additional investing choices. For these reasons, the Commission designates the proposal operative upon filing.[25]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2012–004 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.

All submissions should refer to File Number SR–BATS–2012–004. 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 such filing

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6).

[18] The Commission notes that the Exchange has satisfied this requirement.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.10A–3.

[22] 17 CFR 240.19b–4(f)(6)(iii)

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f)(6).

[25] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–BATS–2012–004 and should be submitted on or before March 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3331 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66354; File No. SR–CME–2012–03]

Self-Regulatory Organizations; Chicago Mercantile Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend Certain Aspects of the Performance Bond Regime Applicable to Cleared Only OTC FX Swaps

February 8, 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 30, 2012, the Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which items have been prepared primarily by CME. The Commission is publishing this Notice and Order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

CME proposes to make certain changes that are related to its current cleared-only OTC foreign currency (''FX'') product offering. The proposed rule changes [3] would add Price Alignment Interest (''PAI'') functionality to current ''cash mark-to-market'' performance bond regime that applies to CME's cleared-only OTC FX offering.

A description of the revised performance bond regime with the addition of PAI is included below:

* * * * *

CME Forwards With Cash Mark-To-Market

In accordance with customer demand CME has begun clearing privately-negotiated transactions in forwards with cash mark-to-market.

Until October 18, 2011, all forwards cleared by CME had a collateralized mark-to-market. Each day, for each open forward trade, mark-to-market is calculated, from original trade price to the current end-of-day settlement price. These amounts are netted together and ''collateralized''. In other words, if a negative number (a loss), they increase the initial margin (performance bond) requirement, thereby increasing the amount of collateral that must be posted to meet that margin requirement. If a positive number (a gain), they decrease the initial margin requirement.

With cash mark-to-market implemented on October 18, 2011, the mark-to-market value for the previous clearing business date is subtracted from the mark-to-market amount for the current clearing date. These amounts are netted down and become part of the total banked cash flow for the currency in which they are denominated. It is a very simple change for this cash mark-to-market as opposed to collateralized mark-to-market.

There is an additional feature for FX forwards, and in particular for non-deliverable forwards (NDF's)—forwards where one currency of the pair is not bankable. We call this a forward where the cash mark-to-market is flipped, or inverted.

Take for example a forward on the exchange rate between the US Dollar (USD) and the Chilean Peso (CLP). The quantity is specified in USD, and the price is quoted as a specified amount of CLP per one USD. Normally, the mark-to-market amount would be denominated in CLP, also referred to as the contra currency. But with the flipped mark-to-market, the amount is converted to USD by dividing by today's end-of-day settlement price for the contract.

Calculating Mark-to-Market and Change in Mark-to-Market

In the normal case, the mark-to-market amount for a forward is calculated as:

- Subtract the original trade price from the end-of-day settlement price.
- Express the trade quantity as a positive number for a buy or a negative number for a sell.
- Take the product of the price difference, the trade quantity, the contract value factor, and the discount factor.
- Round normally to the normal precision of the currency in which the mark-to-market amount is denominated. (the contra currency for an FX forward)

In other words:

(S − T) * Q * CVF * DF

Where:

S is the end-of-day settlement price
T is the original trade price
Q is the trade quantity
CVF is the contract value factor
DF is the discount factor

In the inverse case, the mark-to-market amount is calculated in the exact same way, except that it includes a division by the daily settlement price:

- Subtract the original trade price from the end-of-day settlement price.
- Express the trade quantity as a positive number for a buy or a negative number for a sell.
- Take the product of the price difference, the trade quantity, the contract value factor, and the discount factor.
- Divide this result by the end-of-day settlement price.
- Round normally to the normal precision of the currency in which the mark-to-market amount is denominated. (the primary currency for an FX forward)

In other words:

[(S − T) * Q * CVF * DF]/S

In either case, the settlement variation amount to be banked is calculated by subtracting the mark-to-market amount for the previous clearing business date from the amount for the current business date.

Cash-Settled and Physically-Delivered Forwards

At maturity, forwards with cash mark-to-market can be either cash-settled or physically-delivered, exactly as for forwards with collateralized mark-to-market.

For a cash-settled forward, at contract maturity (end-of-day on the ''clearing settlement date''):

- The mark-to-market amount is set to zero.
- We then calculate the settlement variation amount to be banked exactly as on any other day—by subtracting the previous day's value for mark-to-market from the current day's (zero) value.
- The mark-to-market amount is then calculated one final time—from original

[26] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The text of the proposed changes does not appear in CME's rulebook but is available on CME's Web site at *http://www.cmegroup.com/rulebook/files/s_6105_otc_fx_pai_cash_mk_to_mkt_ser_020112_revised.pdf*.

trade price to the final settlement price and banked as part of the final settlement of the contract.

• The initial margin requirement is also set to zero, exactly as for any other cash-settled forward or future.

• The next morning the cash moves at the bank, and any collateral deposited to meet the initial margin requirement may be withdrawn.

For a physically-delivered forward, at contract maturity (end-of-day on the clearing settlement date):

• The mark-to-market amount is set to zero.

• We then calculate the settlement variation amount to be banked exactly as on any other day—by subtracting the previous day's value for mark-to-market from the current day's (zero) value.

• The invoice amount, calculated at original trade price, is included in the total amount to be banked.

• On the value date for physical delivery, the position is removed. This causes the initial margin requirement to be set to zero, and any collateral deposited to meet it may be withdrawn.

PAI is now a second additional feature for FX forwards and it applies to both (1) non-deliverable forwards (NDF's)—cash-settlement forwards where one currency of the pair is not bankable and (2) cash-settlement WM/Reuters OTC FX forwards.

CME Clearing is introducing PAI to ensure settlement variation amounts for cleared OTC FX forwards are treated consistently with those of CME's cleared interest-rate swaps and credit-default swaps. PAI is consistent and appropriate for all of these cleared products with daily mark-to-market amounts settled in cash.

If the forward has positive net present value, the position holder pays price alignment interest, and conversely if the forward has negative net present value, the position holder receives price alignment interest. The amount is calculated on the net realized cash flow, from the banking business day on which that amount was realized, to the next banking business day, and is annualized on an actual/360 day basis.

Data Formats

Exactly as before, a forward is denoted with a product type code of FWD, and the settlement method is denoted as either CASH (for cash-settled) or DELIV (for physically-delivered).

There are now three possible values for the ''valuation method'' for forwards:

• The existing value FWD will continue to mean that mark-to-market amounts are collateralized.

• A new value FWDB (''forward banked'') means a forward with cash mark-to-market.

• A second new value FWDBI (''forward banked inverse'') will be used for FX forwards with cash mark-to-market where the value is flipped from the contra currency to the primary currency.

Exactly as before, the FinalSettlCcy attribute denotes the currency in which the mark-to-market amount is denominated, and the Ccy attribute on Amt elements also specifies the currency.

Exactly as before, the FMTM amount type will denote mark-to-market. For forwards with cash mark-to-market, a new IMTM amount type—''incremental mark-to-market''—denotes the change in mark-to-market from the previous clearing business date—in other words, the settlement variation amount.

Exactly as before, the DLV amount type represents either the final mark-to-market amount to be banked (for cash settled contracts) or the invoice amount (for physically-delivered contracts.)

To simplify bookkeeping system processing, a new BANK amount element represents the total cash to be banked, and a new COLAT amount element represents the total amount to be collateralized. (For forwards with cash mark-to-market, the COLAT element will always have a value of zero.)

Margining in SPAN

There are no changes to how performance bond (initial margin) requirements are calculated in SPAN for portfolios including forwards with cash mark-to-market. Simply divide the true notional position by the equivalent position factor for the product, round the result up (away from zero) to the nearest integer, and feed the resulting ''marginable positions'' to SPAN, exactly as before.

Production Ready

Forwards with cash mark-to-market and the PAI enhancement are now available in CME's ''Production'' environment. For more information please contact CME Clearing at 312–207–2525.

* * * * *

The text of the proposed changes is also available at the CME's Web site at *http://www.cmegroup.com,* at the principal office of CME, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose 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 III below. CME 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 Purpose of, and Statutory Basis for, the Proposed Rule Change

CME currently offers clearing for certain OTC FX cleared-only products. In a previous filing, CME adopted a ''cash mark-to-market'' performance bond regime for its cleared-only OTC FX products. These changes were applicable to all then currently listed and future product rollouts (which now include 12 cleared, cash-settlement OTC FX non-deliverable forwards (''NDFs'') and 26 cleared, cash-settlement CME WM/Reuters OTC Spot, Forward and Swaps).[4] With this filing, CME proposes to enhance this current ''cash mark-to-market'' performance bond regime by adding PAI functionality, which will bring CME's centrally cleared OTC FX products in line with typical bilaterally held OTC FX transactions.

CME uses its SPAN system to establish performance bond or ''margin'' requirements for CME's OTC FX cleared-only products. Initial performance bond requirements are established at levels that are consistent with observed levels of volatility in the particular currency pairing and generally aligned with initial margin levels applied to current CME FX futures and option contracts, where applicable. Variation margins may be satisfied with the posting of appropriate amounts of collateral, where CME collects and pays in cash between the counterparties each day. CME accepts as collateral cash or any other instruments currently designated as approved collateral for posting for performance bonds. In order to calculate variation requirements, settlement prices are established for each contract and for each delivery date referencing data collected from a variety of market sources. None of these risk components of the clearing system would be changed with the proposed implementation of

[4] *See* Securities Exchange Act Release No. 34–65636 (October 26, 2011), 76 FR 67514 (November 1, 2011) [SR–CME–2011–14].

PAI to the ''cash mark-to-market'' performance bond regime.

The addition of PAI, which is appropriate for cleared-only derivatives products with daily mark-to-market amounts settled in cash like OTC FX, would simply enhance the current performance bond administration operational procedures. Under PAI, if the contract has positive net present value, the position holder pays price alignment interest and, conversely, if the contract has negative net present value, the position holder receives price alignment interest. The amount is calculated on the net realized cash flow, from the banking business day on which that amount was realized, to the next business day, and is annualized on an actual/360 basis. Therefore, when market participants are required to post a cash mark-to-market amount for a cleared OTC FX forward position, that market participant will be reimbursed the interest equivalent on those newly posted funds. Similarly, those market participants receiving the cash mark-to-market amount for a cleared OTC FX forward position are charged the interest equivalent on those newly credited funds to their account. This PAI performance bond mechanism adjustment makes the CME cleared OTC FX market more aligned with the underlying OTC FX forward market.

Pursuant to Commodity Futures Trading Commission (''CFTC'') regulations, the changes in the applicable performance bond regime have been interpreted by CME as being subject to CFTC Regulation 40.6(d), requiring a self certification filing to the CFTC, although no change to text of the CME rulebook is required. As such, the changes that are the subject of this filing and that are necessary to add the PAI functionality to CME's ''cash mark to market'' performance bond regime are changes to CME operational procedures only. CME notes that it has already certified the proposed changes that are the subject of this filing to its primary regulator, the CFTC. The text of the proposed changes is noted above.

CME believes the proposed changes are consistent with the requirements of the Exchange Act including Section 17A of the Exchange Act because they involve clearing of swaps and thus relate solely to the CME's swaps clearing activities pursuant to its registration as a derivatives clearing organization under the Commodity Exchange Act (''CEA'') and do not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service. CME further notes that the policies of the CEA with respect to clearing are comparable to a number of the policies underlying the Exchange Act, such as promoting market transparency for over-the-counter derivatives markets, promoting the prompt and accurate clearance of transactions and protecting investors and the public interest. The proposed rule changes accomplish those objectives by offering investors clearing for a range of FX OTC swap products.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. 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 may be submitted by using 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 No. SR–CME–2012–03 on the subject line.
- Paper comments should be sent 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–CME–2012–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME. 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–CME–2012–03 and should be submitted on or before March 6, 2012.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

In its filing, CME requested that the Commission approve this request on an accelerated basis, for good cause shown. CME has articulated three reasons for granting this request on an accelerated basis. One, the products covered by this filing, and CME's operations as a derivatives clearing organization for such products, are regulated by the CFTC under the CEA. Two, the proposed rule changes relate solely to FX swap products and therefore relate solely to its swaps clearing activities and do not significantly relate to CME's functions as a clearing agency for security-based swaps. Three, not approving this request on an accelerated basis will have a significant impact on the swap clearing business of CME as a designated clearing organization.

Section 19(b) of the Act [5] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. The Commission finds that the proposed rule changes is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act,[6] and the rules and regulations thereunder applicable to CME. Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act which requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and

[5] 15 U.S.C. 78s(b).

[6] 15 U.S.C. 78q–1. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

settlement of derivative agreements, contracts, and transactions because it should allow CME to enhance its services in clearing foreign currency contracts, thereby promoting the prompt and accurate clearance and settlement of derivative agreements, contracts, and transactions.[7]

The Commission finds good cause for accelerating approval because: (i) The proposed rule change does not significantly affect any securities clearing operations of the clearing agency (whether in existence or contemplated by its rules) or any related rights or obligations of the clearing agency or persons using such service; (ii) CME has indicated that not providing accelerated approval would have a significant impact on the foreign currency contracts clearing business of CME as a designated clearing organization; and (iii) the activity relating to the non-security clearing operations of the clearing agency for which the clearing agency is seeking approval is subject to regulation by another regulator.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–CME–2012–03) is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3329 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66356; File No. SR–BX–2012–007]

Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of a Proposal To Permit Customer Cross Orders on BOX

February 8, 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 26, 2012, NASDAQ OMX BX (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter V, Section 14(c) (Doing Business on BOX-Order Entry) and Supplementary Material .01 to Chapter V, Section 17 (Customer Orders), of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to permit Customer Cross Orders.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.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 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

Chapter V, Section 14(c) of the BOX Rules designates the order types that may be submitted to the Trading Host. The purpose of this proposal is to amend the definition of Order Entry to include Customer Cross Orders. In particular, the Exchange proposes to add the definition of a Customer Cross Order as new Section 14(c)(vii), specifying that a Customer Cross Order is comprised of a non-Professional, Public Customer Order to buy and a non-Professional, Public Customer Order to sell at the same price and for the same quantity. The Exchange also proposes to specify that Customer Cross Orders be automatically executed upon entry provided that the execution is between the best bid and offer on BOX (''BBO'') and will not trade-through the national best bid or offer (''NBBO'').

The proposed rule also specifies that Customer Cross Orders entered at a price that is outside the BBO or the NBBO will be automatically canceled, and that Customer Cross Orders may only be entered in the regular trading increments applicable to the options class under Chapter V, Section 6 of the BOX Rules.

Finally, the proposal specifies that Supplementary Material .01 to Chapter V, Section 17 of the BOX Rules, which prohibits an Options Participant from being a party to any arrangement designed to circumvent the requirements applicable to executing agency orders as principal, applies to the entry and execution of Customer Cross Orders. In this respect, the Exchange proposes to amend Supplementary Material .01 to Chapter V, Section 17 to specifically reference affiliates of Options Participants, which is consistent with how BOX has interpreted the provision.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[4] in general, and Section 6(b)(5) of the Act,[5] in particular. Specifically, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the Exchange believes that the proposed rule change provides for the efficient entry and execution of Customer Cross Orders while also protecting orders at the best prices on the BOX Book.

The Exchange notes that a similar filing proposed by the International Securities Exchange, LLC (''ISE'') became effective July 7, 2009.[6] The Exchange would like to similarly offer BOX Options Participants the opportunities associated with Customer

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] *See* Securities Exchange Act Release No. 60253 (July 7, 2009) 74 FR 34063 (July 14, 2009) (SR–ISE–2009–34) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Customer Cross Orders).

Cross Orders. BOX believes that this proposed rule change, which is essential for competitive purposes and to promote a free and open market for the benefit of investors, does not raise any new, unique or substantive issues from those raised in the effective ISE filing.

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

This proposed rule change is filed pursuant to paragraph (A) of section 19(b)(3) of the Exchange Act[7] and Rule 19b–4(f)(6) thereunder.[8] This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[9]

A similar filing proposed by the International Securities Exchange, LLC (''ISE'') became effective July 7, 2009.[10] The Exchange would like to similarly offer BOX Options Participants the opportunities associated with Customer Cross Orders. BOX believes that this proposed rule change, which is essential for competitive purposes and to promote a free and open market for the benefit of investors, does not raise any new, unique or substantive issues from those raised in the effective ISE filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2012–007 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2012–007. 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 10:00 a.m. and 3:00 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–BX–2012–007, and should be submitted on or before March 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3330 Filed 2–13–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[10] *See* Securities Exchange Act Release No. 60253 (July 7, 2009) 74 FR 34063 (July 14, 2009) (SR–ISE–2009–34) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Customer Cross Orders).

[11] 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 (PRA) of 1995, effective October 1, 1995. This notice includes an extention and a revision 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 collection below is pending at SSA. SSA will submit it 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 16, 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.

Youth Transition Process Demonstration Evaluation Data Collection—0960–0687

Background

The purpose of the Youth Transition Demonstration (YTD) project is to help

young people with disabilities make the transition from school to work. While participating in the project, youth can continue to work or continue their education because SSA waives certain disability program rules and offers services to youth who are receiving disability benefits or have a high probability of receiving them. We are currently implementing YTD projects in three sites across the country. Three other sites completed service delivery and closed. The evaluation will produce empirical evidence on the effects of the waivers and project services including (1) educational attainment, (2) employment, (3) earnings, (4) receipt of benefits by youth with disabilities, and (5) Social Security Trust Fund and Federal income tax revenues. Sections 1110 and 234 of the Social Security Act authorize this project.

Project Description

Given the importance of estimating YTD effects as accurately as possible, we are evaluating the project using rigorous analytic methods based on randomly assigning youth to a treatment or control group. We conducted several data collections. These include: (1) Baseline interviews with youth and their parents or guardians prior to random assignment; (2) follow-up interviews at 12 months after random assignment; (3) interviews and roundtable discussions with local program administrators, program supervisors, and service delivery staff; and (4) focus groups of youths, their parents, and service providers. We are currently collecting follow-up interviews at 36 months after random assignment. We began collecting information for YTD in 2007, and we will conclude data collection for the project in 2013. The respondents are youths with disabilities enrolled in the project; their parents or guardians; program staff; and service providers.

Type of Request: Extension of an existing OMB-approved information collection.

Data collection year	Collection	Number of respondents	Responses per respondent	Average burden per response (hours)	Total response burden (hours)
FY 2012 Data					
2012	36 Month Follow-up	364	1	0.83	302
Total					302
Combined Data from 2007–2013					
All Years	Baseline	5,651	1	0.55	3,108
	Informed Consent	5,651	1	.83	469
	12 Month Follow-up	4,752	1	.83	3,944
	In-depth Interviews	240	1	.42	101
	Focus Group	440	1	1.5	660
	Program Staff/Service Provider	192	1	1	192
	36 Month Follow-up	3,962	1	.83	3,288
Grand Total		20,888			11,762

II. SSA submitted the information collection 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 15, 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.

Application for Extra Help With Medicare Prescription Drug Plan Costs—20 CFR 418.310—0960–0696

The Medicare Modernization Act of 2003 mandated the creation of the Medicare Part D prescription drug coverage program and the provision of subsidies for eligible Medicare beneficiaries. SSA uses Form SSA–1020 and the i1020, the Application for Extra Help with Medicare Prescription Drug Plan Costs, to obtain income and resource information from Medicare beneficiaries and to make a subsidy decision. The respondents are Medicare beneficiaries applying for the Part D low-income subsidy.

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–1020 (paper application form)	724,238	1	30	362,119
i1020 (online application)	409,189	1	25	170,495
Field office interview	278,613	1	30	139,307
Totals	1,412,040			671,921

Dated: February 8, 2012.

Faye Lipsky,

Reports Clearance Officer, Office of Regulations and Reports Clearance, Social Security Administration.

[FR Doc. 2012–3291 Filed 2–13–12; 8:45 am]

BILLING CODE 4191–02–P

TENNESSEE VALLEY AUTHORITY

[Meeting No. 12–01]

Sunshine Act Meeting Notice, February 16, 2012

The TVA Board of Directors will hold a public meeting on February 16, 2012, in the Missionary Ridge Auditorium at TVA's Chattanooga Office Complex, 1101 Market Street, Chattanooga, Tennessee. The public may comment on any agenda item or subject at a *public listening session* which begins at 9 a.m. (ET). Following the end of the public listening session, the meeting will be called to order to consider the agenda items listed below. On-site registration will be available until 15 minutes before the public listening session begins at 9 a.m. (ET). Pre-registered speakers will address the Board first. TVA management will answer questions from the news media following the Board meeting.

STATUS: Open.

Agenda

Chairman's Welcome

Old Business

Approval of minutes of November 17, 2011, Board Meeting

New Business

1. Report from President and CEO.
2. Report of the Finance, Rates, and Portfolio Committee.
A. Financial Report.
B. Portfolio Report.
C. Small Manufacturing Credit Modification.
3. Report of the Customer and External Relations Committee.
A. Charter Amendment.
4. Report of the Nuclear Oversight Committee.
5. Report of the Audit, Risk, and Regulation Committee.
6. Report of the People and Performance Committee.

For more information: Please call TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. People who plan to attend the meeting and have special needs should call (865) 632–6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: February 9, 2012.

Ralph E. Rodgers

General Counsel and Secretary.

[FR Doc. 2012–3482 Filed 2–10–12; 11:15 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Applications for the Environment: Real-Time Information Synthesis (AERIS) User Needs Workshop; Notice of Public Meeting

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

The U.S. Department of Transportation (USDOT) Intelligent Transportation System Joint Program Office (ITS JPO) will host a free public workshop to discuss the Applications for the Environment: Real-Time Information Synthesis (AERIS) Program and solicit user needs for its Transformative Concepts on March 14, 2012, 9 a.m. to 5 p.m. and March 15, 2012, 9 a.m. to 4:30 p.m. at the Hall of States, 444 North Capitol Street NW., Washington, DC 20001, 202–624–5490. On March 14th, the first three hours of the workshop will also be webcast at no charge for those participants who are not able to participate in person. An electronic feedback form will be made available to allow participants to provide additional input.

Persons planning to attend any part of the workshop or participate in the three-hour Webinar should register online at *http://www.itsa.org/AERIS_User_Needs_Workshop* by February 29, 2012. Please specify if you plan to attend in person or participate via Webinar. For additional questions, please contact Adam Hopps at *Ahopps@ITSA.org* or 202–680–0091.

About the AERIS Program

At the core of Federal ITS research is connected vehicle research—a multimodal initiative that aims to enable safe, interoperable networked wireless communications among vehicles, the infrastructure, and passengers' personal communications devices. This research leverages the potentially transformative capabilities of wireless technology to make surface transportation safer, smarter, and greener. The objective of the AERIS research program is to generate and acquire environmentally-relevant real-time transportation data, and use these data to create actionable information that supports and facilitates ''green'' transportation choices by transportation system users and operators. Employing a multi-modal approach, the AERIS Program will work in partnership with the vehicle-to-vehicle (V2V) and vehicle-to-infrastructure (V2I) communications research efforts to better define how connected vehicle data and applications might contribute to mitigating some of the negative environmental impacts of surface transportation.

About the AERIS User Needs Workshop

The purpose of this workshop is to obtain stakeholder input on the Concepts of Operations (ConOps) that will be developed for the set of AERIS Transformative Concepts. Transformative Concepts are integrated operational concepts that use V2V, V2I, and other data and communications in innovative ways to operate surface transportation networks to reduce transportation-related emissions and fuel consumption. Transformative Concepts are intended to change the way surface transportation systems operate, with an emphasis on combining connected vehicle applications to provide significant environmental benefits. The AERIS Transformative Concepts include: (1) Eco-signal operations, (2) eco-lanes, (3) low-emissions zone, (4) eco-traveler information, (5) support for alternative fuel vehicle operations, and (6) eco-integrated corridor management. During this workshop, the AERIS team will facilitate interactive breakout sessions to obtain stakeholder input on desired capabilities, data needs, and modeling needs. This valuable feedback will be utilized by the USDOT to further define the Transformative Concepts and provide input into the ConOps. Input from this workshop will enable the USDOT in conducting future research and modeling to determine potential environmental benefits in a connected vehicle environment. For more information on the AERIS Program and the Transformative Concepts, visit: *http://www.its.dot.gov/aeris/index.htm.*

Issued in Washington, DC, on the 8th day of February 2012.

Shelley Row,

Director, ITS Joint Program Office.

[FR Doc. 2012–3349 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Sixth Meeting: RTCA Special Committee 225, Rechargeable Lithium Batteries and Battery Systems, Small and Medium Size

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

ACTION: Notice of RTCA Special Committee 225, Rechargeable Lithium Batteries and Battery Systems, Small and Medium Size.

SUMMARY: The FAA is issuing this notice to advise the public of the sixth meeting of RTCA Special Committee 225, Rechargeable Lithium Batteries and Battery Systems, Small and Medium Size.

DATES: The meeting will be held February 28–29, 2012, from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC, 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org*.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 225. The agenda will include the following:

February 28, 2012

- Welcome, Introductions, and Administrative Remarks
- Review of the meeting agenda.
- Review and approval of summary from the 5th plenary meeting.
- Review SC–225 schedule for Plenaries, working group meetings, and document preparation.
- Review action items.
- Review of current events with Li-Ion Batteries (15 min).
- Results of EFB thermal runaway on flightdeck (smoke and toxic gases).
- RTCA Workspace Demo.
- Discuss title of DO–3xx.
- Working Group Meeting—Review draft document.
- Battery Size Table (1.3.1) updates:
  - Add row for large size.
  - Add Wh equation.
- Review new action items.
- Review agenda for Wednesday.

February 29, 2012

- Review of meeting agenda, other actions.
- Verify dates of next plenary and upcoming meeting working group meetings.
- Establish Agenda for 7th plenary meeting.
- Working Group Meeting—Review draft document
- Working Group report, review progress and actions.
- Review all action items.
- Adjourn.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on February 7, 2012.

Kathy Hitt,

Program Analyst, Business Operations Branch, Federal Aviation Administration.

[FR Doc. 2012–3364 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0107]

Petition for Waiver of Compliance

In accordance with part 213 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. By a document dated December 28, 2011, CSX Transportation (CSX) petitions FRA for a waiver from certain rail testing requirements contained in 49 CFR part 213. FRA assigned the petition Docket Number FRA–2011–0107.

Pursuant to 49 CFR Section 213.113(a), CSX requests a waiver from the accepted practice of stop/start rail testing for phase III of its nonstop continuous rail test pilot project beginning April 1, 2012, for a period of up to 1 year on the main tracks between Richmond, VA, and Charleston, SC. The subdivisions that would be traversed are the North End, South End, and Charleston.

Based on the results of the previous phases of nonstop continuous rail test, CSX will not perform parallel or redundant start/stop rail testing on track segments being nonstop continuous rail tested under this waiver. Instead, CSX proposes to produce nonstop continuous rail test reports every 2 weeks for review by FRA's Rail and Infrastructure Integrity Division. As CSX develops confidence in the performance of the system, and as agreed by CSX and FRA, it proposes to expand the test area to include the tracks between Richmond, VA, and Jacksonville, FL, and test on a monthly basis.

The nonstop continuous high-speed rail test vehicle will be a self-propelled ultrasonic/induction flaw detection vehicle operating at speeds up to 30 mph. This vehicle will be making runs every 2 weeks over the assigned territory. Upon completion of each run, data will be analyzed offline by a group of experts with experience in this process. The analysis will categorize and prioritize suspect defective locations for post-test verification. Verifiers will then be sent out with field instruments to check these suspect locations based upon Global Positioning System (GPS) coordinates. All suspect locations will be checked 60 feet on either side of the suspect GPS location. Remedial actions will be applied, as per 49 CFR Section 213.113, for confirmed rail defects. CSX believes that nonstop continuous rail testing will provide the capability to test track more quickly and frequently, and minimize the risk of rail service failures.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2011–0107) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202 493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is

taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

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

Issued in Washington, DC, on February 8, 2012.

Ron Hynes,

Acting Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2012–3346 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0180]

Petition for Waiver of Compliance

In accordance with part 211 of title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that by a document dated January 26, 2011, the Denton County Transportation Authority (DCTA) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations. FRA assigned the petition Docket Number FRA–2010–0180.

Specifically, DCTA has ordered 11 Stadler Bussnang AG, GTW 2⁄6 Diesel Multiple Units. These vehicles are constructed by a European manufacturer and meet European safety standards for crashworthiness and related safety measures. Currently, these vehicles are being delivered and tested at a DCTA maintenance facility. DCTA now seeks relief from certain requirements of the ''Technical Criteria and Procedures for Evaluating the Crashworthiness and Occupant Protection Performance of Alternatively Designed Passenger Rail Equipment for use in Tier I Service.'' In 2010, FRA formed an Engineering Task Force (ETF) to develop crashworthiness criteria for an alternatively designed and constructed passenger vehicle to be capable of operating on the general railroad system with other compliant Tier 1 equipments.

The waiver petition includes documentation on the following crashworthiness issues as required by ETF–1:

- Collision with Conventional Equipment
- Occupant Volume Integrity
- Colliding Equipment Override
- Fluid Entry Inhibition
- End Structure Integrity of Cab End
- End Structure Integrity of Non-Cab End
- Roof Integrity
- Side Structure Integrity
- Truck to Carbody Attachment
- Interior Fixture Attachment

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19477), or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on February 8, 2012.

Ron Hynes,

Acting Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2012–3347 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Hazardous Materials Safety, DOT.

ACTION: List of Applications Delayed More than 180 Days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION:

Key to ''Reason for Delay''

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit Applications.

Meaning of Application Number Suffixes

N—New application.
M—Modification request.

R—Renewal Request.

P—Party To Exemption Request.

Issued in Washington, DC, on February 2, 2012.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Applicant	Reason for delay	Estimated date of completion
	Modification to Special Permits		
8826–M	Phoenix Air Group, Inc. Cartersville, GA	4	03–31–2012
14909–M	Lake Clark Air, Inc. Port Alsworth, AK	4	03–31–2012
10656–M	Conference of Radiation Control Program Directors, Inc. Frankfort, KY	4	03–31–2012
11406–M	Conference of Radiation Control Program Directors, Inc. Frankford, KY	4	03–31–2012
12561–M	Rhodia, Inc. Cranbury, NJ	4	03–31–2012
	New Special Permit Applications		
14872–N	Arkema, Inc. King of Prussia, PA	4	03–31–2012
14951–N	Lincoln Composites Lincoln, NE	1	03–31–2012
15080–N	Alaska Airlines Seattle, WA	1	03–31–2012
15233–N	ExpressJet Airlines, Inc. Houston, TX	4	03–31–2012
15510–N	TEMSCO Helicopters, Inc. Ketchikan, AK	4	03–31–2012
	Party to Special Permits Application		
12134–P	Riceland Foods, Inc. Stuttgart, AR	4	03–31–2012
	Renewal Special Permits Applications		
8445–R	Environmental Products & Services, Inc. Syracuse, NY	4	03–31–2012
12443–R	Thatcher Company of Nevada Henderson, NV	4	03–31–2012
14482–R	Classic Helicopters Limited, L.C. Woods Cross, UT	4	03–31–2012
11759–R	E.I. duPont de Neumours & Company, Inc. Wilmington, DE	4	03–31–2012
8723–R	Nelson Brothers Mining Services, LLC Birmingham, AL	4	03–31–2012
11749–R	Occidental Chemical Corporation Dallas, TX	4	03–31–2012
7891–R	Aldrich Chemical Company Inc. Milwaukee, WI	4	03–31–2012
12283–R	Interstate Battery of Alaska Anchorage, AK	4	03–31–2012
10709–R	Schlumberger Technologies Corporation Sugar Land, TX	4	03–31–2012
11227–R	Schlumberger Well Services a Division of Schlumberger Technology Corporation Sugar Land, TX.	4	03–31–2012
9929–R	Alliant Techsystems Inc. Propulsion & Controls (Former Grantee ATK Elkton) Elkton, MD	4	03–31–2012
11903–R	Comptank Corporation Bothwell, ON	4	03–31–2012
4850–R	Schlumberger Technology Corporation Sugar Land, TX	4	03–31–2012

[FR Doc. 2012–2898 Filed 2–13–12; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Joint Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Joint Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, March 28, 2012.

FOR FURTHER INFORMATION CONTACT: Susan Gilbert at 1–888–912–1227 or (515) 564–6638.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Wednesday, March 28, 2012, 2:00 p.m. Eastern Time via teleconference. The public is invited to make oral comments or submit written statements for consideration. Notification of intent to participate must be made with Susan Gilbert. For more information please contact Ms. Gilbert at 1–888–912–1227 or (515) 564–6638 or write: TAP Office, 210 Walnut Street, Stop 5115, Des Moines, IA 50309 or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS topics.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3354 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Refund Processing Communications Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Refund Processing Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, March 01, 2012.

FOR FURTHER INFORMATION CONTACT: Ellen Smiley at 1–888–912–1227 or 414–231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section

10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Refund Processing Communications Project Committee will be held Thursday, March 01, 2012 at 2 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Ms. Ellen Smiley. For more information please contact Ms. Smiley at 1–888–912–1227 or 414–231–2360, or write TAP Office Stop 1006MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3366 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Return Processing Delays Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Return Processing Delays Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, March 06, 2012.

FOR FURTHER INFORMATION CONTACT: Janice Spinks at 1–888–912–1227 or 206–220–6098.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Return Processing Delays Project Committee will be held Tuesday, March 06, 2012, at 9:30 a.m. Pacific Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notifications of intent to participate must be made with Ms. Janice Spinks. For more information please contact Ms. Spinks at 1–888–912–1227 or 206–220–6098, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3368 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Toll-Free Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Toll-Free Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, March 06, 2012.

FOR FURTHER INFORMATION CONTACT: Marianne Dominguez at 1–888–912–1227 or 954–423–7978.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Toll-Free Project Committee will be held Tuesday, March 06, 2012, at 11 a.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Marianne Dominguez. For more information please contact Ms. Dominguez at 1–888–912–1227 or 954–423–7978, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324, or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3367 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Bankruptcy Compliance Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Bankruptcy Compliance Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, March 13, 2012.

FOR FURTHER INFORMATION CONTACT: Timothy Shepard at 1–888–912–1227 or 206–220–6095.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Bankruptcy Compliance Project Committee will be held Tuesday, March 13, 2012, at 9 a.m. Pacific Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Timothy Shepard. For more information please contact Mr. Shepard at 1–888–912–1227 or 206–220–6095, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174, or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS Issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3365 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Face-to-Face Service Methods Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Face-to-Face Service Methods Project Committee will

be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, March 13, 2012.

FOR FURTHER INFORMATION CONTACT: Donna Powers at 1–888–912–1227 or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Face-to-Face Service Methods Project Committee will be held Tuesday, March 13, 2012, at 2 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Donna Powers. For more information please contact Ms. Powers at 1–888–912–1227 or 954–423–7977, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324, or contact us at the Web site: *http://www.improveirs.org*.

The agenda will include various IRS Issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3363 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of Taxpayer Advocacy Panel Taxpayer Burden Reduction Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Taxpayer Burden Reduction Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, March 21, 2012.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 or 718–488–2085.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10 (a) (2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Taxpayer Burden Reduction Project Committee will be held Wednesday, March 21, 2012, at 2:30 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Ms. Jenkins. For more information please contact Ms. Jenkins at 1–888–912–1227 or 718–488–2085, or write TAP Office, 10 MetroTech Center, 625 Fulton Street Brooklyn, NY 11201, or post comments to the Web site: *http://www.improveirs.org*.

The agenda will include various IRS issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3355 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Small Business/Self-Employed Decreasing Non-Filers Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Small Business/Self-Employed Decreasing Non-Filers Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, March 20, 2012.

FOR FURTHER INFORMATION CONTACT: Patricia Robb at 1–888–912–1227 or 414–231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Small Business/Self-Employed Decreasing Non-Filers Project Committee will be held Tuesday, March 20, 2012, at 10 a.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Ms. Patricia Robb. For more information please contact Ms. Robb at 1–888–912–1227 or 414–231–2360, or write TAP Office, Stop 1006MIL, 211 West Wisconsin Avenue Milwaukee, WI 53203–2221, or post comments to the Web site: *http://www.improveirs.org*.

The agenda will include various IRS issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3360 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Tax Forms and Publications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Tax Forms and Publications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, March 14, 2012.

FOR FURTHER INFORMATION CONTACT: Marisa Knispel at 1–888–912–1227 or 718–488–3557.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Tax Forms and Publications Project Committee will be held Wednesday, March 14, 2012, at 2:00 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Ms. Knispel. For more information please contact Ms. Knispel at 1–888–912–1227 or 718–488–3557, or write TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201, or post comments to the web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: February 8, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–3361 Filed 2–13–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Health Services Research and Development Service Scientific Merit Review Board; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that various subcommittees of the Health Services Research and Development Service Scientific Merit Review Board will meet on March 6–8, 2012, at the Hilton New Orleans Riverside, 2 Poydras Street, New Orleans, Louisiana. Each subcommittee meeting of the Board will be open to the public the first day for approximately one half-hour from 8 a.m. until 8:30 a.m. to cover administrative matters and to discuss the general status of the program. The remaining portion of the meetings will be closed. The closed portion of each meeting will involve discussion, examination, reference to, and oral review of the intramural research proposals and critiques.

The purpose of the Board is to review research and development applications involving the measurement and evaluation of health care services, the testing of new methods of health care delivery and management, and nursing research. Applications are reviewed for scientific and technical merit. Recommendations regarding funding are submitted to the Chief Research and Development Officer.

On March 6, the subcommittee on Nursing Research Initiatives will convene from 8 a.m. to 3 p.m., and the Career Development Award will convene from 8 a.m. to 5:30 p.m. On March 7, the Career Development Award will reconvene from 8 a.m. to 3 p.m.; and six subcommittees on Health Services Research (HSR) (HSR 1—Medical Care and Clinical Management; HSR 2—Determinants of Patient Response to Care; HSR 3—Informatics and Research Methods Development; HSR 4—Mental and Behavioral Health; HSR 5—Health Care System Organization and Delivery, and HSR 6—Post-acute and Long-term Care) will convene from 8 a.m. to 6 p.m. On March 8, eight subcommittees on HSR Collaborative Research (HCR) to Enhance and Advance Transformation and Excellence (HCR 1—Post-Traumatic Stress Disorders; HCR 2—Substance Use Disorders; HCR 3—Rehabilitation/Rural; HCR 4—Women's Health; HCR 5—Pain; HCR 6—Long-Term Care; HCR 7—Diabetes; and HCR 8—Safety Health Information Technology) will convene from 8 a.m. to 4 p.m.

During the closed portion of each meeting, discussion and recommendations will include qualifications of the personnel conducting the studies (the disclosure of which would constitute a clearly unwarranted invasion of personal privacy), as well as research information (the premature disclosure of which would likely compromise significantly the implementation of proposed agency action regarding such research projects). As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing portions of each meeting is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

Those who plan to attend the open sessions should contact Kristy Benton-Grover, Scientific Merit Review Program Manager, Department of Veterans Affairs,

Health Services Research and Development (10P9H), 810 Vermont Avenue NW., Washington, DC 20420, or by email at *Kristy.benton-grover@va.gov,* at least 5 days before the meeting. For further information, please call Mrs. Benton-Grover at (202) 443–5728.

By Direction of the Secretary.

Dated: February 8, 2012.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–3315 Filed 2–13–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Cemeteries and Memorials will be held on April 24–25, 2012, in Suite 150 at the Veterans Health Administration Conference Center, Department of Veterans Affairs, 2011 Crystal Drive, Suite 150, Arlington, VA, from 8:30 a.m. to 4 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of national cemeteries, soldiers' lots and plots, the selection of new national cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits.

On April 24, the Committee will receive updates on National Cemetery Administrations issues. In the morning of April 25, the Committee will participate in a wreath presentation and tour the Quantico National Cemetery, 18424 Joplin Road, Triangle, Virginia. In the afternoon, the Committee will reconvene at the Conference Center and discuss Committee recommendations, future meeting sites, and potential agenda topics at future meetings.

Time will be allocated for receiving public comments at 1 p.m. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

Members of the public may direct questions or submit written statements for review by the Committee in advance of the meeting to Mr. Michael Nacincik, Designated Federal Officer, Department of Veterans Affairs, National Cemetery Administration (41C2), 810 Vermont Avenue NW., Washington, DC 20420, or by email at *Michael.n@va.gov.* In the public's communications with the Committee, the writers must identify themselves and state the organizations, associations, or persons they represent. Any member of the public wishing to attend the meeting should contact Mr. Nacincik at (202) 461–6240.

Dated: February 8, 2012.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–3327 Filed 2–13–12; 8:45 am]

BILLING CODE P



FEDERAL REGISTER

Vol. 77 Tuesday,
No. 30 February 14, 2012

Part II

Commodity Futures Trading Commission

17 CFR Part 75
Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Covered Funds; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 75

RIN 3038–AD05

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Covered Funds

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is requesting comment on a proposed rule that would implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') which contains certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the Board of Governors of the Federal Reserve System (the ''Board'') to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund (''CFTC Rule'').

On November 7, 2011, the Office of the Comptroller of the Currency, Treasury (''OCC''); the Board; the Federal Deposit Insurance Corporation (''FDIC''); and the Securities and Exchange Commission (''SEC'') published a joint proposed rule implementing Section 619 of the Dodd-Frank Act (the ''Joint Release'').[1] The CFTC is adopting the entire text of the proposed common rules section from the Joint Release (the ''Joint Rule'') as part of its proposed rule.[2] Similar to the OCC, the Board, the FDIC, and the SEC in the Joint Release, the CFTC is modifying the Joint Rule with CFTC-specific rule text. The CFTC Rule also contains additional questions specific to the CFTC in Section III and does not include Subpart E of the Joint Release because Subpart E deals exclusively with the Board. The Commission solicits comments on all aspects of this proposed rule.

DATES: Comments should be received on or before April 16, 2012.

ADDRESSES: Interested parties are encouraged to submit written comments to either the CFTC individually or jointly to the OCC, Board, FDIC (collectively, the ''Federal Banking Agencies'' or ''FBA''); SEC, and together with the CFTC, (the ''Agencies'').[3] Commenters are encouraged to use the title ''Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds'' to facilitate the organization and distribution of comments to the CFTC and among the Agencies. Commenters are also encouraged to identify the number of the specific question for comment to which they are responding.

You may submit comments, identified by RIN number 3038–AD05, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Please submit comments by only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in 17 CFR 145.9. The Commission reserves the right, but shall have no obligation, to review, prescreen, filter, redact, refuse, or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

FOR FURTHER INFORMATION CONTACT: Steven E. Seitz, Counsel, Office of the General Counsel, 202–418–5615, *sseitz@cftc.gov;* Gary Barnett, Director, Division of Swap and Intermediary Oversight, (202) 418–5977, *gbarnett@cftc.gov;* Beverly Loew, Assistant General Counsel, Office of the General Counsel, (202) 418–5648, *bloew@cftc.gov;* Adedayo Banwo, Counsel, Office of the General Counsel, (202) 418–6249, *abanwo@cftc.gov;* Mathew Hargrow, Attorney Advisor, Office of the General Counsel, (202) 418–5267, *mhargrow@cftc.gov;* Todd Prono, Financial Economist, Office of the Chief Economist, (202) 418–5640, *tprono@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act was enacted on July 21, 2010.[4] Section 619 of the Dodd-Frank Act added a new section 13 to the Bank Holding Company Act of 1956 (''BHC Act'') (to be codified at 12 U.S.C. 1851) that generally prohibits any banking entity[5] from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (''covered fund''), subject to certain exemptions.[6] New section 13 of the BHC Act also provides for nonbank financial companies supervised by the Board that engage in such activities or have such interests or relationships to be subject to additional capital requirements, quantitative limits, or other restrictions.[7]

[1] *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 FR 68846, (Nov. 7, 2011).

[2] *See* 76 FR 68944–68967 for the Joint Rule text adopted by the Board, the OCC, the FDIC, and the SEC.

[3] *See id.* at 68846 for instructions on submitting comments to the OCC, the Board, the FDIC, and the SEC.

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[5] Application of the proposed rule to smaller, less-complex banking entities is discussed below in Part II.G of this Supplemental Information.

[6] The term ''banking entity'' is defined in section 13(h)(1) of the BHC Act, as amended by section 619 of the Dodd-Frank Act. *See* 12 U.S.C. 1851(h)(1). The statutory definition includes any insured depository institution (other than certain limited purpose trust institutions), any company that controls an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106), and any affiliate or subsidiary of any of the foregoing. Section 13 of the BHC Act defines the terms ''hedge fund'' and ''private equity fund'' as an issuer that would be an investment company, as defined under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), but for section 3(c)(1) or 3(c)(7) of that Act, or any such similar funds as the appropriate Federal banking agencies (*i.e.,* the Board, OCC, and FDIC), the SEC, and the CFTC may, by rule, determine should be treated as a hedge fund or private equity fund. *See* 12 U.S.C. 1851(h)(2). The term banking entity that is used throughout this Supplemental Information only pertains to those banking entities that are relevant to the CFTC under the CFTC Rule.

[7] *See* 12 U.S.C. 1851(a)(2) and (f)(4). A ''nonbank financial company supervised by the Board'' is a

A. Rulemaking Framework

Section 13 of the BHC Act requires that implementation of its provisions occur in several stages. First, the Council was required to conduct a study (''Council study'') and make recommendations by January 21, 2011 on the implementation of section 13 of the BHC Act. The Council study was issued on January 18, 2011, and included a detailed discussion of key issues related to implementation of section 13 and recommended that the Agencies consider taking a number of specified actions in issuing rules under section 13 of the BHC Act.[8] The Council study also recommended that the Agencies adopt a four-part implementation and supervisory framework for identifying and preventing prohibited proprietary trading, which included a programmatic compliance regime requirement for banking entities, analysis and reporting of quantitative metrics by banking entities, supervisory review and oversight by the Agencies, and enforcement procedures for violations.[9] The CFTC has carefully considered the Council study and its recommendations, and has consulted with staff of the other Agencies, in formulating this proposal.[10]

The CFTC is adopting the entire text of the proposed common rules from the Joint Release (the ''Joint Rule'') as part of its proposed rule.[11] Similar to the other Agencies in the Joint Release, the CFTC is modifying the text of proposed common rules section from the Joint Release with CFTC-specific rule text.

Sections II and III of the CFTC Rule are substantively consistent with Sections II and III of the Joint Release, with the following exceptions: (a) Sections II of the CFTC Rule also includes the following additional questions: 8.1, 14.1, 30.1, 30.2, 64.1, 87.1, 88.1, 168.1, 168.2, 177.1, 218.1, 227.1, 296.1, and 302.1 [12] and (b) the CFTC Rule does not include Subpart E of the Joint Release because Subpart E only applies to the Board.[13] The CFTC Rule includes these additional questions to ask whether certain provisions of the Joint Rule should be applicable to CFTC-regulated banking entities. In these questions, the CFTC generally asks whether the proposed CFTC Rule should adopt such provisions and requests an explanation of the rationale for either including or excluding such provision in the proposed CFTC Rule.

Authority for developing and adopting regulations to implement the prohibitions and restrictions of section 13 of the BHC Act is divided between the Agencies in the manner provided in section 13(b)(2) of the BHC Act.[14] The statute also requires the Agencies, in developing and issuing implementing rules, to consult and coordinate with each other, as appropriate, for the purposes of assuring, to the extent possible, that such rules are comparable and provide for consistent application and implementation of the applicable provisions of section 13 of the BHC Act.[15] The CFTC believes that such coordination will assist in ensuring that advantages are not unduly provided to, and that disadvantages are not unduly imposed upon, companies affected by section 13 of the BHC Act and that the safety and soundness of banking entities and nonbank financial companies supervised by the Board are protected. The statute requires the CFTC to implement rules under section 13 not later than 9 months after the Council completes its study (*i.e.,* not later than October 18, 2011).[16] The restrictions and prohibitions of section 13 of the BHC Act become effective 12 months after issuance of final rules by the CFTC, or July 21, 2012, whichever is earlier.[17]

In addition, the statute required the Board, acting alone, to adopt rules to implement the provisions of section 13 of the BHC Act that provide a banking entity or a nonbank financial company supervised by the Board a period of time *after* the effective date of section 13 of the BHC Act to bring the activities, investments, and relationships of the banking entity into compliance with that section and the Agencies' implementing regulations.[18] The Board issued its final conformance rule as required under section 13(c)(6) of the BHC Act on February 8, 2011 (''Board's Conformance Rule'').[19] As noted in the issuing release for the Board's Conformance Rule, this period is intended to give markets and firms an opportunity to adjust to section 13 of the BHC Act.[20]

B. Section 13 of the BHC Act

Section 13 of the BHC Act generally prohibits banking entities from engaging in proprietary trading or from acquiring or retaining any ownership interest in, or sponsoring, a covered fund.[21] However, section 13(d)(1) of that Act expressly includes exemptions from

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nonbank financial company or other company that the Financial Stability Oversight Council (''Council'') has determined, under section 113 of the Dodd-Frank Act, shall be subject to supervision by the Board and prudential standards. The Board is not proposing at this time any additional capital requirements, quantitative limits, or other restrictions on nonbank financial companies pursuant to section 13 of the BHC Act, as it believes doing so would be premature in light of the fact that the Council has not yet finalized the criteria for designation of, nor yet designated, any nonbank financial company.

[8] *See* Financial Stability Oversight Counsel, Study and Recommendations on Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds (Jan. 18, 2011), *available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20619%20study%20final%201%2018%2011%20rg.pdf. See* 12 U.S.C. 1851(b)(1). Prior to publishing its study, the Council requested public comment on a number of issues to assist the Council in conducting its study. *See* 75 FR 61,758 (Oct. 6, 2010). Approximately 8,000 comments were received from the public, including from members of Congress, trade associations, individual banking entities, consumer groups, and individuals. As noted in the issuing release for the Council Study, these comments were carefully considered by the Council when drafting the Council study.

[9] *See* Council study at 5–6. The CFTC has implemented this recommendation through the proposed compliance program requirements contained in Subpart D of this proposal with respect to both proprietary trading and covered fund activities and investments.

[10] The CFTC also received a number of comment letters concerning implementation of section 13 of the BHC Act in advance of this proposal. The CFTC has carefully considered these comments in formulating this proposal.

[11] *See* 76 FR 68944 through 68967 for the Joint Rule.

[12] Section VI of the proposed CFTC Rule also contains the additional question 348.1.

[13] The CFTC believes that Sections II and III of both the CFTC Rule and the Joint Release are substantively consistent with the exception of the additional questions and the deletion of Subpart E. Any other discrepancies between Sections II and III of the CFTC Rule and the Joint Release are solely for stylistic purposes and are not intended to create any substantive differences between these sections of the CFTC Rule and the Joint Release.

[14] *See* 12 U.S.C. 1851(b)(2). Under section 13(b)(2)(B) of the BHC Act, rules implementing section 13's prohibitions and restrictions must be issued by: (i) the appropriate Federal banking agencies (*i.e.,* the Board, the OCC, and the FDIC), jointly, with respect to insured depository institutions; (ii) the Board, with respect to any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act, any nonbank financial company supervised by the Board, and any subsidiary of any of the foregoing (other than a subsidiary for which an appropriate Federal banking agency, the SEC, or the CFTC is the primary financial regulatory agency); (iii) the CFTC with respect to any entity for which it is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Act; and (iv) the SEC with respect to any entity for which it is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Act. *See id.*

[15] *See* 12 U.S.C. 1851(b)(2)(B)(ii). The Secretary of the Treasury, as Chairperson of the Council, is responsible for coordinating the Agencies' rulemakings under section 13 of the BHC Act. *See id.*

[16] *See id.* at 1851(b)(2)(A).

[17] *See id.* at 1851(c)(1).

[18] *See id.* at 1851(c)(6).

[19] *See Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities,* 76 FR 8265 (Feb. 14, 2011).

[20] *See id.* (citing 156 Cong. Rec. S5898 (daily ed. July 15, 2010) (statement of Sen. Merkley)).

[21] 12 U.S.C. 1851(a)(1)(A) and (B).

these prohibitions for certain permitted activities, including:

- Trading in certain government obligations;
- Underwriting and market making-related activities;
- Risk-mitigating hedging activity;
- Trading on behalf of customers;
- Investments in Small Business Investment Companies (''SBICs'') and public interest investments;
- Trading for the general account of insurance companies;
- Organizing and offering a covered fund (including limited investments in such funds);
- Foreign trading by non-U.S. banking entities; and
- Foreign covered fund activities by non-U.S. banking entities.[22]

For purposes of this **SUPPLEMENTARY INFORMATION,** trading activities subject to section 13 of the BHC Act, including those permitted under a relevant exemption, are sometimes referred to as ''covered trading activities.'' Similarly, activities and investments with respect to a covered fund that are subject to section 13 of the BHC Act, including those permitted under a relevant exemption, are sometimes referred to as ''covered fund activities or investments.''

Additionally, section 13 of the BHC Act permits the CFTC to grant, by rule, other exemptions from the prohibitions on proprietary trading and acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund if the CFTC determines that the exemption would promote and protect the safety and soundness of the banking entity and the financial stability of the United States.[23] Furthermore, under the statute, no banking entity may engage in a permitted activity if that activity would (i) involve or result in a material conflict of interest or material exposure of the banking entity to high-risk assets or high-risk trading strategies, or (ii) pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[24]

Section 13(f) of the BHC Act separately prohibits a banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a covered fund, and any affiliate of such a banking entity, from entering into any transaction with the fund, or any other covered fund controlled by such fund, that would be a ''covered transaction'' as defined in section 23A of the Federal Reserve Act (''FR Act''),[25] as if such banking entity or affiliate were a member bank and the covered fund were an affiliate thereof, subject to certain exceptions.[26] Section 13(f) also provides that a banking entity may enter into certain prime brokerage transactions with any covered fund in which a covered fund managed, sponsored, or advised by the banking entity has taken an equity, partnership, or other ownership interest, but any such transaction (and any other permitted transaction with such funds) must be on market terms in accordance with the provisions of section 23B of the FR Act.[27]

Section 13 of the BHC Act does not prohibit a nonbank financial company supervised by the Board from engaging in proprietary trading, or from having the types of ownership interests in or relationships with a covered fund that a banking entity is prohibited or restricted from having under section 13 of the BHC Act. However, section 13 of the BHC Act provides for the Board or other appropriate Agency to impose additional capital charges, quantitative limits, or other restrictions on a nonbank financial company supervised by the Board or their subsidiaries and affiliates that are engaged in such activities or maintain such relationships.[28]

II. Overview of Proposed Rule

A. General Approach

In formulating the proposed rule, the CFTC attempted to reflect the structure of section 13 of the BHC Act, which is to prohibit a banking entity from engaging in proprietary trading or acquiring or retaining an ownership interest in, or having certain relationships with, a covered fund, while permitting such entities to continue to provide client-oriented financial services. However, the delineation of what constitutes a prohibited or permitted activity under section 13 of the BHC Act often involves subtle distinctions that are difficult both to describe comprehensively within regulation and to evaluate in practice. The CFTC appreciates that while it is crucial that rules under section 13 of the BHC Act clearly define and implement its requirements, any rule must also preserve the ability of a banking entity to continue to structure its businesses and manage its risks in a safe and sound manner, as well as to effectively deliver to its clients the types of financial services that section 13 expressly protects and permits. These client-oriented financial services, which include underwriting, market making, and traditional asset management services, are important to the U.S. financial markets and the participants in those markets, and the CFTC endeavored to develop a proposed rule that does not unduly constrain banking entities in their efforts to safely provide such services. At the same time, providing appropriate latitude to banking entities to provide such client-oriented services need not and should not conflict with clear, robust, and effective implementation of the statute's prohibitions and restrictions. Given these complexities, the CFTC requests comment on the potential impacts the proposed approach may have on banking entities and the businesses in which they engage. In particular, and as discussed further in Part VII of this Supplemental Information, the CFTC recognizes that there are economic impacts that may arise from the proposed rule and its implementation of section 13 of the BHC Act, and the CFTC requests comment on such impacts, including quantitative data or studies, where possible.

In light of these larger challenges and goals, the CFTC's proposal takes a multi-faceted approach to implementing section 13 of the BHC Act. In particular, the proposed rule includes a framework that: (i) Clearly describes the key characteristics of both prohibited and permitted activities; (ii) requires banking entities to establish a comprehensive programmatic compliance regime designed to ensure compliance with the requirements of the statute and rule in a way that takes into account and reflects the unique nature of a banking entity's businesses; and (iii) with respect to proprietary trading, requires certain banking entities to calculate and report meaningful quantitative data that will assist both banking entities and the CFTC in identifying particular activity that warrants additional scrutiny to distinguish prohibited proprietary trading from otherwise permissible activities. This multi-faceted approach, which is consistent with the implementation and supervisory framework recommended in the Council study, is intended to strike an appropriate balance between accommodating prudent risk

[22] *See id.* at 1851(d)(1). As described in greater detail in Part III.B.4 of this **SUPPLEMENTARY INFORMATION**, the proposed rule applies some of these statutory exemptions only to the proprietary trading prohibition or the covered fund prohibitions and restrictions, but not both, where it appears either by plain language or by implication that the exemption was intended only to apply to one or the other.

[23] *Id.* at 1851(d)(1)(J).

[24] *See id.* at 1851(d)(2).

[25] *See* 12 U.S.C. 371c.

[26] 12 U.S.C. 1851(f).

[27] 12 U.S.C. 371c–1.

[28] *See* 12 U.S.C. 1851(a)(2), (d)(4).

management and the continued provision of client-oriented financial services by banking entities while ensuring that such entities do not engage in prohibited proprietary trading or restricted covered fund activities or investments.[29]

In addition, and consistent with the statutory requirement that the CFTC's rule under section 13 of the BHC Act be, to the extent possible, comparable and provide for consistent application and implementation, the CFTC is proposing the Joint Rule (*i.e.,* common rule and appendices) that was proposed by the other Agencies. This uniform approach to implementation is intended to provide the maximum degree of clarity to banking entities and market participants and ensure that section 13's prohibitions and restrictions are applied consistently across different types of regulated entities.[30]

As a matter of structure, the proposed rule is generally divided into four subparts and contains three appendices, as follows:

- Subpart A of the proposed rule describes the authority, scope, purpose, and relationship to other authorities of the rule and defines terms used commonly throughout the rule;
- Subpart B of the proposed rule prohibits proprietary trading, defines terms relevant to covered trading activity, establishes exemptions from the prohibition on proprietary trading and limitations on those exemptions, and requires certain banking entities to report quantitative measurements with respect to their trading activities;
- Subpart C of the proposed rule prohibits or restricts acquiring or retaining an ownership interest in, and certain relationships with, a covered fund, defines terms relevant to covered fund activities and investments, as well as establishes exemptions from the restrictions on covered fund activities and investments and limitations on those exemptions;
- Subpart D of the proposed rule generally requires banking entities to establish an enhanced compliance program regarding compliance with section 13 of the BHC Act and the proposed rule, including written policies and procedures, internal controls, a management framework, independent testing of the compliance program, training, and recordkeeping;
- Appendix A of the proposed rule details the quantitative measurements that certain banking entities may be required to compute and report with respect to their trading activities;[31]
- Appendix B of the proposed rule provides commentary regarding the factors the Agencies propose to use to help distinguish permitted market making-related activities from prohibited proprietary trading; and
- Appendix C of the proposed rule details the minimum requirements and standards that certain banking entities must meet with respect to their compliance program, as required under subpart D.[32]

B. Proprietary Trading Restrictions

Subpart B of the proposed rule implements the statutory prohibition on proprietary trading and the various exemptions to this prohibition included in the statute. Section __.3 of the proposed rule contains the core prohibition on proprietary trading and defines a number of related terms, including ''proprietary trading'' and ''trading account.'' The proposed rule's definition of proprietary trading generally parallels the statutory definition, and includes engaging as principal for the trading account of a banking entity in any transaction to purchase or sell certain types of financial positions.[33]

The proposed rule's definition of trading account generally parallels the statutory definition, and provides further guidance regarding the circumstances in which a position will be considered to have been taken principally for the purpose of short-term resale or benefiting from actual or expected short-term price movements, recognizing the importance of providing as much clarity as possible regarding this term, which ultimately defines the scope of accounts subject to the prohibition on proprietary trading.[34] In particular, the proposed definition of trading account identifies three classes of positions that would cause an account to be a trading account. First, the definition includes positions taken principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging another trading account position.[35] As described in this notice, this language is substantially similar to language for a ''trading position'' used in the Federal banking agencies' current market risk capital rules, as proposed to be revised (''Market Risk Capital Rules''),[36] and the CFTC proposes to interpret this language in a similar manner. Second, with respect to a banking entity subject to the Federal banking agencies' Market Risk Capital Rules, the definition includes all positions in financial instruments subject to the prohibition on proprietary trading that are treated as ''covered positions'' under those capital rules, other than certain foreign exchange and commodities positions. Third, the definition includes all positions acquired or taken by certain registered securities and derivatives dealers (or, in the case of financial institutions[37] that are government securities dealers, that have filed notice with an appropriate regulatory agency) in connection with their activities that require such registration or notice.[38] The definition of trading account also contains clarifying exclusions for certain positions that do not appear to involve the requisite short-term trading intent, such as positions arising under certain repurchase and reverse repurchase arrangements or securities lending transactions, positions acquired or taken for *bona fide* liquidity

[29] In recognition of economic impacts that may arise from the proposed rule and its implementation of section 13 of the BHC Act, the CFTC is requesting comment on the relative costs and benefits of the proposal in Part VI of this Supplemental Information.

[30] Under this uniform approach, the CFTC is proposing the same rule provisions under section 13 of the BHC Act as the Joint Rule. The CFTC's proposed rule would apply only to banking entities for which it has regulatory authority under section 13(b)(2)(B) of the BHC Act.

[31] A banking entity must comply with proposed Appendix A's reporting and recordkeeping requirements only if it has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

[32] In particular, a banking entity must comply with the minimum standards specified in Appendix C of the proposed rule (i) with respect to its covered trading activities, if it engages in any covered trading activities and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, (X) is equal to or greater than $1 billion or (Y) equals 10 percent or more of its total assets; and (ii) with respect to its covered fund activities and investments, if it engages in any covered fund activities and investments and either (X) has, together with its affiliates and subsidiaries, aggregate investments in covered funds the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion or (Y) sponsors and advises, together with its affiliates and subsidiaries, covered funds the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

[33] *See* proposed rule § __.3(b)(1).

[34] *See* proposed rule § __.3(b)(2).

[35] *See* proposed rule § __.3(b)(2)(i)(A).

[36] *See* 76 FR 1890 (Jan. 11, 2011).

[37] In the context of regulation of government securities dealers under the Securities Exchange Act of 1934 (''Exchange Act''), the term ''financial institution'' as defined in section 3(a)(46) of the Exchange Act includes a bank (as defined in section 3(a)(36) of the Exchange Act) and a foreign bank (as defined in the International Banking Act of 1978). *See* 15 U.S.C. 78c(a)(46).

[38] *See* proposed rule § __.3(b)(2)(i)(B).

management purposes, and certain positions of derivatives clearing organizations or clearing agencies.[39]

Section __.3 of the proposed rule also defines a number of other relevant terms, including the term ''covered financial position.'' This term is used to define the scope of financial instruments subject to the prohibition on proprietary trading. Consistent with the statutory language, such covered financial positions include positions (including long, short, synthetic and other positions) in securities, derivatives, commodity futures, and options on such instruments, but do not include positions in loans, spot foreign exchange or spot commodities.[40]

Section __.4 of the proposed rule implements the statutory exemptions for underwriting and market making-related activities. For each of these permitted activities, the proposed rule provides a number of requirements that must be met in order for a banking entity to rely on the applicable exemption. These requirements are generally designed to ensure that the activities, revenues and other characteristics of the banking entity's trading activity are consistent with underwriting and market making-related activities, respectively, and not prohibited proprietary trading.[41] These requirements are intended to support and augment other parts of the proposed rule's approach to implementing the prohibition on proprietary trading, including the compliance program requirement and the reporting of quantitative measurements, in order to assist banking entities and the CFTC in identifying prohibited trading activities that may be conducted in the context of, or mischaracterized as, permitted underwriting or market making-related activities.

Section __.5 of the proposed rule implements the statutory exemption for risk-mitigating hedging. As with the underwriting and market-making exemptions, proposed § __.5 contains a number of requirements that must be met in order for a banking entity to rely on the exemption. These requirements are generally designed to ensure that the banking entity's trading activity is truly risk-mitigating hedging in purpose and effect.[42] Proposed § __.5 also requires banking entities to document, at the time the transaction is executed, the hedging rationale for certain transactions that present heightened compliance risks.[43] As with the exemptions for underwriting and market making-related activity, these requirements form part of a broader implementation approach that also includes the compliance program requirement and the reporting of quantitative measurements.

Section __.6 of the proposed rule implements statutory exemptions for trading in certain government obligations, trading on behalf of customers, trading by a regulated insurance company, and trading by certain foreign banking entities outside the United States. Section __.6(a) of the proposed rule describes the government obligations in which a banking entity may trade notwithstanding the prohibition on proprietary trading, which include U.S. government and agency obligations, obligations and other instruments of certain government sponsored entities, and State and municipal obligations.[44] Section __.6(b) of the proposed rule describes permitted trading on behalf of customers and identifies three categories of transactions that would qualify for the exemption.[45] These categories include: (i) Transactions conducted by a banking entity as investment adviser, commodity trading advisor, trustee, or in a similar fiduciary capacity for the account of a customer where the customer, and not the banking entity, has beneficial ownership of the related positions; (ii) riskless principal transactions; and (iii) transactions conducted by a banking entity that is a regulated insurance company for the separate account of insurance policyholders, subject to certain conditions. Section __.6(c) of the proposed rule describes permitted trading by a regulated insurance company for its general account, and generally parallels the statutory language governing this exemption.[46] Finally, § __.6(d) of the proposed rule describes permitted trading outside of the United States by a foreign banking entity.[47] The proposed exemption clarifies when a foreign banking entity will be considered to engage in such trading pursuant to sections 4(c)(9) or 4(c)(13) of the BHC Act, as required by the statute, including with respect to a foreign banking entity not currently subject to section 4 of the BHC Act. The exemption also clarifies when trading will be considered to have occurred solely outside of the United States, as required by the statute, and provides a number of specific criteria for determining whether that standard is met.

Section __.7 of the proposed rule requires certain banking entities with significant covered trading activities to comply with the reporting and recordkeeping requirements specified in Appendix A of the proposed rule. In addition, § __.7 requires that a banking entity comply with the recordkeeping requirements in § __.20 of the proposed rule, including, where applicable, the recordkeeping requirements in Appendix C of the proposed rule. Section __.7 of the proposed rule also requires a banking entity to comply with any other reporting or recordkeeping requirements that the CFTC may impose to evaluate the banking entity's compliance with the proposed rule.[48] Proposed Appendix A requires those relevant banking entities with significant covered trading activities to furnish periodic reports to the CFTC regarding a variety of quantitative measurements of its covered trading activities and maintain records documenting the preparation and content of these reports. These proposed reporting and recordkeeping requirements vary depending on the scope and size of covered trading activities, and a banking entity must comply with proposed Appendix A's reporting and recordkeeping requirements only if it has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion. These thresholds are designed to reduce the burden on smaller, less complex banking entities, which generally engage in limited market-making and other trading activities. Other provisions of the proposal, and in particular the compliance program requirement in § __.20 of the proposed rule, are likely to be less burdensome and equally effective methods for ensuring compliance with section 13 of the BHC Act by smaller, less complex banking entities.

The quantitative measurements that must be furnished under the proposed rule are generally designed to reflect, and provide meaningful information regarding, certain characteristics of trading activities that appear to be particularly useful to help differentiate permitted market making-related activities from prohibited proprietary trading and to identify whether certain trading activities result in a material

[39] *See* proposed rule § __.3(b)(2)(iii).

[40] *See* proposed rule § __.3(b)(3).

[41] *See* proposed rule § __.4(a), (b).

[42] *See* proposed rule §§ __.5(b)(1), (2).

[43] *See* proposed rule § __.5(b)(3).

[44] *See* proposed rule § __.6(a).

[45] *See* proposed rule § __.6(b).

[46] *See* proposed rule § __.6(c).

[47] *See* proposed rule § __.6(d).

[48] *See* proposed rule § __.7.

exposure to high-risk assets or high-risk trading strategies. In addition, proposed Appendix B contains a detailed commentary regarding identification of permitted market making-related activities and distinguishing such activities from trading activities that constitute prohibited proprietary trading.

As described in Part II.B.5 of the **SUPPLEMENTARY INFORMATION** below, the CFTC expects to utilize the conformance period provided in section 13(c)(2) of the BHC Act to further refine and finalize the reporting requirements, reflecting the substantial public comment, practical experience, and revision that will likely be required to ensure appropriate, effective use of reported quantitative data in practice.

Section __.8 of the proposed rule prohibits a banking entity from relying on any exemption to the prohibition on proprietary trading if the permitted activity would involve or result in a material conflict of interest, result in a material exposure to high-risk assets or high-risk trading strategies, or pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[49] This section also defines material conflict of interest, high-risk asset, and high-risk trading strategy for these purposes.

C. Covered Fund Activities and Investments

Subpart C of the proposed rule implements the statutory prohibition on, as principal, directly or indirectly, acquiring and retaining an ownership interest in, or having certain relationships with, a covered fund, as well as the various exemptions to this prohibition included in the statute. Section __.10 of the proposed rule contains the core prohibition on covered fund activities and investments and defines a number of related terms, including ''covered fund'' and ''ownership interest.'' The proposed rule's definition of covered fund generally parallels the statutory definition of ''hedge fund'' and ''private equity fund,'' and explains the universe of entities that would be considered a ''covered fund'' (including those entities determined by the CFTC to be ''such similar funds'') and, thus, subject to the general prohibition.[50]

The definition of ''ownership interest'' provides further guidance regarding the types of interests that would be considered to be an ownership interest in a covered fund.[51] As described in this **SUPPLEMENTARY INFORMATION**, these interests may take various forms. The definition of ownership interest also explicitly *excludes* from the definition ''carried interest'' whereby a banking entity may share in the profits of the covered fund solely as performance compensation for services provided to the covered fund by the banking entity (or an affiliate, subsidiary, or employee thereof).[52]

Section __.10 of the proposed rule also defines a number of other relevant terms, including the terms ''prime brokerage transaction,'' ''sponsor,'' and ''trustee.''

Section ____.11 of the proposed rule implements the exemption for organizing and offering a covered fund provided for under section 13(d)(1)(G) of the BHC Act. Section ____.11(a) of the proposed rule outlines the conditions that must be met in order for a banking entity to organize and offer a covered fund under this authority. These requirements are contained in the statute and are intended to allow a banking entity to engage in certain traditional asset management and advisory businesses in compliance with section 13 of the BHC Act.[53] The requirements are discussed in detail in Part III.C.2 of this **SUPPLEMENTARY INFORMATION.**

Section ____.12 of the proposed rule permits a banking entity to acquire and retain, as an investment in a covered fund, an ownership interest in a covered fund that the banking entity organizes and offers under § ____.11.[54] This section implements section 13(d)(4) of the BHC Act and related provisions. Section 13(d)(4) of the BHC Act permits a banking entity to make an investment in a covered fund that the banking entity organizes and offers pursuant to section 13(d)(1)(G), or for which it acts as sponsor, for the purposes of (i) establishing the covered fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, or (ii) making a *de minimis* investment in the covered fund in compliance with applicable requirements. Section ____.12 of the proposed rule implements this authority and related limitations, including limitations regarding the amount and value of any individual per-fund investment and the aggregate value of all such permitted investments.[55] Proposed § ____.12 also clarifies how a banking entity must calculate its compliance with these investment limitations (including by deducting such investments from applicable capital, as relevant), as well as sets forth how a banking entity may request an extension of the period of time within which it must conform an investment in a single covered fund.[56]

Section ____.13 of the proposed rule implements the statutory exemptions described in sections 13(d)(1)(C), (E), and (I) of the BHC Act that permit a banking entity: (i) to acquire and retain an ownership interest in, or act as sponsor to, one or more SBICs, a public welfare investment, or certain qualified rehabilitation expenditures; (ii) to acquire and retain an ownership interest in a covered fund as a risk-mitigating hedging activity; and (iii) in the case of a non-U.S. banking entity, to acquire and retain an ownership interest in, or act as sponsor to, a foreign covered fund.[57] Section ____.13(a) of the proposed rule permits a banking entity to acquire and retain an ownership interest in, or act as sponsor to, an SBIC or certain public interest investments, without limitation as to the amount of ownership interests it may own, hold, or control with the power to vote.[58]

Section ____.13(b) of the proposed rule permits a banking entity to use an ownership interest in a covered fund to hedge, but only with respect to individual or aggregated obligations or liabilities of a banking entity that arise from: (i) The banking entity acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the customer's exposure to the profits and losses of the covered fund (similar to acting as a ''riskless principal''); or (ii) a compensation arrangement with an employee of the banking entity that directly provides investment advisory or other services to that fund.[59] Additionally, § ____.13(b) of the proposed rule requires that the hedge represent a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest in the covered fund arising out of the transaction that the acquisition or retention of an ownership interest in the covered fund is intended to hedge or otherwise mitigate.[60] Proposed § ____.13(b) also requires a banking entity to document, at the time the transaction is executed, the hedging rationale for all hedging transactions

[49] *See* proposed rule § __.8.

[50] *See* proposed rule § __.10(b)(1).

[51] *See* proposed rule § __.10(b)(3).

[52] *See* proposed rule § __.10(b)(3)(ii).

[53] *See* 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Hagan).

[54] *See* proposed rule § ____.12.

[55] *See* proposed rule § ____.12(a)(2).

[56] *See* proposed rule §§ ____.12(b), (c), and (d).

[57] *See* proposed rule § ____.13(a)–(c).

[58] *See* proposed rule § ____.13(a).

[59] *See* proposed rule § ____.13(b)(1).

[60] *See* proposed rule §§ ____.13(b)(2)(ii)(C) and (D).

involving an ownership interest in a covered fund.[61]

Section ____.13(c) of the proposed rule implements section 13(d)(1)(I) of the BHC Act and permits certain foreign banking entities to acquire or retain an ownership interest in, or to act as sponsor to, a covered fund so long as such activity occurs solely outside of the United States and the entity meets the requirements of sections 4(c)(9) or 4(c)(13) of the BHC Act. This statutory exemption limits the extraterritorial application of the statutory restrictions on covered fund activities and investments to foreign firms that, in the course of operating outside of the United States, engage in activities permitted under relevant foreign law outside of the United States, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States.[62] The proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which covered fund activities or investments by such an entity will be considered to have occurred solely outside of the United States (including clarifying when an ownership interest will be considered to have been offered for sale or sold to a resident of the United States). Section ____.13(d) of the proposed rule also implements in part the rule of construction contained in section 13(g)(2) of the BHC Act, which permits the sale and securitization of loans.[63] Proposed § ____.13(d) clarifies that a banking entity may acquire and retain an ownership interest in, or act as sponsor to, a covered fund that is an issuer of asset-backed securities, the assets or holdings of which are solely comprised of: (i) Loans; (ii) contractual rights or assets directly arising from those loans supporting the asset-backed securities; and (iii) a limited amount of interest rate or foreign exchange derivatives that materially relate to such loans and that are used for hedging purposes with respect to the securitization structure.[64] The authority contained in this section of the proposed rule would therefore allow a banking entity to acquire and retain an ownership interest in a loan securitization vehicle (which would be a covered fund for purposes of section 13(h)(2) of the BHC Act and the proposed rule) that the banking entity organizes and offers, or acts as sponsor to, in excess of the three percent limits specified in section 13(d)(4) of the BHC Act and § ____.12 of the proposed rule.

Section ____.14 of the proposed rule implements section 13(d)(1)(J) of the BHC Act[65] and permits a banking entity to engage in any covered fund activity or investment that the CFTC and the Agencies determine promotes and protects the safety and soundness of banking entities and the financial stability of the United States.[66] The CFTC has proposed to permit three activities at this time under this authority. These activities involve acquiring and retaining an ownership interest in, or acting as sponsor to, certain bank owned life insurance (''BOLI'') separate accounts, investments in and sponsoring of certain asset-backed securitizations, and investments in and sponsoring of certain entities that rely on the exclusion from the definition of investment company in section 3(c)(1) and/or 3(c)(7) of the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'') but that are, in fact, common corporate organizational vehicles.[67] Additionally, the CFTC has proposed to permit a banking entity to acquire and retain an ownership interest in, or act as sponsor to, a covered fund, if such acquisition or retention is done (i) in the ordinary course of collecting a debt previously contracted, or (ii) pursuant to and in compliance with the conformance or extended transition periods implemented under section 13(c)(6) of the BHC Act.[68]

Section ____.15 of the proposed rule, which implements section 13(e)(1) of the BHC Act,[69] requires a relevant banking entity engaged in covered fund activities and investments to comply with (i) the internal controls, reporting, and recordkeeping requirements required under § ____.20 and Appendix C of the proposed rule, as applicable and (ii) such other reporting and recordkeeping requirements as the CFTC may deem necessary to appropriately evaluate the banking entity's compliance with subpart C.[70]

Section ____.16 of the proposed rule implements section 13(f) of the BHC Act and generally prohibits a banking entity from entering into certain transactions with a covered fund that would be a covered transaction as defined in section 23A of the FR Act.[71] Section ____.16(a)(2) of the proposed rule clarifies that, for reasons explained in part III.C.7 of this **SUPPLEMENTARY INFORMATION**, certain transactions between a banking entity and a covered fund remain permissible. Section ____.16(b) of the proposed rule implements the statute's requirement that any transaction permitted under section 13(f) of the BHC Act (including a prime brokerage transaction) between the banking entity and a covered fund is subject to section 23B of the FR Act,[72] which, in general, requires that the transaction be on market terms or on terms at least as favorable to the banking entity as a comparable transaction by the banking entity with an unaffiliated third party.

Section ____.17 of the proposed rule prohibits a banking entity from relying on any exemption to the prohibition on acquiring and retaining an ownership interest in, acting as sponsor to, or having certain relationships with, a covered fund, if the permitted activity or investment would involve or result in a material conflict of interest, result in a material exposure to high-risk assets or high-risk trading strategies, or pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[73] This section also defines material conflict of interest, high-risk asset, and high-risk trading strategy for these purposes.

D. Compliance Program Requirement

Subpart D of the proposed rule requires a banking entity engaged in covered trading activities or covered fund activities to develop and implement a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on covered trading activities and covered fund activities and investments set forth in section 13 of the BHC Act and the proposed rule.[74]

[61] *See* proposed rule § ____.13(b)(3).

[62] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[63] *See* 12 U.S.C. 1851(g)(2).

[64] *See* proposed rule § ____.13(d).

[65] Section 13(d)(1)(J) of the BHC Act provides the Agencies discretion to determine that activities not specifically identified by sections 13(d)(1)(A)–(I) of the BHC Act are also exempted from the general prohibitions contained in section 13(a) of that Act, and are thus permitted activities. In order to make such a determination, the Agencies must find that such activity or activities promote and protect the safety and soundness of banking entities, as well as promote and protect the financial stability of the United States. *See* 12 U.S.C. 1851(d)(1)(J).

[66] *See* 12 U.S.C. 1851(d)(1)(J).

[67] *See* proposed rule § ____.13(a)(1)–(2).

[68] *See* proposed rule at § ____.14(b).

[69] Section 13(e)(1) of the BHC Act requires the CFTC to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1).

[70] *See* proposed rule § ____.15.

[71] *See* proposed rule § ____.16.

[72] 12 U.S.C. 371c–1.

[73] *See* proposed rule § ____.17.

[74] *See* proposed rule § ____.20. If a banking entity does not engage in covered trading activities and/or covered fund activities and investments, it need only ensure that its existing compliance policies and procedures include measures that are designed to prevent the banking entity from becoming engaged in such activities and making such

Section ____.20(b) of the proposed rule specifies six elements that each compliance program established under subpart D must, at a minimum, include:

- Internal written policies and procedures reasonably designed to document, describe, and monitor the covered trading activities and covered fund activities and investments of the banking entity to ensure that such activities comply with section 13 of the BHC Act and the proposed rule;
- A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and the proposed rule in the banking entity's covered trading and covered fund activities and to prevent the occurrence of activities that are prohibited by section 13 of the BHC Act and the proposed rule;
- A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and the proposed rule;
- Independent testing for the effectiveness of the compliance program, conducted by qualified banking entity personnel or a qualified outside party;
- Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and
- Making and keeping records sufficient to demonstrate compliance with section 13 of the BHC Act and the proposed rule, which a relevant banking entity must promptly provide to the CFTC upon request and retain for a period of no less than 5 years.

For a banking entity with significant covered trading activities or covered fund activities and investments, the compliance program must also meet a number of minimum standards that are specified in Appendix C of the proposed rule.[75] The application of detailed minimum standards for these types of banking entities is intended to reflect the heightened compliance risks of large covered trading activities and covered fund activities and investments and to provide clear, specific guidance to such banking entities regarding the compliance measures that would be required for purposes of the proposed rule. For banking entities with smaller, less complex covered trading activities and covered fund activities and investments, these detailed minimum standards are not applicable, though the CFTC expects that such smaller entities will consider these minimum standards as guidance in designing an appropriate compliance program.

E. Conformance Provisions

Subpart E of the Board's proposed rule, as set forth in the Joint Release, is not included in the proposed CFTC Rule because this Subpart E only applies to the Board.

F. Treatment of Smaller, Less-Complex Banking Entities

In formulating the proposed rule, the CFTC has carefully considered and taken into account the potential impact of the proposed rule on small banking entities and banking entities that engage in little or no covered trading activities or covered fund activities and investments, including the burden and cost that might be associated with such banking entities' compliance with the proposed rule. In particular, the CFTC has proposed to reduce the effect of the proposed rule on such banking entities by limiting the application of certain requirements, such as the reporting and recordkeeping requirements of § ____.7 and Appendix A of the proposed rule and the compliance program requirements contained in subpart D and Appendix C of the proposed rule, to those banking entities that engage in little or no covered trading activities or covered fund activities and investments. The CFTC also requested comment (i) throughout this **SUPPLEMENTARY INFORMATION** on a number of questions related to the costs and burdens associated with particular aspects of the proposal, as well as (ii) in Part VII.B of this Supplementary Information on any significant alternatives that would minimize the impact of the proposal on small banking entities.

G. Application of Section 13 of the BHC Act to Securitization Vehicles or Issuers of Asset-Backed Securities

Many issuers of asset-backed securities may be included within the definition of covered fund since they would be an investment company but for the exclusions contained in section 3(c)(1) or 3(c)(7) of the Investment Company Act.[76] If an issuer of asset-backed securities is considered to be a covered fund, then a banking entity would not be permitted to acquire or retain any ownership interest issued by such issuer except as otherwise permitted under section 13 of the BHC Act and the proposed rule.[77] Separately, issuers of asset-backed securities may be included within the definition of banking entity, as noted in Part III.A.2 of this Supplementary Information. Although the proposed definition of banking entity would not include any entity that is a covered fund, an issuer of asset-backed securities that is both (i) an affiliate or subsidiary of a banking entity,[78] and (ii) does not rely on an exclusion contained in section 3(c)(1) of 3(c)(7) of the Investment Company Act, would be a banking entity and thus subject to the requirements of section 13

investments, and which require the banking entity to develop and provide for the required compliance program prior to engaging in such activities or making such investments.

[75] A banking entity must comply with the minimum standards specified in Appendix C of the proposed rule (i) with respect to its covered trading activities, if it engages in any covered trading activities and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, (X) is equal to or greater than $1 billion or (Y) equals 10 percent or more of its total assets; and (ii) with respect to its covered fund activities and investment, if it engages in any covered fund activities and investments and either (X) has, together with its affiliates and subsidiaries, aggregate investments in covered funds the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion or (Y) sponsors and advises, together with its affiliates and subsidiaries, covered funds the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

[76] For purposes of the proposed rule, any securitization entity that meets the requirements for an exclusion under Rule 3a–7 or section 3(c)(5) of the Investment Company Act, or any other exclusion or exemption from the definition of ''investment company'' under the Investment Company Act (other than sections 3(c)(1) or 3(c)(7) of the Investment Company Act), would not be a covered fund under the proposed definition. Additionally, an issuer of asset-backed securities that is subject to legal documents mandating compliance with the conditions of section 3(c)(1) of 3(c)(7) of the Investment Company Act would not be a covered fund if such issuer also can satisfy all the conditions of an alternative exclusion or exemption for which it is eligible.

[77] For example, under the proposed rule, a banking entity would be able to acquire or retain an interest or security of an issuer of asset-backed securities that is a covered fund if: (i) The interest or security of the issuer does not qualify as an ''ownership interest'' under § ____.10(b)(3) of the proposed rule; (ii) the issuer of asset-backed securities is comprised solely of loans, contractual rights or assets directly arising from those loans, and certain specified interest rate or foreign exchange derivatives used for hedging purposes, as permitted under § ____.13(d) or ____.14(a)(2)(v) of the proposed rule; (iii) the banking entity is a ''securitizer'' or ''originator'' and acquires and retains such interest in compliance with the minimum requirements of section 15G of the Exchange Act and any implementing regulations issued thereunder, as provided under § ____.14(a)(2)(iii) of the proposed rule; or (v) the banking entity organizes and offers the issuer and the ownership interest is a permitted investment under § ____.12 of the proposed rule. The circumstances where a banking entity may acquire or retain an ownership interest in a covered fund are discussed in detail in Part III.C of this **SUPPLEMENTAL INFORMATION**.

[78] The definitions of ''affiliate'' and ''subsidiary'' are discussed in detail in Part III.A.2 of this Supplemental Information.

of the BHC Act and the proposed rule, including: (i) the prohibition on proprietary trading; (ii) limitations on investments in and relationships with a covered fund; (iii) the establishment and implementation of a compliance program as required under the proposed rule; and (iv) recordkeeping and reporting requirements. Given the breadth of the definition of ''affiliate,'' these requirements may apply to a significant portion of the outstanding securitization market, including issuers of asset-backed securities that rely on rule 3a–7 or section 3(c)(5) of the Investment Company Act.

In recognition of these concerns, the CFTC, similar to the Agencies in the Joint Rule, has requested comment throughout this **SUPPLEMENTARY INFORMATION** on the potential effects of section 13 of the BHC Act and the proposed rule on the securitization industry and issuers of asset-backed securities.

III. Section by Section Summary of Proposed Rule

A. Subpart A—Authority and Definitions

1. Section ____.1: Authority, Purpose, Scope, and Relationship to Other Authorities

a. Authority and Scope

Section ____.1 of the proposed rule describes the authority under which the CFTC is issuing the proposed rule, the purpose of the proposed rule, and the banking entities to which the CFTC's rule applies. In addition, § ____.1(d) of the proposed rule implements section 13(g)(1) of the BHC Act, which provides that the prohibitions and restrictions of section 13 apply to the activities of a banking entity regardless of whether such activities are authorized for a banking entity under other applicable provisions of law.[79]

b. Effective Date

Section 13(c)(1) of the BHC Act provides that section 13 will take effect on the earlier of (i) 12 months after the date of issuance of final rules implementing that section, or (ii) 2 years after the date of enactment of section 13, which is July 21, 2012.[80] Because the CFTC did not issue final rules implementing section 13 of the BHC Act by July 21, 2011, § ____.1 of the proposed rule specifies that the effective date for its provisions will be July 21, 2012.

The CFTC notes that the proposed effective date will impact not only the date on which the proposed rule's prohibitions and restrictions on proprietary trading and covered fund activities and investments go into effect (subject to the conformance period or extended transition period provided by section 13(c) of the BHC Act),[81] but also the date on which a banking entity must comply with (i) the reporting and recordkeeping requirements of § ____.7 and Appendix A of the proposed rule and (ii) the compliance program mandate of § ____.20 and Appendix C of the proposed rule. As proposed, § ____.1 would require a banking entity subject to either the reporting and recordkeeping or compliance program requirements to begin complying with these requirements as of July 21, 2012.[82] With respect to the compliance program requirement of the proposed rule, § ____.1 would require a banking entity to have developed and implemented the required program by the proposed effective date, though the CFTC notes that prohibited activities and investments may not be fully conformed by that date. The CFTC expects a banking entity to fully conform all investments and activities to the requirements of the proposed rule as soon as practicable within the conformance periods provided in section 13 of the BHC Act and the Board's rules thereunder, which define the conformance periods. With respect to the reporting and recordkeeping requirements of the proposed rule, § ____.1 of the proposed rule would require a banking entity to begin furnishing these reports for all trading units or asset management units as of the effective date, though the quantitative measurements furnished for proprietary trading activities that are conducted in reliance on the authority provided by the conformance period would not be used to identify prohibited proprietary trading until such time as the relevant trading activities must be conformed.

The CFTC expects that a banking entity may need a period of time to prepare for effectiveness of the proposed rule and, in particular, to implement both the compliance program and the reporting and recordkeeping requirements provided under the proposed rule. Accordingly, in order to help assess the effects and impact of the proposed effective date and any alternative compliance dates, the CFTC requests comment on the following questions:

Question 1. Does the proposed effective date provide banking entities with sufficient time to prepare to comply with the prohibitions and restrictions on proprietary trading and covered fund activities and investments? If not, what other period of time is needed and why?[83]

Question 2. Does the proposed effective date provide banking entities with sufficient time to implement the proposal's compliance program requirement? If not, what are the impediments to implementing specific elements of the compliance program and what would be a more effective time period for implementing each element and why?

Question 3. Does the proposed effective date provide banking entities sufficient time to implement the proposal's reporting and recordkeeping requirements? If not, what are the impediments to implementing specific elements of the proposed reporting and recordkeeping requirements and what would be a more effective time period for implementing each element and why?

Question 4. Should the CFTC use a gradual, phased in approach to implement the statute rather than having the implementing rules become effective at one time? If so, what prohibitions and restrictions should be implemented first? Please explain.

2. Section ____.2: Definitions

Section ____.2 of the proposed rule defines a variety of terms used throughout the proposed rule, including ''banking entity,'' which defines the scope of entities to which the proposed rule applies. Consistent with the statutory definition of that term, § ____.2(e) of the proposed rule provides that a ''banking entity'' includes: (i) Any insured depository institution; (ii) any company that controls an insured depository institution; (iii) any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and (iv) any affiliate or subsidiary of any of the foregoing.[84] In addition, in order to avoid application of section 13 of the BHC Act in a way that appears unintended by the statute and would create internal inconsistencies in the statutory scheme,

[79] *See* proposed rule § ____.1(d).

[80] *See* 12 U.S.C. 1851(c)(1).

[81] *See id.* at 1851(c)(2)—(6).

[82] *See* proposed rule § ____.1.

[83] Note that each additional question asked by the CFTC in the CFTC Rule retains the same base question number as in the Joint Release (*e.g.* when the CFTC has included a question on whether question number 168 may be applicable to the CFTC, the new additional question is listed as question 168.1).

[84] *See* proposed rule § ____.2(e). Sections ____.2(a) and (bb) of the proposed rule clarify that the terms ''affiliate'' and ''subsidiary'' have the same meaning as in sections 2(d) and (k) of the BHC Act (12 U.S.C. 1841(d) and (k)).

the proposed rule also clarifies that the term ''banking entity'' does not include any affiliate or subsidiary of a banking entity, if that affiliate or subsidiary is (i) a covered fund, or (ii) any entity controlled by such a covered fund.[85] This clarification is proposed because the definition of ''affiliate'' and ''subsidiary'' under the BHC Act is broad, and could include a covered fund that a banking entity has permissibly sponsored or made an investment in because, for example, the banking entity acts as general partner or managing member of the covered fund as part of its permitted sponsorship activities.[86] If such a covered fund were considered a ''banking entity'' for purposes of the proposed rule, the fund itself would become subject to all of the restrictions and limitations of section 13 of the BHC Act and the proposed rule, which would be inconsistent with the purpose and intent of the statute. For example, such a covered fund would then generally be prohibited from investing in other covered funds, notwithstanding the fact that section 13(f)(3) of the BHC Act specifically contemplates such investments. Accordingly, the proposed rule would exclude from the definition of banking entity any fund that a banking entity may invest in or sponsor as permitted by the proposed rule.

An entity such as a mutual fund would generally not be a subsidiary or affiliate of a banking entity under this definition if the banking entity only provides advisory or administrative services to, has certain limited investments in, or organizes, sponsors, and manages a mutual fund (which includes a registered investment company) in accordance with BHC Act rules.[87]

Section ____.2(j) of the proposed rule defines the term ''covered banking entity,'' which is used to describe the specific types of banking entities to which the CFTC's rule applies. In addition, a number of other definitions contained in § ____.2 are discussed in further detail below in connection with the separate sections of the proposed rule in which they are used.

The proposed rule also defines the terms ''buy and purchase'' and ''sell and sale,'' which are used throughout the proposed rule to describe the scope of transactions that are subject to subparts B and C of the proposed rule. These definitions are substantially similar to the definitions of the same terms under the Exchange Act, except that the proposed definitions provide additional clarity regarding the types of transactions that would be considered the purchase or sale of a commodity future or derivative or ownership interest in a covered fund.[88] These definitions are purposefully broad in scope, and are intended to include a wide range of transaction types that would permit a banking entity to gain or eliminate, or increase or reduce, exposure to a covered financial position or ownership interest in a covered fund.

Request for comment.

The CFTC requests comment on the proposed rule's definition of ''banking entity.'' In particular, the CFTC requests comment on the following questions:

Question 5. Is the proposed rule's definition of banking entity effective? What alternative definitions might be more effective in light of the language and purpose of the statute?

Question 6. Are there any entities that should not be included within the definition of banking entity since their inclusion would not be consistent with the language or purpose of the statute or could otherwise produce unintended results? Should a registered investment company be expressly excluded from the definition of banking entity? Why or why not?

Question 7. Is the proposed rule's exclusion of a covered fund that is organized, offered and held by a banking entity from the definition of banking entity effective? Should the definition of banking entity be modified to exclude any covered fund? Why or why not?

Question 8. Banking entities commonly structure their registered investment company relationships and investments such that the registered investment company is not considered an affiliate or subsidiary of the banking entity. Should a registered investment company be expressly excluded from the definition of banking entity? Why or why not? Are there circumstances in which such companies should be treated as banking entities subject to section 13 of the BHC Act? How many such companies would be covered by the proposed definition?

Question 8.1. What is the best method for the CFTC and the other regulators to coordinate regarding the allocation of supervisory responsibilities under the proposed CFTC Rule?

Question 9. Under the proposed rule, would issuers of asset-backed securities be captured by the proposed definition of ''banking entity''? If so, are issuers of asset-backed securities within certain asset classes particularly impacted? Are particular types of securitization vehicles (trusts, LLCs, *etc.*) more likely than others to be included in the definition of banking entity? Should issuers of asset-backed securities be excluded from the proposed definition of ''banking entity,'' and if so, why? How would such an exclusion be consistent with the language and purpose of the statute?

Question 10. What would be the potential impact of including existing issuers of asset-backed securities[89] in the proposed definition of ''banking entity'' on existing issuers of asset-backed securities and the securitization market generally? How many existing issuers of asset-backed securities might be included in the proposed definition of ''banking entity''? Are there ways in which the proposed rule could be amended to mitigate or eliminate potential impact, if any, on existing asset-backed securities[90] without compromising the intent of the statute?

Question 11. What would be the legal and economic impact to an issuer of asset-backed securities of being considered a ''banking entity''? What additional costs would be incurred in the establishment and implementation of a compliance program related to the provisions of the proposed rule as required by § ____.20 of the proposed rule (including Appendix C, where applicable)? Who would pay those additional costs?

Question 12. If the ownership requirement under the proposed rule for credit risk retention (section 15G of the Exchange Act) combined with the control inherent in the position of servicer or investment manager means that more securitization vehicles would be considered affiliates of banking

[85] The CFTC notes that since the proposed rule implements section 13 of the BHC Act, it incorporates that Act's definition of ''affiliate'' and ''subsidiary.'' *See* proposed rule §§ ____.2(a) and (bb). The terms affiliate and subsidiary are generally defined in section 2 of the BHC Act according to whether such entity controls or is controlled by another relevant entity. *See* 12 U.S.C. 1841(d), (k). The concept of control under the proposed rule, in turn, is as defined in section 2 of the BHC Act and as implemented by the Board. *See* 12 U.S.C. 1841(a)(2); 12 CFR 225.2(e).

[86] Under section 2 of the BHC Act and the Board's Regulation Y (12 CFR part 225), a banking entity acting as general partner or managing member of another company would be deemed to control that company and, as such, the company would be both an ''affiliate'' and ''subsidiary'' of the banking entity for purposes of the BHC Act. *See* 12 U.S.C. 1841(d), (k).

[87] *See, e.g.,* 12 U.S.C. 1483(c)(6), (c)(8), and (k); 12 CFR 225.28(b)(6), 225.86(b)(3).

[88] *See* proposed rule §§ ____.2(g), (v); 15 U.S.C. 78c(a)(13), (14).

[89] For purposes of this **SUPPLEMENTAL INFORMATION**, ''existing issuers of asset-backed securities'' means issuers that issued asset-backed securities prior to the effective date of the proposed rule.

[90] For purposes of this **SUPPLEMENTAL INFORMATION**, ''existing asset-backed securities'' means asset-backed securities that were issued prior to the effective date of the proposed rule.

entities, would fewer banking entities be willing to (i) serve as the servicer or investment manager of securitization transactions and/or (ii) serve as the originator or securitizer (as defined in section 15G of the Exchange Act) of securitization transactions? What other impact might the potential interplay between these rules have on future securitization transactions? Could there be other potential unintended consequences?

Question 13. Are the proposed rule's definitions of buy and purchase and sale and sell appropriate? If not, what alternative definitions would be more appropriate? Should any other terms be defined? If so, are there existing definitions in other rules or regulations that could be used in this context? Why would the use of such other definitions be appropriate?

B. Subpart B—Proprietary Trading Restrictions

1. Section ____.3: Prohibition on Proprietary Trading

Section ____.3 of the proposed rule describes the scope of the prohibition on proprietary trading and defines a number of terms related to proprietary trading. The CFTC notes that the definition of ''proprietary trading'' in the statute and under the proposed rule is broad. This definition must be viewed in light of the exemptions described later in the proposed rule, which reflect statutory provisions permitting a number of activities.

a. Prohibition on Proprietary Trading

Section ____.3(a) of the proposed rule implements section 13(a)(1)(A) of the BHC Act and prohibits a banking entity from engaging in proprietary trading unless otherwise permitted under §§ ____.4 through ____.6 of the proposed rule. Section ____.3(b)(1) of the proposed rule defines proprietary trading in accordance with section 13(h)(4) of the BHC Act.[91] This definition is a key element of the proposal because, unless an activity covered by the definition is specifically permitted under one of the exemptions contained in §§ ____.4 through ____.6 of the proposed rule, a banking entity is prohibited from engaging in that activity. Specifically, the proposal largely restates the statutory definition of proprietary trading, defining that term to mean engaging in the purchase or sale of one or more covered financial positions as principal for the trading account of the banking entity.[92] The terms ''trading account'' and ''covered financial position'' are defined in §§ ____.3(b)(2) and ____.3(b)(3) of the proposed rule, respectively. The proposed definition of proprietary trading also clarifies that proprietary trading does not include acting as agent, broker, or custodian for an unaffiliated third party, because acting in these types of capacities does not involve trading as principal, which is one of the requisite aspects of the statutory definition.

b. ''Trading Account''

i. Definition of ''Trading Account''

Section 13(h)(6) of the BHC Act defines the term ''trading account'' as ''any account used for acquiring or taking positions in securities [or other enumerated instruments] principally for the purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements),'' as well as any such other accounts that the CFTC by rule determine.[93] As an initial matter, the CFTC notes that it is often difficult to clearly identify the purpose for which a position is acquired or taken and whether that purpose is short-term in nature, particularly since identification of that purpose generally depends on the intent with which the position is acquired or taken. Moreover, the statute does not define the terms ''near-term'' or ''short-term'' for these purposes.

In implementing the statutory definition of trading account, the proposed rule generally restates the statutory definition, with the addition of certain details intended to provide banking entities with greater clarity regarding the scope of positions that fall within the definition of trading account.[94] The proposed definition of trading account has three prongs. First, under the proposed rule, a trading account includes any account that is used by a banking entity to acquire or take one or more covered financial positions for the purpose of: (i) Short-term resale; (ii) benefitting from actual or expected short-term price movements; (iii) realizing short-term arbitrage profits; or (iv) hedging one or more such positions.[95] Second, the proposed definition of trading account also includes any account used by a banking entity that is subject to the Market Risk Capital Rules to acquire or take one or more covered financial positions that are subject to those rules, other than certain foreign exchange and commodity positions.[96] Third, the proposed definition of trading account also includes any account used by a banking entity that is a securities dealer, swap dealer, or security-based swap dealer to acquire or take positions in connection with its dealing activities.[97] To provide additional clarity and guidance regarding the trading account definition, the proposed rule also includes a rebuttable presumption that any account used to acquire or take a covered financial position that is held for sixty days or less is a trading account under the first prong, unless the banking entity can demonstrate that the position was not acquired principally for short-term trading purposes. The proposed definition also clarifies that no account will be a trading account to the extent that it is used to acquire or take certain positions under repurchase or reverse repurchase arrangements or securities lending transactions, positions for *bona fide* liquidity management purposes, or certain positions held by derivatives clearing organizations or clearing agencies. Each of the three definitional prongs is independent of the others—any one prong would, if met, cause the relevant account to fall within the definition of ''trading account.''

The CFTC has drawn on existing rules, in particular the Market Risk Capital Rules and various securities and commodities laws, in identifying trading accounts and defining related terms in the proposal.

ii. Positions Acquired or Taken for Short-Term Trading Purposes

The first prong of the proposed trading account definition refers to positions that a banking entity acquires or takes principally for short-term purposes—that is, for one of the following enumerated purposes described in §§ ____.3(b)(2)(i)(A)(*1*) through (*4*) of the proposed rule:

- Short-term resale;
- Benefitting from actual or expected short-term price movements;
- Realizing short-term arbitrage profits; or
- Hedging one or more such positions.

This prong reflects the statutory definition's reference to positions acquired or taken ''principally for the

[91] *See* proposed rule § ____.3(b)(1).

[92] *See* 12 U.S.C. 1851(h)(4); *see also* proposed rule § ____.3(b)(1). Although the statutory definition refers to the ''purchase, sale, acquisition, or disposition of'' covered financial positions, the proposed rule uses the simpler terms ''purchase'' and ''sale,'' which are defined broadly in §§ ____.2(g) and (v) of the proposed rule.

[93] *See* 12 U.S.C. 1851(h)(6).

[94] The CFTC notes that the structure of the proposed definition, which defines a trading account by reference to the positions that the account is used to acquire or take, is consistent with the structure of the statutory language used in section 13(h)(6) of the BHC Act.

[95] *See* proposed rule § ____.3(b)(2)(i)(A).

[96] *See* proposed rule § ____.3(b)(2)(i)(B).

[97] *See* proposed rule § __.3(b)(2)(i)(C).

purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements).'' [98]

Section ____.3(b)(2)(i)(A)(*1*) of the proposed rule's definition of trading account includes covered financial positions acquired or taken principally for the purpose of short-term resale.[99] This part of the trading account definition restates language contained in the statutory definition of trading account and describes one class of positions that are acquired or taken for short-term trading purposes.

Section ____.3(b)(2)(i)(A)(*2*) of the proposed rule includes covered financial positions acquired or taken principally for the purpose of benefitting from actual or expected short-term price movements.[100] This part of the trading account definition does not require the *resale* of the position; rather, it requires only an intent to engage in any form of transaction on a short-term basis (including a transaction separate from, but related to, the initial acquisition of the position) for the purpose of benefitting from a short-term movement in the price of the underlying position. This part of the proposed definition would, for example, include a derivative or other position where the banking entity enters into (or intends to enter into) a subsequent transaction in the near-term to simply offset or ''close out,'' rather than sell, all or a portion of the risks of the initial position, in order to benefit from a price movement occurring between the acquisition of the underlying position and the subsequent offsetting transaction. Similarly, it would also include a derivative, commodity future, or other position that, regardless of the term of that position, is subject to the exchange of short-term variation margin through which the banking entity intends to benefit from short-term price movements. The proposed definition would also capture the acquisition of a debt instrument where the banking entity intends to enter into a short-term transaction to simply offset, rather than sell, the credit, interest rate and/or other material risk elements of the initial position so as to benefit from a price movement occurring between acquisition of the underlying position and the subsequent offsetting transaction.

Section ____.3(b)(2)(i)(A)(*3*) of the proposed rule's definition of trading account includes covered financial positions acquired or taken principally to lock in short-term arbitrage profits.[101] Although similar to the positions described in § ____.3(b)(2)(i)(A)(*2*) of the proposed definition (*i.e.,* those acquired for the purpose of benefitting from actual or expected short-term price movements), this part of the definition focuses on short-term arbitrage profits more generally, without regard to whether the transaction is predicated on expected or actual *movements* in price. Rather, a position acquired to lock in arbitrage profits would include positions acquired or taken with the intent to benefit from *differences* in multiple market prices, even in cases in which no movement in those prices is necessary to realize the intended profit. Such arbitrage-based transactions might involve profiting from the difference in the market price of multiple related positions or assets, or might instead involve the difference in market price for particular price or risk elements associated with positions or assets. This would include, for example, arbitrage profits resulting from the convergence or divergence in prices between different positions held by a banking entity engaged in relative value convergence arbitrage, which involves marrying a long and short position to benefit from a convergence or divergence in price between the two, or any similar strategy, because such convergence or divergence could happen at any time (*i.e.,* in one day, in sixty-one days, or some other time period).

Section ____.3(b)(2)(i)(A)(*4*) of the proposed rule's definition of trading account includes covered financial positions acquired or taken for the purpose of hedging another position that is itself held in a trading account.[102] In particular, the CFTC assumes that, with respect to any position the purpose of which is to hedge another covered financial position in the trading account, the banking entity generally intends to hold the hedging position, whatever its nominal duration, for only so long as the underlying position is held. Accordingly, the proposed rule makes clear that such hedging positions fall within the definition of trading account.

iii. Overview of Current Market Risk Capital Rules Approach to Short-Term Trading Positions

The first prong of the proposed trading account definition, which references positions acquired principally for short-term trading purposes, is, like the statutory definition it implements, substantially similar to a key portion of the definition of a ''covered position'' under the Market Risk Capital Rules.[103] For the reasons discussed below, the CFTC has taken this similarity into account and propose to construe the first prong of the definition of trading account under the proposed rule—and in particular its reference to ''short-term''—in a manner that is consistent with the Market Risk Capital Rules' approach to identifying positions taken with short-term trading intent.

The Market Risk Capital Rules define a covered position to include all positions in a bank's ''trading account,'' as that term is defined, in part, in the Report of Condition and Income that banks are required to file periodically with respect to their financial condition (''Call Report''). Under the Market Risk Capital Rules, a covered position is one that is subject to a risk-based capital charge that is based, at least in part, on the banking organization's internal risk management models for purposes of calculating the banking organization's risk-based capital requirement.[104] In

[98] *See* 12 U.S.C. 1851(h)(6); *see also* proposed rule § ____.3(b)(2)(i).

[99] *See* proposed rule § ____.3(b)(2)(i)(A)(*1*).

[100] *See* proposed rule § ____.3(b)(2)(i)(A)(*2*).

[101] *See* proposed rule § ____.3(b)(2)(i)(A)(*3*).

[102] *See* proposed rule § ____.3(b)(2)(i)(A)(*4*).

[103] The Federal banking agencies' current Market Risk Capital Rules are located at 12 CFR 3, Appendix B (OCC), 12 CFR 208, Appendix E and 12 CFR 225, Appendix E (Board), and 12 CFR 325, Appendix C (FDIC), and apply on a consolidated basis to banks and bank holding companies with trading activity (on a worldwide consolidated basis) that equals 10 percent or more of the institution's total assets, or $1 billion or more. On January 11, 2011, the Federal banking agencies proposed revisions to the Market Risk Capital Rules that include, *inter alia,* changes to the definition of covered position. Proposed revisions to the Market Risk Capital Rules include (i) changes to portions of the covered position definition not relevant to the statutory definition of trading account in section 13 of the BHC Act and (ii) the addition of a requirement that any position in a trading account also be a ''trading position'' in order to be considered a covered position. *See* 76 FR 1890 (Jan. 11, 2011). The revised definition of ''trading position'' that has been proposed for those purposes is generally identical to this proposed rule's definition of trading account (*i.e.,* a position acquired or taken: (i) For the purpose of short-term resale; (ii) with the intent of benefitting from actual or expected short-term price movements; (iii) to lock in short-term arbitrage profits; or (iv) to hedge another trading position). The CFTC also notes that the first prong of the proposed rule's trading account definition is also substantially similar to the Basel Committee's definition of ''trading book.'' *See* Basel Committee on Banking Supervision, *Amendment to the Capital Accord to Incorporate Market Risks, available at http://bis.org/publ/bcbs119.pdf.*

[104] The CFTC notes that the Market Risk Capital Rules, both in their current and proposed form, also (i) include within the definition of covered position other positions not captured by the reference to positions acquired for the purpose of short-term resale or with the intent of benefitting from actual or expected short-term price movements (*e.g., all* commodity and foreign exchange positions,

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defining the term ''trading account,'' the Call Report notes that trading activities typically include, among other activities, ''acquiring or taking positions in such items principally for the purpose of selling in the near-term or otherwise with the intent to resell in order to profit from short-term price movements.'' [105] This language is substantially identical to the statutory definition of trading account in section 13 of the BHC Act in that it refers to acquiring or taking positions (i) principally for the purpose of selling in the near-term or (ii) otherwise with the intent to resell in order to profit from short-term price movements.

In providing guidance regarding the application of ''trading account,'' the Call Report also states that trading account positions include any position that is classified as ''trading securities'' under relevant U.S. Generally Accepted Accounting Principles (''GAAP'') standards for accounting.[106] Under the referenced accounting standards, trading securities are defined as those ''that are bought and held principally for the purpose of selling them in the near-term'' and ''generally used with the objective of generating profits on short-term differences in price.'' [107] The CFTC notes that the definition of a trading security under the relevant U.S. GAAP accounting standards is similar to both (i) the financial positions described in the second prong of the Call Report's definition of trading account and (ii) the financial positions described in the statutory definition of trading account under section 13 of the BHC Act.

Although neither the Market Risk Capital Rules, the Call Report, nor relevant accounting standards provide a precise definition of what constitutes ''near-term'' or ''short-term'' for purposes of evaluating whether a position is of the type held in a trading account or is a trading security, guidance provided under relevant accounting standards notes that ''near-term'' for purposes of classifying trading activities is ''generally measured in hours and days rather than months or years.'' [108] The CFTC expects that the precise period of time that may be considered near-term or short-term for purposes of evaluating any particular covered financial position would depend on a variety of factors, including the facts and circumstances of the covered financial position's acquisition, the banking entity's trading and business strategies, and the nature of the relevant markets. In considering the purpose for which a covered financial position is acquired or taken and evaluating whether such position is acquired or taken for short-term purposes, the CFTC intends to rely on a variety of information, including quantitative measurements of banking entities' covered trading activities (as described below in Part II.B.5 of this **SUPPLEMENTARY INFORMATION**), supervisory review of banking entities' compliance practices and internal controls, and supervisory review of individual transactions.

In order to better reinforce the general consistency between the proposal's approach to defining a trading account and the ''trading account'' concept embedded in the Market Risk Capital Rules, the second prong of the proposed definition of trading account, contained in § ____.3(b)(2)(i)(B) of the proposed rule, provides that a trading account includes any account used to acquire or take one or more covered financial positions, other than positions that are foreign exchange derivatives, commodity derivatives, or contracts of sale of a commodity for future delivery (unless the position is otherwise held with short-term intent), that are also market risk capital rule covered positions, if the banking entity, or any affiliate of the banking entity that is a bank holding company, calculates risk-based capital ratios under the Market Risk Capital Rules.[109] For these purposes, a ''market risk capital rule covered position'' is defined as any covered position as that term is defined for purposes of (i) in the case of a banking entity that is a bank holding company or insured depository institution, the market risk capital rule that is applicable to the banking entity, and (ii) in the case of a banking entity that is affiliated with a bank holding company, other than a banking entity to which a market risk capital rule is applicable, the market risk capital rule that is applicable to the affiliated bank holding company.[110] In particular, for banking entities already subject to the Market Risk Capital Rules, it appears that positions subject to trading account treatment under those rules because they involve short-term trading intent are generally the type of positions to which the proprietary trading restrictions of section 13 of the BHC Act were intended to apply. In addition, including all covered financial positions that receive trading account treatment under the Market Risk Capital Rules because they meet a nearly identical standard regarding short-term trading intent would also eliminate the potential for inconsistency or regulatory arbitrage in which a banking entity might characterize a position as

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regardless of the intended holding period) and (ii) exclude from that definition certain positions otherwise acquired with short-term trading intent for a variety of policy reasons. The CFTC has not proposed to incorporate such inclusions or exclusions for purposes of the proposed rule's definition of trading account; rather, the Market Risk Capital Rules and related concepts have been referred to only to the extent that they pertain to positions acquired for the purpose of short-term resale or with the intent of benefitting from actual or expected short-term price movements.

[105] Report of Condition and Income at A78a (also including, in the definition of ''trading account,'' ''regularly underwriting or dealing in securities; interest rate, foreign exchange rate, commodity, equity, and credit derivative contracts; other financial instruments; and other assets for resale * * * and * * * acquiring or taking positions in such items as an accommodation to customers or for other trading purposes.''). Accordingly, given its broader scope, the Call Report ''trading account'' includes trading positions that fall outside the statutory ''trading account'' for purposes of determining what is prohibited and permitted covered trading activity under section 13 of the BHC Act.

[106] *See* Report of Condition and Income at A78a, referring to ASC Topic 320, Investments-Debt and Equity Securities (formerly FASB Statement of Financial Accounting Standards No. 115, ''Accounting for Certain Investments in Debt and Equity Securities'').

[107] *See id.* In formulating the proposed rule, the CFTC carefully considered whether to define trading account for purposes of the proposed rule in a manner that formally incorporated the accounting standards governing trading securities. The CFTC has not proposed this approach because: (i) The statutory proprietary trading prohibition under section 13 of the BHC Act applies to financial instruments, such as derivatives, to which the trading security accounting standards may not apply; (ii) these accounting standards permit companies to classify, at their discretion, assets as trading securities even where the assets would not otherwise meet the definition of trading security; and (iii) these accounting standards could change in the future without consideration of the potential impact on section 13 of the BHC Act.

[108] *See* FASB ASC Master Glossary definition of ''trading.'' Although § ____.3(b)(2)(ii) of the proposed rule includes a rebuttable presumption that an account used to acquire or take certain covered financial positions that are held for 60 days or less is a trading account, the CFTC notes that U.S. GAAP does not include a presumption that securities sold within 60 days of acquisition were held for the purpose of selling them in the near term.

[109] The CFTC has excluded positions that are foreign exchange derivatives, commodity derivatives, or contracts of sale of a commodity for future delivery from this prong of the proposed trading account definition because all foreign exchange and commodity positions are considered ''covered positions'' under the Market Risk Capital Rules regardless of whether they involve the short-term trading intent required under the statutory definition of trading account in section 13(h)(6) of the BHC Act.

[110] *See* proposed rule § ____.3(c)(8). Accordingly, in the context of a subsidiary of a bank holding company (other than a subsidiary, such as a bank, to which a market risk capital rule is already directly applicable), if that bank holding company is subject to a market risk capital rule, any position of that subsidiary that meets the definition of a ''covered position'' under the market risk capital rule applicable to the bank holding company would be subject to § ____.3(b)(2)(i)(B) of the proposed rule.

''trading'' for capital purposes but not for purposes of the proposed rule.

The CFTC emphasizes that this second prong of the trading account definition is being proposed in contemplation of the proposed revisions to the Market Risk Capital Rules and, in particular, the proposed definition of ''covered position'' under those proposed revisions. To the extent that those proposed revisions with respect to the definition of ''covered position'' are not adopted, or adopted in a form other than as proposed, the CFTC would expect to take that into account in determining whether or how to include the proposed second prong of the trading account definition for purposes of the final rule to implement section 13 of the BHC Act. [111]

iv. Positions Acquired or Taken by Securities Dealers, Swap Dealers, and Security-Based Swap Dealers

The third prong of the proposed definition of trading account is contained in § ____.3(b)(2)(i)(C) of the proposed rule and provides that a trading account includes *any account* used to acquire or take one or more covered financial positions by a banking entity that is: (i) A SEC-registered securities or municipal securities dealer; (ii) a government securities dealer that registered, or that has filed notice, with an appropriate regulatory agency; [112] (iii) a CFTC-registered swap dealer; or (iv) a SEC-registered security-based swap dealer, in each case to the extent that the covered financial position is acquired or taken in connection with the activities that require the banking entity to be registered, or to file notice, as such.[113] Similarly included is any covered financial position acquired or taken by a banking entity that is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, if such position is acquired or taken in connection with the activities of such business.[114] As a result of this third prong, all covered financial positions acquired or taken by a registered dealer, swap dealer or security-based swap dealer, a government securities dealer that has filed notice with an appropriate regulatory agency, or a banking entity engaged in the same type of dealing activities outside the United States, are automatically included within the scope of positions described in the trading account definition, if they are acquired or taken in connection with the activities that require the banking entity to be registered, or file notice, as such (or, in the case of a banking entity engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, in connection with the activities of such business). As discussed below, the proposed rule contains exemptions that permit a variety of covered trading activity in which these types of entities typically engage, notwithstanding the inclusion of all covered financial positions of such entities within the definition of trading account.

The CFTC has proposed this third prong of the trading account definition because all assets or other positions held by firms that register or file notice as securities or derivatives dealers as part of their dealing activity are generally held for sale to customers upon request or otherwise support the firm's trading activities (*e.g.,* by hedging its dealing positions), and so would appear to involve the requisite short-term intent and be captured within the statutory definition of trading account. To the extent that a covered financial position is acquired or taken by such a banking entity outside the scope of the dealing activities that require the banking entity to be registered, or to file notice, as a dealer, swap dealer, or security-based swap dealer, that position may still cause the relevant account to be a trading account under the proposed rule if the account holding such a position otherwise meets the terms of the first or second prong of the trading account definition (*i.e.,* positions acquired or taken for short-term trading purposes or certain Market Risk Capital Rules positions).

v. Rebuttable Presumption for Certain Positions

In order to provide greater clarity and guidance on the application of the trading account definition, and in particular for those banking entities with no experience in evaluating short-term trading intent or that are not subject to the Market Risk Capital Rules, the proposed rule also includes a rebuttable presumption regarding certain positions that, by reason of their holding period, are presumed to be trading account positions. In particular, § ____.3(b)(2)(ii) of the proposed rule provides that an account would be presumed to be a trading account if it is used to acquire or take a covered financial position, other than dealing positions or certain Market Risk Capital Rules covered positions that are automatically considered part of the trading account, that the banking entity holds for a period of sixty days or less. However, the presumption does not apply if the banking entity can demonstrate, based on all the facts and circumstances, that the covered financial position, either individually or as a category, was not acquired or taken principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging another trading account position.[115] Because it appears likely that most positions held for sixty days or less would have been acquired with short-term trading intent, the proposal presumes such positions are trading account positions unless the banking entity can demonstrate otherwise. The purpose of the proposed rebuttable presumption is to simplify the process of evaluating whether individual positions are included in the definition of trading account. The proposal does not apply this rebuttable presumption to positions described in § ____.3(b)(2)(i)(B) or (C) of the proposed rule (*i.e.,* certain Market Risk Capital Rules positions and dealing positions), because these positions are automatically part of the trading account, and cannot be rebutted.

[111] In particular, the CFTC notes that under the proposed revisions to the Market Risk Capital Rules, but not the existing Market Risk Capital Rule, the term ''covered position'' expressly includes, other than with respect to commodity and foreign exchange positions, only positions taken with short-term trading intent. *See* 76 FR 1890 (Jan. 11, 2011). The CFTC does not intend to incorporate ''covered positions'' under the Market Risk Capital Rules in a way that includes positions lacking short-term trading intent.

[112] *See* 15 U.S.C. 78c(a)(42)(E); 15 U.S.C. 78*o*–5(a)(1)(B); 17 CFR 400.5(b); 17 CFR 449.1. Section 15C(a)(1)(A) of the Exchange Act requires any government securities dealer, other than a registered broker-dealer or a financial institution, to register with the SEC pursuant to section 15C(a)(2). Registered broker-dealers and financial institutions are required to file written notice with their appropriate regulatory agency, as defined in section 3(a)(34) of the Exchange Act, prior to acting as a government securities dealer. *See* 15 U.S.C. 78o–5(a)(1)(B). The proposed definition of trading account would cover positions of all three forms of government securities dealers: (i) those registered with the SEC; (ii) registered broker-dealers; and (iii) financial institutions that have filed notice with an appropriate regulatory agency.

[113] *See* proposed rule § ____.3(b)(2)(i)(C)(1)–(4). The CFTC emphasizes that this provision applies only to positions taken in connection with the activities that require the banking entity to be registered as one of the listed categories of dealer, not to *all* of the activities of that banking entity. For example, an insured depository institution may be registered as a swap dealer, but only the swap dealing activities that require it to be so registered would be covered by the second prong of the trading account definition. A position taken in connection with other activities of the insured depository institution that do not trigger registration as a swap dealer, such as lending, deposit-taking, the hedging of business risks, or other end-user activity, would only be included within the trading account if the position met one of the other prongs of the trading account definition (*i.e.,* §§ ____.3(b)(2)(i)(A) or (B) of the proposed rule).

[114] *See* proposed rule § ____.3(b)(2)(i)(C)(5).

[115] *See* proposed rule § ____.3(b)(2)(ii).

However, the CFTC recognizes that, for a variety of reasons, a banking entity may acquire a covered financial position for purposes other than short-term trading but nonetheless dispose of that position within the sixty-day period covered by the presumption. Accordingly, § ____.3(b)(2)(ii) is only a *presumption,* and may be rebutted by reference to all the facts and circumstances surrounding the acquisition of a particular position. For example, if a banking entity acquired a covered financial position with the demonstrable intent of holding it for investment or other non-trading purposes but, because of developments not expected or anticipated at the time of acquisition (*e.g.,* increased customer demand, an unexpected increase in its volatility or a need to liquidate the position to meet unexpected liquidity demands), held it for less than sixty days, those facts and circumstances would generally suggest that the position was not acquired with short-term trading intent, notwithstanding the presumption.[116] The proposed rule also makes clear that this rebuttal may be made not only with respect to a particular transaction, but also with respect to a particular category of transactions, recognizing that it may be possible to identify a category of similar transactions that clearly do not involve short-term trading, notwithstanding the typical holding period of the related positions.

It is important to note that these presumptions are designed to help determine whether a transaction is within the definition of ''proprietary trading,'' not whether a transaction is permissible under section 13 of the BHC Act. A transaction may fall within the definition of ''proprietary trading'' and yet be permissible if it meets one of the exemptions provided in the proposed rule, such as the exemption for market making-related activities.

vi. Request for Comment

The CFTC requests comment on the proposed rule's approach to defining trading account. In particular, the CFTC requests comment on the following questions:

Question 14. Is the proposed rule's definition of trading account effective? Is it over- or under-inclusive in this context? What alternative definition might be more effective in light of the language and purpose of the statute? How would such definition better identify the accounts that are intended to be covered by section 13 of the BHC Act?

Question 14.1. Should the CFTC Rule's proposed definition of trading account include: (i) § ____.3(b)(2)(i)(B), relating to Federal Banking Agencies' Market Risk Capital Rules; or (ii) §§ ____.3(b)(2)(i)(C)(1),(2) and/or (4), relating to SEC registered dealers and dealers who have filed notice with the appropriate regulatory agency? Please explain the rationale for including or excluding the provisions in the proposed CFTC Rule.

Question 15. Is the proposed rule's approach for determining when a position falls within the definition of ''trading account'' for purposes of the proposed rule from when it must be reported in the ''trading account'' for purpose of filing the Call Report effective? What additional guidance could the CFTC provide on this distinction? Are there alternative approaches that would be more effective in light of the language and purpose of the statute? Is this approach workable for affiliates of bank holding companies that are not subject to the Federal banking agencies' Market Risk Capital Rules (*e.g.,* affiliated investment advisers)? If not, why not? Are affiliates of bank holding companies familiar with the concepts from the Market Risk Capital Rules that are being incorporated into the proposed rule? If not, what steps would an affiliate of a bank holding company have to take to become familiar with these concepts and what would be the costs and/or benefits of such actions? Is application of the trading account concept from the Federal banking agencies' Market Risk Capital Rules to affiliates of bank holding companies necessary to promote consistency and prevent regulatory arbitrage? Please explain.

Question 16. Is the manner in which the CFTC intends to take into account, and substantially adopt, the approach used in the Market Risk Capital Rules and related concepts for determining whether a position is acquired with short-term trading intent effective?

Question 17. Should the proposed rule's definition of trading account, or its use of the term ''short-term,'' be clarified? Are there particular transactions or positions to which its application would be unclear? Should the proposed rule define ''short-term'' for these purposes? What alternative approaches to construing the term ''short-term'' should the CFTC consider and/or adopt?

Question 18. Are there particular transactions or positions to which the application of the proposed definition of trading account is unclear? Is additional regulatory language, guidance, or clarity necessary?

Question 19. Is the exchange of variation margin as a potential indicator of short-term trading in derivative or commodity future transactions appropriate for the definition of trading account? How would this impact such transactions or the manner by which banking entities conduct such transactions? For instance, would banking entities seek to avoid the use of variation margin to avoid this rule? What are the costs and benefits of referring to the exchange of variation margin to determine if positions should be included in a banking entity's trading account? Please explain.

Question 20. Are there particular transactions or positions that are included in the definition of trading account that should not be? If so, what transactions or positions and why?

Question 21. Are there particular transactions or positions that are not included in the definition of trading account that should be? If so, what transactions or positions and why?

Question 22. Is the proposed rule of construction for positions acquired or taken by dealers, swap dealers and security-based swap dealers appropriate and consistent with the purpose and language of section 13 of the BHC Act? Is its application to any particular type of entity, such as an insured depository institution engaged in derivatives dealing activities, sufficiently clear and effective? If not, what alternative would be clearer and/or more effective?

Question 23. Is the rebuttable presumption included in the proposed rule appropriate and effective? Are there more effective ways in which to provide clarity regarding the determination of whether or not a position is included within the definition of trading account? If so, what are they?

Question 24. Are records currently created and retained that could be used to demonstrate investment or other non-trading purposes in connection with rebutting the presumption in the proposed rule? If yes, please identify such records and explain when they are created and whether they would be useful in connection with a single transaction or a category of similar transactions. If no, we seek commenter input regarding the manner in which banking entities might demonstrate investment or other non-trading intent. Should the CFTC require banking entities to create and keep records to demonstrate investment or non-trading intent with respect to their covered financial positions?

[116] In such cases, the documented intention for acquiring or taking the position should be consistent with the intention articulated for financial reporting and other purposes.

Question 25. How should the proposed trading account definition address arbitrage positions? Should all arbitrage positions be included in the definition of trading account, unless the timing of such profits is long-term and established at the time the arbitrage position is acquired or taken? Please explain in detail, including a discussion of different arbitrage trading strategies and whether subjecting such strategies to the proposed rule would be consistent with the language and purpose of section 13 of the BHC Act.

Question 26. Is the holding period referenced in the rebuttable presumption appropriate? If not, what holding period would be more appropriate, and why?

Question 27. Should the proposed rule include a rebuttable presumption regarding positions that are presumed *not* to be within the definition of trading account? If so, why, and what would the presumption be?

Question 28. Should any additional accounts be included in the proposed rule pursuant to the authority granted under section 13(h)(6) of the BHC Act? If so, what accounts and why? For example, should accounts used to acquire or take certain long-term positions be included in the definition? If so, how would subjecting such accounts to the proposed rule's prohibitions and restrictions be consistent with the language and purpose of section 13 of the BHC Act?

Question 29. Do any of the activities currently engaged in by issuers of asset-backed securities that would be considered a banking entity constitute proprietary trading as defined by § ____.3(b) of this rule proposal? Would any activities relating to investment of funds in accounts held by issuers of asset-backed securities (*e.g.,* reserve accounts, prefunding accounts, reinvestment accounts, *etc.*) or the purchase and sale of securities as part of the management of a collateralized debt obligation portfolio be considered proprietary trading under the proposed rule? What would be the potential impact of the prohibition on proprietary trading on the use of such accounts in (i) existing securitization transactions and (ii) future securitization transactions? Would any of the securities typically acquired and retained using these accounts be considered an ownership interest in a covered fund under the proposed rule? Does the exclusion of trading in certain government obligations in § ____.6(a) of the proposed rule mitigate the impact of the proposed rule on such issuers of asset-backed securities and their activities? Why or why not?

c. Excluded Positions

i. Excluded Positions Under Certain Repurchase and Reverse Repurchase Arrangements

Section ____.3(b)(2)(iii)(A) of the proposed rule's definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take one or more covered financial positions that arise under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing at the start of the transaction, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty.[117] This clarifying exclusion is proposed because positions held under a repurchase or reverse repurchase agreement operate in economic substance as a secured loan, and are not based on expected or anticipated movements in asset prices. Accordingly, these types of asset purchases and sales do not appear to be the type of transaction intended to be covered by the statutory definition of trading account.

ii. Excluded Positions Under Securities Lending Transactions

Section ____.3(b)(2)(iii)(B) of the proposed rule's definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take one or more covered financial positions that arise under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed to by the parties.[118] This clarifying exclusion is proposed because a position held under a securities lending arrangement can be used, for example, to operate in economic substance and function, as a means to facilitate settlement of securities transactions, and is not based on expected or anticipated movements in asset prices. Accordingly, securities lending transactions do not appear to be the type of transaction intended to be covered by the statutory definition of trading account.

iii. Excluded Positions Acquired or Taken for Liquidity Management Purposes

Section ____.3(b)(2)(iii)(C) of the proposed definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take a position for the purpose of *bona fide* liquidity management, so long as important criteria are met.[119]

This proposed clarifying exclusion is intended to make clear that, where the purpose for which a banking entity acquires or takes a position is to ensure that it has sufficient liquid assets to meet its short-term cash demands, and the related position is held as part of the banking entity's liquidity management process, that transaction falls outside of the types of transactions described in the proposed rule's definition of trading account. Maintaining liquidity management positions is a critical aspect of the safe and sound operation of certain banking entities, and does not involve the requisite short-term trading intent that forms the basis of the statutory definition of ''trading account.'' In the context of *bona fide* liquidity management activity that would qualify for the clarifying exclusion, a banking entity's purpose for acquiring or taking these types of positions is not to benefit from short-term profit or short-term price movements, but rather to ensure that it has sufficient, readily-marketable assets available to meet its expected short-term liquidity needs.

However, the CFTC is concerned with the potential for abuse of this clarifying exclusion—specifically, that a banking entity might attempt to improperly mischaracterize positions acquired or taken for prohibited proprietary trading purposes as positions acquired or taken for liquidity management purposes. To address this, the proposed rule requires that the transaction be conducted in accordance with a documented liquidity management plan that meets five criteria. First, the plan would be required to specifically contemplate and authorize any particular instrument used for liquidity management purposes, its profile with respect to market, credit and other risks, and the liquidity circumstances in which the position may or must be used. Second, the plan would have to require that any transaction contemplated and authorized by the plan be principally for the purpose of managing the liquidity of

[117] *See* proposed rule § ____.3(b)(2)(iii)(A).

[118] *See* proposed rule § __.3(b)(2)(iii)(B). The language describing securities lending transactions in the proposed rule generally mirrors that contained in Rule 3a5–3 under the Exchange Act. *See* 17 CFR 240.3a5–3.

[119] *See* proposed rule § ____.3(b)(2)(iii)(C).

the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position acquired or taken for such short-term purposes. Third, the plan would have to require that any positions acquired or taken for liquidity management purposes be highly liquid and limited to financial instruments the market, credit and other risks of which are not expected to give rise to appreciable profits or losses as a result of short-term price movements.[120] Fourth, the plan would be required to limit any position acquired or taken for liquidity management purposes, together with any other positions acquired or taken for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations, as estimated and documented pursuant to methods specified in the plan. Fifth, the plan would be required to be consistent with the CFTC's supervisory requirements, guidance and expectations regarding liquidity management. The CFTC would review these liquidity plans and transactions effected in accordance with these plans through supervisory and examination processes to ensure that the applicable criteria are met and that any position acquired or taken in reliance on the clarifying exclusion for liquidity management transactions is fully consistent with such plans.

iv. Excluded Positions of Derivatives Clearing Organizations and Clearing Agencies

Section ____.3(b)(2)(iii)(D) of the proposed rule's definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take one or more covered financial positions that are acquired or taken by a banking entity that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the SEC under section 17A of the Exchange Act (15 U.S.C. 78q–1) in connection with clearing derivatives or securities transactions.[121] This clarifying exclusion is proposed because, in the case of a banking entity that acts as a registered, central counterparty in the securities or derivatives markets, these types of transactions do not appear to be the type of transaction intended to be covered by the statutory definition of trading account, as the purpose of such transactions is to provide a clearing service to third parties and not to profit from short-term resale or short-term price movements.

v. Request for Comment

The CFTC requests comment regarding the proposed clarifying exclusions and whether any other types of activity or transactions should be excluded from the proposed definition of trading account for clarity. In particular, the CFTC requests comment on the following questions:

Question 30. Are the proposed clarifying exclusions for positions under certain repurchase and reverse repurchase arrangements and securities lending transactions over- or under-inclusive and could they have unintended consequences? Is there an alternative approach to these clarifying exclusions that would be more effective? Are the proposed clarifying exclusions broad enough to include *bona fide* arrangements that operate in economic substance as secured loans and are not based on expected or anticipated movements in asset prices? Are there other types of arrangements, such as open dated repurchase arrangements, that should be excluded for clarity and, if so, how should the proposed rule be revised? Alternatively, are the proposed clarifying exclusions broad enough to not inadvertently exclude from coverage any similar arrangements or transactions that have these characteristics?

Question 30.1. Should the proposed CFTC Rule include the clarifying exclusion for certain positions taken by clearing agencies that are registered with the SEC under section 17A of the Exchange Act? Please explain the rationale for including or excluding the provision in the proposed CFTC Rule.

Question 30.2. The CFTC notes that only the actual repurchase or reverse repurchase arrangements would be exempt from the definition of trading account, and not the collateral or position that is being financed by the repurchase or reverse repurchase arrangement. The CFTC further notes that if a banking entity used a repurchase arrangement to finance a purchase of a covered financial position, that covered financial position would be considered in the trading account if it satisfied, at the time of its purchase, one of the three prongs set forth in the definition of trading account. Is this treatment of repurchase and reverse repurchase arrangements appropriate for the proposed CFTC Rule?

Question 31. Are repurchase and reverse repurchase arrangements and securities lending transactions sufficiently similar such that they should be treated in the same way for purposes of the proposed rule? Are there aspects of repurchase and reverse repurchase arrangements or securities lending transactions that should be highlighted in considering the application of the proposed rule? Do repurchase and reverse repurchase arrangements or securities lending transactions raise any additional or heightened concerns regarding risk? Please identify and explain how these concerns should be reflected in the proposed rule.

Question 32. Are the proposed exclusions for repurchase and reverse repurchase arrangements and securities lending transactions appropriate or are there conditions that commenters believe would be appropriate as a pre-requisite to relying on these exclusions? Please identify such conditions and explain. Alternatively, we seek commenter input regarding why repurchase and reverse repurchase arrangements and securities lending transactions do not present the potential for abuse, namely, that a banking entity might attempt to improperly mischaracterize prohibited proprietary trading as activity that qualifies for the proposed exclusions.

Question 33. Is the proposed clarifying exclusion for liquidity management transactions effective and appropriate? If not, what alternative would be more effective and appropriate, and why? Is the proposed exclusion under- or over-inclusive? Does the proposed clarifying exclusion place sufficient limitations on liquidity management transactions to prevent abuse of the clarifying exclusion? If not, what additional limitations should be specified? Are any of the limitations contained in the proposed rule inappropriate or unnecessary? If so, how could such limitations be eliminated or altered in a way that does not permit abuse of the clarifying exclusion?

Question 34. Is the proposed exclusion for liquidity management positions necessary? If not excluded, would such activity otherwise qualify for an exemption contained in the proposed rule (*e.g.,* the exemptions contains in §§____.5 and ____.6(a) of the proposed rule)? What types of banking entities are likely to engage in the liquidity management activities described in the proposed exclusion?

[120] Any instance in which positions characterized as taken for liquidity purposes do give rise to appreciable profits or losses as a result of short-term price movements will be subject to significant CFTC scrutiny and, absent compelling explanatory facts and circumstances, would be viewed as prohibited proprietary trading under the proposal.

[121] *See* proposed rule § ____.3(b)(2)(iii)(D).

Question 35. What types of instruments do particular types of banking entities currently use in connection with liquidity management activities (*e.g.,* Treasuries)? Why are such instruments chosen for liquidity management purposes? Would such instruments meet the proposed requirement that the position be highly liquid and limited to financial instruments the market, credit and other risk of which are not expected to give rise to appreciable profits or losses as a result of short-term price movements? Why or why not?

Question 36. What methodologies do banking entities currently use for estimating deviations from normal operations in connection with liquidity management programs?

Question 37. Which unit or units within a banking entity are typically responsible for liquidity management? What is the typical reporting line structure used to control and supervise that unit or units? Are the responsibilities of personnel in the unit limited to liquidity management or do they perform other functions in addition to liquidity management? How is compensation determined for personnel in the unit of the banking entity responsible for liquidity management?

Question 38. Would current liquidity management programs meet the five proposed criteria for liquidity management programs? If not which criteria would not be met, and why? What effect would the proposed liquidity management exclusions have on current liquidity management programs and banking entities in general?

Question 39. Are liquidity management programs used for purposes other than ensuring the banking entity has sufficient assets available to it that are readily marketable to meet expected short-term liquidity needs? If so, for what purposes, and why?

Question 40. What costs or other burdens would arise if the proposal did not contain an exclusion for positions acquired or taken for liquidity management purpose? Please explain and quantify these costs or other burdens in detail.

Question 41. Is the proposed liquidity management exclusion sufficiently clear? If not, why is the exclusion unclear and how should the CFTC clarify the terms of this exclusion?

Question 42. Is the proposed clarifying exclusion for certain positions taken by derivatives clearing organizations and clearing agencies effective and appropriate? If not, what alternative would be more effective and appropriate, and why?

Question 43. Are any additional clarifying exclusions warranted? If so, what clarifying exclusion, and why?

Question 44. Should the proposed definition exclude any position the market risk of which cannot be hedged by the banking entity in a two-way market?[122] If so, what would be the basis for concluding that such positions are clearly not within the statutory definition of trading account?

Question 45. Should the proposed definition include a clarifying exclusion for any position in illiquid assets? If so, what would be the basis for concluding that such positions are clearly not within the statutory definition of trading account? How should ''illiquid assets'' be defined for these purposes? Should the definition be consistent with the definition given that term in the Board's Conformance Rule under section 13 of the BHC Act (12 CFR 225.180 *et seq.*)?[123]

d. Covered Financial Position

i. Definition of ''Covered Financial Position''

Section ____.3(b)(3)(i) of the proposed rule defines a covered financial position as any long, short, synthetic or other position[124] in: (i) A security, including an option on a security; (ii) a derivative, including an option on a derivative; or (iii) a contract of sale of a commodity for future delivery, or an option on such a contract. The types of financial instruments described in the proposed definition are consistent with those referenced in section 13(h)(4) of the BHC Act as part of the statutory definition of proprietary trading.[125]

To provide additional clarity, § ____.3(b)(3)(ii) of the proposed rule provides that, consistent with the statute, the term covered financial position does not include any position that is itself a loan, a commodity, or foreign exchange or currency.[126] The exclusion of these types of positions is intended to eliminate potential confusion by making clear that the purchase and sale of loans, commodities and foreign exchange—none of which are referred to in section 13(h)(4) of the BHC Act—are outside the scope of transactions to which the proprietary trading restrictions apply. The reference in § ____.3(b)(3)(ii) to a position that *is,* rather than a position that *is in,* a loan, a commodity, or foreign exchange or currency is intended to capture only the purchase and sale of these instruments themselves. This reflects the fact that, consistent with section 13(h)(4) of the BHC Act and the proposed rule, although a position that is a foreign exchange derivative or commodity derivative is included in the definition of covered financial position and therefore subject to the prohibition on proprietary trading, a position that is a commodity or foreign currency is not.[127] For example, the spot purchase of a commodity would meet the terms of the exclusion, but the acquisition of a futures position in the same commodity would not. The CFTC requests comment on the proposed rule's definition of covered financial position. In particular, the CFTC requests comment on the following questions:

Question 46. Is the proposed rule's definition of covered financial position effective? Is the definition over- or under-inclusive? What alternative approaches might be more effective in light of the language and purpose of section 13 of the BHC Act, and why?

Question 47. Are there definitions in other rules or regulations that might inform the proposed definition of covered financial position? If so, what rule or regulation? How should that approach be incorporated into the proposed definition? Why would that approach be more appropriate?

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[122] The CFTC also notes that such an exclusion would be similar to the express exclusion of similar positions under the Federal banking agencies' most recent proposed revisions to the Market Risk Capital Rules. *See* 76 FR 1890, 1912 (Jan. 11, 2011) (excluding from the definition of a covered position any position the material risk elements of which the holder is unable to hedge in a two-way market).

[123] *See* 76 FR 8265 (Feb. 14, 2011). The Board's conformance rule defines ''illiquid asset'' as ''any real property, security obligation, or other asset that (i) is not a liquid asset; (ii) because of statutory or regulatory restrictions applicable to the hedge fund, private equity fund or asset, cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund to a person that is unaffiliated with the relevant banking entity; or (iii) because of contractual restrictions applicable to the hedge fund, private equity fund or asset, cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund for a period of 3 years or more to a person that is unaffiliated with the relevant banking entity.'' 12 CFR 225.180(g). A ''liquid asset'' is defined in paragraph (h) of the conformance rule. *See* 12 CFR 225.180(h).

[124] The proposed definition's reference to any ''long, short, synthetic or other position'' is intended to make clear that a position in an identified category of financial instrument qualifies as a covered financial position regardless of whether the position is (i) an asset or liability or (ii) is acquired through acquisition or sale of the financial instrument or synthetically through a derivative or other transaction.

[125] Section 13(h)(4) of the BHC Act also permits the CFTC to extend the scope of the proprietary trading restrictions to other financial instruments. The CFTC has not proposed to do so at this time.

[126] *See* proposed rule § ____.3(b)(ii).

[127] The types of commodity- and foreign exchange-related derivatives that are included within the definition of ''derivative'' under the proposed rule are discussed in detail below in Part III.B.2.d.ii of this Supplementary Information.

Question 48. Are there particular transactions or positions to which the application of the proposed definition of covered financial position is unclear? Is additional regulatory language, guidance, or clarity necessary?

Question 49. The proposal would apply to long, short, synthetic, or other positions in one of the listed categories of financial instruments. Does this language adequately describe the type of positions that are intended to fall within the proposed definition of covered financial position? If not, why not? Are there different or additional concepts that should be specified in this context? Please explain.

Question 50. Should the CFTC expand the scope of covered financial positions to include other transactions, such as spot commodities or foreign exchange or currency, or certain subsets of transaction (*e.g.,* spot commodities or foreign exchange or currency traded on a high-frequency basis)? If so, which instruments and why?

Question 51. What factors should the CFTC consider in deciding whether to extend the scope of the proprietary trading restriction to other financial instruments under the authority granted in section 13(h)(4) of the BHC Act? Please explain.

Question 52. Is the proposed exclusion of any position that is a loan, a commodity, or foreign exchange or currency effective? If not, what alternative approaches might be more effective in light of the language and purpose of section 13 of the BHC Act? Should additional positions be excluded? If so, why and under what authority?

ii. Other Terms Used in the Definition of Covered Financial Position

The proposal also defines a number of terms used in the proposed definition of covered financial position. The term ''security'' is defined by reference to that same term under the Exchange Act.[128] The terms ''commodity'' and ''contract of sale of a commodity for future delivery'' are defined by reference to those same terms under the Commodity Exchange Act.[129] The CFTC has proposed to reference these existing definitions from the securities and commodities laws because these existing definitions are generally well-understood by market participants and have been subject to extensive interpretation in the context of securities and commodities trading activities.

[128] *See* proposed rule § ____.2(w).

[129] *See* proposed rule §§ ____.3(c)(1), (2).

The proposed rule also defines the term ''derivative.'' [130] In particular, the definition of ''derivative'' under the proposed rule includes any ''swap'' (as that term is defined in the Commodity Exchange Act) and any ''security-based swap'' (as that term is defined in the Exchange Act), in each case as further defined by the CFTC and SEC by joint regulation, interpretation, guidance, or other action, in consultation with the Board pursuant to section 712(d) of the Dodd-Frank Act. The CFTC has proposed to incorporate these definitions of ''swap'' and ''security-based swap'' under the Federal securities and commodities laws because those definitions: (i) Govern the primary Federal regulatory scheme applicable to exchange-traded and over-the-counter derivatives; (ii) will be frequently evaluated and applied by banking entities in the course of their trading activities; and (iii) capture agreements and contracts that are, or function as, derivatives.[131] The proposed rule also includes within the definition of derivative certain other transactions that, although not included within the definition of ''swap'' or ''security-based swap.'' Specifically, the proposed definition of derivative also includes: (i) any purchase or sale of a nonfinancial commodity for deferred shipment or delivery that is intended to be physically settled; (ii) any foreign exchange forward or foreign exchange swap (as those terms are defined in the Commodity Exchange Act); [132] (iii) any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i)); [133] (iv) any agreement, contract, or transactions in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and (v) any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b)). The CFTC is requesting comment on whether including these five types of transactions within the proposed definition of derivative is appropriate.

To provide additional clarity, the proposed definition of derivative also clarifies two types of transactions that are outside the scope of the definition. First, the proposed definition of derivative would not include any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in the Commodity Exchange Act, or security-based swap, as that term is defined in the Exchange Act. The SEC and CFTC have, in proposing rules further defining the terms ''swap'' and ''security-based swap,'' proposed to not include a variety of agreements, contracts, and transactions within those definitions by joint regulation or interpretation, and the CFTC has proposed to expressly reflect such

[130] *See* proposed rule § ____.2(l).

[131] The CFTC notes that it has not included a variety of security-related derivatives within the proposed definition of derivative, as such transactions are ''securities'' for purposes of both the Exchange Act and the proposed rule and, as a result, already included in the broader definition of ''covered financial position'' to which the prohibition on proprietary trading applies.

[132] The CFTC notes that foreign exchange swaps and foreign exchange forwards are considered swaps for purposes of the Commodity Exchange Act definition of that term unless the Secretary of the Treasury determines, pursuant to section 1a(47)(E) of that Act (7 U.S.C. 1a(47)(E)), that foreign exchange swaps and forwards should not be regulated as swaps under the Commodity Exchange Act and are not structured to evade certain provisions of the Dodd-Frank Act. On May 5, 2011, the Treasury Secretary proposed to exercise that authority to exclude foreign exchange forwards and foreign exchange swaps from the definition of ''swap.'' *See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act,* 76 FR 25774 (May 5, 2011). If the Secretary of the Treasury issues a final determination, as proposed, a ''foreign exchange swap'' and ''foreign exchange forward'' would be excluded from the definition of ''swap'' under the Commodity Exchange Act and, therefore, would fall outside of the proposed rule's definition of ''derivative.'' Accordingly, the CFTC has proposed to expressly include such transactions in the proposed definition of derivative, but have requested comment on a variety of questions related to whether foreign exchange swaps and forwards should be included or excluded from the definition of derivative. The CFTC notes that, aside from foreign exchange swaps and forwards, the Commodity Exchange Act's definition of ''swap'' (and therefore the proposed definition of ''derivative'') also includes other types of foreign exchange derivatives, including non-deliverable foreign exchange forwards (NDFs), foreign exchange options, and currency options, which fall outside of the Secretary of the Treasury's authority to issue a determination to exclude certain transactions from the ''swap'' definition.

[133] Section 2(c)(2)(C)(i) was added to the Commodity Exchange Act in 2008 to address retail foreign exchange transactions that were documented as automatically renewing spot contracts (so-called rolling spot transactions) and therefore not futures contracts subject to the Commodity Exchange Act, but which were functionally and economically similar to futures. *See Retail Foreign Exchange Transactions,* 76 FR 41375, 47376–77 (July 15, 2011). However, section 2(c)(2)(C)(i) of the Commodity Exchange Act does not apply to transactions entered into by U.S. financial institutions, including insured depository institutions, brokers, dealers, and certain retail foreign exchange dealers. *See* 7 U.S.C. 2(c)(2)(C)(i)(I)(aa). To apply this definitional prong to such banking entities, the definition of derivative includes a transaction ''described in'' section 2(c)(2)(C)(i) of the Commodity Exchange Act. In other words, the use of this phrase is intended to capture any transaction described in section 2(c)(2)(C)(i) without regard to the identity of the counterparty.

exclusions in the proposed rule's definition in order to avoid the potential application of its restrictions to transactions that are not commonly thought to be derivatives.[134] Second, the proposed definition of derivative also does not include any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)). This provision is proposed to clearly exclude identified banking products that are expressly excluded (i) from the definition of ''security-based swap'' and (ii) from Commodity Exchange Act and CFTC jurisdiction pursuant to section 403(a) of the Legal Certainty for Bank Products Act of 2000.[135]

The proposed rule defines a ''loan'' as any loan, lease, extension of credit, or secured or unsecured receivable.[136] The CFTC notes that the proposed definition of loan is expansive, and includes a broad array of loans and similar credit transactions, but does *not* include any asset-backed security that is issued in connection with a loan securitization or otherwise backed by loans.

The CFTC requests comment on the proposed rule's definition of terms used in the definition of covered financial position. In particular, the CFTC requests comment on the following questions:

Question 53. Are the proposed rule's definitions of commodity and contract of sale of a commodity for future delivery appropriate? If not, what alternative definitions would be more appropriate?

Question 54. Is the proposed definition of derivative effective? If not, what alternative definition would be more effective? Should the proposed rule expressly incorporate the definition of ''swap'' and ''security-based swap'' under the Federal commodities and securities laws? If not, what alternative approach should be taken? Are there transactions included in those incorporated definitions that should not be included in the proposed rule's definition? If so, what transactions and why? Are there transactions excluded from those incorporated definitions that should be included within the proposed rule's definition? If so, what transactions and why?

Question 55. Is the proposed inclusion of foreign exchange forwards and swaps in the definition of derivative effective? If not, why not? On what basis would the CFTC conclude that such transactions are not derivatives? Are these transactions economically or functionally more similar to secured loans or repurchase arrangements than to commodity forwards and swaps? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative? What effect is including foreign exchange swaps and forwards in the definition of derivative likely to have on banking entities, participants in the foreign exchange markets, and the liquidity and efficiency of foreign exchange markets generally? If included within the definition of derivative, should transactions in foreign exchange swaps and forwards be permitted under section 13(d)(1)(J) of the BHC Act? If so, why and on what basis? Please quantify your responses, to the extent feasible.

Question 56. Is the proposed inclusion of any purchase or sale of a nonfinancial commodity for deferred shipment or delivery that is intended to be physically settled in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 57. Is the proposed inclusion of foreign currency transactions described in section 2(c)(2)(C)(i) of the Commodity Exchange Act in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 58. Is the proposed inclusion of commodity transactions described in section 2(c)(2)(D)(i) of the Commodity Exchange Act in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 59. Is the proposed inclusion of any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b)) in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 60. Is the manner in which the proposed definition of derivative excludes any transaction that the CFTC or SEC exclude by joint regulation, interpretation, guidance, or other action from the definition of ''swap'' or ''security-based swap'' effective? If not, what alternative approach would be more appropriate? Should such exclusions be restated in the proposed rule's definition? If so, why?

Question 61. Is the proposed rule's definition of loan appropriate? If not, what alternative definition would be more appropriate? Should the definition of ''loan'' exclude a security? Should other types of traditional banking products be included in the definition of ''loan''? If so, why?

iii. Definition of Other Terms Related to Proprietary Trading

Section ____.3(d) of the proposed rule defines a variety of other terms used throughout subpart B of the proposed rule. These definitions are discussed in further detail below in the relevant summary of the separate sections of the proposed rule in which they are used.

The CFTC requests comment on the proposed rule's definition of other terms used in subpart B of the proposed rule. In particular, the CFTC requests comment on the following questions:

Question 62. Are the proposed rule's definitions of other terms in § ____.3(d) appropriate? If not, what alternative definitions would be more appropriate?

Question 63. Is the definition of additional terms for purposes of subpart B of the proposed rule necessary? If so, what terms should be defined? How should those terms be defined?

2. Section ____.4: Permitted Underwriting and Market Making-related Activities

Section ____.4 of the proposed rule implements section 13(d)(1)(B) of the BHC Act, which permits banking entities to engage in certain underwriting and market making-related activities, notwithstanding the prohibition on proprietary trading.[137]

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[134] *See* 76 FR 29818 (May 23, 2011). For example, the SEC and CFTC have proposed to not include (i) certain insurance products within the definitions of ''swap'' and ''security-based swap'' by regulation and (ii) certain consumer agreements (*e.g.,* agreements to acquire or lease real property or purchase products at a capped price) and commercial agreements (*e.g.,* employment contracts or the purchase of real property, intellectual property, equipment or inventory) by joint interpretation. *See id.* at 29832–34. The CFTC has proposed to define ''derivative'' in the proposed rule by reference to the definition of ''swap'' and ''security-based swap'' under the Federal securities and commodities laws in contemplation of the SEC and CFTC's proposed regulatory and interpretative exclusions; to the extent that such exclusions are not included in any final action taken by the SEC and CFTC, the CFTC will consider whether to state such exclusions expressly within the proposed rule's definition of derivative.

[135] Examples of excluded identified banking products are deposit accounts, savings accounts, certificates of deposit, or other deposit instruments issued by a bank.

[136] *See* proposed rule § ____.2(q).

[137] *See* 12 U.S.C. 1851(d)(1)(B).

Section ____.4(a) addresses permitted underwriting activities, and § ____.4(b) addresses permitted market making-related activities.

a. Permitted Underwriting Activities

Section ____.4(a) of the proposed rule permits a banking entity to purchase or sell a covered financial position in connection with the banking entity's underwriting activities to the extent that such activities are designed not to exceed the reasonably expected near-term demands of clients, customers, or counterparties (the ''underwriting exemption''). In order to rely on this exemption, a banking entity's underwriting activities must meet all seven of the criteria listed in § ____.4(a)(2). These seven criteria are intended to ensure that any banking entity relying on the underwriting exemption is engaged in *bona fide* underwriting activities, and conducts those activities in a way that is not susceptible to abuse through the taking of speculative, proprietary positions as a part of, or mischaracterized as, underwriting activity.

First, the banking entity must have established the internal compliance program required by subpart D of the proposed rule, as further described below in Part III.D of this **SUPPLEMENTARY INFORMATION**. This requirement is intended to ensure that any banking entity relying on the underwriting exemption has reasonably designed written policies and procedures, internal controls, and independent testing in place to support its compliance with the terms of the exemption.

Second, the covered financial position that is being purchased or sold must be a security. This requirement reflects the common usage and understanding of the term ''underwriting.'' [138]

Third, the transaction must be effected solely in connection with a distribution of securities for which the banking entity is acting as an underwriter. This prong is intended to give effect to the essential element of the underwriting exemption—*i.e.,* that the transaction be in connection with underwriting activity. For these purposes, the proposed rule defines both (i) a distribution of securities and (ii) an underwriter. The definitions of these terms are generally identical to the definitions provided for the same terms in the SEC's Regulation M,[139] which governs the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities under the Exchange Act.[140] The CFTC has proposed to use similar definitions because the meanings of these terms under Regulation M are generally well-understood by market participants and define the scope of underwriting activities in which banking entities typically engage, including underwriting of SEC-registered offerings, underwriting of unregistered distributions, and acting as a placement agent in private placements.

With respect to the definition of distribution, the CFTC notes that Regulation M defines a distribution of securities as ''an offering of securities, whether or not subject to registration under the Securities Act that are distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts.'' [141] The manner in which this Regulation M definition distinguishes a distribution of securities from other transactions appears to be relevant in the context of the underwriting exemption and useful to address potential evasion of the general prohibition on proprietary trading, while permitting *bona fide* underwriting activities. Accordingly, in order to qualify as a distribution for purposes of the proposal, as with Regulation M, the offering must meet the two elements—''magnitude'' and ''special selling efforts and selling methods.'' The CFTC has not defined the terms ''magnitude'' and ''special selling efforts and selling methods'' in the proposed rule, but would expect to rely on the same factors considered under Regulation M in assessing these elements. For example, the number of shares to be sold, the percentage of the outstanding shares, public float, and trading volume that those shares represent are all relevant to an assessment of magnitude.[142] In addition, delivering a sales document, such as a prospectus, and conducting road shows are generally indicative of special selling efforts and selling methods.[143] Another indicator of special selling efforts and selling methods is compensation that is greater than that for secondary trades but consistent with underwriting compensation for an offering. Similar to the approach taken under Regulation M, the CFTC notes that ''magnitude'' does not imply that a distribution must be large; instead, this factor is a means to distinguish a distribution from ordinary trading, and therefore does not preclude small offerings or private placements from qualifying for the underwriting exemption.

The definition of ''underwriter'' in the proposed rule is generally similar to that under the SEC's Regulation M, except that the proposed rule's definition would also include, within that definition, a person who has an agreement with another underwriter to engage in a distribution of securities for or on behalf of an issuer or selling security holder.[144] Consistent with current practices and the Council study, the CFTC proposes to take into consideration the extent to which the banking entity is engaged in the following activities when determining whether a banking entity is acting as an underwriter as part of a distribution of securities:

- Assisting an issuer in capital raising;
- Performing due diligence;
- Advising the issuer on market conditions and assisting in the preparation of a registration statement or other offering documents;
- Purchasing securities from an issuer, a selling security holder, or an underwriter for resale to the public;
- Participating in or organizing a syndicate of investment banks;
- Marketing securities; and
- Transacting to provide a post-issuance secondary market and to facilitate price discovery.

The CFTC notes that the precise activities performed by an underwriter may vary depending on the liquidity of the securities being underwritten and the type of distribution being conducted. For example, each factor need not be present in a private placement.

There may be circumstances in which an underwriter would hold securities that it could not sell in the distribution for investment purposes. If the acquisition of such unsold securities were in connection with the underwriting pursuant to the permitted underwriting activities exemption, the underwriter would also be able to dispose of such securities at a later time.[145]

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[138] The CFTC notes, however, that a derivative or commodity future transaction may be otherwise permitted under another exemption (*e.g.,* the exemptions for market making-related or risk-mitigating hedging activities).

[139] 17 CFR 242.100 *et seq.*

[140] *See* proposed rule §§ ____.4(a)(3), (4); 17 CFR 242.100(b).

[141] 17 CFR 242.100.

[142] *See* Review of Antimanipulation Regulation of Securities Offering, Exchange Act Release No. 33924 (Apr. 19, 1994), 59 FR 21681, 21684 (Apr. 26, 1994) (''Regulation M Concept Release'').

[143] *See* Regulation M Concept Release, 59 FR at 21684–85.

[144] *See* proposed rule § ____.4(a)(4)(ii).

[145] The CFTC notes, however, that such sale would have to be made in compliance with other applicable provisions of the Federal securities laws and regulations.

Fourth, to the extent that the transaction involves a security for which a person must generally be a registered securities dealer, municipal securities dealer or government securities dealer in order to underwrite the security, the banking entity must have the appropriate dealer registration (or in the case of a financial institution that is a government securities dealer, has filed notice of that status as required by section 15C(a)(1)(B) of the Exchange Act) or otherwise be exempt from registration or excluded from regulation as a dealer.[146] Similarly, if the banking entity is engaged in the business of a dealer outside the United States in a manner for which no U.S. registration is required, the banking entity must be subject to substantive regulation of its dealing business in the jurisdiction in which the business is located. This requirement is intended to ensure that (i) any underwriting activity conducted in reliance on the exemption is subject to appropriate regulation and (ii) banking entities are not simultaneously characterizing the transaction as underwriting for purposes of the exemption while characterizing it in a different manner for purposes of applicable securities laws.

Fifth, the underwriting activities of the banking entity with respect to the covered financial position must be designed not to exceed the reasonably expected near-term demands of clients, customers and counterparties.[147] This requirement restates the statutory limitation on the underwriting exemption.

Sixth, the underwriting activities of the banking entity must be designed to generate revenues primarily from fees, commissions, underwriting spreads or other income, and not from appreciation in the value of covered financial positions it holds related to such activities or the hedging of such covered financial position.[148] This requirement is intended to ensure that activities conducted in reliance on the underwriting exemption demonstrate patterns of revenue generation and profitability consistent with, and related to, the services an underwriter provides to its customers in bringing securities to market, rather than changes in the market value of the securities underwritten.

Seventh, the compensation arrangements of persons performing underwriting activities at the banking entity must be designed not to encourage proprietary risk-taking. Activities for which a banking entity has established a compensation incentive structure that rewards speculation in, and appreciation of, the market value of securities underwritten, rather than success in bringing securities to market for a client, are inconsistent with permitted underwriting activities under the proposed rule. Although a banking entity relying on the underwriting exemption may appropriately take into account revenues resulting from movements in the price of securities that the banking entity underwrites to the extent that such revenues reflect the effectiveness with which personnel have managed underwriting risk, the banking entity should provide compensation incentives that primarily reward client revenues and effective client service, not proprietary risk-taking.

The CFTC requests comment on the proposed rule's implementation of the underwriting exemption. In particular, the CFTC requests comment on the following questions:

Question 64. Is the proposed rule's implementation of the underwriting exemption effective? If not, what alternative approach would be more effective? For example, should the exemption include other transactions that do not involve a distribution of securities for which the banking entity is acting as underwriter?

Question 64.1. Should the proposed CFTC Rule include the underwriting exemption? Please explain the rationale for including or excluding the provision in the proposed CFTC Rule.

Question 65. Are the seven requirements included in the underwriting exemption effective? Is the application of each requirement to potential transactions sufficiently clear? Should any of the requirements be changed or eliminated? Should other requirements be added in order to better provide an exemption that is not susceptible to abuse through the taking of speculative, proprietary positions in the context of, or mischaracterized as, underwriting? Alternatively, are any of the proposed requirements inappropriately restrictive in that they would be inconsistent with the statutory exemption for certain underwriting activities? If so, how?

Question 66. Do underwriters currently have processes in place that would prevent or reduce the likelihood of taking speculative, proprietary positions in the context of, or mischaracterized as, underwriting? If so, what are those processes?

Question 67. Would any of the proposed requirements cause unintended consequences? Would the proposed requirements alter current underwriting practices in any way? Would any of the proposed requirements trigger an unwillingness to engage in underwriting? What impact, if any, would the proposed exemption have on capital raising? Please explain.

Question 68. What increased costs, if any, would underwriters incur to satisfy the seven proposed requirements of the underwriting exemption? Would underwriters pass the increased costs onto issuers, selling security holders, or their customers in connection with qualifying for the proposed exemption?

Question 69. In addition to the specific activities highlighted above for purposes of evaluating whether a banking entity is acting as an underwriter as part of distribution of securities (*e.g.,* assisting an issuer in capital raising, performing due diligence, *etc.*), are there other or alternative activities that should be considered? Please explain.

Question 70. Should the requirement that a covered financial position be a security be expanded to include other financial instruments? If so, why? How are such other instruments underwritten within the meaning of section 13(d)(1)(B) of the BHC Act?

Question 71. Is the proposed definition of a ''distribution'' of securities appropriate, or over- or under-inclusive in this context? Is there any category of underwriting activity that would not be captured by the proposed definition? If so, what are the mechanics of that underwriting activity? Should it be permitted under the proposed rule, and, if so, why? Would an alternative definition better identify offerings intended to be covered by the proposed definition? If so, what alternative definition, and why?

Question 72. Is the proposed definition of ''underwriter'' appropriate, or over- or under-inclusive in this context? Would an alternative definition, such as the statutory

[146] *See* proposed rule § ____.4(a)(2)(iv). For example, if a banking entity is a bank engaged in underwriting asset-backed securities for which it would be required to register as a securities dealer but for the exclusion contained in section 3(a)(5)(C)(iii) of the Exchange Act, the proposed rule would not require that banking entity be a registered securities dealer in order to rely on the underwriting exemption for that transaction. The proposed rule does not apply the dealer registration/notice requirement to the underwriting of exempted securities, security-based swaps, commercial paper, bankers acceptances or commercial bills because the underwriting of such instruments does not require registration as a securities dealer under the Exchange Act.

[147] *See* proposed rule § ____.4(a)(2)(v).

[148] For these purposes, underwriting spreads would include any ''gross spread'' (*i.e.,* the difference between the price an underwriter sells securities to the public and the price it purchases them from the issuer) designed to compensate the underwriter for its services.

definition of ''underwriter'' under the Securities Act, better identify persons intended to be covered by the proposed definition? If so, why?

Question 73. How accurately can a banking entity engaging in underwriting predict the near-term demands of clients, customers, and counterparties with respect to an offering? How can principal risk that is retained in connection with underwriting activities to support near-term client demand be distinguished from positions taken for speculative purposes?

Question 74. Is the requirement that the underwriting activities of a banking entity relying on the underwriting exemption be designed to generate revenues primarily from fees, commissions, underwriting spreads or similar income effective? If not, how should the requirement be changed? Does the requirement appropriately capture the type and nature of revenues typically generated by underwriting activities? Is any further clarification or additional guidance necessary?

Question 75. Is the requirement that the compensation arrangements of persons performing underwriting activities at a banking entity be designed not to reward proprietary risk-taking effective? If not, how should the requirement be changed? Are there other types of compensation incentives that should be clearly referenced as consistent, or inconsistent, with permitted underwriting activity? Are there specific and identifiable characteristics of compensation arrangements that clearly incentivize prohibited proprietary trading?

Question 76. Are there other types of underwriting activities that should also be included within the scope of the underwriting exemption? If so, what additional activities and why? How would an exemption for such additional activities be consistent with the language and purpose of section 13 of the BHC Act? What criteria, requirements, or restrictions would be appropriate to include with respect to such additional activities to prevent misuse or evasion of the prohibition on proprietary trading?

Question 77. Does the proposed underwriting exemption appropriately accommodate private placements? If not, what changes are necessary to do so?

Question 78. The creation, offer and sale of certain structured securities such as trust preferred securities or tender option bonds, among others, may involve the purchase of another security and repackaging of that security through an intermediate entity. Should the sale of the security by a banking entity to an intermediate entity as part of the creation of the structured security be permitted under one of the exemptions to the prohibition on proprietary trading currently included in the proposed rule (*e.g.,* underwriting or market making)? Why or why not? For purposes of determining whether an exemption is available under these circumstances, should gain on sale resulting from the sale of the purchased security to the intermediate entity as part of the creation of the structured security be considered a relevant factor? Why or why not? What other factors should be considered in connection with the creation of the structured securities and why? Would the analysis be different if the banking entity acquired and retained the security to be sold to the intermediate entity as part of the creation of the structured securities as part of its underwriting of the underlying security? Why or why not?

Question 79. We seek comment on the application of the proposed exemption to a banking entity retaining a portion of an underwriting. Please discuss whether or not firms frequently retain securities in connection with a distribution in which the firm is acting as underwriter. Please identify the types of offerings in which this may be done (*e.g.,* fixed income offerings, securitized products, *etc.*). Please identify and discuss any circumstances which can contribute to the decision regarding whether or not to retain a portion of an offering. Please describe the treatment of retained securities (*e.g.,* the time period of retention, the type of account in which securities are retained, the potential disposition of the securities). Please discuss whether or not the retention is documented and, if so, how. Should the CFTC require disclosure of securities retained in connection with underwritings? Should the CFTC require specific documentation to demonstrate that the retained portion is connected to an underwriting pursuant to the proposed rule? If so, what kind of documentation should be required? Please discuss how you believe retention should be addressed under the proposal.

b. Permitted Market Making-related Activities

Section ____.4(b) of the proposed rule permits a banking entity to purchase or sell a covered financial position in connection with the banking entity's market making-related activities (the ''market-making exemption'').

i. *Approach to Implementing the Exemption for Market Making-Related Activities*

As the Council study noted, implementing the statutory exception for permitted market making-related activities requires a regulatory regime that differentiates permitted market making-related activity, and in particular the taking of principal positions in the course of making a market in particular financial instruments, from prohibited proprietary trading. Although the purpose and function of these two activities are markedly different—market making-related activities provide intermediation and liquidity services to customers, while proprietary trading involves the generation of profit through speculative risk-taking—clearly distinguishing these activities may be difficult in practice. Market making-related activities, like prohibited proprietary trading, sometimes require the taking of positions as principal, and the amount of principal risk that must be assumed by a market maker varies considerably by asset class and differing market conditions.[149] It may be difficult to distinguish principal positions that appropriately support market making-related activities from positions taken for short-term, speculative purposes. In particular, it may be difficult to determine whether principal risk has been retained because (i) the retention of such risk is necessary to provide intermediation and liquidity services for a relevant financial instrument or (ii) the position is part of a speculative trading strategy designed to realize profits from price movements in retained principal risk.[150]

In order to address these complexities, the CFTC has proposed a multi-faceted approach that draws on several key elements. First, similar to the underwriting exemption, the proposed rule includes a number of criteria that a banking entity's activities must meet in order to rely on the exemption for market making-related

[149] With respect to certain kinds of market making-related activities, such as market making in securities, these principal positions are often referred to as ''inventory'' or ''inventory positions.'' However, since certain types of market making-related activities, such as market making in derivatives, involve the retention of principal positions arising out of multiple derivatives transactions in particular risks (*e.g.,* retained principal interest rate risk), rather than retention of actual financial instruments, the broader term ''principal positions'' is used in this discussion.

[150] The Council study contains a detailed discussion of the challenges involved in delineating prohibited proprietary trading from permitted market making-related activities. *See* Council study at 15–18.

activities. These criteria are intended to ensure that the banking entity is engaged in *bona fide* market making. As described in greater detail in Part III.D of the Supplementary Information, among these criteria is the requirement that the banking entity have in place a programmatic compliance regime to guide its compliance with section 13 of the BHC Act and the proposed rule. This compliance regime includes requirements that a banking entity have effective policies, procedures, and internal controls that are designed to ensure that prohibited proprietary trading positions are not taken under the guise of permitted market making-related activity. Second, as described in greater detail in Part III.B.5 of this **SUPPLEMENTARY INFORMATION:** Appendix B of the proposed rule contains a detailed commentary regarding how the CFTC proposes to identify permitted market making-related activities. This commentary includes six principles the CFTC proposes to use as a guide to help distinguish market-making related activities from prohibited proprietary trading. Third, also as described in greater detail in Part III.B.5 of this Supplementary Information, § ____.7 and Appendix A of the proposed rule require a banking entity with significant covered trading activities to report certain quantitative measurements for each of its trading units.[151] These quantitative measurements are intended to assist both banking entities and the CFTC in assessing whether the quantitative profile of a trading unit (*e.g.,* the types of revenues it generates and the risks it retains) is consistent with permitted market making-related activities under the proposed rule.

The proposal's multi-faceted approach is intended, through the incorporation of multiple regulatory and supervisory tools, to strike an appropriate balance in implementing the market-making exemption in a way that articulates the scope of permitted activities and meaningfully addresses the potential for misuse of the exemption, while not unduly constraining the important liquidity and intermediation services that market makers provide to their customers and to the capital markets at large.

The CFTC requests comment on the proposed rule's approach to implementing the exemption for permitted market making-related activities. In particular, the CFTC requests comment on the following questions:

Question 80. Is the proposed rule's approach to implementing the exemption for permitted market making-related activities (i) appropriate and (ii) likely to be effective? If not, what alternative approach would be more appropriate or effective?

Question 81. Does the proposed multi-faceted approach appropriately take into account and address the challenges associated with differentiating prohibited proprietary trading from permitted market making-related activities? Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 82. Does the proposed multi-faceted approach provide banking entities and market participants with sufficient clarity regarding what constitutes permitted market making-related activities? If not, how could greater clarity be provided?

Question 83. What impact will the proposed multi-faceted approach have on the market making-related services that a banking entity provides to its customers? How will the proposed approach impact market participants who use the services of market makers? How will the approach impact the capital markets at large, and in particular the liquidity, efficiency and price transparency of capital markets? If any of these impacts are positive, how can they be amplified? If any of these impacts are negative, how can they be mitigated? Would the proposed rule's prohibition on proprietary trading and exemption for market making-related activity reduce incentives or opportunities for banking entities to trade against customers, as opposed to trading on behalf of customers? If so, please discuss the benefits arising from such reduced incentives or opportunities.

Question 84. What burden will the proposed multi-faceted approach have on banking entities, their customers, and other market participants? How can any burden be minimized or eliminated in a manner consistent with the language and purpose of the statute?

Question 85. Are there particular asset classes that raise special concerns in the context of market making-related activity that should be considered in connection with the proposed market-making exemption? If so, what asset class(es) and concern(s), and how should the concerns be addressed in the proposed exemption?

Question 86. Are there other market making-related activities that the rule text should more clearly permit? Why or why not?

ii. Required Criteria for Permitted Market Making-Related Activities

As part of the proposal's multi-faceted approach to implementing the exemption for permitted market making-related activities, § ____.4(b)(2) of the proposed rule specifies seven criteria that a banking entity's market making-related activities must meet in order to rely on the exemption, each of which are described in detail below. These criteria are designed to ensure that any banking entity relying on the exemption is engaged in *bona fide* market making-related activities and conducts those activities in a way that is not susceptible to abuse through the taking of speculative, proprietary positions as a part of, or mischaracterized as, market making-related activity.

First Criterion—Establishment of Internal Compliance Program

Section ____.4(b)(2)(i) of the proposed rule requires a banking entity to establish a comprehensive compliance program to monitor and control its market making-related activities. Subpart D of the proposed rule further describes the appropriate elements of an effective compliance program. This criterion is intended to ensure that any banking entity relying on the market-making exemption has reasonably designed written policies and procedures, internal controls, and independent testing in place to support its compliance with the terms of the exemption.

Second Criterion—Bona Fide Market Making

Section ____.4(b)(2)(ii) of the proposed rule articulates the core element of the statutory exemption, which is that the activity must be market making-related. In order to give effect to this requirement, § ____.4(b)(2)(ii) of the proposed rule requires the trading desk or other organizational unit that purchases or sells a particular covered financial position to hold itself out as being willing to buy and sell, or otherwise enter into long and short positions in, the covered financial position for its own account on a regular or continuous basis. Notably, this criterion requires that a banking entity relying on the exemption with respect to a particular transaction must actually make a market in the covered financial position involved; simply because a banking entity makes a market in one type of covered financial position does not permit it to rely on the market-making exemption for another type of covered

[151] The definition of ''trading unit'' for this purpose is discussed in detail in Part III.B.5 of this **SUPPLEMENTARY INFORMATION**.

financial position.[152] Similarly, the particular trading desk or other organizational unit of the banking entity that is relying on the exemption for a particular type of covered financial position must also be the trading desk or other organizational unit that is actually making the market in that covered financial position; market making in a particular covered financial position by one trading desk of a banking entity does not permit another trading desk of the banking entity to rely on the market-making exemption for that type of covered financial position.

As previously noted, the CFTC is adopting the entire text of the Joint Rule as part of its proposed rule. Similarly, the CFTC is proposing the same criteria and considerations to determine bona-fide market making activities as was previously proposed in the Joint Release. Both prior to and since the issuance of the Joint Release, the CFTC and the SEC have been working toward the issuance of a joint final rule to further define the terms ''swap dealer'' and ''security-based swap dealer'' (the ''Entities Definition Rulemaking''). The Commodity Exchange Act defines the term ''swap dealer'' to include any person who ''(i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.'' [153] The CFTC has received a number of comments in the Entities Definition Rulemaking regarding the criteria for determining whether a person is engaging in market making activity for the purposes of determining whether a person is a swap dealer. Accordingly, the CFTC anticipates that the final rule further defining the term ''swap dealer'' will provide guidance on these criteria as to market making. Therefore, following the issuance of the Entities Definition Rulemaking, the CFTC also may consider the extent to which ''market making'' for purposes of determining whether a person is a swap dealer should be considered ''bona fide market making'' for purposes of this Rule.

The language used in § ____.4(b)(2)(ii) of the proposed rule to describe *bona fide* market making-related activity is similar to the definition of ''market maker'' under section 3(a)(38) of the Exchange Act.[154] The CFTC has proposed to use similar language because the Exchange Act definition is generally well-understood by market participants and is consistent with the scope of *bona fide* market making-related activities in which banking entities typically engage.

In assessing whether a particular trading desk or other organizational unit holds itself out as being willing to buy and sell, or otherwise enter into long and short positions in, a covered financial position for its own account on a regular or continuous basis in liquid markets, the CFTC expects to take an approach similar to that used by the SEC in the context of assessing whether a person is engaging in *bona fide* market making. The precise nature of a market maker's activities often varies depending on the liquidity, trade size, market infrastructure, trading volumes and frequency, and geographic location of the market for any particular covered financial position. In the context of relatively liquid positions, such as equity securities or other exchange-traded instruments, a trading desk or other organizational unit's market making-related activity should generally include:

- Making continuous, two sided quotes and holding oneself out as willing to buy and sell on a continuous basis;
- A pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity;
- Making continuous quotations that are at or near the market on both sides; and
- Providing widely accessible and broadly disseminated quotes.[155]

In less liquid markets, such as over-the-counter markets for debt and equity securities or derivatives, the appropriate indicia of market making-related activities will vary, but should generally include:

- Holding oneself out as willing and available to provide liquidity by providing quotes on a regular (but not necessarily continuous) basis; [156]
- With respect to securities, regularly purchasing covered financial positions from, or selling the positions to, clients, customers, or counterparties in the secondary market; and
- Transaction volumes and risk proportionate to historical customer liquidity and investments needs.

The CFTC would apply these indicia when evaluating when a banking entity is eligible for the market making-related activities exemption, but also recognize that these indicia cannot be applied at all times and under all circumstances because some may be inapplicable to the specific asset class or market in which the market making activity is conducted.

The *bona fide* market making-related activity described in § ____.4(b)(2)(ii) of the proposed rule would include block positioning if undertaken by a trading desk or other organizational unit of a banking entity for the purpose of intermediating customer trading.[157] In addition, *bona fide* market making-related activity may include taking positions in securities in anticipation of customer demand, so long as any

[152] The CFTC notes that a market maker may often make a market in one type of covered financial positions and hedge its activities using different covered financial positions in which it does not make a market. Such hedging transactions would meet the terms of the market-making exemption if the hedging transaction met the requirements of § ____.4(b)(3) of the proposed rule.

[153] 7 U.S.C. 1a(49). The Exchange Act includes a similar test for a security-based swap dealer. 15 U.S.C. 78c(a)(71).

[154] Section 3(a)(38) of the Exchange Act defines ''market maker'' as ''any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer quotation communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.'' 15 U.S.C. 78c(a)(38).

[155] The CFTC notes that these indicia are generally consistent with the indicia of *bona fide* market making in equity markets articulated by the SEC for purposes of describing the exception to the locate requirement of the SEC's Regulation SHO for market makers engaged in *bona fide* market-making activities. *See* Exchange Act Release No. 58775 (October 14, 2008), 73 FR 61690, 61698–61699 (Oct. 17, 2008); *see also* 17 CFR 242.203(b)(2)(iii).

[156] The frequency of such regular quotations will itself vary; less illiquid markets may involve quotations on a daily or more frequent basis, while highly illiquid markets may trade only by appointment.

[157] The definition of ''market maker'' in the Exchange Act includes a dealer acting in the capacity of a block positioner. Although the term ''block positioner'' is not defined in the proposed rule, the Agencies note that the SEC has adopted a definition of ''qualified block positioner'' in the SEC's Rule 3b–8(c) (17 CFR 240.3b–8(c)), which may serve as guidance in determining whether a block positioner engaged in block positioning is engaged in *bona fide* market making-related activities for purposes of § ____.4(b)(2)(ii) of the proposed rule. Under the SEC's Rule 3b–8(c), among other things, a qualified block positioner must meet all of the following conditions: (i) Engages in the activity of purchasing long or selling short, from time to time, from or to a customer (other than a partner or a joint venture or other entity in which a partner, the dealer, or a person associated with such dealer participates) a block of stock with a current market value of $200,000 or more in a single transaction, or in several transactions at approximately the same time, from a single source to facilitate a sale or purchase by such customer; (ii) has determined in the exercise of reasonable diligence that the block could not be sold to or purchased from others on equivalent or better terms; and (iii) sells the shares comprising the block as rapidly as possible commensurate with the circumstances. The CFTC notes that the rule establishes a minimum dollar value threshold for a block. The size of a block will vary among different asset classes.

anticipatory buying or selling activity is reasonable and related to clear, demonstrable trading interest of clients, customers, or counterparties.

Third Criterion—Reasonably Expected Near-Term Demands of Clients, Customers, and Counterparties

Under § ____.4(b)(2)(iii) of the proposed rule, the market making-related activities of the trading desk or other organization unit that conducts a transaction in reliance on the market-making exemption must be designed not to exceed the reasonably expected near-term demands of clients, customers, and counterparties. This criterion implements the language in section 13(d)(1)(B) of the BHC Act and is intended to prevent a trading desk relying on the market-making exemption from taking a speculative proprietary position unrelated to customer needs as part of its purported market making-related activities. As described in further detail in Parts III.B.5 and III.D of the **SUPPLEMENTARY INFORMATION**, the proposed rule also includes a programmatic compliance requirement and requires reporting of quantitative measurements for certain banking entities, both of which are designed, in part, to meaningfully circumscribe the principal positions taken as part of market making-related activities to those which are necessary to meet the reasonably expected near-term demands of clients, customers and counterparties. The CFTC expects that the programmatic compliance requirement and required reporting of quantitative measurements will play an important role in assessing a banking entity's compliance with § ____.4(b)(2)(iii)'s requirement. In addition, as described in Part II.B.5 of the Supplementary Information, Appendix B of the proposed rule provides additional, detailed commentary regarding how the CFTC expects a firm relying on the market-making exemption to manage principal positions and how the CFTC proposes to assess whether such positions are consistent with market making-related activities under the proposed rule.

In order for a banking entity's expectations regarding near-term customer demand to be considered reasonable, such expectations should be based on more than a simple expectation of future price appreciation and the generic increase in marketplace demand that such price appreciation reflects. Rather, a banking entity's expectation should generally be based on the unique customer base of the banking entity's specific market-making business lines and the near-term demands of those customers based on particular factors beyond a general expectation of price appreciation. To the extent that a trading desk or other organizational unit of a banking entity is engaged wholly or principally in trading that is not in response to, or driven by, customer demands, the CFTC would not expect those activities to qualify under § ____.4(b) of the proposed rule, regardless of whether those activities promote price transparency or liquidity. For example, a trading desk or other organizational unit of a banking entity that is engaged wholly or principally in arbitrage trading with non-customers would not meet the terms of the proposed rule's market making exemption. In the case of a market maker engaging in market making in a security that is executed on an organized trading facility or exchange, that market maker's activities are generally consistent with reasonably expected near-term customer demand when such activities involve passively providing liquidity by submitting resting orders that interact with the orders of others in a non-directional or market-neutral trading strategy and the market maker is registered, if the exchange or organized trading facility registers market makers.[158] However, activities by such a person that primarily takes liquidity on an organized trading facility or exchange, rather than provides liquidity, would not qualify for the market-making exemption under the proposed rule, even if those activities were conducted by a registered market maker.

Fourth Criterion—Registration Under Securities or Commodities Laws

Under § ____.4(b)(2)(iv) of the proposed rule, a banking entity relying on the market-making exemption with respect to trading in securities or certain derivatives must be appropriately registered as a dealer, or exempt from registration or excluded from regulation as a dealer, under applicable securities or commodities laws. With respect to a market-making transaction in one or more covered financial positions that are securities, other than exempted securities, security-based swaps, commercial paper, bankers acceptances or commercial bills, for which a person must be a registered securities dealer, municipal securities dealer or government securities dealer in order to deal in the security, the banking entity must have the appropriate dealer registration (or in the case of a financial institution that is a government securities dealer, has filed notice of that status as required by section 15C(a)(1)(B) of the Exchange Act) or otherwise be exempt from registration or excluded from regulation as a dealer.[159] Similarly, with respect to a market-making transaction involving a swap or security-based swap for which a person must generally be a registered swap dealer or security-based swap dealer, respectively, the banking entity must be appropriately registered or otherwise be exempt from registration or excluded from regulation as a swap dealer or security-based swap dealer.[160] If the banking entity is engaged in the business of a securities dealer, swap dealer or security-based swap dealer outside the United States in a manner for which no U.S. registration is required, the banking entity must be subject to substantive regulation of its dealing business in the jurisdiction in which the business is located. This requirement is intended to ensure that

[158] The CFTC emphasizes that the status of being a registered market maker is *not,* on its own, a sufficient basis for relying on the exemption for market making-related activity contained in § ____.4(b); however, being a registered market maker is required under these circumstances if the applicable exchange or organized trading facility registers market makers. Registration as a market maker generally involves filing a prescribed form with an exchange or organized trading facility, in accordance with its rules and procedures, and complying with the applicable requirements for market makers set forth in the rules of that exchange or organized trading facility. *See, e.g.,* Nasdaq Rule 4612, New York Stock Exchange Rule 104, CBOE Futures Exchange Rule 515, BATS Exchange Rule 11.5.

[159] *See* proposed rule §§ ____.4(b)(2)(iv)(A), (D), (E). For example, if a banking entity is a bank engaged in market-making in qualified Canadian government obligations for which it would be required to register as a securities dealer but for the exclusion contained in section 3(a)(5)(C)(i)(I) of the Exchange Act, the proposed rule would not require that banking entity to be a registered securities dealer in order to rely on the market-making exemption for that market-making transaction. Such a bank would, however, be required to file notice that it is a government securities dealer and comply with rules applicable to financial institutions that are government securities dealers. *See* 15 U.S.C. 78c(a)(42)(E); 15 U.S.C. 78*o*–5(a)(1)(B); 17 CFR 400.5(b); 17 CFR 449.1. Similar to the underwriting exemption, the proposed rule does not apply the dealer registration requirement to market making in securities that are exempted securities, commercial paper, bankers acceptances or commercial bills because dealing in such securities does not require registration as securities dealer under the Exchange Act; however, registering as a municipal securities dealer or government securities dealer is required, if applicable.

[160] *See* proposed rule §§ ____.4(b)(2)(iv)(B), (C). A banking entity may be required to be a registered securities dealer if it engages in market-making transactions involving security-based swaps with persons that are not eligible contract participants. *See* 15 U.S.C. 78c(a)(5) (the definition of ''dealer'' in section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), generally includes ''any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants), for such person's own account.'').

(i) any market making-related activity conducted in reliance on the exemption is subject to appropriate regulation and (ii) a banking entity does not simultaneously characterize the transaction as market making-related for purposes of the exemption while characterizing it in a different manner for purposes of applicable securities or commodities laws.

Fifth Criterion—Revenues From Fees, Commissions, Bid/Ask Spreads or Other Similar Income

Under § ____.4(b)(2)(v) of the proposed rule, the market making-related activities of the banking entity must be designed to generate revenues primarily from fees, commissions, bid/ask spreads or other income not attributable to appreciation in the value of covered financial positions it holds in trading accounts or the hedging of such positions. This criterion is intended to ensure that activities conducted in reliance on the market-making exemption demonstrate patterns of revenue generation and profitability consistent with, and related to, the intermediation and liquidity services a market maker provides to its customers, rather than changes in the market value of the positions or risks held in inventory. Similar to the requirement that a firm relying on the market-making exemption design its activities not to exceed reasonably expected near-term client, customer, or counterparty demands, the Agencies expect that the programmatic compliance requirement and required reporting of quantitative measurements will play an important role in assessing a banking entity's compliance with § ____.4(b)(2)(v)'s requirement. In addition, as described in Part III.B.5 of this **SUPPLEMENTARY INFORMATION**, Appendix B of the proposed rule provides additional, detailed commentary regarding how the CFTC proposes to assess whether the types of revenues generated by a banking entity relying on the market-making exemption are consistent with market making-related activities.

Sixth Criterion—Compensation Incentives

Under § ____.4(b)(2)(vii) of the proposed rule, the compensation arrangements of persons performing market making-related activities at the banking entity must be designed not to encourage or reward proprietary risk-taking. Activities for which a banking entity has established a compensation incentive structure that rewards speculation in, and appreciation of, the market value of a covered financial position held in inventory, rather than success in providing effective and timely intermediation and liquidity services to customers, are inconsistent with permitted market making-related activities. Although a banking entity relying on the market-making exemption may appropriately take into account revenues resulting from movements in the price of principal positions to the extent that such revenues reflect the effectiveness with which personnel have managed principal risk retained, a banking entity relying on the market-making exemption should provide compensation incentives that primarily reward customer revenues and effective customer service, not proprietary risk-taking. In addition, as described in Part III.B.5 of this Supplementary Information, Appendix B of the proposed rule provides further commentary regarding how the CFTC proposes to assess whether the compensation incentives provided to trading personnel performing trading activities in reliance on the market-making exemption are consistent with market making-related activities.

Seventh Criterion—Consistency With Appendix B Commentary

Under § ____.4(b)(2)(vi) of the proposed rule, the market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are required to be consistent with the commentary provided in Appendix B, which provides guidance that the CFTC proposes to apply to help distinguish permitted market making-related activities from prohibited proprietary trading. Appendix B's proposed commentary, which is described in detail below in Part III.B.5 of this Supplementary Information, discusses various factors by which the CFTC proposes to distinguish prohibited proprietary trading from permitted market making-related activities (*e.g.,* how and to what extent a market maker hedges the risk of its market-making transactions, including (i) further detail related directly to other criteria in § ____.4(b)(2) (*e.g.,* the types of revenues generated by market makers), and (ii) expectations regarding other factors not expressly included in § ____.4(b)(2)).

ii. Market Making-Related Hedging

Section ____.4(b)(3) of the proposed rule provides that certain hedging transactions related to market-making positions and holdings will also be deemed to be made in connection with a banking entity's market making-related activities for purposes of the market-making exemption. In particular, § ____.4(b)(3) provides that the purchase or sale of a covered financial position for hedging purposes will qualify for the market-making exemption if it meets two requirements. First, the purchase or sale must be conducted in order to reduce the specific risks to the banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings acquired pursuant to the market-making exemption. Where the purpose of a transaction is to hedge a market making-related position, it would appear to be market making-related activity of the type described in section 13(d)(1)(B) of the BHC Act. Second, the hedging transaction must also meet the criteria specified in the general exemption for risk-mitigating hedging activity for purposes of the proprietary trading prohibition, which is contained in §§ ____.5(b) and (c) of the proposed rule and described in detail in Part III.B.3 of this Supplementary Information. Those criteria are intended to clearly define the scope of appropriate risk-mitigating hedging activities, to foreclose reliance on the exemption for prohibited proprietary trading that is conducted in the context of, or mischaracterized as, hedging activity, and to require documentation regarding the hedging purpose of certain transactions that are established at a level of organization that is different than the level of organization establishing or responsible for the underlying risk or risks that are being hedged, which in the context of the market making-related activity would generally be the trading desk.

iii. Request for Comment

The CFTC requests comment on the proposed criteria that must be met in order to rely on the market-making exemption. In particular, the CFTC requests comment on the following questions (as well as related questions in Part III.B.5 of this Supplementary Information):

Question 87. Are the seven criteria included in the market-making exemption effective? Is the application of each criterion to potential transactions sufficiently clear? Should any of the criteria be changed or eliminated? Should other criteria be added?

Question 87.1. Should the proposed CFTC Rule's market making exemption include the requirements set forth in §§ ____.4(b)(2)(iv)(A),(C), (D) and (E), relating to SEC registered dealers and dealers who have filed notice with the appropriate regulatory agency? Please explain the rationale for including or excluding the provision in the proposed CFTC Rule.

Question 88. Is incorporation of concepts from the definition of ''market maker'' under the Exchange Act useful for purposes of section 13 of the BHC Act and consistent with its purposes? If not, what alternative definition would be more useful or more consistent?

Question 88.1. Alternatively, to what extent should the CFTC incorporate concepts regarding market making from the Entities Definitions Rulemaking for purposes of section 13 of the BHC Act?

Question 89. Is the proposed exemption overly broad or narrow? For example, would it encompass activity that should be considered prohibited proprietary trading under the proposed rule? Alternatively, would it prohibit forms of market making or market making-related activities that are permitted under other rules or regulations?

Question 90. We seek commenter input on the types of banking entities and forms of activities that would not qualify for the proposed market-making exemption but that commenters consider to otherwise be market making. Please discuss the impact of not permitting such activities under the proposed exemption (*e.g.,* the impact on liquidity).

Question 91. Is the requirement that a trading desk or other organizational unit relying on the market-making exemption hold itself out as being willing to buy and sell, or otherwise enter into long and short positions in, the relevant covered financial position for its own account on a regular or continuous basis effective? If not, what alternative would be more effective? Does the proposed requirement appropriately differentiate between market making-related activities in different markets and asset classes? If not, how could such differences be better reflected? Should the requirement be modified to include certain arbitrage trading activities engaged in by market makers that promote liquidity or price transparency, but do not serve customer, client or counterparty demands, within the scope of market making-related activity? If so why? How could such liquidity- or price transparency-promoting activities be meaningfully identified and distinguished from prohibited proprietary trading practices that also may incidentally promote liquidity or price transparency? Do particular markets or instruments, such as the market for exchange-traded funds, raise particular issues that are not adequately or appropriately addressed in the proposal? If so, how could the proposal better address those instruments, markets or market features?

Question 92. Do the proposed indicia of market making in liquid markets accurately reflect the factors that should generally be used to analyze whether a banking entity is engaged in market making-related activities for purposes of section 13 of the BHC Act and the proposed rule? If not, why not? Should any of the proposed factors be eliminated or modified? Should any additional factors be included? Is reliance on the SEC's indicia of *bona fide* market making for purposes of Regulation SHO under the Exchange Act and the equity securities market appropriate in the context of section 13 of the BHC Act and the proposed rule with respect to liquid markets? If not, why not?

Question 93. Do the proposed indicia of market making in illiquid markets accurately reflect the factors that should generally be used to analyze whether a banking entity is engaged in market making-related activities for purposes of section 13 of the BHC Act and the proposed rule? If not, why not? Should any of the proposed factors be eliminated or modified? Should any additional factors be included?

Question 94. How accurately can a banking entity predict the near-term demands of clients, customers, and counterparties? Are there measures that can distinguish the amount of principal risk that should be retained to support such near-term client, customer, or counterparty demand from positions taken for speculative purposes? How is client, customer, or counterparty demand anticipated in connection with market making-related activities, and how does such approach vary by asset class?

Question 95. Is the requirement that a banking entity relying on the market-making exemption be registered as a dealer (or in the case of a financial institution that is a government securities dealer, has filed notice of that status as required by section 15C(a)(1)(B) of the Exchange Act), or exempt from registration or excluded from regulation as a dealer under relevant securities or commodities laws effective? If not, how should the requirement be changed? Does the requirement appropriately take into account the particular registration requirements applicable to dealing in different types of financial instruments? If not, how could it better do so? Does the requirement appropriately take into account the various registration exemptions and exclusions available to certain entities, such as banks, under the securities and commodities laws? If not, how could it better do so?

Question 96. Is the requirement that a trading desk or other organizational unit of a banking entity relying on the market-making exemption be designed to generate revenues primarily from fees, commissions, bid/ask spreads or similar income effective? If not, how should the requirement be changed? Does the requirement appropriately capture the type and nature of revenues typically generated by market making-related activities? Is any further clarification or additional guidance necessary? Can revenues primarily from fees, commissions, bid/ask spreads or similar income be meaningfully separated from other types of revenues?

Question 97. Is the requirement that the compensation arrangements of persons performing market making-related activities at a banking entity not be designed to encourage proprietary risk-taking effective? If not, how should the requirement be changed? Are there other types of compensation incentives that should be clearly referenced as consistent, or inconsistent, with permitted market making-related activity? Are their specific and identifiable characteristics of compensation arrangements that clearly incentivize prohibited proprietary trading?

Question 98. Is the inclusion of market making-related hedging transactions within the market-making exemption effective and appropriate? Are the proposed requirements that certain hedging transactions must meet in order to be considered to have been made in connection with market making-related activity effective and sufficiently clear? If not, what alternative requirements would be more effective and/or clearer? Should any of the proposed requirements be eliminated? If so, which ones, and why?

Question 99. Should the terms ''client,'' ''customer,'' or ''counterparty'' be defined for purposes of the market-making exemption? If so, how should these terms be defined? For example, would an appropriate definition of ''customer'' be: (i) A continuing relationship in which the banking entity provides one or more financial products or services prior to the time of the transaction; (ii) a direct and substantive relationship between the banking entity and a prospective customer prior to the transaction; (iii) a relationship initiated by the banking entity to a prospective customer to induce transactions; or (iv) a relationship initiated by the prospective customer with a view to engaging in transactions?

Question 100. Are there other types of market making-related activities that should also be included within the

scope of the market-making exemption? If so, what additional activities and why? How would an exemption for such additional activities be consistent with the language and intent of section 13 of the BHC Act? What criteria, requirements, or restrictions would be appropriate to include with respect to such additional activities? How would such criteria, requirements, or restrictions prevent circumvention or evasion of the prohibition on proprietary trading?

Question 101. Do banking entities currently have processes in place that would prevent or reduce the likelihood of taking speculative, proprietary positions in the context of, or mischaracterized as, market making-related activities? If so, what processes?

3. Section ____.5: Permitted Risk-Mitigating Hedging Activities

Section ____.5 of the proposed rule permits a banking entity to purchase or sell a covered financial position if the transaction is made in connection with, and related to, individual or aggregated positions, contracts, or other holdings of a banking entity and is designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings (the ''hedging exemption''). This section of the proposed rule implements, in relevant part, section 13(d)(1)(C) of the BHC Act, which provides an exemption from the prohibition on proprietary trading for certain risk-mitigating hedging activities.

a. Approach To Implementing the Hedging Exemption

Like market making-related activities, risk-mitigating hedging activities present certain implementation challenges because of the potential that prohibited proprietary trading could be conducted in the context of, or mischaracterized as, a hedging transaction. This is because it may often be difficult to identify in retrospect whether a banking entity engaged in a particular transaction to manage or eliminate risks arising from related positions, on the one hand, or to profit from price movements related to the hedge position itself, on the other. The intent with which a purported hedge position is acquired may often be difficult to discern in practice.

In light of these complexities, the CFTC has again proposed a multi-faceted approach to implementation. As with the underwriting and market-making exemptions, the CFTC has proposed a set of criteria that must be met in order for a banking entity to rely on the hedging exemption. The proposed criteria are intended to define the scope of permitted risk-mitigating hedging activities and to foreclose reliance on the exemption for prohibited proprietary trading that is conducted in the context of, or mischaracterized as, permitted hedging activity. This includes implementation of the programmatic compliance regime required under subpart D of the proposed rule and, in particular, requires that a banking entity with significant trading activities implement robust, detailed hedging policies and procedures and related internal controls that are designed to prevent prohibited proprietary trading in the context of permitted hedging activity.[161] In particular, a banking entity's compliance regime must include written hedging policies at the trading unit level and clearly articulated trader mandates for each trader to ensure that the decision of when and how to put on a hedge is consistent with such policies and mandates, and not fully left to a trader's discretion.[162] In addition, to address potential supervisory concerns raised by certain types of hedging transactions, § ____.5 of the proposed rule also requires a banking entity to document certain hedging transactions at the time the hedge is established. This multi-faceted approach is intended to articulate the CFTC's expectations regarding the scope of permitted risk-mitigating hedging activities in a manner that limits potential abuse of the hedging exemption while not unduly constraining the important risk management function that is served by a banking entity's hedging activities.

b. Required Criteria for Permitted Risk-Mitigating Hedging Activities

Section ____.5(b) of the proposed rule describes the seven criteria that a banking entity must meet in order to rely on the hedging exemption. First, § ____.5(b)(1) of the proposed rule requires the banking entity to have established an internal compliance program, consistent with the requirements of subpart D, that is designed to ensure the banking entity's compliance with the requirements of this paragraph, including reasonably-designed written policies and procedures, internal controls, and independent testing. This criterion is intended to ensure that any banking entity relying on the exemption has appropriate internal control processes in place to support its compliance with the terms of the exemption.

Second, § ____.5(b)(2)(i) of the proposed rule requires that a transaction for which a banking entity is relying on the hedging exemption have been made in accordance with written policies, procedures and internal controls established by the banking entity pursuant to subpart D. This criterion would preclude reliance on the hedging exemption if the transaction was inconsistent with a banking entity's own hedging policies and procedures, as such inconsistency would appear to be indicative of prohibited proprietary trading.

Third, § ____.5(b)(2)(ii) of the proposed rule requires that the transaction hedge or otherwise mitigate one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity. This criterion implements the essential element of the hedging exemption—*i.e.,* that the transaction be risk-mitigating. Notably, and consistent with the statutory reference to mitigating risks of *individual or aggregated* positions, this criterion would include the hedging of risks on a portfolio basis. For example, it would include the hedging of one or more specific risks arising from a portfolio of diverse holdings, such as the hedging of the aggregate risk of one or more trading desks. However, in each case, the CFTC would expect that the transaction or series of transactions being used to hedge is, in the aggregate, demonstrably risk-reducing with respect to the positions, contracts, or other holdings that are being hedged. A banking entity relying on the exemption should be prepared to identify the specific position or portfolio of positions that is being hedged and demonstrate that the hedging transaction is risk-reducing in the aggregate, as measured by appropriate risk management tools.

In addition, this criterion would include a series of hedging transactions designed to hedge movements in the price of a portfolio of positions. For example, a banking entity may need to engage in dynamic hedging, which involves rebalancing its current hedge position(s) based on a change in the portfolio resulting from permissible activities or from a change in the price, or other characteristic, of the individual or aggregated positions, contracts, or other holdings. The CFTC recognizes that, in such dynamic hedging, material

[161] These aspects of the compliance program requirement are described in further detail in Part III.D of this Supplementary Information.

[162] *See, e.g.,* proposed rule Appendix C.II.a.

changes in risk may require a corresponding modification to the banking entity's current hedge positions.[163]

The CFTC also expects that a banking entity relying on the exemption would be able to demonstrate that the banking entity is already exposed to the specific risks being hedged; generally, the purported hedging of risks to which the banking entity is not actually exposed would not meet the terms of the exemption. However, the hedging exemption would be available in certain cases where the hedge is established slightly before the banking entity becomes exposed to the underlying risk if such anticipatory hedging activity: (i) Is consistent with appropriate risk management practices; (ii) otherwise meets the terms of the hedging exemption; and (iii) does not involve the potential for speculative profit. For example, if a banking entity was contractually obligated, or otherwise highly likely, to become exposed to a particular risk and there was a sound risk management rationale for hedging that risk slightly in advance of actual exposure, the hedging transaction would generally be consistent with the requirement described in § ____.5(b)(2)(ii) of the proposed rule.

Fourth, § ____.5(b)(2)(iii) of the proposed rule requires that the transaction be reasonably correlated, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the transaction is intended to hedge or otherwise mitigate. A transaction that is only tangentially related to the risks that it purportedly mitigates would appear to be indicative of prohibited proprietary trading. Importantly, the CFTC has not proposed that a transaction relying on the hedging exemption be *fully* correlated; instead, only *reasonable* correlation is required.[164] The degree of correlation that may be reasonable will vary depending on the underlying risks and the availability of alternative hedging options—risks that can be easily and cost-effectively hedged with extremely high or near-perfect correlation would typically be expected to be so hedged, whereas other risks may be difficult or impossible to hedge with anything greater than partial correlation. Moreover, it is important to consider the fact that trading positions are often subject to a number of different risks, and some risks may be hedged easily and at low cost but may only account for a small proportion of the total risk in the position.[165] More generally, potential correlation levels between asset classes can differ significantly, and analysis of the reasonableness of correlation would depend on the facts and circumstances of the initial position(s), risk(s) created, liquidity of the instrument, and the legitimacy of the hedge. Regardless of the precise degree of correlation, if the predicted performance of a hedge position during the period that the hedge position and the related position are held would result in a banking entity earning appreciably more profits on the hedge position than it stood to lose on the related position, the hedge would appear likely to be a proprietary trade designed to result in profit rather than an exempt hedge position.

Fifth, § ____.5(b)(2)(iv) of the proposed rule requires that the hedging transaction not give rise, at the inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction. A transaction that creates significant new risk exposure that is not itself hedged at the same time would appear to be indicative of prohibited proprietary trading. For example, over-hedging, correlation trading, or pairs trading strategies that generate profits through speculative, proprietary risk-taking would fail to meet this criterion. Similarly, a transaction involving a pair of positions that hedge each other with respect to one type of risk exposure, but create or contain a residual risk exposure would, taken together, constitute prohibited proprietary trading and not risk-mitigating hedging if those positions were taken collectively for the purpose of profiting from short-term movements in the effective price of the residual risk exposure. However, the proposal also recognizes that any hedging transaction will inevitably give rise to certain types of new risk, such as counterparty credit risk or basis risk reflecting the differences between the hedge position and the related position; the proposed criterion only prohibits the introduction of additional significant exposures through the hedging transaction. In addition, proposed § ____.5(b)(2)(iv) only requires that no new and significant exposures be introduced at the *inception* of the hedge, and not during the entire period that the hedge is maintained, reflecting the fact that new, unanticipated risks can and sometimes do arise out of hedging positions after the hedge is established. The CFTC has proposed to address the appropriate management of risks that arise out of a hedge position after inception through § ____.5(b)(2)(v) of the proposed rule.

Sixth, § ____.5(b)(2)(v) of the proposed rule requires that any transaction conducted in reliance on the hedging exemption be subject to continuing review, monitoring and management after the hedge position is established. Such review, monitoring, and management must: (i) be consistent with the banking entity's written hedging policies and procedures; (ii) maintain a reasonable level of correlation, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and (iii) mitigate any significant exposure arising out of the hedge after inception. In accordance with a banking entity's written internal hedging policies, procedures, and internal controls, a banking entity should actively review and manage its hedging positions and the risks that may arise out of those positions over time. A banking entity's internal hedging policies should be designed to ensure that hedges remain effective as correlations or other factors change. In particular, a risk-mitigating hedge position typically should be unwound as exposure to the underlying risk is reduced or increased as underlying risk increases, as selective hedging activity would appear to be indicative of prohibited proprietary trading.[166] A banking entity's written internal hedging policies, procedures, and internal controls for monitoring and managing its hedges also should be reasonably designed to prevent the occurrence of such prohibited

[163] This corresponding modification to the hedge should also be reasonably correlated to the material changes in risk that are intended to be hedged or otherwise mitigated, as required by proposed rule § ____.5(b)(2)(iii).

[164] Although certain accounting standards, such as FASB ASC Topic 815 hedge accounting, address circumstances in which a transaction may be considered a hedge of another transaction, the proposed rule does not refer to or rely on these accounting standards, because such standards (i) are designed for financial statement purposes, not to identify proprietary trading and (ii) change often and are likely to change in the future without consideration of the potential impact on section 13 of the BHC Act.

[165] Interest rate risk in an equity derivative transaction is one example—the hedging of interest rate risk in an equity derivative position may only result in a small reduction in overall risk and interest rates may only exhibit a small correlation with the value of the equity derivative, but the lack of perfect or significant correlation would not impair reliance on the hedging exemption.

[166] The CFTC notes that in some cases, it may be appropriate for a banking entity to unwind a hedge, even if the underlying risk remains, if the cost of that hedge become uneconomic, better hedging options become available, or the overall risk profile of the banking entity has changed such that no longer hedging the risk is consistent with appropriate risk management practices.

proprietary trading activity and be reasonably specific about the level of hedging that is expected to be maintained regardless of opportunities for profit associated with over- or under-hedging.

Seventh, § ____.5(b)(2)(vi) of the proposed rule requires that the compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking. Hedging activities for which a banking entity has established a compensation incentive structure that rewards speculation in, and appreciation of, the market value of a covered financial position, rather than success in reducing risk, are inconsistent with permitted risk-mitigating hedging activities.

c. Documentation Requirement

Section ____.5(c) of the proposed rule imposes a documentation requirement on certain types of hedging transactions. Specifically, for any transaction that a banking entity conducts in reliance on the hedging exemption that involves a hedge established at a level of organization that is different than the level of organization establishing the positions, contracts, or other holdings the risks of which the hedging transaction is designed to reduce, the banking entity must, at a minimum, document the risk-mitigating purpose of the transaction and identify the risks of the individual or aggregated positions, contracts, or other holdings of a banking entity that the transaction is designed to reduce.[167] Such documentation must be established at the time the hedging transaction is effected, not after the fact. The CFTC is concerned that hedging transactions established at a different level of organization than the positions being hedged may present or reflect heightened potential for prohibited proprietary trading, as a banking entity may be able, after the fact, to point to a particular, offsetting exposure within its organization after a position is established and characterize that position as a hedge even when, at the time the position was established, it was intended to generate speculative proprietary gains, not mitigate risk. To address this concern, the CFTC has proposed to require a banking entity, when establishing a hedge at a different level of organization than that establishing or responsible for the underlying positions or risks being hedged, to document the hedging purpose of the transaction and risks being hedged so as to establish a contemporaneous, documentary record that will assist the CFTC in assessing the actual reasons for which the position was established.

d. Request for Comment

The CFTC requests comment on the proposed implementation of the risk-mitigating hedging exemption with respect to proprietary trading. In particular, the CFTC requests comment on the following questions:

Question 102. Is the proposed rule's approach to implementing the hedging exemption effective? If not, what alternative approach would be more effective?

Question 103. Does the proposed multi-faceted approach appropriately take into account and address the challenges associated with differentiating prohibited proprietary trading from permitted hedging activities? Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 104. Does the proposed approach to implementing the hedging exemption provide banking entities and market participants with sufficient clarity regarding what constitutes permitted hedging activities? If not, how could greater clarity be provided?

Question 105. What impact will the proposed approach to implementing the hedging exemption have on the hedging and risk management activities of a banking entity and the services it provides to its clients? If any of these impacts are positive, how can they be amplified? If any of these impacts are negative, how can they be mitigated?

Question 106. What burden will the proposed approach to implementing the hedging exemption have on banking entities? How can any burden be minimized or eliminated in a manner consistent with the language and purpose of the statute?

Question 107. Are the criteria included in the hedging exemption effective? Is the application of each criterion to potential transactions sufficiently clear? Should any of the criteria be changed or eliminated? Should other requirements be added?

Question 108. Is the requirement that a transaction hedge or otherwise mitigate one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity effective? If not, what requirement would be more effective? Does the proposed approach sufficiently articulate the types of risks that a banking entity typically hedges? Does the proposal sufficiently address application of the hedging exemption to portfolio hedging strategies? If not, how should the proposal be changed?

Question 109. Does the manner in which section ____.5 of the proposal implements the risk-mitigating hedging exemption effectively address transactions that hedge or otherwise mitigate specific risks arising in connection with and related to *aggregated* positions, contracts, or other holdings of a banking entity? Do certain hedging strategies or techniques that involve hedging the risks of aggregated positions (*e.g.,* portfolio hedging) (i) create the potential for abuse of the hedging exemption or (ii) give rise to challenges in determining whether a banking entity is engaged in exempt, risk-mitigating hedging activity or prohibited proprietary trading? If so, what hedging strategies and techniques, and how? Should additional restrictions, conditions, or requirements be placed on the use of the hedging exemption with respect to aggregated positions so as to limit potential abuse of the exemption, assist banking entities and the CFTC in determining compliance with the exemption, or otherwise improve the effectiveness of the rule? If so, what additional restrictions, conditions, or requirements, and why?

Question 110. Is the requirement that the transaction be reasonably correlated to the risk or risks the transaction is intended to hedge or otherwise mitigate effective? If not, how should the requirement be changed? Should some specific level of correlation and/or hedge effectiveness be required? Should the proposal specify in greater detail how correlation should be measured? Should the proposal require hedges to be effective in periods of financial stress? Does the proposal sufficiently reflect differences in levels of correlation among asset classes? If not, how could it better do so?

Question 111. Is the requirement that the transaction not give rise, at the inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction effective? Does the requirement establish an appropriate range for legitimate hedging while

[167] For example, a hedge would be established at a different level of organization of the banking entity if multiple market making desks were exposed to similar risks and, to hedge such risks, a portfolio hedge was established at the direction of a supervisor or risk manager responsible for more than one desk rather than at each of the market making desks that established the initial positions, contracts, or other holdings.

constraining impermissible proprietary trading? Is this requirement sufficiently clear? If not, what alternative would be more effective and/or clearer? Are there types of risk-mitigating hedging activities that may give rise to new and significant exposures that should be permitted under the hedging exemption? If so, what activities? Should the requirement that no significant exposure be introduced be extended for the duration of the hedging position? If so, why?

Question 112. Is the requirement that any transaction conducted in reliance on the hedging exemption be subject to continuing review, monitoring and management after the transaction is established effective? If not, what alternative would be more effective?

Question 113. Is the requirement that the compensation arrangements of persons performing risk-mitigating hedging activities at a banking entity be designed not to reward proprietary risk-taking effective? If not, how should the requirement be changed? Are there other types of compensation incentives that should be clearly referenced as consistent, or inconsistent, with permitted risk-mitigating hedging activity? Are there specific and identifiable characteristics of compensation arrangements that clearly incentivize prohibited proprietary trading?

Question 114. Is the proposed documentation requirement effective? If not, what alternative would be more effective? Are there certain additional types of hedging transactions that should be subject to the documentation requirement? If so, what transactions and why? Should all types of hedging transactions be subject to the documentation requirement? If so, why? Should banking entities be required to document more aspects of a particular transaction (*e.g.,* all of the criteria applicable to § ____.5(b) of the proposed rule)? If so, what aspects and why? What burden would the proposed documentation requirement place on banking entities? How might such burden be reduced or eliminated in a manner consistent with the language and purpose of the statute?

Question 115. Aside from the required documentation, do the substantive requirements of the proposed risk-mitigating hedging exemption suggest that additional documentation would be required to achieve compliance with the proposed rule? If so, what burden would this additional documentation requirement place on banking entities? How might such burden be reduced or eliminated in a manner consistent with the language and purpose of the statute?

4. Section __.6: Other Permitted Trading Activities

Section ____.6 of the proposed rule permits a banking entity to engage in certain other trading activities described in section 13(d)(1) of the BHC Act. These permitted activities include trading in certain government obligations, trading on behalf of customers, trading by insurance companies, and trading outside of the United States by certain foreign banking entities. Section ____.6 of the proposed rule does not contain *all* of the statutory exemptions contained in section 13(d)(1) of the BHC Act. Several of these exemptions appear, either by plain language or by implication, to be intended to apply only to covered fund activities and investments, and so the CFTC has not proposed to include them in the proposed rule's proprietary trading provisions.[168] Those exemptions are referenced in other portions of the proposed rule pertaining to covered funds.

The CFTC requests comment on the proposed rule's approach to implementing the exemptions contained in section 13(d)(1) of the BHC Act to the proposed rule's proprietary trading provisions. In particular, the CFTC requests comment on the following questions:

Question 116. Is the proposed rule's approach of identifying which of the statutory exemptions contained in section 13(d)(1) of the BHC Act apply to the proposed rule's proprietary trading provisions effective and/or consistent with the language and purpose of the statute? If not, what alternative would be more effective and/or consistent with the language and purpose of the statute?

Question 117. Are there statutory exemptions that should apply to the proposed rule's proprietary trading provisions that were not included? If so, what exemptions and why?

Question 118. Are there statutory exemptions that were included in the proposed rule's proprietary trading provisions that should not have been included? If so, what exemptions and why?

a. Permitted Trading in Government Obligations

Section ____.6(a) of the proposed rule, which implements section 13(d)(1)(A) of the BHC Act,[169] permits the purchase or sale of a covered financial position that is: (i) an obligation of the United States or any agency thereof;[170] (ii) an obligation, participation, or other instrument of or issued by the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or (iii) an obligation issued by any State or any political subdivision thereof.[171] The proposed rule also clarifies that these obligations include limited as well as general obligations of the relevant government entity. The CFTC notes that, consistent with the statutory language, the types of instruments described with respect to the enumerated government-sponsored entities include not only obligations of such entities, but also participations and other instruments of or issued by such entity. This would include, for example, pass-through or participation certificates that are issued and guaranteed by one of these government-sponsored entities (*e.g.,* the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation) in connection with their securitization activities.

The CFTC requests comment on the proposed rule's approach to implementing the government obligation exemption. In particular, the CFTC requests comment on the following questions:

Question 119. Is the proposed rule's application to trading in government obligations sufficiently clear? Should such obligations expressly include, for example, instruments issued by third parties but insured or guaranteed by an enumerated government entity or

[168] In particular, the proposed rule does not apply (i) the exemption in section 13(d)(1)(E) of the BHC Act for SBICs and certain public welfare or qualified rehabilitation investments, or (ii) the exemptions in sections 13(d)(1)(G) and 13(d)(1)(I) of the BHC Act for certain covered funds activities and investments, to the proprietary trading provisions of subpart B.

[169] Section 13(d)(1)(A) of the BHC Act permits a banking entity to purchase, sell, acquire or dispose securities and other instruments described in section 13(h)(4) of the BHC Act if those securities or other instruments are specified types of government obligations, notwithstanding the prohibition on proprietary trading. *See* 12 U.S.C. 1851(d)(1)(A).

[170] The CFTC proposes that United States ''agencies'' for this purpose will include those agencies described in section 201.108(b) of the Board's Regulation A. *See* 12 CFR 201.108(b). The CFTC also notes that the terms of the exemption would encompass the purchase or sale of enumerated government obligations on a forward basis (*e.g.,* in a to-be-announced market).

[171] Consistent with the statutory language, the proposed rule does not extend the government obligations exemption to transactions in obligations of an *agency* of any State or political subdivision thereof.

otherwise backed by its full faith and credit?

Question 120. Should the CFTC adopt an additional exemption for proprietary trading in State or municipal agency obligations under section 13(d)(1)(J) of the BHC Act? If so, how would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 121. Should the CFTC adopt an additional exemption for proprietary trading in options or other derivatives referencing an enumerated government obligation under section 13(d)(1)(J) of the BHC Act? For example, should the CFTC provide an exemption for options or other derivatives with respect to U.S. government debt obligations? If so, how would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 122. Should the CFTC adopt an additional exemption for proprietary trading in the obligations of foreign governments and/or international and multinational development banks under section 13(d)(1)(J) of the BHC Act? If so, what types of obligations should be exempt? How would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 123. Should the CFTC adopt an additional exemption for proprietary trading in any other type of government obligations under section 13(d)(1)(J) of the BHC Act? If so, how would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 124. Are the definitions of ''government security'' and ''municipal security'' in sections 3(a)(42) and 3(a)(29) of the Exchange Act helpful in determining the proper scope of this exemption? If so, please explain their utility and how incorporating such definitions into the exemption would be consistent with the language and purpose of section 13 of the BHC Act.

b. Permitted Trading on Behalf of Customers

Section 13(d)(1)(D) of the BHC Act permits a banking entity to purchase or sell a covered financial position on behalf of customers, notwithstanding the prohibition on proprietary trading. Section ____.6(b) of the proposed rule implements this section. Because the statute does not specifically define when a transaction would be conducted ''on behalf of customers,'' the proposed rule identifies three categories of transactions that, while they may involve a banking entity acting as principal for certain purposes, appear to be on behalf of customers within the purpose and meaning of the statute. As proposed, only transactions meeting the terms of these three categories would be considered on behalf of customers for purposes of the exemption.

Section ____.6(b)(i) of the proposed rule provides that a purchase or sale of a covered financial position is on behalf of customers if the transaction (i) is conducted by a banking entity acting as investment adviser, commodity trading advisor, trustee, or in a similar fiduciary capacity for a customer and for the account of that customer, and (ii) involves solely covered financial positions of which the banking entity's customer, and not the banking entity or any subsidiary or affiliate of the banking entity, is beneficial owner (including as a result of having long or short exposure under the relevant covered financial position). This category is intended to capture a wide range of trading activity conducted in the context of customer-driven investment or commodity advisory, trust, or fiduciary services, so long as that activity is structured in a way that the customer, and not the banking entity providing those services, benefits from any gains and suffers from any losses on such covered financial positions.[172] A transaction that is structured so as to involve a listed form of relationship but nonetheless allows gains or losses from trading activity to inure to the benefit or detriment of the banking entity would fall outside the scope of this category.

Section ____.6(b)(ii) of the proposed rule provides that a transaction is on behalf of customers if the banking entity is acting as riskless principal. These type of transactions are similarly customer-driven and do not expose the banking entity to gains or losses on the value of the traded positions, notwithstanding the fact that the banking entity technically acts as principal. The CFTC notes that the proposed language describing riskless principal transactions generally mirrors that used in the Board's Regulation Y, OCC interpretive letters, and the SEC's Rule 3a5–1 under the Exchange Act.[173]

Section ____.6(b)(iii) of the proposed rule addresses trading for the separate account of insurance policyholders by a banking entity that is an insurance company. In particular, this part of the proposed rule provides that a purchase or sale of a covered financial position is on behalf of customers if:

- The banking entity is an insurance company engaging in the transaction for a separate account;
- The banking entity is directly engaged in the business of insurance and subject to regulation by a State insurance regulator or foreign insurance regulator;[174]
- The banking entity purchases or sells the covered financial position solely for a separate account established by the insurance company in connection with one or more insurance policies issued by that insurance company;
- All profits and losses arising from the purchase or sale of the covered financial position are allocated to the separate account and inure to the benefit or detriment of the owners of the insurance policies supported by the separate account, and not the banking entity; and
- The purchase or sale is conducted in compliance with, and subject to, the insurance company investment and other laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled.

This category is included within the exemption for transactions on behalf of customers because such insurance-related transactions are generally customer-driven and do not expose the banking entity to gains or losses on the value of separate account assets, even though the banking entity may be treated as the owner of those assets for certain purposes. However, to limit the potential for abuse of the exemption, the proposed rule also includes related requirements designed to ensure that the separate account trading activity is subject to appropriate regulation and supervision under insurance laws and not structured so as to allow gains or losses from trading activity to inure to the benefit or detriment of the banking entity.[175] The proposed rule defines a ''separate account'' as an account established or maintained by a regulated insurance company subject to regulation by a State insurance regulator or foreign insurance regulator under which

[172] For example, in the case of a banking entity acting as investment adviser to a registered mutual fund, any trading by the banking entity in its capacity of investment adviser and on behalf of that fund would be permitted pursuant to § ____.6(b)(i) of the proposed rule, so long as the relevant criteria were met.

[173] *See* 12 CFR 225.28(b)(7)(ii); 17 CFR 240.3a5–1(b); OCC Interpretive Letter 626 (July 7, 1993).

[174] The proposed rule provides definitions of the terms ''State insurance regulator'' and ''foreign insurance regulator.'' *See* proposed rule §§ ____.3(c)(4), (13).

[175] The CFTC would not consider profits to inure to the benefit of the banking entity if the banking entity were solely to receive payment, out of separate account profits, of fees unrelated to the investment performance of the separate account.

income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.[176]

The CFTC requests comment on the proposed rule's approach to implementing the exemption for trading on behalf of customers. In particular, the CFTC requests comment on the following questions:

Question 125. Is the proposed rule's articulation of three categories of transactions on behalf of customers effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should any of the categories be eliminated? Should any additional categories be added? Please explain.

Question 126. Is the proposed rule's exemption of certain investment adviser, commodity trading advisor, trustee or similar fiduciary transactions effective? What other types of relationships are or should be captured by the proposed rule's reference to ''similar fiduciary relationships,'' and why? Is application of this part of the exemption to particular transactions sufficiently clear? Should any other specific types of fiduciary or other relationships be specified in the rule? If so, what types and why? What impact will the proposed rule's implementation of the exemption have on the investment adviser, commodity trading advisor, trustee or similar fiduciary activities of banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

Question 127. Is the proposed rule's exemption of riskless principal transactions effective? If not, what alternative would be more appropriate? Is the description of qualifying riskless principal activity sufficiently clear? If not, how should it be clarified? Should the riskless principal transaction exemption include a requirement that the banking entity must purchase (or sell) the covered financial position as principal at the same price to satisfy the customer buy (or sell) order, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee? Why or why not? Should the riskless principal exemption include a requirement with respect to the timeframe in which the principal transaction must be allocated to a riskless principal or customer account? Why or why not?

Question 128. Is the proposed rule's exemption of trading for separate accounts by insurance companies effective? If not, what alternative would be more appropriate? Does the proposed exemption sufficiently address the variety of customer-driven separate account structures typically used? If not, how should it address such structures? Does the proposed exemption sufficiently address the variety of regulatory or supervisory regimes to which insurance companies may be subject?

Question 129. What impact will the proposed rule's implementation of the exemption have on the insurance activities of insurance companies affiliated with banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

Question 130. Should the term ''customer'' be defined for purposes of the exemption for transactions on behalf of customers? If so, how should it be defined? For example, would an appropriate definition be (i) a continuing relationship in which the banking entity provides one or more financial products or services prior to the time of the transaction, (ii) a direct and substantive relationship between the banking entity and a prospective customer prior to the transaction, or (iii) a relationship initiated by the banking entity to a prospective customer for purposes of the transaction?

Question 131. Is the exemption for trading on behalf of customers in the proposed rule over- or under-inclusive? If it is under-inclusive, please discuss any additional activities that should qualify as trading on behalf of customers under the rule. What are the mechanics of the particular trading activity and how does it qualify as being on behalf of customers? Are there certain requirements or restrictions that should be placed on the activity, if permitted by the rule, to prevent evasion of the prohibition on proprietary trading? How would permitting the activity be consistent with the purpose and language of section 13 of the BHC Act? If the proposed exemption is over-inclusive, please explain what aspect of the proposed exemption does not involve trading on behalf of customers within the language and purpose of the statute.

c. Permitted Trading by a Regulated Insurance Company

Section ____.6(c) of the proposed rule implements section 13(d)(1)(F) of the BHC Act,[177] which permits a banking entity to purchase or sell a covered financial position if the banking entity is a regulated insurance company acting for its general account or an affiliate of an insurance company acting for the insurance company's general account, subject to certain conditions. Section ____.6(d) of the proposed rule generally restates the statutory requirements of the exemption, which provide that:

- The insurance company must directly engage in the business of insurance and be subject to regulation by a State insurance regulator or foreign insurance regulator;
- The insurance company or its affiliate must purchase or sell the covered financial position solely for the general account of the insurance company;
- The purchase or sale must be conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and
- The appropriate Federal banking agencies, after consultation with the Council and the relevant insurance commissioners of the States, must not have jointly determined, after notice and comment, that a particular law, regulation, or written guidance described above is insufficient to protect the safety and soundness of the banking entity or of the financial stability of the United States.[178]

The proposed rule defines a ''general account'' as all of the assets of the insurance company that are not legally segregated and allocated to separate accounts under applicable State law.[179]

The CFTC requests comment on the proposed rule's approach to implementing the exemption for general account trading by insurance companies. In particular, the CFTC requests comment on the following questions:

Question 132. Should any of the statutory requirements for the exemption be further clarified in the

[176] *See* proposed rule § ____.2(z).

[177] *See* 12 U.S.C. 1851(d)(1)(F).

[178] The Federal banking agencies have not proposed at this time to determine, as part of the proposed rule, that the insurance company investment laws, regulations, and written guidance of any particular State or jurisdiction are insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States. The Federal banking agencies expect to monitor, in conjunction with the Federal Insurance Office established under section 502 of the Dodd-Frank Act, the insurance company investment laws, regulations, and written guidance of States or jurisdictions to which exempt transactions are subject and make such determinations in the future, where appropriate.

[179] *See* proposed rule § ____.3(c)(6).

proposed rule? If so, how? Should any additional requirements be added? If so, what requirements and why?

Question 133. Does the proposed rule appropriately and clearly define a general account for these purposes? If not, what alternative definition would be more appropriate?

Question 134. For purposes of the exemption, are the insurance company investment laws, regulations, and written guidance of any particular State or jurisdiction insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States? If so, why?

Question 135. What impact will the proposed rule's implementation of the exemption have on the insurance activities of insurance companies affiliated with banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

d. Permitted Trading Outside of the United States

Section ____.6(d) of the proposed rule implements section 13(d)(1)(H) of the BHC Act,[180] which permits certain foreign banking entities to engage in proprietary trading that occurs solely outside of the United States.[181] This statutory exemption limits the extraterritorial application of the prohibition on proprietary trading to the foreign activities of foreign firms, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States. Consistent with the statute, the proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which proprietary trading by such an entity will be considered to have occurred solely outside of the United States.

i. Foreign Banking Entities Eligible for the Exemption

Section ____.6(d)(1)(i) of the proposed rule provides that, in order to be eligible for the foreign trading exemption, the banking entity must not be directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. This requirement limits the scope of the exemption to banking entities that are organized under foreign law and controlled only by entities organized under foreign law. Consistent with the statutory language, a banking entity organized under the laws of the United States or any State and the subsidiaries and branches of such banking entity (wherever organized or licensed) may not rely on the exemption.[182] Similarly, a U.S. subsidiary or branch of a foreign banking entity would not qualify for the exemption.

Section ____.6(d)(1)(ii) of the proposed rule incorporates the statutory requirement that the banking entity must also conduct the transaction pursuant to sections 4(c)(9) or 4(c)(13) of the BHC Act. Section ____.6(d)(2) clarifies when a banking entity would meet that requirement, the criteria for which vary depending on whether or not the banking entity is a foreign banking organization.[183]

Section 4(c)(9) of the BHC Act provides that the restrictions on interests in nonbanking organizations contained in that statute do not apply to the ownership of shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of the BHC Act and would be in the public interest.[184] The Board has implemented section 4(c)(9) as part of subpart B of the Board's Regulation K,[185] which specifies a number of conditions and requirements that a foreign banking organization must meet in order to use such authority. Such conditions and requirements include, for example, a qualifying foreign banking organization test that requires the foreign banking organization to demonstrate that more than half of its worldwide business is banking and that more than half of its banking business is outside the United States. The proposed rule makes clear that if a banking entity is a foreign banking organization, it will qualify for the foreign trading exemption if the entity is a qualifying foreign banking organization that conducts the transaction in compliance with subpart B of the Board's Regulation K, and the transaction occurs solely outside of the United States.

Section 13 of the BHC Act also applies to foreign companies that control a U.S. insured depository institution but are not currently subject to the BHC Act generally or to the Board's Regulation K—for example, because the foreign company controls a savings association or an FDIC-insured industrial loan company. Accordingly, the proposed rule also clarifies when this type of foreign banking entity would be considered to have conducted a transaction ''pursuant to section 4(c)(9)'' for purposes of the foreign trading exemption.[186] In particular, the draft rule proposes that to qualify for the foreign trading exemption, such firms must meet at least two of three requirements that evaluate the extent to which the foreign entity's business is conducted outside the United States, as measured by assets, revenues, and income. This test largely mirrors the qualifying foreign banking organization test that is made applicable under section 4(c)(9) of the BHC Act and § 211.23(a) of the Board's Regulation K, except that the test does not also require such a foreign entity to demonstrate that more than half of its banking business is outside the United States.[187]

[180] Section 13(d)(1)(H) of the BHC Act permits a banking entity to engage in proprietary trading, notwithstanding the prohibition on proprietary trading, if it is conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act and the trading occurs solely outside of the United States and the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. *See* 12 U.S.C. 1851(d)(1)(H).

[181] This section's discussion of the concept ''solely outside of the United States'' is provided solely for purposes of the proposed rule's implementation of section 13(d)(1)(H) of the BHC Act, and does not affect a banking entity's obligation to comply with additional or different requirements under applicable securities, banking, or other laws.

[182] Under the proposal, a ''State'' means any State, territory or possession of the United States, and the District of Columbia. *See* proposed rule § ____.2(aa).

[183] Section ____.6(d)(2) only addresses when a transaction will be considered to have been conducted pursuant to section 4(c)(9) of the BHC Act. Although the statute also references section 4(c)(13) of the BHC Act, the Board has applied the authority contained in that section solely to the foreign activities of U.S. banking organizations which, by the express terms of section 13(d)(1)(H) of the BHC Act, are unable to rely on the foreign trading exemption.

[184] *See* 12 U.S.C. 1843(c)(9).

[185] *See* 12 CFR 211.20 *et seq.*

[186] The CFTC notes that the Board emphasizes that this clarification would be applicable solely in the context of section 13(d)(1) of the BHC Act. The application of section 4(c)(9) to foreign companies in other contexts is likely to involve different legal and policy issues and may therefore merit different approaches.

[187] *See* 12 U.S.C. 1843(c)(9); 12 CFR 211.23(a); proposed rule § ____.6(d)(2). This difference reflects the fact that foreign entities subject to section 13 of the BHC Act, but not the BHC Act generally, are likely to be, in many cases, predominantly commercial firms. A requirement that such firms also demonstrate that more than half of their banking business is outside the United States would likely make the exemption unavailable to such firms and subject their global activities to the prohibition on proprietary trading, a result that the statute does not appear to have intended.

ii. Trading Solely Outside of the United States

The proposed rule also clarifies when a transaction will be considered to have occurred solely outside of the United States for purposes of the exemption. In interpreting this aspect of the statutory language, the proposal focuses on the extent to which material elements of the transaction occur within, or are conducted by personnel within, the United States. This focus seeks to avoid extraterritorial application of the prohibition of proprietary trading outside the United States while preserving competitive parity within U.S. markets. The proposed rule does not evaluate solely whether the risk of the transaction or management or decision-making with respect to the transaction rests outside the United States, as such an approach would appear to permit foreign banking entities to structure transactions so as to be ''outside of the United States'' for risk and booking purposes while engaging in transactions within U.S. markets that are prohibited for U.S. banking entities.

In particular, § ____.6(d)(3) of the proposed rule provides that a transaction will be considered to have occurred solely outside of the United States only if four conditions are met:

- The transaction is conducted by a banking entity that is not organized under the laws of the United States or of one or more States;
- No party to the transaction is a resident of the United States;
- No personnel of the banking entity that is directly involved in the transaction is physically located in the United States; [188] and
- The transaction is executed wholly outside the United States.

These four criteria are intended to ensure that a transaction executed in reliance on the exemption does not involve U.S. counterparties, U.S. trading personnel, U.S. execution facilities, or risks retained in the United States. The presence of any of these factors would appear to constitute a sufficient locus of activity in the U.S. marketplace so as to preclude availability of the exemption.

A resident of the United States is defined in § ____.2(t) of the proposed rule, and includes: (i) Any natural person resident in the United States; (ii) any partnership, corporation or other business entity organized or incorporated under the laws of the United States or any State; (iii) any estate of which any executor or administrator is a resident of the United States; (iv) any trust of which any trustee, beneficiary or, if the trust is revocable, settlor is a resident of the United States; (v) any agency or branch of a foreign entity located in the United States; (vi) any discretionary or non-discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary for the benefit or account of a resident of the United States; (vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary organized or incorporated in the United States, or (if an individual) a resident of the United States; or (viii) any partnership or corporation organized or incorporated under the laws of any foreign jurisdiction formed by or for a resident of the United States principally for the purpose of engaging in one or more transactions described in § ____.6(d)(1) or § ____.13(c)(1) of the proposed rule.[189] The proposed definition is designed to capture the scope of U.S. counterparties, decision-makers and personnel that, if involved in the transaction, would preclude that transaction from being considered to have occurred solely outside the United States. The Agencies note that the proposed definition is similar but not identical to the definition of ''U.S. person'' for purposes of the SEC's Regulation S, which governs securities offerings and sales outside of the United States that are not registered under the Securities Act.[190]

iii. Request for Comment

The CFTC requests comment on the proposed rule's approach to implementing the foreign trading exemption. In particular, the CFTC requests comment on the following questions:

Question 136. Is the proposed rule's implementation of the foreign trading exemption effectively delineated? If not, what alternative would be more effective and/or clearer?

Question 137. Are the proposed rule's provisions regarding when an activity will be considered to have been conducted pursuant to section 4(c)(9) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Do those provisions effectively address the application of the foreign trading exemption to foreign banking entities not subject to the BHC Act generally? If not, how should the proposed rule apply the exemption?

Question 138. Are the proposed rule's provisions regarding when an activity will be considered to have occurred solely outside the United States effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should any requirements be modified or removed? If so, which requirements and why? Should additional requirements be added? If so, what requirements and why?

Question 139. Is the proposed rule's definition of ''resident of the United States'' effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Is the definition over- or under-inclusive? If so, why? Should the definition more closely track, or incorporate by reference, the definition of ''U.S. person'' under the SEC's Regulation S under the Securities Act? If so, why?

Question 140. Does the proposed rule effectively define a resident of the United States for these purposes? If not, how should the definition be altered?

Question 141. Should the CFTC use the authority provided in section 13(d)(1)(J) of the BHC Act to allow U.S.-controlled banking entities to engage in proprietary trading pursuant to section 4(c)(13) of the BHC Act outside of the United States under certain circumstances? If so, under what circumstances should this be permitted and how would such activity promote and protect the safety and soundness of banking entities and the financial stability of the United States?

e. Discretionary Exemptions for Proprietary Trading Under Section 13(d)(1)(J) of the BHC Act

Section 13(d)(1)(J) of the BHC Act permits the CFTC to grant, by rule, other exemptions from the prohibition on proprietary trading if the CFTC determines that the exemption would promote and protect the safety and soundness of the banking entity and the financial stability of the United States.[191] The CFTC has not, at this time, proposed any such discretionary exemptions with respect to the prohibition on proprietary trading. The CFTC requests comment as follows:

Question 142. Should the CFTC adopt any exemption from the prohibition on proprietary trading under section 13(d)(1)(J) of the BHC Act? If so, what

[188] Personnel directly involved in the transaction would generally not include persons performing purely administrative, clerical, or ministerial functions.

[189] *See* proposed rule § ____.2(t).

[190] *See* 17 CFR 230.902(k).

[191] *See* 12 U.S.C. 1851(d)(1)(J). In addition to permitting the CFTC to provide additional exemptions from the prohibition on proprietary trading, section 13(d)(1)(J) also states that the CFTC may provide additional exemptions from the prohibition on investing in or sponsoring a covered fund, as discussed in Part III.C.5 of this **SUPPLEMENTARY INFORMATION**.

exemption and why? How would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

5. Section ____.7: Reporting and Recordkeeping Requirements Applicable to Trading Activities

Section ____.7 of the proposed rule, which implements in part section 13(e)(1) of the BHC Act,[192] requires certain banking entities to comply with the reporting and recordkeeping requirements specified in Appendix A of the proposed rule. In addition, § ____.7 requires banking entities to comply with the recordkeeping requirements in § ____.20 of the proposed rule, related to the banking entity's compliance program,[193] as well as any other reporting or recordkeeping requirements that the CFTC may impose to evaluate the banking entity's compliance with the proposed rule.[194] Proposed Appendix A requires a banking entity with significant trading activities to furnish periodic reports to the CFTC regarding various quantitative measurements of its trading activities and create and retain records documenting the preparation and content of these reports. The measurements vary depending on the scope, type, and size of trading activities. In addition, proposed Appendix B contains a detailed commentary regarding the characteristics of permitted market making-related activities and how such activities may be distinguished from trading activities that, even if conducted in the context of a banking entity's market-making operations, would constitute prohibited proprietary trading.

A banking entity must comply with proposed Appendix A's reporting and recordkeeping requirements only if it has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.[195] The CFTC has not proposed to extend the reporting and recordkeeping requirements to banking entities with smaller amounts of trading activity, as it appears that the more limited benefits of applying these requirements to such banking entities, whose trading activities are typically small, less complex, and easier to supervise, would not justify the burden associated with complying with the reporting and recordkeeping requirements.

a. General Approach to Reporting and Recordkeeping Requirements

The reporting and recordkeeping requirements of § ____.7 and Appendix A of the proposed rule are an important part of the proposed rule's multi-faceted approach to implementing the prohibition on proprietary trading. These requirements are intended, in particular, to address some of the difficulties associated with (i) identifying permitted market making-related activities and distinguishing such activities from prohibited proprietary trading and (ii) identifying certain trading activities resulting in material exposure to high-risk assets or high-risk trading strategies. To do so, the proposed rule requires certain banking entities to calculate and report detailed quantitative measurements of their trading activity, by trading unit. These measurements will help banking entities and the CFTC in assessing whether such trading activity is consistent with permitted trading activities in scope, type and profile. The quantitative measurements that must be reported under the proposed rule are generally designed to reflect, and to provide meaningful information regarding, certain characteristics of trading activities that appear to be particularly useful in differentiating permitted market making-related activities from prohibited proprietary trading. For example, the proposed quantitative measurements measure the size and type of revenues generated, and the types of risks taken, by a trading unit. Each of these measurements appears to be useful in assessing whether a trading unit is (i) engaged in permitted market making-related activity or (ii) materially exposed to high-risk assets or high-risk trading strategies. Similarly, the proposed quantitative measurements also measure how much revenue is generated per such unit of risk, the volatility of a trading unit's profitability, and the extent to which a trading unit trades with customers. Each of those characteristics appears to be useful in assessing whether a trading unit is engaged in permitted market making-related activity.

However, the CFTC recognizes that no single quantitative measurement or combination of measurements can accurately identify prohibited proprietary trading without further analysis of the context, facts, and circumstances of the trading activity. In addition, certain quantitative measurements may be useful for assessing one type of trading activity, but not helpful in assessing another type of trading activity. As a result, the CFTC proposes to use a variety of quantitative measurements to help identify transactions or activities that warrant more in-depth analysis or review.

To be effective, this approach requires identification of useful quantitative measurements as well as judgment regarding the type of measurement results that suggest a further review of the trading unit's activity is warranted. The CFTC intends to take a heuristic approach to implementation in this area that recognizes that quantitative measurements can only be usefully identified and employed after a process of substantial public comment, practical experience, and revision. In particular, the CFTC notes that, although a variety of quantitative measurements have traditionally been used by market participants and others to manage the risks associated with trading activities, these quantitative tools have not been developed, nor have they previously been utilized, for the explicit purpose of identifying trading activity that warrants additional scrutiny in differentiating prohibited proprietary trading from permitted market making-related activities. Additional study and analysis will be required before quantitative measurements may be effectively designed and employed for that purpose.

Consistent with this heuristic approach, the proposed rule includes a large number of potential quantitative measurements on which public comment is sought, many of which overlap to some degree in terms of their informational value. Not all of these quantitative measurements may ultimately be adopted, depending on their relative strengths, weaknesses, costs, and benefits. The CFTC notes that some of the proposed quantitative measurements may not be relevant to all types of trading activities or may

[192] Section 13(e)(1) of the BHC Act requires the CFTC to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1). Section ____.20 and Appendix C of the proposed rule also implement section 13(e)(1) of the BHC Act.

[193] *See* **SUPPLEMENTARY INFORMATION**, Part III.D.

[194] *See* proposed rule § ____.7.

[195] *See* proposed rule § ____.7(a). The CFTC notes that this $1 billion trading asset and liability threshold is the same standard that is used in the Market Risk Capital Rules for determining which bank holding companies and insured depository institutions must calculate their risk-based capital requirements for trading positions under those rules. These banking entities maintain large and complex portfolios of trading assets and are therefore the most likely to be engaged in the types of trading activities that will require significant oversight of compliance with the restrictions on proprietary trading.

provide only limited benefits, relative to cost, when applied to certain types of trading activities. In addition, certain quantitative measurements may be difficult or impracticable to calculate for a specific covered trading activity due to differences between asset classes, market structure, or other factors. The CFTC has therefore requested comment on a large number of issues related to the relevance, practicability, costs, and benefits of the quantitative measurements proposed. The CFTC also seeks comment on whether the quantitative measurements described in the proposal may be appropriate to use in assessing compliance with section 13 of the BHC Act.

In addition to the proposed quantitative measurements, a banking entity may itself develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and the proposed rule and to establish, maintain, and enforce an effective compliance program, as required by § ____.20 of the proposed rule and Appendix C. The CFTC notes that the proposed quantitative measurements in Appendix A are intended to assist banking entities and the CFTC in monitoring compliance with the proprietary trading restrictions and, thus, are related to the compliance program requirements in § ____.20 of the proposed rule and proposed Appendix C. Nevertheless, implementation of the proposed quantitative measurements under Appendix A would not necessarily provide all the data necessary for the banking entity to establish an effective compliance program, and a banking entity may need to develop and implement additional quantitative measurements. The CFTC recognizes that appropriate and effective quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading unit, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure the activities are within risk tolerances established by the banking entity, and to monitor for compliance with the proprietary trading restrictions in the proposed rule.

To the extent that data regarding measurements, as set forth in the proposed rule, are collected, the CFTC proposes to utilize the automatic two-year conformance period provided in section 13 of the BHC Act to carefully review that data, further study the design and utility of these measurements, and if necessary, propose changes to the reporting requirements as the CFTC believes are needed to ensure that these measurements are as effective as possible.[196] This heuristic, gradual approach to implementing reporting requirements for quantitative measurements would be intended to ensure that the requirements are formulated in a manner that maximizes their utility for identifying trading activity that warrants additional scrutiny in assessing compliance with the prohibition on proprietary trading, while limiting the risk that the use of quantitative measurements could inadvertently curtail permissible market making-related activities that provide an important service to market participants and the capital markets at large.

In addition, the CFTC requests comment on the use of numerical thresholds for certain quantitative measurements that, if reported by a banking entity, would require the banking entity to review its trading activities for compliance and summarize that review to the CFTC. The CFTC has not proposed specific numerical thresholds in the proposal because substantial public comment and analysis would be beneficial prior to formulating and proposing specific numerical thresholds. Instead, the CFTC intends to carefully consider public comments that are provided on this issue and to separately determine whether it would be appropriate to propose, subsequent to finalizing the current proposal, such numerical thresholds.

The CFTC requests comment on the proposed approach to implementing reporting requirements for proprietary trading. In particular, the CFTC requests comment on the following questions:

Question 143. Is the use of the proposed reporting requirements as part of the multi-faceted approach to implementing the prohibition on proprietary trading appropriate? Why or why not?

Question 144. Is the proposed gradual approach to implementing reporting requirements effective? If not, what approach would be more effective? For example, should the CFTC defer reporting of quantitative measurements until banking entities have developed and refined their compliance programs through the supervision and examination process? What would be the costs and benefits of such an approach?

Question 145. What role, if any, could or should the Office of Financial Research (''OFR'') play in receiving and analyzing banking entities' reported quantitative measurements? Should reporting to the OFR be required instead of reporting to the CFTC, and would such reporting be consistent with the composition and purpose of OFR? In the alternative, should reporting to either (i) only the CFTC or (ii) both the CFTC and OFR be required? If so, why? What are the potential costs and benefits of reporting quantitative measurements to the OFR? Please explain.

Question 146. Is there an alternative manner in which the CFTC should develop and propose the reporting requirements for quantitative measurements? If so, how should they do so?

Question 147. Does the proposed approach provide sufficient time for the development and implementation of effective reporting requirements? If not, what alternative approach would be preferable?

Question 148. Should a trading unit be permitted not to furnish a quantitative measurement otherwise required under Appendix A if it can demonstrate that the measurement is not, as applied to that unit, calculable or useful in achieving the purposes of the Appendix with respect to the trading unit's covered trading activities? How might a banking entity make such a demonstration?

Question 149. Is the manner in which the CFTC proposes to utilize the conformance period for review of collected data and refinement of the reporting requirements effective? If not, what process would be more effective?

Question 150. Is the proposed $1 billion trading asset and liability threshold, which is also currently used in the Market Risk Capital Rules for purposes of identifying which banks and bank holdings companies must comply with those rules, an appropriate standard for triggering the reporting and recordkeeping requirements of the proposed rule? Why or why not? If not, what alternative standard would be a better benchmark for triggering the reporting and recordkeeping requirements?

[196] Section 13(c)(2) of the BHC Act provides banking entities two years from the date that the proposed rule becomes effective (with the possibility of up to three, one-year extensions) to bring their activities, investments, and relationships into compliance with section 13, including the prohibition on proprietary trading. *See* 12 U.S.C. 1851(c)(2).

Question 151. What are the typical trading activities (*e.g.,* market making-related activities) of a banking entity with less than $1 billion in gross trading assets and liabilities? How complex are those trading activities?

Question 152. Should the proposed $1 billion trading and asset liability threshold used for triggering the reporting and recordkeeping requirements adjust each time the thresholds for complying with the Market Risk Capital Rules adjust, or otherwise be adjusted over time? If not, how and when should the numerical threshold be adjusted?

Question 153. Should all banking entities be required to comply with the reporting and recordkeeping requirements set forth in Appendix A in order to better protect against prohibited proprietary trading, rather than only those banking entities that meet the proposed $1 billion trading asset and liability threshold? Why or why not?

Question 154. Should banking entities that fall under the proposed $1 billion trading asset and liability threshold be required to comply with the reporting and recordkeeping provisions for a pilot period in order to help inform judgment regarding the levels of quantitative measurements at such entities and the appropriate frequency and scope of examination by the relevant Agency for such banking entities? Why or why not?

b. Proposed Appendix A—Purpose and Definitions

Section I of proposed Appendix A describes the purpose of the appendix, which is to specify reporting requirements that are intended to assist banking entities that are engaged in significant trading activities and the CFTC in identifying trading activities that warrant further review or examination to verify compliance with the proprietary trading restrictions, including whether an otherwise-permitted activity under §§ ____.4 through ____.6(a) of the proposed rule is consistent with the requirement that such activity not result, directly or indirectly, in a material exposure by the banking entity to high-risk assets and high-risk trading strategies. In particular, section I provides that the purpose of the appendix is to assist the CFTC and banking entities in:

- Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;
- Monitoring the banking entity's covered trading activities;
- Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;
- Evaluating whether the trading activities of trading units engaged in market making-related activities under § ____.4(b) of the proposed rule are consistent with the requirements governing permitted market making-related activities;
- Evaluating whether the trading activities of trading units that are engaged in permitted trading activity under §§ ____.4, ____.5, or ____.6(a) of the proposed rule (*e.g.,* permitted underwriting, market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure by the banking entity to high-risk assets and high-risk trading strategies;
- Identifying the profile of particular trading activities of the banking entity, and the individual trading units of the banking entity, to help establish the appropriate frequency and scope of examination by the CFTC of such activities; and
- Assessing and addressing the risks associated with the banking entity's trading activities.

The types of trading and market making-related activities in which banking entities engage is often highly complex, and any quantitative measurement is capable of producing both ''false negatives'' and ''false positives'' that suggest that prohibited proprietary trading is occurring when it is not, or vice versa. Recognizing this, section I of proposed Appendix A makes clear that the quantitative measurements that may be required to be reported would *not* be intended to serve as a dispositive tool for identifying permissible or impermissible activities.

Section II of proposed Appendix A defines relevant terms used in the appendix. These include certain definitions that clarify how and when certain calculations must be made, as well as a definition of ''trading unit'' that governs the level of organization at which a banking entity must calculate quantitative measurements. The proposed definition of ''trading unit'' covers multiple organizational levels of a banking entity, including:

- Each discrete unit engaged in the coordinated implementation of a revenue generation strategy that participates in the execution of any covered trading activity; [197]
- Each organizational unit used to structure and control the aggregate risk-taking activities and employees of one or more trading units described above;
- All trading operations, collectively; and
- Any other unit of organization specified by the CFTC with respect to a particular banking entity.[198]

The definition of ''trading unit'' is intended to capture multiple layers of a banking entity's organization structure, including individual trading desks, intermediate divisions that oversee a variety of trading desks, and all trading operations in the aggregate. As described below, under the proposal, the quantitative measurements specified in section IV of proposed Appendix A must be calculated and reported for each such ''trading unit.'' Accordingly, the definition of trading unit is purposefully broad and captures multiple levels of organization so as to ensure that quantitative measurements provide meaningful information, at both a granular and aggregate level, to help banking entities and the CFTC evaluate the quantitative profile of trading operations in a variety of contexts.

The CFTC expects that the scope and nature of trading units to which the quantitative measurements are applied would have an important impact on the informational content and utility of the resulting measurements. Applying a quantitative measurement to a trading unit at a level that aggregates a variety of distinct trading activities may obscure or ''smooth'' differences between distinct lines of business, asset

[197] As noted in Appendix A, the CFTC expects that this would generally be the smallest unit of organization used by the banking entity to structure and control its risk-taking activities and employees, and would include each unit generally understood to be a single ''trading desk.'' For example, if a banking entity has one set of employees engaged in market making-related activities in the equities of U.S. non-financial corporations, and another set of employees engaged in market making-related activities in the equities of U.S. financial corporations, the two sets of employees would appear to be part of a single trading unit if both sets of employees structure and control their trading activities together, making and executing highly coordinated decisions about required risk levels, inventory levels, sources of revenue growth and similar features. On the other hand, if the risk decisions and revenue strategies are considered and executed separately by the two sets of employees, with only loose coordination, they would appear to be two distinct trading units. In determining whether a set of employees constitute a single trading unit, important factors would likely include whether compensation is strongly linked to the group's performance, whether risk levels and trading limits are managed and set jointly or separately, and whether trades are booked together or separately.

[198] This latter prong of the definition has been included to ensure that the CFTC has the ability to require banking entities to report quantitative measurements in other ways to prevent a banking entity from organizing its trading operations so as to undermine the effectiveness of the reporting requirement.

categories and risk management processes in a way that renders the measurement relatively uninformative, because it does not adequately reflect the specific characteristics of the trading activities being conducted. Similarly, applying a quantitative measurement to a trading unit at a highly granular level could, if it captured only a narrow portion of activity that is conducted as part of a broader business strategy, introduce meaningless ''noise'' into the measure or result in a measurement that is idiosyncratic in nature. This highly granular application could render the measurement relatively uninformative because it would not accurately reflect the entirety of the trading activities being conducted. In order to address the potential weaknesses of applying the quantitative measurements at an aggregate and a granular level, respectively, the proposal requires reporting at both levels. The informational inputs required to calculate any particular quantitative measurement at either level are the same. Consequently, it is expected that, depending on the nature of the systems of a particular institution, there may be little, if any, incremental burden associated with calculating and reporting quantitative measurements at multiple levels.

The CFTC requests comment on the proposed reporting requirements in Appendix A. In particular, the CFTC requests comment on the following questions:

Question 155. Are the ways in which the proposed rule would make use of reported quantitative measurements effective? If not, what uses would be more effective? Should the proposed rule instead use quantitative measurements as a dispositive tool for identifying prohibited proprietary trading? If so, what types of quantitative measurements should be employed, what numerical amount would indicate impermissible proprietary trading activity, and why? Should the quantitative measurements play a less prominent role than proposed in identifying prohibited proprietary trading and why?

Question 156. Are the proposed definitions of terms provided in Appendix A effective? If not, how should the definitions be amended?

Question 157. Is the proposed definition of ''trading unit'' effective? Is it sufficiently clear? If not, what alternative definition would be more effective and/or clearer? Should the definition include more or less granular levels of activity? If so, what specific criteria should be used to determine the appropriate level of granularity?

Question 158. If you are a banking entity, how would your trading activity be categorized, in terms of quantity and type, under the proposed definition of trading unit in Appendix A? For each trading unit type, what categories of quantitative measurements (*e.g.,* risk-management measurements) or specific quantitative measurements (*e.g.,* Stressed Value-at-Risk (''Stress VaR'')) are best suited to assist in distinguishing prohibited proprietary trading from permitted trading activity?

Question 159. Is the proposed rule's requirement that quantitative measurements be reported at multiple levels of organization, including for quantitative measurements historically reported on an aggregate basis (*e.g.,* Value-at-Risk (''VaR'') or Stress VaR) appropriate? If not, what alternative would be more effective? What burdens are associated with such a requirement? How might those burdens be reduced or limited? Please quantify your answers, to the extent feasible.

c. Proposed Appendix A—Scope of Required Reporting

Part III of proposed Appendix A defines the scope of the reporting requirements. The proposed rule adopts a tiered approach that requires banking entities with the most extensive trading activities to report the largest number of quantitative measurements, while banking entities with smaller trading activities have fewer or no reporting requirements. This tiered approach is intended to reflect the heightened compliance risks of banking entities with extensive trading activities and limit the regulatory burden imposed on banking entities with relatively small or no trading activities, which appear to pose significantly less compliance risk.

Banking Entities With Gross Trading Assets and Liabilities of $5 Billion or More

For any banking entity that has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, equals or exceeds $5 billion, the proposal would require the banking entity to furnish quantitative measurements for all trading units of the banking entity engaged in trading activity subject to §§ ____.4, ____.5, or ____.6(a) of the proposed rule (*i.e.,* permitted underwriting and market making-related activity, risk-mitigated hedging, and trading in certain government obligations). The scope of data to be furnished depends on the activity in which the trading unit is engaged. First, for the trading units of such a banking entity that are engaged in market making-related activity pursuant to § ____.4(b) of the proposed rule, proposed Appendix A requires that a banking entity furnish seventeen quantitative measurements.[199] Second, all trading units of such a banking entity engaged in trading activity subject to §§ ____.4(a), ____.5, or ____.6(a) of the proposed rule would be required to report five quantitative measurements designed to measure the general risk and profitability of the trading unit.[200] The CFTC expects that each of these general types of measurements will be useful in assessing the extent to which any permitted trading activity involves exposure to high-risk assets or high-risk trading strategies. These requirements would apply to all type of trading units engaged in underwriting and market making-related activity, risk-mitigated hedging, and trading in certain government obligations. These additional measurements are designed to help evaluate the extent to which the quantitative profile of a trading unit's activities is consistent with permissible market making-related activities.

Banking Entities With Gross Trading Assets and Liabilities Between $1 Billion and $5 Billion

For any banking entity that has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, equals or exceeds $1 billion but is less than $5 billion, the proposal would require quantitative measurements to be furnished for trading units that are engaged in market making-related activity subject to § ____.4(b) of the proposed rule. Trading units of such banking entities that are engaged in market making-related activities must report eight quantitative measurements that are designed to help evaluate the extent to which the quantitative profile of a trading unit's activities is consistent with permissible market making-related

[199] *See* proposed rule Appendix A.III.A. These seventeen quantitative measurements are discussed further below.

[200] *See* proposed rule Appendix A.III.A. These five quantitative measurements are: (i) Comprehensive Profit and Loss; (ii) Comprehensive Profit and Loss Attribution; (iii) VaR and Stress VaR; (iv) Risk Factor Sensitivities; and (v) Risk and Position Limits. Each of these and other quantitative measurements discussed in proposed Appendix A are discussed in detail below.

activities.[201] The proposal applies a smaller number of measurements to a smaller universe of trading units for this class of banking entities because they are likely to pose lesser compliance risk and fewer supervisory and examination challenges. A less burdensome reporting regime, coupled with other elements of the proposal (*e.g.,* the compliance program requirement), is likely to be equally as effective in ensuring compliance with section 13 of the BHC Act and the proposed rule for banking entities with smaller trading operations.

Frequency of Calculation and Reporting

Section III.B of proposed Appendix A specifies the frequency of required calculation and reporting of quantitative measurements. Under the proposed rule, each required quantitative measurement must be calculated for each trading day. Required quantitative measurements must be reported to the CFTC on a monthly basis, within 30 days of the end of the relevant calendar month, or on such other reporting schedule as the CFTC may require. Section III.C of proposed Appendix A requires a banking entity to create and retain records documenting the preparation and content of any quantitative measurement furnished by the banking entity, as well as such information as is necessary to permit the CFTC to verify the accuracy of such measurements, for a period of 5 years. This would include records for each trade and position.

Question 160. Is the proposed tiered approach to identifying which banking entities and trading units must comply with the reporting requirements effective? If not, what alternative would be more effective? Does the proposal strike the appropriate balance between the potential benefits of the reporting requirements for monitoring and assuring compliance and the potential costs of those reporting requirements? If not, how could that balance be improved? Should the relevant gross trading assets and liabilities threshold for any category be increased or reduced? If so, why?

Question 161. Should the $1 billion and $5 billion gross trading assets and liabilities thresholds used to identify the extent to which a banking entity is required to furnish quantitative measurements be increased or reduced? If so, why? Should the thresholds be indexed in some way to account for fluctuations in capital markets activity over time? If so, what would be an appropriate method of indexation?

Question 162. Is the proposed $5 billion trading asset and liability threshold an appropriate standard for triggering enhanced reporting requirements under the proposed rule? Why or why not? If not, what alternative standard would be a better benchmark for triggering enhanced reporting requirements?

Question 163. Should the proposed $5 billion trading and asset liability threshold used for triggering enhanced reporting requirements under the proposed rule be subject to adjustment over time? If so, how and when should the numerical threshold be adjusted?

Question 164. Is there a different criterion other than gross trading assets and liabilities that would be more appropriate for identifying banking entities that must furnish quantitative measurements? If so, what is the alternative criterion, and why would it be more appropriate? Are worldwide gross trading assets and liabilities the appropriate criterion for foreign-based banking entities? If not, what alternative criterion would be more appropriate, and why?

Question 165. Are the quantitative measurements specified for the various types of banking entities and trading units effective? If not, what alternative set of measurements would be more effective? For each type of trading unit, does the proposal strike the appropriate balance between the potential benefits of the reporting requirements for monitoring and assuring compliance and the potential costs of those reporting requirements? If not, how could that balance be improved?

Question 166. Should banking entities with gross trading assets and liabilities between $1 billion and $5 billion also be required to calculate and report some of the quantitative measurements proposed for banking entities meeting the $5 billion threshold for purposes of assessing whether the banking entity's underwriting, market making, risk-mitigating hedging, and trading in certain government obligations activities involve a material exposure to high-risk assets or high-risk trading strategies? If so, which quantitative measurements and why? If not, why not?

Question 167. Is the proposed frequency of reporting effective? If not, what frequency would be more effective? Should the quantitative measurements be required to be reported quarterly, annually, or upon the request of the CFTC and why?

d. Proposed Appendix A—Quantitative Measurements

Section IV of proposed Appendix A describes, in detail, the individual quantitative measurements that must be furnished. These measurements are grouped into the following five broad categories, each of which is described in more detail below:

- *Risk-management measurements*—VaR, Stress VaR, VaR Exceedance, Risk Factor Sensitivities, and Risk and Position Limits;
- *Source-of-revenue measurements*—Comprehensive Profit and Loss, Portfolio Profit and Loss, Fee Income and Expense, Spread Profit and Loss, and Comprehensive Profit and Loss Attribution;
- *Revenues-relative-to-risk measurements*—Volatility of Comprehensive Profit and Loss, Volatility of Portfolio Profit and Loss, Comprehensive Profit and Loss to Volatility Ratio, Portfolio Profit and Loss to Volatility Ratio, Unprofitable Trading Days based on Comprehensive Profit and Loss, Unprofitable Trading Days based on Portfolio Profit and Loss, Skewness of Portfolio Profit and Loss, and Kurtosis of Portfolio Profit and Loss;
- *Customer-facing activity measurements*—Inventory Turnover, Inventory Aging, and Customer-facing Trade Ratio; and
- *Payment of fees, commissions, and spreads measurements*—Pay-to-Receive Spread Ratio.

The CFTC has proposed these quantitative measurements because, taken together, these measurements appear useful for understanding the context in which trading activities occur and identifying activities that may warrant additional scrutiny to determine whether these activities involve prohibited proprietary trading because the trading activity either is inconsistent with permitted market making-related activities or presents a material exposure to high-risk assets or high-risk trading strategies. As described below, different quantitative measurements are proposed to identify different aspects and characteristics of trading activity for the purpose of helping to identify prohibited proprietary trading, and the CFTC expects that the quantitative measurements will be most useful for this purpose when implemented and reviewed collectively, rather than in isolation. The CFTC believes that, in the aggregate, many banking entities already collect and review many of these

[201] *See* proposed rule Appendix A.III.A. These eight quantitative measurements are (i) Comprehensive Profit and Loss; (ii) Comprehensive Profit and Loss Attribution; (iii) Portfolio Profit and Loss; (iv) Fee Income and Expense; (v) Spread Profit and Loss; (vi) VaR; (vii) Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss; and (viii) Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio.

measurements as part of their risk management activities, and expect that many of the quantitative measurements proposed would be readily computed and monitored at the multiple levels of organization that are included in proposed Appendix A's definition of ''trading unit,'' to which they would apply.

The first set of quantitative measurements relates to risk management, and includes VaR, Stress VaR, VaR Exceedance, Risk Factor Sensitivities, and Risk and Position Limits. These measurements are widely used by banking entities to measure and manage trading risks and activities. In the case of VaR, Stress VaR, VaR Exceedance, and Risk Factor Sensitivities, these measures provide internal, model-based assessments of overall risk, stated in terms of large but plausible losses that may occur or changes in revenue that would be expected to result from movements in underlying risk factors. In the case of Risk and Position Limits, the measure provides an explicit assessment of management's expectation of how much risk is required to perform permitted market-making and hedging activities. With the exception of Stress VaR, each of these measurements are routinely used to manage and control risk taking activities, and are also used by some banking entities for purposes of calculating regulatory capital and allocating capital internally. In the context of permitted market making-related activities, these risk management measures are useful in assessing whether the actual risk taken is consistent with the level of principal risk that a banking entity must retain in order to service the near-term demands of customers. Significant, abrupt or inconsistent changes to key risk management measures, such as VaR, that are inconsistent with prior experience, the experience of similarly situated trading units and management's stated expectations for such measures may indicate impermissible proprietary trading. In addition, indicators of unanticipated or unusual levels of risk taken, such as a significant number of VaR Exceedance or breaches of internal Risk and Position Limits, may suggest behavior that is inconsistent with appropriate levels of risk and may warrant further scrutiny.

The second set of quantitative measurements relates to the source of revenues, and includes Comprehensive Profit and Loss, Portfolio Profit and Loss, Fee Income, Spread Profit and Loss, and Comprehensive Profit and Loss Attribution. These measurements are intended to capture the extent, scope, and type of profits and losses generated by trading activities and provide important context for understanding how revenue is generated by trading activities. Because permitted market making-related activities seek to generate profits by providing customers with intermediation and related services while maintaining, and to the extent practicable, minimizing the risks associated with any asset or risk inventory required to meet customer demands, these revenue measurements would appear to provide helpful information to banking entities and the CFTC regarding whether actual revenues are consistent with these expectations. The CFTC notes that although banking entities already routinely calculate and analyze the extent and source of revenues derived from their trading activities, calculating the proposed source of revenue measurements according to the specifications described in proposed Appendix A may require banking entities to implement new processes to calculate and furnish the required data.

The third set of measurements relates to realized risks and revenue relative to realized risks, and includes Volatility of Profit and Loss, Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio, Unprofitable Trading Days based on Comprehensive Profit and Loss and Unprofitable Trading Days based on Portfolio Profit and Loss, and Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss. These measurements are intended to provide banking entities and the Agencies with *ex post,* data-based assessments of risk, as a supplement to internal, model-based assessments of risk, and give further context around the riskiness of underlying trading activities and the profitability of these activities relative to the risks taken. Some of these measurements, such as the skewness and kurtosis measurements, are proposed in order to capture asymmetric, ''fat tail'' risks that (i) are not well captured by simple volatility measures, (ii) may not be well captured by internal risk measurement metrics, such as VaR, and (iii) can be associated with proprietary trading strategies that seek to earn short-term profits by taking exposures to these types of risks. The CFTC expects that these realized-risk and revenue-relative-to-realized-risk measurements would provide information useful in assessing whether trading activities are producing revenues that are consistent, in terms of the degree of risk that is being assumed, with typical market making-related activities. Market making and related activities seek to generate profitability primarily by generating fees, commissions, spreads and other forms of customer revenue that are relatively, though not completely, insensitive to market fluctuations and generally result in a high level of revenue relative to risk over an appropriate time frame. In contrast, proprietary trading strategies seek to generate revenue primarily through favorable changes in asset valuations. The CFTC notes that each of the proposed measurements relating to realized risks and revenues relative to realized risks are generally consistent with existing revenue, risk, and volatility data routinely collected by banking entities with large trading operations or are simple, standardized functions of such data.

The fourth set of quantitative measurements relates to customer-facing activity measurements, and includes Inventory Risk Turnover, Inventory Aging, and Customer-facing Trade Ratio. These measurements are intended to provide banking entities and the CFTC with meaningful information regarding the extent to which trading activities are directed at servicing the demands of customers. Quantitative measurements such as Inventory Risk Turnover and Inventory Aging assess the extent to which size and volume of trading activity is aimed at servicing customer needs, while the Customer-facing Trade Ratio provides directionally useful information regarding the extent to which trading transactions are conducted with customers. The CFTC expects that these measurements will be useful in assessing whether permitted market making-related activities are focused on servicing customer demands. Although the CFTC understands that banking entities typically measure inventory aging and turnover in the context of cash instruments (*e.g.,* equity and debt securities), they note that applying these measurements, as well as the Customer-facing Trade Ratio generally, would require banking entities to implement new processes to calculate and furnish the related data.

The fifth set of quantitative measurements relates to the payment of fees, commissions, and spreads, and includes the Pay-to-Receive Spread Ratio. This measurement is intended to measure the extent to which trading activities generate *revenues* for providing intermediation services, rather than generate *expenses* paid to other intermediaries for such services. Because market making-related activities ultimately focus on servicing customer demands, they typically generate substantially more fees,

spreads and other sources of customer revenue than must be paid to other intermediaries to support customer transactions. Proprietary trading activities, however, that generate almost no customer facing revenue will typically pay a significant amount of fees, spreads and commissions in the execution of trading strategies that are expected to benefit from short-term price movements. Accordingly, the CFTC expects that the proposed Pay-to-Receive Spread Ratio measurement will be useful in assessing whether permitted market making-related activities are primarily generating, rather than paying, fees, spreads and other transactional revenues or expenses. A level of fees, commissions, and spreads paid that is inconsistent with prior experience, the experience of similarly situated trading units and management's stated expectations for such measures could indicate impermissible proprietary trading.

For each individual quantitative measurement, proposed Appendix A describes the measurement, provides general guidance regarding how the measurement should be calculated (where needed) and specifies the period over which each calculation should be made. The proposed quantitative measurements attempt to incorporate, wherever possible, measurements already used by banking entities to manage risks associated with their trading activities. Of the measurements proposed, the CFTC expects that a large majority of measurements proposed are either (i) already routinely calculated by banking entities or (ii) based solely on underlying data that are already routinely calculated by banking entities. However, calculating these measurements according to the specifications described in proposed Appendix A and at the various levels of organization mandated may require banking entities to implement new processes to calculate and furnish the required data.

The extent of the burden associated with calculating and reporting quantitative measurements will likely vary depending on the particular measurements and differences in the sophistication of management information systems at different banking entities. As noted, the proposal tailors these data collections to the size and type of activity conducted by each banking entity in an effort to minimize the burden in particular on firms that engage in few or no trading activities subject to the proposed rule.

The CFTC also has attempted to provide, to the extent possible, a standardized description and general method of calculating each quantitative measurement that, while taking into account the potential variation among trading practices and asset classes, would facilitate reporting of sufficiently uniform information across different banking entities so as to permit horizontal reviews and comparisons of the quantitative profile of trading units across firms.

The CFTC requests comment on the proposed quantitative measurements. In particular, the CFTC requests comment on the following questions:

Question 168. Are the proposed quantitative measurements appropriate in general? If not, what alternative(s) would be more appropriate, and why? Should certain quantitative measurements be eliminated, and if so, why? Should additional quantitative measurements be added? If so, which measurements and why? How would those additional measurements be described and calculated?

Question 168.1. Should the proposed CFTC Rule include all of the required metrics? In particular, the Commission is interested in which metrics are most relevant for swaps, futures, and their related hedges. Please explain the rationale for including or excluding the provisions in the proposed CFTC Rule.

Question 168.2. If the CFTC Rule reduces the number of required metrics, should both sets of covered banking entities described in sections III.A.(i) and III.A.(ii) of Appendix A be required to comply with the reduced number of required metrics?

Question 169. How many of the proposed quantitative measurements do banking entities currently utilize? What are the current benefits and costs associated with calculating such quantitative measurements? Would the reporting and recordkeeping requirements proposed in Appendix A for such quantitative measurements impose any significant, additional benefits or costs?

Question 170. Which of the proposed quantitative measurements do banking entities currently not utilize? What are the potential benefits and costs to calculating these quantitative measurements and complying with the proposed reporting and recordkeeping requirements? Please quantify your answers, to the extent feasible.

Question 171. Is the scope and frequency of required reporting appropriate? If not, what alternatives would be more appropriate? What burdens would be associated with reporting quantitative measurements on that basis, and how could those burdens be reduced or eliminated in a manner consistent with the purpose and language of the statute? Please quantify your answers, to the extent feasible.

Question 172. For each of the categories of quantitative measurements (*e.g.,* quantitative measurements relating to risk management), what factors should be considered in order to further refine the proposed category of quantitative measurements to better distinguish prohibited proprietary trading from permitted trading activity? For example, should the timing of a calculation be considered significant in certain contexts (*e.g.,* should specific quantitative measurements be calculated during the middle of a trading day instead of the end of the day)? Please quantify your answers, to the extent feasible.

Question 173. In light of the size, scope, complexity, and risk of covered trading activities, do commenters anticipate the need to hire new staff with particular expertise in order to calculate the required quantitative measurements (*e.g.,* collect data and make computations)? Do commenters anticipate the need to develop additional infrastructure to obtain and retain data necessary to compute the proposed quantitative measurements? Please explain and quantify your answers, to the extent feasible.

Question 174. For each individual quantitative measurement that is proposed:

- Is the use of the quantitative measurement to help distinguish between permitted and prohibited trading activities effective? If not, what alternative would be more effective? Does the quantitative measurement provide any additional information of value relative to other quantitative measurements proposed?
- Is the use of the quantitative measurement to help determine whether an otherwise-permitted trading activity is consistent with the requirement that such activity must not result, directly or indirectly, in a material exposure by the banking entity to high-risk assets and high-risk trading strategies effective? If not, what alternative would be more effective?
- What factors should be considered in order to further refine the proposed quantitative measurement to better distinguish prohibited proprietary trading from permitted trading activity? For example, should the timing of a calculation be considered significant in certain contexts (*e.g.,* should specific quantitative measurements be calculated during the middle of a trading day instead of at the end of the day)?
- If the quantitative measurement is proposed to be applied to a trading unit

that is engaged in activity pursuant to §§ ____.4(a), ____.5, or ____.6(a) of the proposed rule, is the quantitative measurement calculable in relation to such activity? Is the quantitative measurement useful for determining whether underwriting, risk-mitigating hedging, or trading in certain government obligations is resulting, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies?

- Is the description of the quantitative measurement sufficiently clear? What alternative would be more appropriate or clearer? Is the description of the quantitative measurement appropriate, or is it overly broad or narrow? If it is overly broad, what additional clarification is needed? Should the CFTC provide this additional clarification in the appendix's description of the quantitative measurement? If the description is overly narrow, how should it be modified to appropriately describe the quantitative measurement, and why?
- Is the general calculation guidance effective and sufficiently clear? If not, what alternative would be more effective or clearer? Is more or less specific calculation guidance necessary? If so, what level of specificity is needed to calculate the quantitative measurement? What are the different calculation options and methodologies that could be used to reach the desired level of specificity? What are the costs and benefits of these different options? If the proposed calculation guidance is not sufficiently specific, how should the calculation guidance be modified to reach the appropriate level of specificity? For example, rather than provide this level of specificity in proposed Appendix A, should the CFTC instead make each banking entity responsible for determining the best method of calculating the quantitative measurement at this level of specificity, based on the banking entity's business and profile, which would then be subject to supervision, review, or examination by the CFTC? If the proposed calculation guidance is overly specific, why is it too specific and how should the guidance be modified to reach the appropriate level of specificity?
- Is the general calculation guidance for the measurement consistent with how banking entities currently calculate the quantitative measurement, if they do so? If not, how does the proposed guidance differ from methodology currently used by banking entities? What is the purpose of the current calculation methodology used by banking entities?
- What operational or logistical challenges might be associated with performing the calculation of the quantitative measurement and obtaining any necessary informational inputs?
- Is the quantitative measurement not calculable for any specific type of trading unit? If so, what type of trading unit, and why is the quantitative measurement not calculable for that type of trading unit? Is there an alternative quantitative measurement that would reflect the same trading activity but not pose the same calculation difficulty? Are there particular challenges to documenting that a specific quantitative measurement is not calculable?
- Is the quantitative measurement substantially likely to frequently produce false negatives or false positives that suggest that prohibited proprietary trading is occurring when it is not, or vice versa? If so, why? If so, what alternative quantitative measurement would better help identify prohibited proprietary trading?
- Should the quantitative measurement better account for distinctions among trading activities, trading strategies, and asset classes? If so, how? For example, should the quantitative measurements better account for distinctions between trading activities in cash and derivatives markets? If so, how? Are there any other distinctions for which the quantitative measurements may need to account? If so, what distinctions, and why?
- Does the quantitative measurement provide useful information as applied to all types of trading activities, or only a certain subset of trading activities? If it only provides useful information for a subset of trading activities, how should this issue be addressed? How beneficial is the information that the quantitative measurement provides for this subset of trading activities? Do any of the other quantitative measurements provide the same level of beneficial information for this subset of trading activities? Should the quantitative measurement be required to be reported for all trading activities, only a relevant subset of trading activities, or not at all?
- Does the quantitative measurement provide useful information as applied to all asset classes, or only a certain subset of asset classes? If it only provides useful information for a subset of asset classes, how should this issue be addressed? How beneficial is the information the quantitative measurement provides for this subset of asset classes? Do any of the other quantitative measurements provide the same level of beneficial information for this subset of asset classes? Should the quantitative measurement be required to be reported for all asset classes, only a relevant subset of asset classes, or not at all?
- Is the calculation period effective and sufficiently clear? If not, what alternative would be more effective or clearer?
- How burdensome and costly would it be to calculate the measurement at the specified calculation frequency and calculation period? Are there any difficulties or costs associated with calculating the measurement for particular trading units? How significant are those potential costs relative to the potential benefits of the measurement in monitoring for impermissible proprietary trading? Are there potential modifications that could be made to the measurement that would reduce the burden or cost? If so, what are those modifications? Please quantify your answers, to the extent feasible.

Question 175. In light of the size, scope, complexity, and risk of covered trading activities, are there certain types of quantitative measurements that will not be appropriate for some types of banking entities, desks, or levels? If so, would it be appropriate to require only certain quantitative measurements for such banking entities, desks, or levels?

Question 176. How might the number of quantitative measurements impact behavior of banking entities? Is there a cost of requiring more quantitative measurements, such as the cost of increased uncertainty regarding the combined results of such quantitative measurements? To what extent and in what ways might uncertainty as to how the quantitative measurements are applied and evaluated impact behavior?

Proposed Appendix B—Commentary Regarding Identification of Permitted Market Making-Related Activities

Proposed Appendix B provides commentary that is intended to assist a banking entity in distinguishing permitted market making-related activities from trading activities that, even if conducted in the context of a banking entity's market making operations, would constitute prohibited proprietary trading. As noted in Part I of proposed Appendix B, the commentary applies to all banking entities that are engaged in market making-related activities in reliance on § ____.4(b) of the proposed rule. Part II of proposed Appendix B clarifies that all defined terms used in Appendix B have the meaning given those terms in §§ ____.2 and ____.3 of the proposed rule and Appendix A.

The commentary regarding identification of permitted market making-related activities, which is contained in Part III of proposed Appendix B, includes three principal components. The first component provides an overview of market making-related activities and describes, in detail, typical practices in which market makers engage and typical characteristics of market making-related activities, articulating the general framework within which the CFTC views market making-related activities.[202] For example, the commentary provides that market making-related activities, in the context of a banking entity acting as principal, generally involve either (i) in the case of market making in a security that is executed on an organized trading facility or exchange, passively providing liquidity by submitting resting orders that interact with the orders of others on an organized trading facility or exchange and acting as a registered market maker, where such exchange or organized trading facility provides the ability to register as a market maker, or (ii) in other cases, providing an intermediation service to its customers by assuming the role of a counterparty that stands ready to buy or sell a position that the customer wishes to sell or buy. The second component of the commentary provides an overview of prohibited proprietary trading activities, which describes the general framework within which the CFTC views prohibited proprietary trading and contrasts that activity to the practices and characteristics of market making-related activities.[203] The third component describes certain challenges that arise in distinguishing permitted market making-related activities and prohibited proprietary trading, particularly in cases in which both of these activities occur within the context of a market making operation,[204] and proposes guidance that the CFTC would apply in distinguishing permitted market making-related activities from prohibited proprietary trading. This guidance includes six factors that would cause a banking entity to be considered, absent explanatory circumstances, to be engaged in prohibited proprietary trading, and not permitted market making-related activity. The six factors are:

- Trading activity in which a trading unit retains risk in excess of the size and type required to provide intermediation services to customers; [205]
- Trading activity in which a trading unit primarily generates revenues from price movements of retained principal positions and risks, rather than customer revenues;
- Trading activity in which a trading unit: (i) Generates only very small or very large amounts of revenue per unit of risk taken; (ii) does not demonstrate consistent profitability; or (iii) demonstrates high earnings volatility;
- Trading activity in which a trading unit either (i) does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services, or (ii) holds principal positions in excess of reasonably expected near term customer demands;
- Trading activity in which a trading unit routinely pays rather than earns fees, commissions, or spreads; and
- The use of compensation incentives for employees of a particular trading activity that primarily reward proprietary risk-taking.[206]

The proposed commentary makes clear that the enumerated factors are subject to certain facts and circumstances that may explain why a trading activity may meet one or more factors but does not involve prohibited proprietary trading, and provides a range of examples of such explanatory facts and circumstances.[207] The CFTC emphasizes that these examples are not meant to be exhaustive, as a variety of other circumstances may exist to explain why a particular trading activity, even if meeting one of the factors, may nonetheless be a permitted market making-related activity.[208]

In addition, for each of these six factors, the proposed rule provides general guidance as to (i) the types of facts and circumstances on which the CFTC may base any determination that a banking entity's trading activity met the relevant factor and (ii) which quantitative measurements, if furnished by a banking entity pursuant to Appendix A, the CFTC would use to help assess the extent to which a banking entity's activities met the relevant factor.

The CFTC requests comment on the proposed commentary regarding identification of permitted market making-related activities. In particular, the CFTC requests comment on the following questions:

Question 177. Is the overview of permitted market making-related activities and prohibited proprietary trading proposed in Appendix B accurate? If not, what alternative overview would be more accurate? Does the overview appropriately account for differences in market making-related activities across different asset classes? If not, which type of market making-related activity does the overview not sufficiently describe or account for?

Question 177.1. Should the proposed CFTC Rule include the entire Appendix B (*e.g.,* description of market-making in liquid exchange-traded equity)? Please explain the rationale for including or excluding certain provisions of Appendix B in the proposed CFTC Rule.

Question 178. Is the requirement that a market maker engaged in market making that is executed on an exchange or an organized trading facility must be a registered market maker, provided the relevant exchange or organized trading facility provides the ability to register, appropriate, or is it over- or under-inclusive? Please discuss and provide detailed examples of any such markets where registering as a market maker is not feasible or should not be required for purposes of this rule, and

[202] *See* proposed rule Appendix B, § III.A. The practices and characteristics that are described generally reinforce and augment the specific requirements that a banking entity must meet in order to rely on the market-making exemption under § ____.4(b) of the proposed rule.

[203] *See* proposed rule Appendix B, § III.B.

[204] *See* proposed rule Appendix B, § III.C. Proposed Appendix B notes, for example, that it may be difficult to distinguish (i) inventory positions that appropriately support market making-related activities from (ii) positions taken for proprietary purposes. *See id.*

[205] For simplicity and ease of reading, the CFTC has used the term ''customer'' throughout the discussion of market making-related activity. However, as discussed in proposed Appendix B, a market maker's ''customers'' generally vary depending on the asset class and market in which the market maker is providing intermediation services. In the context of market making in a security that is executed on an organized trading facility or an exchange, a ''customer'' is any person on behalf of whom a buy or sell order has been submitted by a broker-dealer or any other market participant. In the context of market making in a covered financial position in an over-the-counter market, a ''customer'' generally would be a market participant that makes use of the market maker's intermediation services, either by requesting such services or entering into a continuing relationship with the market maker with respect to such services. In certain cases, depending on the conventions of the relevant market (*e.g.,* the over-the-counter derivatives market), such a ''customer'' may consider itself or refer to itself more generally as a ''counterparty.''

[206] *See* proposed rule Appendix B, § III.C.1–6. The CFTC notes that each of these six criteria is directly related to the overview of market making-related activities provided in section III.A. of proposed Appendix B.

[207] The proposed commentary does not contemplate explanatory facts and circumstances for the compensation incentives factor, given that the choice of compensation incentives provided to trading personnel is under the full control of the banking entity.

[208] The CFTC also notes that, although a particular trading activity may not meet the requirements applicable to permitted market making-related activities, it may still be exempt under another available exemption.

unregistered market makers provide similar services or perform similar functions.

Question 179. With respect to market making that is executed on an exchange or an organized trading facility, what potential impact or unintended consequences might result from limiting the market making exemption to registered market makers when the relevant exchange or organized trading facility registers market makers? Would such a requirement result in any potential decrease in the passive provision of liquidity by the submission of resting orders? Do you anticipate that any such decrease would be exacerbated in times of market stress? If yes, please describe the impact on liquidity and the marketplace in general. Please discuss whether and how any potential decrease in liquidity could be mitigated. In addition, would such a requirement result in additional costs that would be borne by market participants purchasing and selling on an exchange or organized trading facility? Please identify and discuss any other additional costs. Please discuss whether and how any such consequences can be mitigated.

Question 180. In addition to benefits discussed in the Supplementary Information, are there other benefits that would be achieved by requiring that a market maker be registered with respect to market making on an exchange or an organized trading facility? Is there a way to amplify these benefits? Could these benefits be realized through alternative means? If so, how?

Question 181. In addition to registered market makers on exchanges or organized trading facilities, what other classes of liquidity providers exist? Are their obligations and activities similar to, or different than those of registered market makers? If so, how? Are the compensated in a different manner?

Question 182. How much liquidity is provided by registered market makers versus other liquidity providers by asset class (*e.g.,* equities, *etc.*) with respect to trading on an exchange or an organized trading facility? The CFTC encourages commenters to provide data, or studies, in support of comments.

Question 183. Is there any specific element of market making-related activity that the overview does not take into account in its description of market making? If so, how should the overview account for this element? Are there any descriptions of market making-related activity in the overview that should not be considered to be market making-related activity? If so, why? Is there any specific element of prohibited proprietary trading activity that the overview does not take into account in its description of prohibited proprietary trading? If so, how should the overview account for this element? Are there any descriptions of prohibited proprietary trading activity in the overview that should not be considered to be prohibited proprietary trading? If so, why?

Question 184. Are each of the six factors specified for helping to distinguish permitted market making-related activity from prohibited proprietary trading appropriate? If not, how should they be changed, and why? Should any factors be eliminated or added? If so, which ones and why? Could any of the proposed factors occur as a result of the banking entity engaging in one of the other permitted activities (*e.g.,* underwriting, trading on behalf of customers)? If so, would the facts and circumstances that the CFTC proposes to consider be sufficient to determine and verify that the banking entity is not engaged in prohibited proprietary trading? If not, how should this issue be addressed?

Question 185. Are the facts and circumstances that would be used to determine whether a banking entity's activities satisfy a certain factor appropriate? If not, how should they be changed, and why? Should any be eliminated or added? If so, which ones, and why?

Question 186. Are the identified quantitative measurements that the CFTC would use to help assess a particular factor appropriate? If not, how should they be changed, and why? Should any be eliminated or added? If so, which ones, and why?

e. Incorporation of Numerical Thresholds in the Commentary Regarding Identification of Permitted Market Making-Related Activities

As noted above, the CFTC is currently requesting comment on whether to incorporate, as part of the proposed rule, numerical thresholds for certain quantitative measurements, and if so, how to do so. For example, the proposed rule could include one or more numerical thresholds that, if met by a banking entity, would require the banking entity to review its trading activities for compliance and summarize that review to the CFTC.

The primary purpose of using some form of threshold would be to provide banking entities with a clear standard regarding trading activity that presented a quantitative profile sufficiently questionable to warrant further review and explanation to the CFTC. Such clarity would appear to provide significant benefits both to banking entities in conducting their trading activities in conformance with the proposed rule and to the CFTC in monitoring trading activities and obtaining additional, more detailed information in circumstances warranting closer scrutiny. In addition to the benefits of transparency, thresholds would also encourage consistent review by banking entities and the CFTC of transactions, both within a banking entity and across all banking entities. The purpose of such thresholds would not be to serve as bounds of permitted conduct or as a comprehensive, dispositive tool for determining whether prohibited proprietary trading has occurred.

Numerical thresholds have not been included in the proposed rule because the CFTC believes that public comment and further review is warranted before numerical thresholds and specific numerical amounts may be proposed. Instead, the CFTC requests comment on whether such thresholds would be desirable and, if so, what particular form such thresholds should take and what specific numerical thresholds would be appropriate. To facilitate the comment process, this request for comment includes a number of illustrative examples of numerical thresholds on which specific comment is sought.

In particular, the CFTC requests comment on the following questions:

Question 187. What are the potential benefits and costs of incorporating into the proposed rule one or more numerical thresholds for certain quantitative measurements that, if reported by a banking entity, would require the banking entity to review its trading activities for compliance and summarize that review to the CFTC? Would such thresholds provide useful clarity to banking entities and/or market participants regarding the types of trading activities that merit additional scrutiny? Should numerical thresholds be used for any purposes other than highlighting trading activities that should be reviewed, the results of which would be reported to the CFTC? If so, for what purpose, and how and why?

Question 188. For which of the relevant quantitative measurements might it be appropriate and effective to include a numerical threshold that would trigger banking entity review and explanation? How should a numerical threshold be formulated, and why? Should a numerical threshold for a single quantitative measurement be applied individually, or should the threshold instead be triggered by exceeding some combination of numerical thresholds for different

measurements? For any particular threshold, what numerical amount should be used, and why? How would such numerical amount be consistent with a level at which further review and explanation is warranted? Should the amount vary by asset class or other characteristic? If so, how?

Question 189. For each of the following illustrative examples of potential thresholds, is the threshold formulated effectively? If not, what alternative formulation would be more effective? Should the threshold formulation vary by asset class or other characteristic? If so, how and why? If the threshold was utilized, what actual numerical amount should be specified, and why? How would such numerical amount be consistent with a level at which further review and explanation is warranted? Should the numerical amount vary by asset class or other characteristic? If so, how and why?

- ''If a trading unit reports an increase in VaR, Stress VaR, or Risk Factor Sensitivities greater than [____] over a period of [____] months, or such other threshold as the CFTC may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to the CFTC a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports an average Comprehensive Profit and Loss that is less than [____] times greater than the Portfolio Profit and Loss, exclusive of Spread Profit and Loss, for [____] consecutive months, or such other threshold as the CFTC may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to the CFTC a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports a Comprehensive Profit and Loss to Volatility Ratio that is less than [____] times greater than that trading desk's Portfolio Profit and Loss to Volatility Ratio over a period of [____] months, or such other threshold as the CFTC may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to the CFTC a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports a number of Unprofitable Trading Days Based on Portfolio Profit and Loss that is less than [____] times greater than the number of Unprofitable Trading Days Based on Comprehensive Profit and Loss for [____] consecutive months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports a Pay-to-Receive Spread Ratio that is less than [____] over a period of [____] months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''

6. Section ____.8: Limitations on permitted trading activities

Section ____.8 of the proposed rule implements section 13(d)(2) of the BHC Act, which places certain limitations on the permitted trading activities (*e.g.,* permitted market making-related activities, risk-mitigating hedging, *etc.*) in which a banking entity may engage.[209] Consistent with the statute, § ____.8(a) of the proposed rule provides that no transaction, class of transactions, or activity is permissible under §§ ____.4 through ____.6 of the proposed rule if the transaction, class of transactions, or activity would:

- Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;
- Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or
- Pose a threat to the safety and soundness of the banking entity or U.S. financial stability.

The proposed rule further defines ''material conflict of interest,'' ''high-risk asset,'' and ''high-risk trading strategy'' for these purposes.

a. Scope of ''Material Conflict of Interest''

Section ____.8(b) of the proposed rule defines the scope of material conflicts of interest which, if arising in connection with a permitted trading activity, are prohibited under the proposal.[210] Conflicts of interest may arise in a variety of circumstances related to permitted trading activities. For example, a banking entity may acquire substantial amounts of nonpublic information about the financial condition of a particular company or issuer through its lending, underwriting, investment advisory or other activities which, if improperly transmitted to and used in trading operations, would permit the banking entity to use such information to its customers', clients' or counterparties' disadvantage. Similarly, a banking entity may conduct a transaction that places the banking entity's own interests ahead of its obligations to its customers, clients or counterparties, or it may seek to gain by treating one customer involved in a transaction more favorably than another customer involved in that transaction. Concerns regarding conflicts of interest are likely to be elevated when a transaction is complex, highly structured or opaque, involves illiquid or hard-to-value instruments or assets, requires the coordination of multiple internal groups (such as multiple trading desks or affiliated entities), or involves a significant asymmetry of information or transactional data among participants.[211] In all cases, the existence of a material conflict of interest depends on the specific facts and circumstances.

To address these types of material conflicts of interest, § ____.8(b) of the proposed rule specifies that a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, unless the banking entity has appropriately addressed and mitigated the conflict of interest, where possible, and subject to specific requirements provided in the proposal, through either (i) timely and effective disclosure, or (ii) informational barriers.[212] Unless the conflict of interest is addressed and mitigated in one of the two ways specified in the proposal, the related transaction, class of transactions or

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[209] *See* 12 U.S.C. 1851(d)(2).

[210] Section ____.17(b) of the proposed rule defines the scope of material conflicts of interest which, if arising in connection with permitted covered fund activities, are prohibited.

[211] *See, e.g.,* U.S. Senate Permanent Subcommittee on Investigations, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse (Apr. 13, 2011), *available at http://hsgac.senate.gov/public/__files/Financial__Crisis/FinancialCrisisReport.pdf.*

[212] *See* proposed rule § ____.8(b)(1).

activity would be prohibited under the proposed rule, notwithstanding the fact that it may be otherwise permitted under §§ ____.4 through ____.6 of the proposed rule.[213]

However, while these conflicts may be material for purposes of the proposed rule, the mere fact that the buyer and seller are on opposite sides of a transaction and have differing economic interests would not be deemed a ''material'' conflict of interest with respect to transactions related to *bona fide* underwriting, market making, risk-mitigating hedging or other permitted activities, assuming the activities are conducted in a manner that is consistent with the proposed rule and securities and banking laws and regulations.

Section ____.8(b)(1) of the proposed rule describes the two requirements that must be met in cases where a banking entity addresses and mitigates a material conflict of interest through timely and effective disclosure. First, § ____.8(b)(1)(i) of the proposed rule requires that the banking entity, *prior* to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, for which a conflict may arise, make clear, timely, and effective disclosure of the conflict or potential conflict of interest, together with any other necessary information.[214] This would also require such disclosure to be provided in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest.[215] Disclosure that is only general or generic, rather than specific to the individual, class, or type of transaction or activity, or that omits details or other information that would be necessary to a reasonable client's, customer's, or counterparty's understanding of the conflict of interest, would not meet this standard. Second, § ____.8(b)(1)(ii) of the proposed rule requires that the disclosure be made explicitly and effectively, and in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty that was created or would be created by the conflict or potential conflict.[216]

The CFTC notes that, in order to provide the requisite opportunity for the client, customer or counterparty to negate or substantially mitigate the disadvantage created by the conflict, the disclosure would need to be provided sufficiently close in time to the client's, customer's, or counterparty's decision to engage in the transaction or activity to give the client, customer, or counterparty an opportunity to meaningfully evaluate and, if necessary, take steps that would negate or substantially mitigate the conflict. Disclosure provided far in advance of the individual, class, or type of transaction, such that the client, customer, or counterparty is unlikely to take that disclosure into account when evaluating a transaction, would not suffice. Conversely, disclosure provided without a sufficient period of time for the client, customer, or counterparty to evaluate and act on the information it receives, or disclosure provided after the fact, would also not suffice under the proposal. The CFTC notes that the proposed definition would not prevent or require disclosure with respect to transactions or activities that align the interests of the banking entity with its clients, customers, or counterparties or that otherwise do not involve ''material'' conflicts of interest as discussed above.

The proposed disclosure standard reflects the fact that some types of conflicts may be appropriately resolved through the disclosure of clear and meaningful information to the client, customer, or counterparty that provides such party with an informed opportunity to consider and negate or substantially mitigate the conflict. However, in the case of a conflict in which a client, customer, or counterparty does not have sufficient information and opportunity to negate or mitigate the materially adverse effect on the client, customer, or counterparty created by the conflict, the existence of that conflict of interest would prevent the banking entity from availing itself of any exemption (*e.g.,* the underwriting or market-making exemptions) with respect to the relevant transaction, class of transactions, or activity. The CFTC notes that the proposed disclosure provisions are provided solely for purposes of the proposed rule's definition of material conflict of interest, and do not affect a banking entity's obligation to comply with additional or different disclosure or other requirements with respect to a conflict under applicable securities, banking, or other laws (*e.g.,* section 27B of the Securities Act, which governs conflicts of interest relating to certain securitizations; section 206 of the Investment Advisers Act of 1940, which governs conflicts of interest between investment advisers and their clients; or 12 CFR 9.12, which applies to conflicts of interest in the context of a national bank's fiduciary activities).

Section ____.8(b)(2) of the proposed rule describes the requirements that must be met in cases where a banking entity uses information barriers that are reasonably designed to prevent a material conflict of interest from having a materially adverse effect on a client, customer or counterparty. Information barriers can be used to restrict the dissemination of information within a complex organization and to prevent material conflicts by limiting knowledge and coordination of specific business activities among units of the entity. Examples of information barriers include, but are not limited to, restrictions on information sharing, limits on types of trading, and greater separation between various functions of the firm. Information barriers may also require that banking entity units or affiliates have no common officers or employees. Such information barriers have been recognized in Federal securities laws and rules as a means to address or mitigate potential conflicts of interest or other inappropriate activities.[217]

In order to address and mitigate a conflict of interest through the use of the information barriers pursuant to § ____.8(b)(2) of the proposed rule, a banking entity would be required to establish, maintain, and enforce information barriers that are memorialized in written policies and procedures, including physical separation of personnel, functions, or limitations on types of activity, that are reasonably designed, taking into

[213] The CFTC notes that a banking entity subject to Appendix C must implement a compliance program that includes, among other things, policies and procedures that explain how the banking entity monitors and prohibits conflicts of interest with clients, customers, and counterparties. Further, as noted in the discussion of the definition of ''material conflict of interest'' in Part III.B.6 of this Supplemental Information, the discussion of that definition is provided solely for purposes of the proposed rule's definition of material conflict of interest, and does not affect the scope of that term in other contexts or a banking entity's obligation to comply with additional or different requirements with respect to a conflict under applicable securities, banking, or other laws (*e.g.,* section 27B of the Securities Act, which governs conflicts of interest relating to certain securitizations; section 206 of the Investment Advisers Act of 1940, which applies to conflicts of interest between investment advisers and their clients; or 12 CFR 9.12, which applies to conflicts of interest in the context of a national bank's fiduciary activities).

[214] *See* proposed rule § ____.8(b)(1)(A).

[215] *See id.*

[216] *See* proposed rule § ____.8(b)(1)(B).

[217] For example, information barriers have been used in complying with the requirement in section 15(g) of the Exchange Act that registered brokers and dealers establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.

consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer or counterparty.[218] Importantly, the proposed rule also provides that, notwithstanding a banking entity's establishment of such information barriers, if the banking entity knows or should reasonably know that a material conflict of interest arising out of a specific transaction, class or type of transactions, or activity may involve or result in a materially adverse effect on a client, customer, or counterparty, the banking entity may not rely on those information barriers to address and mitigate any conflict of interest. In such cases, the transaction or activity would be prohibited, unless the banking entity otherwise complies with the requirements of § ____.8(b)(1).[219] This aspect of the proposal is intended to make clear that, in specific cases in which a banking entity has established an information barrier but knows or should reasonably know that it has failed or will fail to prevent a conflict of interest arising from a specific transactions or activity that disadvantages a client, customer, or counterparty, the information barrier is insufficient to address that conflict and the transaction would be prohibited, unless the banking entity is otherwise able to address and mitigate the conflict through timely and effective disclosure under the proposal.[220]

The CFTC notes that the proposed definition of material conflict of interest does not address instances in which a banking entity has made a material misrepresentation to its client, customer, or counterparty in connection with a transaction, class of transactions, or activity, as such transactions or activity appears to involve fraud rather than a conflict of interest. However, the CFTC notes that such misrepresentations are generally illegal under a variety of Federal and State regulatory schemes (*e.g.,* the Federal securities laws). In addition, the CFTC notes that any activity involving a material misrepresentation to, or other fraudulent conduct with respect to, a client, customer, or counterparty would not be permitted under the proposed rule in the first instance. For example, a trading activity involving a material misrepresentation to a client, customer, or counterparty would fail, on its face, to satisfy the proposed terms of the underwriting or market-making exemption.

b. Definition of ''High-Risk Asset'' and ''High-Risk Trading Strategy''

Section ____.8(c) of the proposed rule defines ''high-risk asset'' and ''high-risk trading strategy'' for proposes of § ____.8's proposed limitations on permitted trading activities. Section ____.8(c)(1) defines a ''high-risk asset'' as an asset or group of assets that would, if held by the banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would fail. Section ____.8(c)(2) defines a ''high-risk trading strategy'' as a trading strategy that would, if engaged in by the banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would fail.[221]

c. Request for Comment

The CFTC requests comment on the proposed limitations on permitted trading activities. In particular, the CFTC requests comment on the following questions:

Question 190. Is the manner in which the proposed rule implements the limitations of section 13(d)(2) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer?

Question 191. Is the proposed rule's definition of material conflict of interest effective and sufficiently clear? If not, what alternative would be more effective and/or clearer?

Question 192. Is the proposed definition of material conflict of interest over- or under-inclusive? If so, how should the definition be broader or narrower? Is there an alternative definition that would be appropriate? If so, what definition? Why would that alternative definition better define material conflict of interest for purposes of implementing section 13 of the BHC Act?

Question 193. Would the proposed definition of material conflict of interest have any unintended chilling effect on underwriting, market making, risk-mitigating hedging or other permitted activities? If so, what alternatives might limit such an effect?

Question 194. Would the proposed definition of material conflict of interest lead to unintended consequences? If so, what unintended consequences and why? Please suggest modifications to the proposed definition that would mitigate those consequences.

Question 195. Is it likely that the proposed definition of material conflict of interest would anticipate all future material conflicts of interest, particularly as the financial markets evolve and change? If not, what alternative definition would better anticipate future material conflicts of interest?

Question 196. Does the proposed rule provide sufficient guidance for determining when a material conflict of interest exists? If not, what additional detail should be provided? Should the CFTC adopt an approach similar to that under the securities laws, in which a material conflict of interest is not specifically defined?

Question 197. Are there transactions, classes or types of transactions, or activities inherent in underwriting, market-making, risk-mitigating hedging or other permitted activities that should not be prohibited but may be captured by the proposed definition of material conflict of interest? If so, what transactions and activities? Should they be permitted under the proposed rule? If so, why and under what conditions, if any? Conversely, are there transactions or activities that would be permitted under the proposed rule that should be prohibited? If so, what transactions and activities? Why should they be prohibited under the proposed rule?

Question 198. Please discuss the inherent conflicts of interest that arise from *bona fide* underwriting, market making-related activity, risk-mitigating hedging, or any other permitted activity, and provide specific examples of such inherent conflicts. Do you believe that such conflicts ever result in a materially

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[218] *See* proposed rule § ____.8(b)(2). As part of maintaining and enforcing information barriers, a banking entity should have processes to review, test, and modify information barriers on a continuing basis. In addition, banking entities should have ongoing monitoring to maintain and to enforce information barriers, for example by identifying whether such barriers have not prevented unauthorized information sharing and addressing instances in which the barriers were not effective. This may require both remediating any identified breach as well as updating the information barriers to prevent further breaches, as necessary. Periodic assessment of the effectiveness of information barriers and periodic review of the written policies and procedures are also important to the maintenance and enforcement of effective information barriers and reasonably designed policies and procedures. Such assessments can be done either (i) internally by a qualified employee or (ii) externally by a qualified independent party.

[219] *See* proposed rule § ____.8(b)(2).

[220] In addition, if a conflict occurs to the detriment of a client, customer, or counterparty despite an information barrier, the CFTC would also expect the banking entity to review the effectiveness of its information barrier and make adjustments, as necessary, to avoid future occurrences, or review whether such information barrier is appropriate for that type of conflict.

[221] The CFTC notes that a banking entity subject to proposed Appendix C must implement a compliance program that includes, among other things, policies and procedures that explain how the banking entity monitors and prohibits exposure to high-risk assets and high-risk trading strategies, and identifies a variety of assets and strategies (*e.g.,* assets or strategies with significant embedded leverage).

adverse interest between a banking entity and a client, customer, or counterparty? How should the proposal address inherent conflicts that result from otherwise-permitted activities?

Question 199. Is the manner in which the proposed rule permits the use of disclosure in certain cases to address and mitigate conflicts of interest appropriate? Why or why not? Should additional or alternative requirements be placed on the use of disclosure to address and mitigate conflicts? If so, what additional and alternative requirements, and why? Is the level of detail and specificity required by the proposed rule with respect to disclosure appropriate? If not, what alternative level of detail and specificity would be more appropriate?

Question 200. Should the proposed rule require written disclosure to a client, customer, or counterparty regarding a material conflict of interest? If so, please explain why written disclosure should be required. Are there certain circumstances where written disclosure should be required, but others where oral disclosure should be sufficient? For example, should oral disclosure be permitted for transactions in certain fast-moving markets or transactions with sophisticated clients, customers, or counterparties? If oral disclosure is permitted under certain circumstances, should subsequent written disclosure be required? Please explain.

Question 201. Should the proposed rule provide further detail regarding the types of conflicts of interest that cannot be addressed and mitigated through disclosure? If so, what type of additional detail would be helpful, and why? Should the proposed rule enumerate an exhaustive or non-exhaustive list of conflicts that cannot be addressed and mitigated through disclosure? If so, what conflicts should that list include, and why?

Question 202. Should the proposed rule provide further detail regarding the frequency at which disclosure must be made? Should general disclosure be permitted for certain types of transactions, classes of transactions, or activities? For example, should a banking entity be permitted to make a one-time, written disclosure to a client, customer, or counterparty prior to engaging in a certain type of transaction or activity? Should general disclosure be permitted for certain types of clients, customers, or counterparties (*e.g.,* highly sophisticated parties)? Please explain why specific disclosure (*i.e.,* prior to each transaction, class of transaction, or activity) would not be necessary under the identified circumstances. Are there any clients, customers, or counterparties that should be able to waive a material conflict of interest under certain circumstances? If so, under what circumstances would a waiver approach be appropriate and consistent with the statute? Please explain.

Question 203. Should the proposed definition of material conflict of interest deem certain potential conflicts of interest to not be material conflicts of interest if a banking entity establishes, maintains, and enforces policies and procedures (other than information barriers) reasonably designed to prevent transactions, classes of transactions, or activities that would involve or result in a material conflict of interest? If so, for what types of potential conflicts? What policies and procedures would be appropriate? How would this approach be consistent with the purpose and language of the statute? Should such policies and procedures only be considered effective if they prevent the banking entity from receiving an advantage to the disadvantage of the client, customer, or counterparty?

Question 204. Are there any particular types of clients, customers, or counterparties for whom disclosure of a material conflict of interest should not be required under the proposal, consistent with the statute? Please identify the types of clients, customers, or counterparties for whom disclosure might not be necessary and explain. Why might disclosures be useful for some clients, customers, or counterparties, but not others? Please explain. What characteristics should a firm use in determining whether or not a client, customer, or counterparty needs a particular disclosure?

Question 205. Are there additional steps that a banking entity that seeks to manage conflicts of interest through the use of disclosure should be required to take with regard to disclosure? If so, what steps?

Question 206. Are there circumstances in which disclosure might be impracticable or ineffective? If so, what circumstances, and why?

Question 207. Is the manner in which the proposed rule permits the use of information barriers to address and mitigate conflicts of interest appropriate? Why or why not? Should additional or alternative requirements be placed on the use of information barriers to address and mitigate conflicts? If so, what additional and alternative requirements, and why?

Question 208. Should the proposed rule mandate the use of other means of managing potential conflicts of interest? If so, what specific means should be considered? How effective are any such methods as currently used? Can such methods be circumvented? If so, in what ways?

Question 209. What burdens or costs might be associated with the disclosure-related or information barrier-related requirements contained in the proposed definition of material conflict of interest? How might these burdens or costs be eliminated or reduced in a manner consistent with the purpose and language of section 13 of the BHC Act?

Question 210. Are there specific transactions, classes of transactions or activities that should be managed through consent? If so, what transactions or activities, and why? What form of consent should be required? What level of detail should any such consent include? Should consent only apply to certain conflicts and not others? If so, which conflicts? Are there circumstances in which obtaining consent might be impracticable or ineffective? Should consent be limited to certain types of clients, customers, or counterparties? If so, which clients, customers, or counterparties? Are there certain types of clients, customers, or counterparties for whom consent would never be sufficient? Are there additional steps that a banking entity that seeks to manage conflicts of interest through the use of consent should be required to take? Please specify such steps.

Question 211. What is the potential relationship between, and interplay of, the proposed rule and Section 621 of the Dodd-Frank Act regarding conflicts of interest relating to certain securitizations which contains a prohibition on material conflicts of interest?

Question 212. Should the proposed rule provide for specific types of procedures that would be more effective in managing and mitigating conflicts of interest than others? Do banking entities currently use certain procedures that effectively manage and mitigate material conflicts of interest? If so, please describe such procedures and explain why such procedures are effective. Is the proposed rule consistent with such procedures? Why or why not? What are the costs and benefits of modifying your current procedures in response to the proposed rule?

Question 213. Is the proposed rule's definition of a high-risk asset effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should the proposed rule specify particular assets that are deemed high-risk *per se*? If so, what assets and why?

Question 214. Is the proposed rule's definition of a high-risk trading strategy effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should the proposed rule specify particular trading strategies that are deemed high-risk *per se*? If so, what trading strategies and why?

C. Subpart C—Covered Fund Activities and Investments

As noted above, except as otherwise permitted, section 13(a)(1)(B) of the BHC Act prohibits a banking entity from acquiring or retaining any ownership in, or acting as sponsor to, a covered fund.[222] Subpart C of the proposed rule applies those portions of section 13 of the BHC Act that operate as a prohibition or restriction on a banking entity's ability, as principal, directly or indirectly, to acquire or retain an ownership interest in, act as sponsor to, or have certain relationships with, a covered fund. Subpart C also implements the permitted activity and investment authorities provided for under section 13(d)(1) of the BHC Act related to covered fund activities and investments, as well as the rule of construction related to the sale and securitization of loans under section 13(g)(2) of that Act. Additionally, subpart C contains a discussion of the internal controls, reporting and recordkeeping requirements applicable to covered fund activities and investments, and incorporates by reference the minimum compliance standards for banking entities contained in subpart D of the proposed rule, as well as Appendix C, to the extent applicable.

1. Section ____.10: Prohibition of Acquisition or Retention of Ownership Interests in, and Certain Relationships With, a Covered Fund

Section ____.10 of the proposed rule defines the scope of the prohibition on acquisition or retention of ownership interests in, and certain relationships with, a covered fund, as well as defines a number of key terms related to such prohibition.

a. Prohibition Regarding Covered Fund Activities and Investments

Section ____.10(a) of the proposed rule implements section 13(a)(1)(B) of the BHC Act and prohibits a banking entity from, as principal, directly or indirectly, acquiring or retaining an equity, partnership, or other ownership interest in, or acting as sponsor to, a covered fund, unless otherwise permitted under subpart C of the proposed rule.[223] This prohibition reflects the statute's purpose and effect of limiting a banking entity's ability to invest in or have exposure to a covered fund.

The CFTC notes that the general prohibition in § ____.10(a) of the proposed rule applies solely to a banking entity's acquisition or retention of an ownership interest in or acting as sponsor to a covered fund ''as principal, directly or indirectly.'' [224] As such, the proposed rule would not prohibit the acquisition or retention of an ownership interest (including a general partner or membership interest) in a covered fund: (i) By a banking entity in good faith in a fiduciary capacity, except where such ownership interest is held under a trust that constitutes a company as defined in section (2)(b) of the BHC Act; (ii) by a banking entity in good faith in its capacity as a custodian, broker, or agent for an unaffiliated third party; (iii) by a ''qualified plan,'' as that term is defined in section 401 of the Internal Revenue Code of 1956 (26 U.S.C. 401), if the ownership interest would be attributed to a banking entity solely by operation of section 2(g)(2) of the BHC Act; or (iv) by a director or employee of a banking entity who acquires the interest in his or her personal capacity and who is directly engaged in providing advisory or other services to the covered fund, unless the banking entity, directly or indirectly, extended credit for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the credit was used to acquire such ownership interest in the fund.

Among other things, § ____.10(b) of the proposed rule defines the term ''covered fund.'' [225] This definition explains the universe of entities to which the prohibition contained in § ____.10(a) applies unless the activity is specifically permitted under an available exemption contained in subpart C of the proposed rule. Other related terms, including ''ownership interest,'' ''prime brokerage transaction,'' ''sponsor,'' and ''trustee,'' are in turn defined in §§ ____.10(b)(2) through ____.10(b)(6) of the proposed rule.

b. ''Covered Fund'' and Related Definitions

i. Definition of ''Covered Fund''

Section 13(h)(2) of the BHC Act defines the terms ''hedge fund'' and ''private equity fund'' to mean ''any issuer that would be an investment company, as defined in the [Investment Company Act], but for section 3(c)(1) or 3(c)(7) of that Act,'' or such similar funds as the Agencies may by rule determine.[226] Given that the statute defines a ''hedge fund'' and ''private equity fund'' synonymously, the proposed rule implements this statutory definition by combining the terms into the definition of a ''covered fund.'' [227]

Sections 3(c)(1) and 3(c)(7) of the Investment Company Act are exclusions from the definition of ''investment company'' in that Act and are commonly relied on by a wide variety of entities that would otherwise be covered by the broad definition of ''investment company'' contained in that Act. As a result, the statutory definition in section 13(h)(2) of the BHC Act could potentially include within its scope many entities and corporate structures that would not usually be thought of as a ''hedge fund'' or ''private equity fund.'' For instance, joint ventures, acquisition vehicles, certain wholly-owned subsidiaries, and other widely-utilized corporate structures typically rely on the exclusion contained in section 3(c)(1) or 3(c)(7) of the Investment Company Act. These types of entities are generally not used to engage in investment or trading activities. Additionally, as noted in Part II.H of this Supplementary Information, certain securitization vehicles may be included in this definition.

The proposed rule follows the scope of the statutory definition by covering an issuer only if it would be an investment company, as defined in the Investment Company Act, *but for* section 3(c)(1) or 3(c)(7) of that Act.[228]

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[222] *See* 12 U.S.C. 1851(a)(1)(B).

[223] *See* proposed rule § ____.10(a).

[224] The CFTC notes that this language is intended to prevent a banking entity from evading the restrictions contained in section 13(a)(1)(B) of the BHC Act on acquiring or retaining an ownership interest in a covered fund.

[225] *See* proposed rule § ____.10(b)(1). The term banking entity, which is discussed above in Part III.A.2 of this Supplementary Information, is defined in § ____.2(e).

[226] 12 U.S.C. 1851(h)(2). Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, in relevant part, provide two exclusions from the definition of ''investment company'' for, as appropriate, (1) any issuer whose outstanding securities are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities (other than short-term paper), or (2) any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time proposes to make a public offering of such securities. *See* 15 U.S.C. 80a–3(c)(1) and (c)(7).

[227] *See* proposed rule § ____.10(b)(1).

[228] *See* proposed rule § ____.10(b)(1)(i). Under the proposed rule, if an issuer (including an issuer of asset-backed securities) may rely on another exclusion or exemption from the definition of ''investment company'' under the Investment

Additionally, the proposed rule incorporates the statutory application of the rule to ''such similar funds as the Agencies may determine by rule as provided in section 13(b)(2) of the BHC Act.'' [229] The CFTC has proposed to include as ''similar funds'' a commodity pool,[230] as well as the foreign equivalent of any entity identified as a ''covered fund.'' [231] These entities have been included in the proposed rule as ''similar funds'' given that they are generally managed and structured similar to a covered fund, except that they are not generally subject to the Federal securities laws due to the instruments in which they invest or the fact that they are not organized in the United States or one or more States.

ii. Definition of ''Ownership Interest''

The proposed rule defines ''ownership interest'' in order to make clear the scope of section 13(a)(1)(B) of the BHC Act and § ____.10(a)'s prohibition on a banking entity acquiring or retaining any equity, partnership, or other ownership interest in a covered fund. The definition of ownership interest includes a description of what interests constitute an ownership interest, as well as an exclusion from the definition of ownership interest for carried interest.[232] The proposed rule defines ownership interest to mean, with respect to a covered fund, any equity, partnership, or other similar interest (including, without limitation, a share, equity security, warrant, option, general partnership interest, limited partnership interest, membership interest, trust certificate, or other similar interest) in a covered fund, whether voting or nonvoting, as well as any derivative of such interest. This definition focuses on the attributes of the interest and whether it provides a banking entity with economic exposure to the profits and losses of the covered fund, rather than its form. To the extent that a debt security or other interest of a covered fund exhibits substantially the same characteristics as an equity or other ownership interest (*e.g.,* provides the holder with voting rights, the right or ability to share in the covered fund's profits or losses, or the ability, directly or pursuant to a contract or synthetic interest, to earn a return based on the performance of the fund's underlying holdings or investments), the Agencies could consider such instrument an ownership interest as an ''other similar instrument.''

Many banking entities that serve as investment adviser or commodity trading advisor to a covered fund are compensated for services they provide to the fund through receipt of so-called ''carried interest.'' In recognition of the manner in which such compensation is traditionally provided, the proposed rule also clarifies that an ownership interest with respect to a covered fund does not include an interest held by a banking entity (or an affiliate, subsidiary or employee thereof) in a covered fund for which the banking entity (or an affiliate, subsidiary or employee thereof) serves as investment manager, investment adviser or commodity trading advisor, so long as: (i) The sole purpose and effect of the interest is to allow the banking entity (or the affiliate, subsidiary or employee thereof) to share in the profits of the covered fund as performance compensation for services provided to the covered fund by the banking entity (or the affiliate, subsidiary or employee thereof), provided that the banking entity (or the affiliate, subsidiary or employee thereof) may be obligated under the terms of such interest to return profits previously received; (ii) all such profit, once allocated, is distributed to the banking entity (or the affiliate, subsidiary or employee thereof) promptly after being earned or, if not so distributed, the reinvested profit of the banking entity (or the affiliate, subsidiary or employee thereof) does not share in the subsequent profits and losses of the covered fund; (iii) the banking entity (or the affiliate, subsidiary or employee thereof) does not provide funds to the covered fund in connection with acquiring or retaining this carried interest; and (iv) the interest is not transferable by the banking entity (or the affiliate, subsidiary or employee thereof) except to an affiliate or subsidiary.[233] The proposed rule therefore permits a banking entity to receive an interest as performance compensation for services provided by it or one of its affiliates, subsidiaries, or employees to a covered fund, but only if the enumerated conditions are met.

iii. Definition of ''Prime Brokerage Transaction''

Section 13(f)(3) of the BHC Act permits a banking entity to enter into a prime brokerage transaction with a covered fund in which a covered fund managed, organized, or sponsored by such banking entity (or an affiliate or subsidiary thereof) has taken an ownership interest.[234] However, section 13 of the BHC Act does not define what qualifies as a prime brokerage transaction. In order to provide clarity regarding the types of services and relationships that are permitted as a prime brokerage transaction, the proposed rule defines a ''prime brokerage transaction'' to mean one or more products or services provided by a banking entity to a covered fund, such as custody, clearance, securities borrowing or lending services, trade execution, or financing, data, operational, and portfolio management support.[235]

iv. Definition of ''Sponsor'' and ''Trustee''

The proposed rule defines ''sponsor'' in the same manner as section 13(h)(5) of the BHC Act.[236] Section ____.10(b)(5) of the proposed rule defines the term ''sponsor'' as an entity that: (i) serves as a general partner, managing member, trustee, or commodity pool operator of a covered fund; (ii) in any manner selects or controls (or has employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or (iii) shares with a covered fund, for the corporate, marketing, promotional, or other purposes, the same name or a variation of the same name.[237]

The definition of ''sponsor'' contained in section 13(h)(5) of the BHC Act focuses on the ability to control the decision-making and operational

Company Act other than the exclusions contained in section 3(c)(1) or 3(c)(7) of that Act, it would not be considered a covered fund, as long as it can satisfy all of the conditions of an alternative exclusion or exemption for which it is eligible.

[229] 12 U.S.C. 1851(b)(2).

[230] ''Commodity pool'' is defined in the Commodity Exchange Act to mean any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any: (i) Commodity for future delivery, security futures product, or swap; (ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or 2(c)(2)(D)(i) of the Commodity Exchange Act; (iii) commodity option authorized under section 4c of the Commodity Exchange Act; or (iv) leverage transaction authorized under section 23 of the Commodity Exchange Act. *See* 7 U.S.C. 1a(10).

[231] *See* proposed rule § ____.10(b)(1)(iii). The proposed rule makes clear that any issuer, as defined in section 2(a)(22) of the Investment Company Act, (15 U.S.C. 80a–2(a)(22)), that is organized or offered outside of the United States, would qualify as a covered fund if, were it organized or offered under the laws, or offered for sale or sold to a resident, of the United States or of one or more States, it would be either: (i) An investment company, as defined in the Investment Company Act, *but for* section 3(c)(1) or 3(c)(7) of that Act; (ii) a commodity pool; or (iii) any such similar fund as the appropriate Federal banking agencies, the SEC, and the CFTC may determine, by rule, as provided in section 13(b)(2) of the BHC Act.

[232] *See* proposed rule § ____.10(b)(3).

[233] *See* proposed rule § ____.10(b)(3)(ii).

[234] *See* 12 U.S.C. 1851(f)(3).

[235] *See* proposed rule § ____.10(b)(4).

[236] *See* 12 U.S.C. 1851(h)(5).

[237] *See* proposed rule § ____.10(b)(5).

functions of the fund. In keeping with this focus, the proposed rule defines the term ''trustee'' (which is a part of the definition of ''sponsor'') to exclude trustee that does not exercise investment discretion with respect to a covered fund, including a directed trustee, as that term is used in section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)). The proposed rule provides that a ''trustee'' includes any banking entity that directs a directed trustee, or any person who possesses authority and discretion to manage and control the assets of the covered fund.[238]

v. Request for Comment

The CFTC requests comment on the proposed rule's approach to defining the terms covered fund, ownership interest, and other related terms. In particular, the CFTC requests comment on the following questions:

Question 215. Is the proposed rule's approach to applying section 13 of the BHC Act's restrictions related to covered fund activities and investments to those instances where a banking entity acts ''as principal or beneficial owner'' effective? If not, why? What alternative approach might be more effective in light of the language and purpose of the statute?

Question 216. Does the proposed rule effectively address the circumstances under which an investment by a director or employee of a banking entity in a covered fund would be attributed to a banking entity? If not, why? What alternative might be more effective?

Question 217. Does the proposed rule's definition of ''covered fund'' effectively implement the statute? What alternative definitions might be more effective in light of the language and purpose of the statute?

Question 218. Is specific inclusion of commodity pools within the definition of ''covered fund'' effective and consistent with the language and purpose of the statute? Why or why not?

Question 218.1. The proposed CFTC Rule defines a ''covered fund'' to include a commodity pool, as defined in section 1a(10) of the Commodity Exchange Act. Is the use of this definition of ''commodity pools'' too broad? For example, will this definition potentially pull in additional pools that may be outside the intent of the proposed regulations?

Question 219. The proposed definition of ''sponsor'' focuses on ''the ability to control the decision-making and operational functions of the fund.'' In the securitization context, is this an appropriate manner to determine the identity of the sponsor? If not, what factors should be used to determine the identity of the sponsor in the securitization context for purposes of the proposed rule and why? Is the definition of ''sponsor'' set forth in the SEC's Regulation AB [239] an appropriate party to treat as sponsor for purposes of the proposed rule? Is additional guidance necessary with respect to how the proposed definition of ''sponsor'' should be applied to a securitization transaction?

Question 220. Should the application of the proposed definition of ''sponsor'' mean that the servicer or investment manager in a securitization transaction would be considered the sponsor for purposes of the proposed rule? What impact would this interpretation of the proposed definition have on existing securitizations?

Question 221. Should the definition of ''covered fund'' focus on the characteristics of an entity rather than whether it would be an investment company but for section 3(c)(1) or 3(c)(7) of the Investment Company Act? If so, what characteristics should be considered and why? Would a definition focusing on an entity's characteristics rather than its form be consistent with the language and purpose of the statute?

Question 222. Instead of adopting a unified definition of ''covered fund'' for those entities included under section 13(h)(2) of the BHC Act, should the Agencies consider having separate definitions for ''hedge fund'' and ''private equity fund''? If so, which definitions and why?

Question 223. Should the CFTC consider using the authority provided under section 13(d)(1)(J) of the BHC Act to exempt the acquisition or retention of an ownership interest in a covered fund with certain attributes or characteristics, including, for example: (i) A performance fee or allocation to an investment manager's equity account calculated by taking into account income and realized and unrealized gains; (ii) borrowing an amount in excess of one-half of its total capital commitments or has gross notional exposure in excess of twice its total capital commitments; (iii) sells securities or other assets short; (iv) has restricted or limited investor redemption rights; (v) invests in public and non-public companies through privately negotiated transactions resulting in private ownership of the business; (vi) acquires the unregistered equity or equity-like securities of such companies that are illiquid as there is no public market and third party valuations are not readily available; (vii) requires holding those investments long-term; (viii) has a limited duration of ten years or less; or (ix) returns on such investments are realized and the proceeds of the investments are distributed to investors before the anticipated expiration of the fund's duration? Which, if any, of these characteristics are appropriate to describe a hedge fund or private equity fund that should be considered a covered fund for purposes of this rule? Are there any other characteristics that would be more appropriate to describe a covered fund? If so, which characteristics and why?

Question 224. Is specific inclusion of certain non-U.S. entities as a ''covered fund'' under § ____.10(b)(1)(iii) of the proposed rule necessary, or would such entities already be considered to be a ''covered fund'' under § ____.10(b)(1)(i) of the proposed rule? If so, why? Does the proposed rule's language on non-U.S. entities correctly describe those non-U.S. entities, if any, that should be included in the definition of ''covered fund''? Why or why not? What alternative language would be more effective? Should the CFTC define non-U.S. funds by reference to the following structural characteristics: whether they are limited in the number or type of investors; whether they operate without regard to statutory or regulatory requirements relating to the types of instruments in which they may invest or the degree of leverage they may incur? Why or why not?

Question 225. Are there any entities that are captured by the proposed rule's definition of ''covered fund,'' the inclusion of which does not appear to be consistent with the language and purpose of the statute? If so, which entities and why?

Question 226. Are there any entities that are not captured by the proposed rule's definition of ''covered fund,'' the exclusion of which does not appear to be consistent with the language and purpose of the statute? If so, which entities and why?

Question 227. Do the proposed rule's definitions of ''covered fund'' and/or ''ownership interest'' pose unique concerns or challenges to issuers of asset-backed securities and/or securitization vehicles? If so, why? Do certain types of securitization vehicles (trusts, LLCs, *etc.*) typically issue asset-backed securities which would be included in the proposed definition of ownership interest? What would be the impact of the application of the proposed rules to these securitization

[238] *See* proposed rule § ____.10(b)(6)(ii).

[239] *See* 17 CFR 229.1101(*l*).

vehicles? Are certain asset classes (collateralized debt obligations, future flows, corporate debt repackages, *etc.*) more likely to be impacted by the proposed definition of ''covered fund'' because the issuer cannot rely on an exemption other than 3(c)(1) or 3(c)(7) of the Investment Company Act?

Question 227.1. Should the proposed CFTC Rule cover securitization vehicles? Please explain the rationale for including or excluding securitization vehicles in the proposed CFTC Rule.

Question 228. How many existing issuers of asset-backed securities would be included in the proposed definition of ''covered fund?'' What would be the legal and economic impact of the proposed rule on holders of asset-backed securities issued by existing securitization vehicles that would be included in the proposed definition of covered fund?

Question 229. Are there entities that issue asset-backed securities (as defined in Section 3(a) of the Exchange Act) that should be exempted from the requirements of the proposed rule? How would such an exemption promote and protect the safety and soundness of the banking entity and the financial stability of the United States as required by section 13(d)(1)(J) of the BHC Act?

Question 230. Since certain existing asset-backed securities may have a term that exceeds the conformance or extended transition periods provided for under section 13(c) of the BHC Act, should the CFTC consider using the authority contained in section 13(d)(1)(J) of that Act to exclude those existing asset-backed securities from the proposed definition of ''ownership interest'' and/or should the rule permit a banking entity to acquire or retain an ownership interest in existing asset-backed issuers? If so, how would either approach be consistent with the language and purpose of the statute?

Question 231. Many issuers of asset-backed securities have features and structures that resemble some of the features of hedge funds and private equity funds (*e.g.,* CDOs are managed by an investment adviser that has the discretion to choose investments, including investments in securities). If the proposed definition of ''covered fund'' were to exempt any entity issuing asset-backed securities, would this allow for interests in hedge funds or private equity funds to be structured as asset-backed securities and circumvent the proposed rule? If this approach is taken, how should the proposal address this concern?

Question 232. Are the structural similarities between an entity that issues asset-backed securities and hedge funds and private equity funds of sufficient concern that the CFTC should not exclude any entity that issues asset-backed securities from the definition of covered fund?

Question 233. Should entities that rely on a separate exclusion from the definition of investment company other than sections 3(c)(1) or 3(c)(7) of the Investment Company Act be included in the definition of ''covered fund''? Why or why not?

Question 234. Do the proposed rule's definitions of ''ownership interest'' and ''carried interest'' effectively implement the statute? What alternative definitions might be more appropriate in light of the language and purpose of the statute? Are there other types of instruments that should be included or excluded from the definition of ''ownership interest''? Does the proposed definition of ownership interest capture most interests that are typically viewed as ownership interests? Is the proposed rule's exemption of carried interest from the definition of ownership interest with respect to a covered fund appropriate? Does the exemption adequately address existing compensation arrangements and the way in which a banking entity becomes entitled to carried interest? Is it consistent with the current tax treatment of these arrangements?

Question 235. In the context of asset-backed securities, the distinction between debt and equity may be complicated (*e.g.,* trust certificates issued in a residential mortgage backed security transaction) and the legal, accounting and tax treatment may differ for the same instrument. Is guidance necessary with respect to the application of the definition of ownership interest for asset-backed securitization transactions?

Question 236. In many securitization transactions, the residual interest represents the ''equity'' in the transaction. As this often constitutes the portion of the securitization transaction with the most risk, because it may absorb any losses experienced by the underlying assets before any other interests issued by the securitization vehicle, should the CFTC instead use their authority under section 13(d)(1)(J) of the BHC Act to exempt the buying and selling of any ownership interest in a securitization vehicle that is a covered fund other than the residual interest?

Question 237. For purposes of limiting either an exclusion for issuers of asset-backed securities from the proposed definition of ''covered fund'' and/or an exclusion of asset-backed securities from the proposed definition of ''ownership interest,'' what definition of asset-backed security most effectively implements the language of section 13 of the BHC Act? Section 3(a)(77) of the Exchange Act and the SEC's Regulation AB [240] provide two possible definitions. Is either of these definitions sufficient, and if so why? If one of the definitions is too narrow, what additional entities/securities should be included and why? If one of the definitions is too broad, what entities/securities should be excluded and why? Would some other definition of asset-backed security be more consistent with the language and purpose of section 13 of the BHC Act?

Question 238. Are there special concerns raised by not including as an ownership interest the residual interests in a securitization vehicle? Should the CFTC instead exempt the buying and selling of any ownership interest in a securitization vehicle that is a covered fund other than the residual interest?

Question 239. Should the legal form of a beneficial interest be a determining factor for deciding whether a beneficial interest is an ''ownership interest''? For example, should pass-through trust certificates issued as part of a securitization transaction be excluded from the definition of ''ownership interest''? Should the definition of ownership interest explicitly include debt instruments with equity features (*e.g.,* voting rights, profit participations, *etc.*)?

Question 240. How should the proposed rule address those instances in which both debt and equity interests are issued, and the debt interests receive all of the economic benefits and all of the control rights? Should the debt interests (other than the residual interest) be counted as ownership interests even though they are not legally ownership and do not receive any profit participation? Should the equity interests be counted as ownership interests even though the holder does not receive economic benefits or have any control rights? Should the residual interest be considered the only ''ownership interest'' for purposes of the proposed rule? Should mezzanine interests that lack both control rights and profit participation be considered an ownership interest? If the mezzanine interests obtain control rights (because more senior classes have been repaid), should they become ''ownership interests'' at that time for purposes of the proposed rule? If both debt and equity interests are counted as ownership interests, how should percentages of ownership interests be calculated when the units of measurement do not match (*e.g.,* a

[240] *See* 17 CFR 229.1101(c).

single trust certificate, a single residual certificate with no face value and multiple classes of currency-denominated notes)?

Question 241. Does the proposed rule's definition of ''prime brokerage transaction'' effectively implement the statute? What other types of transactions or services, if any, should be included in the definition? Should any types of transactions or services be excluded from the definition? Would an alternative definition be more effective, and if so, why?

Question 242. Do the proposed rule's definitions of ''sponsor'' and ''trustee'' effectively implement the statute? Is the exclusion of ''directed trustee'' from the definition of ''trustee'' appropriate?

Question 243. Do the proposed rule's other definitions in § ____.10(b) effectively implement the statute? What alternative definitions might be more effective in light of the language and purpose of the statute? Are additional definitions needed, and if so, what definition(s)?

2. Section __.11: Permitted Organizing and Offering of a Covered Fund

Section ____.11 of the proposed rule implements section 13(d)(1)(G) of the BHC Act and permits a banking entity to organize and offer a covered fund, including acting as sponsor of the fund, if certain criteria are met.[241] This exemption is designed to permit a banking entity to be able to engage in certain traditional asset management and advisory businesses in compliance with section 13 of the BHC Act.[242]

a. Required Criteria for Permitted Organizing and Offering of Covered Funds

Section ____.11 of the proposed rule provides for and describes the conditions that must be met in order to enable a banking entity to qualify for the exemption to organize and offer a covered fund.[243] These conditions include: (i) The banking entity must provide *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;[244] (ii) the covered fund must be organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity; (iii) the banking entity may not acquire or retain an ownership interest in the covered fund except as permitted under subpart C of the proposed rule; (iv) the banking entity must comply with the restrictions governing relationships with covered funds under § ____.16 of the proposed rule; (v) the banking entity may not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; (vi) the covered fund, for corporate, marketing, promotional, or other purposes, (A) may not share the same name or a variation of the same name with the banking entity (or an affiliate or subsidiary thereof), and (B) may not use the word ''bank'' in its name; (vii) no director or employee of the banking entity may take or retain an ownership interest in the covered fund, except for any director or employee of the banking entity who is directly engaged in providing investment advisory or other services to the covered fund; and (viii) the banking entity must (A) clearly and conspicuously disclose, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents) the enumerated disclosures contained in § ____.11(h) of the proposed rule, and (B) comply with any additional rules of the CFTC or other Agencies, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the banking entity.[245] These requirements are explained in detail below.

i. Bona Fide Services

Section ____.11(a) of the proposed rule requires that, in order to qualify for the exemption related to organizing and offering a covered fund, a banking entity provide *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services.[246] Banking entities provide a wide range of customer-oriented services which may qualify as *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services.[247] Additionally, depending on the type of banking entity that conducts the activity or provides the service, variations in the precise services involved may occur. For example, a national bank and an SEC-registered investment adviser may provide substantially similar investment advisory services to clients, but be subject to different statutory and regulatory requirements. In recognition of potential variations in services and functional regulation, the proposed rule does not specify what services would qualify as ''*bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services'' under § ____.11(a) of the proposed rule. Instead, the proposed rule largely mirrors the statutory language of section 13(d)(1)(G)(i) of the BHC Act and reflects the intention that so long as a banking entity provides trust, fiduciary, investment advisory, or commodity trading advisory services in compliance with relevant statutory and regulatory requirements, the requirement contained in § ____.11(a) of the proposed rule would generally be deemed to be satisfied.

ii. ''Customers of Such Services'' Requirement

Section 13(d)(1)(G)(ii) of the BHC Act requires that a banking entity organize and offer a covered fund ''only in connection with'' the provision of qualified services to persons that are customers of such services of the banking entity.[248] Section ____.11(b) of the proposed rule implements the statute and reflects the statutory requirement that there are two independent conditions contained in section 13(d)(1)(G)(ii) of the BHC Act: (i) A covered fund must be organized and offered in connection with *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services, and (ii) the banking entity providing those services may offer the covered fund only to persons that are customers of those services of the banking entity.[249] Requiring a customer relationship in connection with organizing and offering a covered fund helps to ensure that a banking entity is engaging in the covered fund activity for others and not on the banking entity's own behalf.[250]

Section 13(d)(1)(G)(ii) of the BHC Act does not explicitly require that the customer relationship be pre-existing.

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[241] *See* proposed rule § ____.11.

[242] 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Hagan).

[243] *See* proposed rule §§ ____.11(a)—(h).

[244] While section 13(d)(1)(G) of the BHC Act does not explicitly mention ''commodity trading advisory services,'' the CFTC has proposed to include commodity pools within the definition of ''covered fund'' and commodity trading advisory services in the same way as investment advisory services because commodity trading advisory services are the functional equivalent of investment advisory services to commodity pools.

[245] *See id.* at § ____.11(a)–(h). The CFTC is not proposing any such additional rules at this time, although they may do so in the future.

[246] *See* 12 U.S.C. 1851(d)(1)(G)(i); proposed rule § ____.11(a).

[247] *See, e.g.,* 12 U.S.C. 1843(c)(4), (c)(8), (k),12 CFR 225.28(b)(5) and (6), 12 CFR 225.86, 12 CFR 225.125 (with respect to a bank holding company); 12 U.S.C. 24 (Seventh), 92a, 12 CFR Part 9 (with respect to a national bank); 12 U.S.C. 1831a, 12 CFR Part 362 (with respect to a state nonmember bank).

[248] *See* 12 U.S.C. 1851(d)(1)(G)(ii).

[249] *See* proposed rule § ____.11(b).

[250] *See* 156 Cong. Rec. at S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

Accordingly, the proposed rule provides that it may be established through or in connection with the banking entity's organization and offering of a covered fund, so long as that fund is a manifestation of the provision by the banking entity of *bona fide* trust, fiduciary, investment advisory or commodity trading advisory services to the customer. This application of the customer requirements is consistent with the manner in which trust, fiduciary, investment advisory, and commodity trading advisory services are provided by banking entities. Historically, banking entities have raised capital commitments for covered funds from existing customers as well as individuals or entities that have no pre-existing relationship with the banking entity.

Banking entities commonly organize and offer funds to customers of the banking entity's trust, fiduciary, and investment advisory or commodity trading advisory services as a way of ensuring the efficient and consistent provision of these services. For example, a person often obtains the investment advisory services of the banking entity by acquiring an interest in a fund organized and offered by the banking entity. This is distinguished from a fund organized and offered by a banking entity for the purpose of itself investing as principal, indirectly through its investment in the fund, in assets held by the fund. Under the proposed rule, a banking entity could, consistent with past practice, provide a covered fund to persons that are customers of such services for purposes of the exemption so long as the fund is organized and offered as a means of providing *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services to customers. The banking entity may not organize and offer a covered fund as a means of itself investing in the fund or assets held in the fund.[251]

The CFTC notes that a banking entity could, through organizing and offering a covered fund pursuant to the authority contained in § ____.11 of the proposed rule that itself makes investments or engages in trading activity, seek to evade the restrictions contained in section 13 of the BHC Act and the proposed rule. In order to address these concerns, the proposed rule provides that a banking entity relying on the authority contained in § ____.11 must organize and offer a covered fund pursuant to a credible plan or similar documentation outlining how the banking entity intends to provide advisory or similar services to its customers through organizing and offering such fund.

iii. Compliance With Investment Limitations

Section 13(d)(1)(G)(iii) of the BHC Act limits the ability of a banking entity that organizes and offers a covered fund to acquire or retain an ownership interest in that covered fund.[252] Separately, other provisions of section 13 of the BHC Act provide independent exemptions which permit a banking entity to acquire or retain an ownership interest in a covered fund.[253] Section ____.11(c) of the proposed rule incorporates these statutory provisions by prohibiting a banking entity from acquiring or retaining an ownership interest in a covered fund that it organizes and offers except as permitted under subpart C of the proposed rule.[254] The limits on a banking entity's ability to invest in a covered fund that it organizes and offers are described in § ____.12 of the proposal.

iv. Compliance With Section 13(f) of the BHC Act

Section ____.11(d) of the proposed rule requires that the banking entity comply with the limitations on certain relationships with covered funds.[255] These limitations apply in several contexts, and are contained in § ____.16 of the proposed rule, discussed in detail below. In general, § ____.16 of the proposed rule prohibits certain transactions or relationships that would be covered by section 23A of the FR Act, and provides that any permitted transaction is subject to section 23B of the FR Act, in each instance as if such banking entity were a member bank and such covered fund were an affiliate thereof.[256]

v. No Guarantees or Insurance of Fund Performance

Section ____.11(e) of the proposed rule prohibits the banking entity from, directly or indirectly, guaranteeing, assuming or otherwise insuring the obligations or performance of the covered fund or any covered fund in which such covered fund invests.[257] This prong implements section 13(d)(1)(G)(iv) of the BHC Act and is intended to prevent a banking entity from engaging in bailouts of a covered fund in which it has an interest.[258]

vi. Limitation on Name Sharing With a Covered Fund

Section ____.11(f) of the proposed rule prohibits the covered fund from sharing the same name or a variation of the same name with the banking entity, for corporate, marketing, promotional, or other purposes.[259] This section implements section 13(d)(1)(G)(v) of the BHC Act and addresses the concern that name-sharing could undermine market discipline and encourage a banking entity to bail out a covered fund it organizes and offers in order to preserve the entity's reputation.[260] Thus, under § ____.11(f) of the proposed rule, a covered fund would be prohibited from sharing the same name or variation of the same name with a banking entity that organizes and offers or serves as sponsor to that fund (or an affiliate or subsidiary of such banking entity). A covered fund would also be prohibited under the proposed rule from using the word ''bank'' in its name.[261]

vii. Limitation on Ownership by Directors and Employees

Section ____.11(g) of the proposed rule implements section 13(d)(1)(G)(vii) of the BHC Act. The provision prohibits any director or employee of the banking entity from acquiring or retaining an ownership interest in the covered fund, except for any director or employee of the banking entity who is directly engaged in providing investment advisory or other services to the covered fund.[262] This allows an individual acting as fund manager or adviser and employed by a banking entity to acquire or retain an ownership interest in a covered fund that aligns the manager or adviser's incentives with those of its

[251] The proposed rule does not change any requirement imposed by separate statute, regulation, or other law, if applicable. For instance, a banking entity that conducts a private placement of a covered fund pursuant to the SEC's Regulation D pertaining to private offerings would still be expected to comply with the relevant requirements related to such offering, including the limitations related to the manner in which and types of persons to whom it may offer or sell interests in such fund. *See* 12 CFR 230.501 *et seq.*

[252] *See* 12 U.S.C. 1851(d)(1)(G)(iii).

[253] *See, e.g., id.* at 1851(d)(1)(C).

[254] *See* proposed rule § ____.11(c).

[255] 12 U.S.C. 1851(d)(1)(G)(iv); proposed rule § ____.11(d).

[256] *See* **SUPPLEMENTARY INFORMATION**, Part III.C.7.

[257] 12 U.S.C. 1851(d)(1)(G)(v); proposed rule § ____.11(e).

[258] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[259] 12 U.S.C. 1851(d)(1)(G)(vi); proposed rule § ____.11(f).

[260] 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[261] Similar restrictions on a fund sharing the same name, or variation of the same name, with an insured depository institution or company that controls an insured depository institution or having the word ''bank'' in its name, have been used previously in order to prevent customer confusion regarding the relationship between such companies and a fund. *See, e.g., Bank of Ireland,* 82 Fed. Res. Bull. 1129 (1996).

[262] *See* 12 U.S.C. 1851(d)(1)(G)(vii); proposed rule § ____.11(g).

customers by allowing the individual to have ''skin in the game'' with respect to a covered fund for which that individual provides management or advisory services (which customers or clients often request).[263]

The CFTC recognizes that director or employee investments in a covered fund may provide an opportunity for a banking entity to evade the limitations regarding the amount or value of ownership interests a banking entity may acquire or retain in a covered fund or funds contained in section 13(d)(4) of the BHC Act and § ____.12 of the proposed rule. In order to address this concern, the proposed rule would generally attribute an ownership interest in a covered fund acquired or retained by a director or employee to such person's employing banking entity, if the banking entity either extends credit for the purpose of allowing the director or employee to acquire such ownership interest, guarantees the director or employee's purchase, or guarantees the director or employee against loss on the investment.

viii. Disclosure Requirements

Section ____.11(h) of the proposed rule requires that, in connection with organizing and offering a covered fund, the banking entity (i) clearly and conspicuously disclose, in writing, to prospective and actual investors in the covered fund (such as through disclosure in the covered fund's offering documents) that ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity and its affiliates or subsidiaries]; therefore, [the banking entity's and its affiliates' or subsidiaries'] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity and its affiliates or subsidiaries] in their capacity as investors in [the covered fund],'' and (ii) comply with any additional rules of the CFTC as provided in section 13(b)(2) of the BHC Act designed to ensure that losses in any such covered fund are borne solely by the investors in the covered fund and not by the banking entity.[264] The proposed rule also provides, as an additional disclosure requirement related to organizing and offering a covered fund, that a banking entity clearly and conspicuously disclose, in writing, to any prospective and actual investor (such as through disclosure in the covered fund's offering documents): (i) That such investor should read the fund offering documents before investing in the covered fund; (ii) that the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and (iii) the role of the banking entity and its affiliates, subsidiaries, and employees in sponsoring or providing any services to the covered fund. As noted above, the proposed rule clarifies that a banking entity may satisfy the requirements of this prong with respect to a covered fund by making the required disclosures, in writing, in the covered fund's offering documents.[265]

ix. Request for Comment

The CFTC requests comment on the proposed rule's approach with respect to implementing the exemption permitting banking entities to organize and offer a covered fund. In particular, the CFTC requests comment on the following questions:

Question 244. Is the proposed rule's approach to implementing the exemption for organizing and offering a covered fund effective? If not, what alternative approach would be more effective and why?

Question 245. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 246. Is the proposed rule's approach to implementing the scope of *bona fide* trust, fiduciary, investment advisory and commodity trading advisory services consistent with the statute? If not, what alternative approach would be more effective? Should the scope of such services be broader or, in the alternative, more limited? Are there specific services which should be included but which are not currently under the proposed rule?

Question 247. Does the proposed rule effectively implement the ''customers of such services'' requirement? If not, what alternative approach would be more effective and why? Is the proposed rule's approach consistent with the statute? Why or why not? How do banking entities currently sell or provide interests in covered funds? Do banking entities rely on a concept of ''customer'' by reference to other laws or regulations, and if so, what laws or regulations?

Question 248. Does the proposed rule effectively and clearly recognize the manner in which banking entities provide trust, fiduciary, investment advisory, or commodity trading advisory services to customers? If not, how should the proposed rule be modified to be more effective or clearer?

Question 249. Should the CFTC consider adopting a definition of ''customer of such services'' for purposes of implementing the exemption related to organizing and offering a covered fund? If so, what criteria should be included in such definition? For example, should the customer requirement specify that the relationship be pre-existing? Should the CFTC consider adopting an existing definition related to ''customer'' and if so, what definitions (for instance, the SEC's ''pre-existing, substantive relationship'' concept applicable to private offerings under its Regulation D) would provide for effective implementation of the customer requirement in section 13(d)(1)(G) of the BHC Act? If so, why and how? How should the customer requirement be applied in the context of non-U.S. covered funds? Is there an equivalent concept used for such non-U.S. covered fund offerings?

Question 250. Should the CFTC distinguish between direct and indirect customer relationships for purposes of implementing section 13(d)(1)(G) of the BHC Act? Should the rule differentiate between a customer relationship established by a customer as opposed to a banking entity? If so, why?

Question 251. Does the proposed rule effectively implement the prohibition on a banking entity guaranteeing or insuring the obligations or performance of certain covered funds? If not, what alternative approach would be more effective, and why?

Question 252. Does the proposed rule effectively implement the requirement that a banking entity comply with the limitation on certain relationships with a covered fund contained in § ____.16 of the proposed rule? If not, what alternative approach would be more effective, and why?

Question 253. Does the proposed rule effectively implement the prohibition on a covered fund sharing the same name or variation of the same name with a banking entity? If not, what alternative approach would be more effective and why? Should the prohibition on a covered fund sharing the same name be limited to specific

[263] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[264] 12 U.S.C. 1851(d)(1)(G)(viii); proposed rule § ____.11(h).

[265] As contemplated in § ____.11(a)(8)(ii) of the proposed rule, to the extent that any additional rules are issued to ensure that losses in a covered fund are borne solely by the investors in the covered fund and not by the banking entity, a banking entity would be required to comply with those as well in order to satisfy the requirements of section 13(d)(1)(G)(viii) of the BHC Act.

types of banking entities (*e.g.,* insured depository institutions and bank holding companies) or only to the banking entity that organizes and offers the fund, and if so why?

Question 254. Does the proposed rule effectively implement the limitation on director or employee investments in a covered fund organized and offered by a banking entity? If not, what alternative approach would be more effective and why? Should the agencies provide additional guidance on what ''other services'' should be included for purposes of satisfying § ____.11(g)? Why or why not?

Question 255. Are the disclosure requirements related to organizing and offering a covered fund appropriate? If not, what alternative disclosure requirement(s) should the proposed rule include? Should the CFTC consider adoption of a model disclosure form related to this requirement? Does the timing of the proposed disclosure requirement adequately address disclosure to secondary market purchasers?

3. Section ____.12: Permitted Investment in a Covered Fund

Section ____.12 of the proposed rule describes the limited circumstances under which a banking entity may acquire or retain, as an investment, an ownership interest in a covered fund that the banking entity or one of its subsidiaries or affiliates organizes and offers. This section implements section 13(d)(4) of the BHC Act and related provisions, and describes the statutory limits on both (i) the amount and value of an investment by a banking entity in a covered fund, and (ii) the aggregate value of all investments in all covered funds made by the banking entity.

As described below, a banking entity that makes or retains an investment in a covered fund under § ____.12 of the proposed rule is generally subject to three principal limitations related to such investment. First, the banking entity's investment in a covered fund may not represent more than 3 percent of the total outstanding ownership interests of such fund (after the expiration of any seeding period provided under the rule). Second, the banking entity's investment in a covered fund may not result in more than 3 percent of the losses of the covered fund being allocable to the banking entity's investment. Third, a banking entity may invest no more than 3 percent of its tier 1 capital in covered funds.[266]

a. Authority and Limitations on Permitted Investments

Section 13(d)(4) of the BHC Act permits a banking entity to acquire and retain an ownership interest in a covered fund that the banking entity organizes and offers pursuant to section 13(d)(1)(G), for the purposes of (i) establishing the covered fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, or (ii) making a *de minimis* investment in the covered fund in compliance with applicable requirements.[267] Section ____.12 of the proposed rule implements this authority and related limitations.

Consistent with this statutory provision, the proposed rule requires a banking entity to (i) actively seek unaffiliated investors to ensure that the banking entity's investment conforms with the limits of § ____.12, and (ii) reduce through redemption, sale, dilution, or other methods the aggregate amount and value of all ownership interests of the banking entity in a single fund held under § ____.12 to an amount that does not exceed 3 percent of the total outstanding ownership interests of the fund not later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board) (the ''per-fund limitation''). Additionally, § ____.12 of the proposed rule implements the statutory requirement that the aggregate value of all ownership interests of the banking entity in all covered funds held as an investment not exceed 3 percent of the tier 1 capital of the banking entity (the ''aggregate funds limitation'').[268]

b. Permitted Investment in a Single Covered Fund

Section ____.12(b) of the proposed rule describes the limitations and restrictions on a banking entity's ability to make or retain an investment in a single covered fund. This section implements the requirements of section 13(d)(4) of the BHC Act.[269]

Section ____.12 of the proposed rule describes the manner in which the limitations on the amount and value of ownership interests in a covered fund must be calculated, in recognition of the fact that a covered fund may have multiple classes of ownership interests which possess different characteristics or values that impact a person's ownership in that fund. A banking entity must apply the limits to both the total value and amount of its investment in a covered fund. For purposes of applying these limits, the banking entity must calculate (without regard to committed funds not yet called for investment): (i) The value of all investments or capital contributions made with respect to any ownership interest by the banking entity in a covered fund, divided by the value of all investments or capital contributions made by all persons in that covered fund, and (ii) the total number of ownership interests held as an investment by the banking entity in a covered fund divided by the total number of ownership interests held by all persons in that covered fund.[270] Therefore, under the proposed rule, such calculation would include as the numerator the amount or value of a banking entity's investment in a covered fund, and as the denominator the amount or value (matched to the unit of measurement in the numerator) of all classes of ownership interests held by all persons in that covered fund. As noted above, the banking entity's investment in a covered fund also may not result in more than 3 percent of the losses of the covered fund being allocable to the banking entity's investment.[271]

In order to ensure that a banking entity calculates its investment in a covered fund accurately and does not evade the per-fund investment limitation, the proposed rule requires that the banking entity must calculate its investment in the same manner and according to the same standards utilized by the covered fund for determining the aggregate value of the fund's assets and ownership interests in the covered fund.[272]

Under the proposed rule, the amount and value of a banking entity's investment in any single covered fund is (i) the total amount or value held by the banking entity directly and through any entity that is controlled, directly or indirectly, by the banking entity,[273] plus (ii) the *pro rata* amount or value of any

[266] *See, e.g.,* proposed rule §§ ____.12(b)(2), (c).

[267] *See* 12 U.S.C. 1851(d)(4).

[268] *See* proposed rule at § ____.12(a)(2)(ii). The process and manner in which a banking entity's 3 percent tier 1 capital limit is determined for purposes of the proposed rule is discussed in detail below in Part III.C.3 of this **SUPPLEMENTARY INFORMATION.**

[269] *See* 12 U.S.C. 1851(d)(4)(B).

[270] *See* proposed rule § ____.12(b)(2).

[271] Under the proposed rule, a banking entity's investment in a covered fund may not result in more than 3 percent of the losses of the covered fund being allocable to the banking entity's investment since the banking entity's permitted investment in a covered fund may be no more than 3 percent of the value and amount of such fund's total ownership interests, and the banking entity may not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund. *See* 12 U.S.C. 1851(d)(1)(G)(v); proposed rule § ____.11(e).

[272] *See* proposed rule § ____.12(b)(4).

[273] *See* proposed rule § ____.12(b)(1)(A).

covered fund held by any entity (other than certain operating entities noted below) that is not controlled, directly or indirectly, by the banking entity but in which the banking entity owns, controls, or holds with the power to vote more than 5 percent of the voting shares.[274]

Additionally, the proposed rule provides that, to the extent that a banking entity is contractually obligated to directly invest in, or is found to be acting in concert through knowing participation in a joint activity or parallel action toward a common goal of investing in, one or more investments with a covered fund that is organized and offered by the banking entity (whether or not pursuant to an express agreement), such investment shall be included in the calculation of a banking entity's per-fund limitation.[275] In this way, the proposed rule prevents a banking entity from evading the limitations under § ____.12 of the proposed rule through committed co-investments.

Section ____.12(b)(3) of the proposed rule provides that the amount and value of a banking entity's investment in a covered fund may at no time exceed the 3 percent limits contained in § ____.12(b) of the proposed rule after the conclusion of any conformance period, if applicable.[276] In cases where a fund calculates its value or stands ready to issue or redeem interests frequently (*e.g.,* daily), a banking entity must calculate its per-fund limitation no less frequently than the fund performs such calculation or issues or redeems interests. In recognition of the fact that not every covered fund may calculate or determine its valuation daily (for instance, if it does not allow redemptions except infrequently or invests principally in illiquid assets for which no market price is readily available), the proposed rule would not require a daily calculation of value for such fund (unless a daily calculation is determined by the fund).[277] In such cases, the calculation of the amount and value of a banking entity's per-fund limitation must be made no less frequently than at the end of every quarter.[278] Additionally, since a banking entity must organize and offer any covered fund in which it invests, the CFTC expects that such banking entity would closely and regularly monitor not only the value of such fund's interests, but also any changes in the fund's investors' relative ownership percentages.[279]

c. Aggregate Permitted Investments in All Covered Funds and Calculation of a Banking Entity's Tier 1 Capital

In addition to a limit on investments in a single covered fund, section 13(d)(4) of the BHC Act requires the banking entity to comply with the aggregate funds limitation on investments in all covered funds.[280] As required under section 13(d)(4)(B)(ii)(II) of the BHC Act, the proposed rule provides that the aggregate of a banking entity's ownership interests in all covered funds that are held under § ____.12 of the proposed rule may not exceed 3 percent of the tier 1 capital of a banking entity.[281] In order to maintain equality in application of the aggregate funds limitation, the proposed rule provides that, for purposes of determining compliance with § ____.12 of the proposed rule, the aggregate of all of a banking entity's investments in all covered funds under § ____.12 of the proposed rule must be valued pursuant to applicable accounting standards.[282] This value calculation is separate and in addition to the required calculation of the value of a banking entity's investment in a covered fund as part of determining compliance with the per-fund limitation.

Tier 1 capital is a banking law concept that, in the United States, is calculated and reported by certain depository institutions and bank holding companies in order to determine their compliance with regulatory capital standards. Accordingly, the proposed rule clarifies that for purposes of the aggregate funds limitation in § ____.12, a banking entity that is a bank, a bank holding company, a company that controls an insured depository institution that reports tier 1 capital, or uninsured trust company that reports tier 1 capital (each a ''reporting banking entity'') must apply the reporting banking entity's tier 1 capital as of the last day of the most recent calendar quarter that has ended, as reported to the relevant Federal banking agency.[283]

However, not all entities subject to section 13 of the BHC Act calculate and report tier 1 capital. In order to provide a measure of equality related to the aggregate funds limitation contained in section 13(d)(4)(B)(ii)(II) of the BHC Act and § ____.12(c) of the proposed rule, the proposed rule clarifies how the aggregate funds limitation shall be calculated for entities that are not required to calculate and report tier 1 capital in order to determine compliance with regulatory capital standards. Under the proposed rule, with respect to any banking entity that is not affiliated with a reporting banking entity and not itself required to report capital in accordance with the risk-based capital rules of a Federal banking agency, the banking entity's tier 1 capital for purposes of the aggregate funds limitation shall be the total amount of shareholders' equity of the top-tier entity within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.[284] For a banking entity that is not itself required to report tier 1 capital but is a subsidiary of a reporting banking entity that is a depository institution (*e.g.,* a subsidiary of a national bank), the aggregate funds limitation shall be the amount of tier 1 capital reported by such depository institution.[285] For a banking entity that is not itself required to report tier 1 capital but is a subsidiary of a reporting banking entity that is not a depository institution (*e.g.,* a nonbank subsidiary of a bank holding company), the aggregate funds limitation shall be the amount of tier 1 capital reported by the top-tier affiliate of such banking entity that holds and reports tier 1 capital.[286] Thus,

[274] *See* proposed rule § ____.12(b)(1)(B). As noted above, whether or not an investment is controlled or noncontrolled will be determined consistent with the BHC Act, as implemented by the Board. *See* 12 U.S.C. 1841(a)(2); 12 CFR 225.2(e).

[275] *See* proposed rule § ____.12(b)(2)(B).

[276] *See* proposed rule § ____.12(b)(3).

[277] With respect to an issuer of asset-backed securities, depending on the transaction structure, such calculation may need to be made each time a payment is made to any holder of the issuer's asset-backed securities.

[278] The CFTC notes that while calculation of a banking entity's ownership interest in a covered fund must be determined no less frequently than at the end of every quarter, it is possible that no change in a banking entity's ownership interest (*e.g.,* no redemptions or other changes in investor composition) may occur during every quarter.

[279] For instance, where a banking entity acts as sponsor to a covered fund, in connection with the organizing and offering of that fund it may include a requirement (such as a ''tag-along'' redemption right) in the fund's organizational documents in order to assist the banking entity in complying with the per-fund investment limitation.

[280] As noted in the discussion regarding the per-fund limitation, the proposed rule provides that, for purposes of determining compliance with § ____.12, the banking entity's permitted investment in a covered fund shall be calculated in the same manner and according to the same standards utilized by the covered fund for determining the aggregate value of the fund's assets and ownership interests. However, the value of a banking entity's aggregate permitted investments in all covered funds shall be determined in accordance with applicable accounting standards. *See* proposed rule § ____.12(c)(1).

[281] *See* 12 U.S.C. 1851(d)(4)(B)(ii)(II); proposed rule § ____.12(a)(2)(ii).

[282] *See* proposed rule § ____.12(c)(1).

[283] *See* proposed rule § ____.12(c)(1)(A).

[284] *See* proposed rule § ____.12(c)(2)(ii)(B)(2).

[285] *See* proposed rule § ____.12(c)(2)(ii)(A).

[286] *See* proposed rule § ____.12(c)(1)(B).

for purposes of calculating the aggregate funds limitation under § ____.12(c)(2) of the proposed rule, the tier 1 capital for the different types of banking entities would be as follows:

Type of banking entity	Tier 1 capital for purposes of § ____.12
Depository institution that is a reporting banking entity (or a subsidiary thereof).	Tier 1 capital of the depository institution as of the last day of the most recent calendar quarter that has ended, as reported to the relevant Federal banking agency.
Bank holding company or a subsidiary thereof (other than a reporting banking entity).	Tier 1 capital of the bank holding company as of the last day of the most recent calendar quarter that has ended, as reported to the Board.
Company that controls an insured depository institution and that is a reporting banking entity (or a subsidiary thereof other than a reporting banking entity).	Tier 1 capital of the top tier entity within such organization as of the last day of the most recent calendar quarter that has ended, as reported to the Board.
Other banking entity (including an industrial loan company holding company, thrift holding company, or a subsidiary thereof).	Shareholders' equity of the top-tier entity within such organization as of the last day of the most recent calendar quarter that has ended, under applicable accounting standards.

Additionally, in the case of a depository institution that is itself a reporting banking entity and is also a subsidiary or affiliate of a reporting banking entity, the aggregate of all investments in all covered funds held by the depository institution (including investments by its subsidiaries) may not exceed 3 percent of either the tier 1 capital of the depository institution or of the top-tier reporting banking entity that controls such depository institution.[287]

d. Deduction of an Investment in a Covered Fund From Tier 1 Capital

Section 12(d) of the proposed rule also implements the provision contained in section 13(d)(4)(b)(iii) of the BHC Act regarding the deduction of a banking entity's aggregate investment in a covered fund held under section 13(d)(4) of that Act from the assets and tangible equity of the banking entity. The statute also provides that the amount of the deduction must increase commensurate with the leverage of the underlying fund.[288]

Section ____.12(d) of the proposal requires a banking entity to deduct the aggregate value of its investments in covered funds from tier 1 capital. Since § ____.12 of the proposed rule implements the authorities contained in section 13(d)(4) of the BHC Act related to an investment in a fund organized and offered by the banking entity (or an affiliate or subsidiary thereof), the deduction contained in § ____.12(d) applies only to those ownership interests held as an investment by a banking entity pursuant to § ____.12 of the proposed rule.[289] For instance, a banking entity that acquires or retains an ownership interest in a covered fund as a permitted risk-mitigating hedge under § ____.13(b) of the proposed rule, or that acquires or retains an ownership interest in the course of collecting a debt previously contracted in good faith, would not be required to deduct the value of such ownership interest from its tier 1 capital.[290] The deduction required under § ____.12(d) of the proposed rule must be calculated consistent with other like deductions under the applicable risk-based capital rules.[291]

e. Extension of Time To Divest an Ownership Interest in a Single Covered Fund

Section 13(d)(4)(C) of the BHC Act permits the Board, upon application by a banking entity, to extend for up to 2 additional years the period of time within which a banking entity must reduce its attributable ownership interests in a covered fund to no more than 3 percent of such fund's total ownership interests.[292] The statute provides the possibility of an extension only with respect to the per-fund limitation, and not to the aggregate funds limitation.[293] Section ____.12(e) of the proposed rule implements this provision of the statute. In order to grant any extension, the Board must determine that the extension would be consistent with safety and soundness and would not be detrimental to the public interest.[294]

Section ____.12(e) of the proposed rule requires any banking entity that seeks an extension of this conformance period to submit a written request to the Board. Under the proposal, any such request must: (i) Be submitted in writing to the Board at least 90 days prior to the expiration of the applicable time period; (ii) provide the reasons why the banking entity believes the extension should be granted; and (iii) provide a detailed explanation of the banking entity's plan for reducing or conforming its investment(s).

In addition, the proposed rule provides that any extension request by a banking entity must address each of the following matters (to the extent they are relevant): (i) Whether the investment would—(A) involve or result in material conflicts of interest between the banking entity and its clients, customers or counterparties; (B) result, directly or indirectly, in a material exposure by the

[287] If the aggregate value of all investments in all covered funds attributable to such a depository institution is less than 3 percent of its tier 1 capital, then that amount of capital which is greater than the amount supporting the depository institution's investments (or those held by its subsidiaries) in a covered fund, but less than 3 percent of the depository institution's tier 1 capital, may be used to support an investment in a covered fund by an affiliated banking entity that is not itself a depository institution that holds and reports tier 1 capital or controlled, directly or indirectly, by such a depository institution.

[288] *See* 12 U.S.C. 1851(d)(4)(B)(iii).

[289] *See* proposed rule § ____.12(d).

[290] The CFTC notes that since this deduction from capital implements Section 13(d)(4)(B)(iii) of the BHC Act, it is being included in this proposed rule which deals with Section 13 of the BHC Act. However, the CFTC may relocate this deduction as part of any later revised capital rules if, in the future, it is determined that inclusion in such rules is more appropriate.

[291] *See* 12 CFR part 208, Appendices A, E, and F (for a state member bank); 12 CFR part 225, Appendices A, E, and G (for a bank holding company); 12 CFR part 3, Appendices A, B, and C (for a national bank); 12 CFR part 325, Appendices A, C, and D (for a state nonmember bank); and 12 CFR part 167, Appendix C (for a federal thrift).

[292] 12 U.S.C. 1851(d)(4)(C).

[293] *See id.*

[294] As noted in Part III.C.2.a.ii of this **SUPPLEMENTARY INFORMATION**, the CFTC recognizes the potential for evasion of the restrictions contained in section 13 of the BHC Act through organizing and offering a covered fund pursuant to the authority contained in § ____.11 of the proposed rule. Therefore, in addition to taking action against a banking entity that does not actively seek unaffiliated investors to reduce or dilute the investment of the banking entity as provided under § ____.12(a)(2) of the proposed rule, the CFTC expects that if a banking entity is habitually or routinely seeking an extension of the one-year period provided under § ____.12(a)(2)(i)(B), this could be evidence of seeking to evade the restrictions contained in the proposed rule and, as appropriate, the CFTC may take action against such banking entity.

banking entity to high-risk assets or high-risk trading strategies; (C) pose a threat to the safety and soundness of the banking entity; or (D) pose a threat to the financial stability of the United States; (ii) market conditions; (iii) the contractual terms governing the banking entity's interest in the covered fund; (iv) the date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in section 12(a)(2)(i)(B) of the proposed rule; (v) the total exposure of the banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity or the financial stability of the United States; (vi) the cost to the banking entity of divesting or disposing of the investment within the applicable period; (vii) whether the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated clients, customers or counterparties to which it owes a duty; (viii) the banking entity's prior efforts to divest or sell interests in the covered fund, including activities related to the marketing of interests in such covered fund; and (ix) any other factor that the Board believes appropriate.[295] Under the proposed rule, the Board would consider requests for an extension in light of all relevant facts and circumstances, including the factors described above.

Section ____.12(e) of the proposed rule also would allow the Board to impose conditions on any extension granted under the proposed rule if the Board determines conditions are necessary or appropriate to protect the safety and soundness of banking entities or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the BHC Act and the proposed rule.[296] In cases where the banking entity is primarily supervised by the CFTC, the Board would consult with the CFTC both in connection with its review of the application and, if applicable, prior to imposing conditions in connection with the approval of any request by the banking entity for an extension of the conformance period under the proposed rule.[297]

f. Request for Comment

The CFTC requests comment on the proposed rule's approach to implementing the exemption which allows a banking entity to make or retain a permitted investment in a covered fund that it organizes and offers. In particular, the CFTC requests comment on the following questions:

Question 256. Is the proposed rule's approach to implementing the exemption that allows a banking entity to make or retain a permitted investment in a covered fund effective? If not, what alternative approach would be more effective and why?

Question 257. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 258. Should the proposed rule specify at what point a covered fund will be considered to have been ''established'' for purposes of commencing the period in which a banking entity may own more than 3 percent of the total outstanding ownership interests in such fund? If so, why and how?

Question 259. Does the proposed rule effectively implement the requirement that a banking entity comply with the limitations on an investment in a single covered fund? If not, what alternative approach would be more effective and why?

Question 260. Does the proposed rule effectively implement the requirement that a banking entity comply with the limitations on the aggregate of all investments in all covered funds? If not, what alternative approach would be more effective and why?

Question 261. Is the proposed rule's approach to calculating a banking entity's investment in a covered fund effective? Should the per-fund calculation be based on committed capital, rather than invested capital? Why or why not? Is the timing of the calculation of a banking entity's ownership interest in a single covered fund appropriate? If not, why not, and what alternative approach would be more effective and why? For example, should the per-fund calculation be required on a less-frequent basis (*e.g.,* monthly) for funds that compute their value and allow purchases and redemptions on a daily basis (*e.g.,* daily)? Why or why not?

Question 262. Is the proposed rule's approach to parallel investments effective? Why or why not? Should this provision require a contractual obligation and/or knowing participation? Why or why not? How else could the proposed rule define parallel investments? What characteristics would more closely achieve the scope and intended purposes of section 13 of the BHC Act?

Question 263. Is the proposed rule's treatment of investments in a covered fund by employees and directors of a banking entity effective? If not, what alternative approach would be more effective and why?

Question 264. Is the proposed rule's approach to differentiating between controlled and noncontrolled investments in a covered fund unduly complex or burdensome? If so, what alternative approach, if any, would be more effective and why?

Question 265. Is the proposed rule's approach to valuing an investment in a covered fund according to the same standards utilized by the covered fund for determining the aggregate value of its assets and ownership interests effective? If not, what alternative valuation approach would be more effective and why? Should the rule specify one methodology for valuing an investment in a covered fund?

Question 266. Is the proposed rule's approach regarding when to require the calculation of a banking entity's aggregate investments in all covered funds effective? What is the potential impact of calculating a banking entity's aggregate investment limit under the proposed rule on a quarterly basis as opposed to solely at the time an investment in a covered fund is made? Would calculation of the aggregate investment limit solely at the time an investment in a covered fund is made be consistent with the language and purpose of the statute? Does the proposed rule provide sufficient guidance for an issuer of asset-backed securities about how and when to make such calculation? Why or why not?

Question 267. Is the proposed rule's approach to determining and calculating a banking entity's relevant tier 1 capital limit effective? If not, what alternative approach would be more effective and why? With respect to applying the aggregate funds limitation to a banking entity that is not affiliated with an entity that is required to hold and report tier 1 capital, is total shareholder equity on a consolidated basis as of the last day of the most recent calendar quarter that has ended an effective proxy for tier 1 capital? If not, what alternative approach would be more effective and why?

[295] *See* proposed rule § ____.12(e)(1)(ii).

[296] Nothing in section 13 of the BHC Act or the proposed rule limits or otherwise affects the authority that the Board, the other Federal banking agencies, the SEC, or the CFTC may have under other provisions of law. In the case of the Board, these authorities include, but are not limited to, section 8 of the Federal Deposit Insurance Act and section 8 of the BHC Act. *See* 12 U.S.C. 1818, 1847.

[297] *See* proposed rule §§ ____.12(e)(iii) and (iv).

Question 268. Should the proposed rule be modified to permit a banking entity to bring its investments in covered funds into compliance with the proposed rule within a reasonable period of time if, for example, the banking entity's aggregate permitted investments in covered funds exceeds 3 percent of its tier 1 capital for reasons unrelated to additional investments (*e.g.,* a banking entity's tier 1 capital decreases)? Why or why not?

Question 269. Does the proposed rule effectively and appropriately implement the deduction from capital for an investment in a covered fund contained in section 13(d)(4)(B)(iii) of the BHC Act? If not, what alternative approach would be more effective or appropriate, given the statutory language of the BHC Act and overall structure of section 13(d)(4), and why? What effect, if any, should the CFTC give to the cross-reference in section 13(d)(4) to section 13(d)(3) of the BHC Act, which provides the CFTC with discretion to require additional capital, if appropriate, to protect the safety and soundness of banking entities engaged in activities permitted under section 13 of the BHC Act? How, if at all, should a banking entity's deduction of its investment in a covered fund be increased commensurate with the leverage of the covered fund? Should the amount of the deduction be proportionate to the leverage of the covered fund? For example, instead of a dollar-for-dollar deduction, should the deduction be set equal to the banking entity's investment in the covered fund times the difference between 1 and the covered fund's equity-to-assets ratio?

Question 270. Does the proposed rule effectively implement the Board's statutory authority to grant an extension of the period of time a banking entity may retain in excess of 3 percent of the ownership interests in a single covered fund? Are the enumerated factors that the Board may consider in connection with reviewing such an extension appropriate (including factors related to the effect of an extension of the covered fund), and if not, why not? Are there additional factors that the Board should consider in reviewing such a request? Are there specific additional conditions or limitations that the Board should, by rule, impose in connection with granting such an extension? If so, what conditions or limitations would be more effective?

Question 271. Given that the statute does not provide for an extension of time for a banking entity to comply with the aggregate funds limitation, within what period of time should a banking entity be required to bring its investments into conformance with the aggregate funds limit? Should the proposed rule expressly contain a grace period for complying with these limits? Why or why not? If yes, what grace period would be most effective and why?

Question 272. Does the proposed rule effectively implement the prohibition on a banking entity guaranteeing or insuring the obligations or performance of certain covered funds? If not, what alternative approach would be more effective and why?

Question 273. In the context of securitization transactions, control and ownership are often completely separated. Is additional guidance necessary with respect to how control should be determined with respect to issuers of asset-backed securities for purposes of determining the calculation of the per-fund and aggregate ownership limitations?

Question 274. In many securitization transactions, the voting rights of investors are extremely limited and management may be contractually delegated to a third party (because issuers of asset-backed securities rarely have a board with any authority or any employees). The servicer or manager has the ''ability to control the decision-making and operational functions of the fund.'' When calculating the per-fund and aggregate ownership limitations, to whom should the proposed rule allocate ''control'' in this type of situation? Which participants in a securitization transaction would need to include the activities of an issuer of asset-backed securities in their calculations of per-fund and aggregate ownership, and what is the potential impact of such inclusion?

Question 275. For purposes of calculating the per-fund and aggregate ownership limitations, how should the proposed rule address those instances in which equity is issued, but the equity holder does not receive economic benefits or have any control rights? For instance, in order to enhance or achieve bankruptcy remoteness, a single purpose trust without an owner (*i.e.,* an orphan trust) may hold all of the equity interests in a securitization vehicle. Such interests often do not have any meaningful economic or control rights.

4. Section ____.13: Other Permitted Covered Fund Activities and Investments

Section 13 of the proposed rule implements the statutory exemptions described in sections 13(d)(1)(C), (E), and (I) of the BHC Act that permit a banking entity: (i) To acquire an ownership interest in, or act as sponsor to, one or more SBICs, a public welfare investment, or a certain qualified rehabilitation expenditure; [298] (ii) to acquire or retain an ownership interest in a covered fund as a risk-mitigating hedging position; and (iii) in the case of a non-U.S. banking entity, to acquire or retain an ownership interest in or sponsor a foreign covered fund. Additionally, § ____.13 of the proposed rule implements in part the rule of construction related to the sale and securitization of loans contained in section 13(g)(2) of the BHC Act. Similar to § ____.6 of the proposed rule (which implements certain permitted proprietary trading activities), § ____.13 contains only the statutory exemptions contained in section 13(d)(1) of the BHC Act that the CFTC has determined apply, either by plain language or by implication, to investments in or relationships with a covered fund.[299]

a. Permitted Investments in SBICs and Related Funds

Section ____.13(a) of the proposed rule implements sections 13(d)(1)(E) and (J) of the BHC Act [300] and permits a banking entity to acquire or retain any ownership interest in, or act as sponsor to: (i) One or more SBICs, as defined in section 102 of the Small Business Investment Act of 1958 (12 U.S.C. 662); (ii) an investment that is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing,

[298] Section ____.13(a) of the proposed rule also implements a proposed determination by the CFTC under section 13(d)(1)(J) of the BHC Act that a banking entity may not only invest in such entities as provided under section 13(d)(1)(E) of the BHC Act, but also may sponsor an entity described in that paragraph and that such activity, since it generally would facilitate investment in small businesses and support the public welfare, would promote and protect the safety and soundness of banking entities and the financial stability of the United States.

[299] In particular, § ____.13 of the proposed rule does not include: (i) The exemption in section 13(d)(1)(A) of the BHC Act for trading in certain permitted government obligations; (ii) the exemption in section 13(d)(1)(H) of the BHC Act for certain foreign proprietary trading activities; and (iii) the exemption contained in section 13(d)(1)(B) of the BHC Act related to underwriting and market-making related activities. Each of these exemptions appear relevant only to covered trading activities and not to covered fund activities.

[300] Section 13(d)(1)(E) of the BHC Act permits a banking entity to make investments in one or more SBICs, investments designed primarily to promote the public welfare, investments of the type permitted under 12 U.S.C. 24 (eleventh), and investments that are qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure. *See* 12 U.S.C. 1851(d)(1)(E).

services, or jobs); and (iii) an investment that is a qualified rehabilitation expenditure with respect to a qualified rehabilitation building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.[301] Since section 13(d)(1)(E) of the BHC Act does not limit a banking entity's investment to a limited partnership or other non-controlling investment, § ____.13(a) of the proposed rule would permit a banking entity to be a shareholder, general partner, managing member, or trustee of an SBIC without regard to whether the interest is a controlling or noncontrolling interest.[302]

In addition to the acquisition or retention of an ownership interest, permitting a banking entity to act as sponsor to these types of public interest investments will provide valuable expertise and services to these types of entities, as well as help enable banking entities to provide valuable funding and assistance to small business and low- and moderate-income communities. Therefore, the Agencies believe this exemption would be consistent with the safe and sound operation of banking entities, and would also promote the financial stability of the United States.

The CFTC requests comment on the proposed rule's approach to implementing the exemption for permitted investments in and relationships with SBICs and certain related funds. In particular, the CFTC requests comment on the following questions:

Question 276. Is the proposed rule's approach to implementing the SBIC, public welfare and qualified rehabilitation investment exemption for acquiring or retaining an ownership interest in a covered fund effective? If not, what alternative approach would be more effective?

Question 277. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 278. Should the proposed rule permit a banking entity to sponsor an SBIC and other identified public interest investments? Why or why not? Does the CFTC's determination under section 13(d)(1)(J) of the BHC Act regarding sponsoring of an SBIC, public welfare or qualified rehabilitation investment effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?

Question 279. What would the effect of the proposed rule be on a banking entity's ability to sponsor and syndicate funds supported by public welfare investments or low income housing tax credits which are utilized to assist banks and other insured depository institutions with meeting their Community Reinvestment Act (''CRA'') obligations?

Question 280. Does the proposed rule unduly constrain a banking entity's ability to meet the convenience and needs of the community through CRA or other public welfare investments or services? If so, why and how could the proposed rule be revised to address this concern?

b. Permitted Risk-Mitigating Hedging Activities

Section ____.13(b) of the proposed rule permits a banking entity to acquire and retain an ownership interest in a covered fund if the transaction is made in connection with, and related to, certain individual or aggregated positions, contracts, or other holdings of the banking entity and is designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings. This section of the proposed rule implements, in relevant part, section 13(d)(1)(C) of the BHC Act, which provides an exemption from the prohibition on acquiring or retaining an ownership interest in a covered fund for certain risk-mitigating hedging activities.[303]

Interests by a banking entity in a covered fund may not typically be used as hedges for specific positions, contracts, or other holdings of a banking entity. However, two situations where a banking entity may potentially acquire or retain an ownership interest in a covered fund as a hedge are (i) when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund (similar to acting as a ''riskless principal''),[304] and (ii) to cover a compensation arrangement with an employee of the banking entity that directly provides investment advisory or other services to that fund. Section ____.13(b) of the proposed rule provides an exemption for banking entity to acquire or retain an ownership interest in a covered fund in these limited situations.[305]

i. Approach for Hedges Using an Ownership Interest in a Covered Fund

As noted above in the discussion of § ____.5 of the proposed rule, risk-mitigating hedging activities present certain implementation challenges because of the potential that prohibited activities or investments could be conducted in the context of, or mischaracterized as, hedging transactions. In light of these complexities, the Agencies have proposed a multi-faceted approach to implementation, which is discussed in detail above in reference to § ____.5 of the proposed rule.[306] As with the hedging exemption provided under § ____.5, this multi-faceted approach is intended to clearly articulate the CFTC's expectation regarding the scope of permitted hedging activities under § ____.13(b) in a manner that limits potential abuse of the hedging exemption while not unduly constraining the important risk management function that is served by a banking entity's hedging activities. However, because of the possibility that using an ownership interest in a covered fund as a hedging instrument may mask an intent to evade the limitations on the amount and value of ownership interests in a covered fund or funds under § ____.12, the proposed rule contains several additional requirements related to a banking entity's ability to use an ownership interest in a covered fund as a hedging instrument.

ii. Required Criteria for Permitted Risk-Mitigating Hedging Activities Involving a Covered Fund

Section ____.13(b) of the proposed rule describes the criteria that a banking entity must meet in order to rely on the hedging exemption with respect to ownership interests of a covered fund. The majority of these requirements are substantially similar to those discussed in detail above in connection with the risk-mitigating hedging exemption contained in § ____.5 of the proposed rule, and include the requirements that:

[301] *See* proposed rule § ____.13(a).

[302] Pursuant to the exemption contained in § ____.13(a) of the proposed rule, a banking entity may acquire an ownership interest in, or act as sponsor to, a low income housing credit fund, if such fund qualifies as an SBIC, public welfare investment or qualified rehabilitation expenditure.

[303] *See* 12 U.S.C. 1851(d)(1)(C).

[304] In order to prevent evasion of the general limitation that a banking entity may not acquire or retain more than 3 percent of the ownership interests in any single covered fund that such banking entity organizes and offers, the proposed rule limits a banking entity's ability to acquire or retain an ownership interest in a covered fund as a permitted risk-mitigating hedge to those situations where the customer of the banking entity is not itself a banking entity. *See* proposed rule § ____.13(b)(1)(i)(A).

[305] *See* proposed rule § ____.13(b).

[306] *See* **SUPPLEMENTARY INFORMATION**, Part III.B.3.

(i) The hedge is made in connection with and related to individual or aggregated obligations or liabilities of the banking entity that are: (A) taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or (B) directly connected to a compensation arrangement with an employee that directly provides investment advisory or other services to the covered fund; (ii) the banking entity has established the internal compliance program required by subpart D designed to ensure the banking entity's compliance with the requirements of this paragraph, including reasonably designed written policies and procedures regarding the instruments, techniques and strategies that may be used for hedging, internal controls and monitoring procedures, and independent testing; (iii) the transaction is designed to reduce the specific risks to the banking entity in connection with and related to such obligations or liabilities; (iv) the acquisition or retention of an ownership interest in a covered fund: (A) Is made in accordance with the written policies, procedures and internal controls established by the banking entity pursuant to subpart D; (B) hedges or otherwise mitigates an exposure to a covered fund through a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest in that covered fund that arises out of a transaction conducted solely to accommodate a specific customer request with respect to, or directly connected to its compensation arrangement with an employee that directly provides investment advisory or other services to, that covered fund; (C) does not give rise, at the inception of the hedge, to significant exposures that were not already present in individual or aggregated positions, contracts, or other holdings of a banking entity and are not hedged contemporaneously; and (D) is subject to continuing review, monitoring and management by the banking entity that: (1) Is consistent with its written hedging policies and procedures; (2) maintains a substantially similar offsetting exposure to the same amount and type of ownership interest, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and (3) mitigates any significant exposure arising out of the hedge after inception; and (v) the compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking.[307]

These requirements, while substantially similar to those contained in § ____.5 above, are different in several material aspects. First, § ____.13(b)(1)(i) of the proposed rule provides that any banking entity relying on this exemption may only hedge or otherwise mitigate one or more specific risks arising in connection with and related to the two situations enumerated in that section. These are risks taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or directly connected to its compensation arrangement with an employee that directly provides investment advisory or other services to the covered fund.[308] Second, § ____.13(b)(2)(ii)(B) of the proposed rule requires that the acquisition or retention of an ownership interest in a covered fund hedge or otherwise mitigate a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest in that covered fund, which requires greater equivalency between the reference asset and hedging instrument than the correlation required under § ____.5. Third, § ____.13(b)(3) of the proposed rule imposes a documentation requirement on all types of hedging transactions where the banking entity uses ownership interests in a covered fund as the hedging instrument. This requirement is broader than that contained in § ____.5 and is reflective of the limited scope of positions or exposures for which a banking entity may acquire or retain an ownership interest in a covered fund as a hedge. Specifically, for *any* transaction that a banking entity acquires or retains an ownership interest in a covered fund in reliance of the hedging exemption, the banking entity must document the risk-mitigating purposes of the transaction and identify the risks of the individual or aggregated positions, contracts, or other holding of the banking entity that the transaction is designed to reduce. Such documentation must be established at the time the hedging transaction is effected, not after the fact. This documentation requirement establishes a contemporaneous record that will assist the CFTC in assessing the actual reasons for which the position was established.

iii. Request for Comment

In addition to those questions raised in connection with the proposed implementation of the risk-mitigating hedging exemption under § ____.5 of the proposed rule, the CFTC requests comment on the proposed implementation of that same exemption with respect to covered fund activities. In particular, the CFTC requests comment on the following questions:

Question 281. Is the proposed rule's approach to implementing the hedging exemption for acquiring or retaining an ownership interest in a covered fund effective? If not, what alternative approach would be more effective?

Question 282. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 283. What burden will the proposed approach to implementing the hedging exemption have on banking entities? How can any burden be minimized or eliminated in a manner consistent with the language and purpose of the statute?

Question 284. Are the criteria included in § ____.13(b)'s hedging exemption effective? Is the application of each criterion to potential transactions sufficiently clear? Should any of the criteria be changed or eliminated? Should other requirements be added?

Question 285. Is the requirement that an ownership interest in a covered fund may only be used as a hedge (i) by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or (ii) to cover compensation arrangements with an employee of the banking entity that directly provides investment advisory or other services to that fund effective? If not, what other requirements would be more effective?

Question 286. Does the proposed rule sufficiently articulate the types of risks and positions that a banking entity typically would utilize an ownership interest in a covered fund to hedge? If not, how should the proposal be changed?

Question 287. Is the requirement that the hedging transaction involve a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest to the risk or risks the transaction is intended to hedge or otherwise mitigate effective? If not, how should the

[307] *See* proposed rule § ____.13(b).

[308] *See* proposed rule § ____.13(b)(1)(i).

requirement be changed? Should some other level of correlation be required? Should the proposal specify in greater detail how correlation should be measured? If not, how could it better do so?

Question 288. Is the requirement that the transaction not give rise, at the inception of the hedge, to material risks that are not themselves hedged in a contemporaneous transaction effective? Is the proposed materiality qualifier appropriate and sufficiently clear? If not, what alternative would be effective and/or clearer?

Question 289. Is the requirement that any transaction conducted in reliance on the hedging exemption be subject to continuing review, monitoring and management after the transaction is established effective? If not, what alternative would be more effective?

Question 290. Is the proposed documentation requirement effective? If not, what alternative would be more effective? What burden would the proposed documentation requirement place on covered banking entities? How might such burden be reduced or eliminated in a manner consistent with the language and purpose of the statute?

c. Permitted Covered Fund Activities and Investments Outside of the United States

Section ____.13(c) of the proposed rule, which implements section 13(d)(1)(I) of the BHC Act,[309] permits certain foreign banking entities to acquire or retain an ownership interest in, or to act as sponsor to, a covered fund so long as such activity occurs solely outside of the United States and the entity meets the requirements of sections 4(c)(9) or 4(c)(13) of the BHC Act. The purpose of this statutory exemption appears to be to limit the extraterritorial application of the statutory restrictions on covered fund activities to foreign firms that, in the course of operating outside of the United States, engage outside the United States in activities permitted under relevant foreign law, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States.[310] Consistent with this purpose, the proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which covered fund activities or investments by such an entity will be considered to have occurred solely outside of the United States (including clarifying when an ownership interest will be deemed to have been offered for sale or sold to a resident of the United States).

i. Foreign Banking Entities Eligible for the Exemption

Section ____.13(c)(1)(i) of the proposed rule incorporates the statutory requirement that the banking entity not be, directly or indirectly, controlled by a banking entity that is organized under the laws of the United States or of one or more States. Consistent with the statutory language, banking entities organized under the laws of the United States or of one or more States, or the subsidiaries or branches thereof (wherever organized or licensed), may not rely on the exemption. Similarly, the U.S. subsidiaries or U.S. branches of foreign banking entities would not qualify for the exemption.

Section ____.13(c)(2) clarifies when a banking entity would be considered to have met the statutory requirement that the banking entity conduct the activity pursuant to paragraphs 4(c)(9) or 4(c)(13) of the BHC Act [311] Section 4(c)(9) of the BHC Act generally provides that the restrictions on nonbanking activities contained in section 4(a) of that statute do not apply to the ownership of shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest.[312] The CFTC notes that the Board has, in part, implemented section 4(c)(9) through subpart B of the Board's Regulation K, which specifies a number of conditions and requirements that a foreign banking organization must meet in order to use such authority. Such conditions and requirements include, for example, a qualifying foreign banking organization test that requires the foreign banking organization to demonstrate that more than half of its worldwide business is banking and that more than half of its banking business is outside the United States.

The proposed rule makes clear that a banking entity will qualify for the foreign fund exemption if the entity is a foreign banking organization subject to subpart B of the Board's Regulation K and the transaction occurs solely outside the United States. Section 13 of the BHC Act also applies to foreign companies that are banking entities covered by Section 13 but are not currently subject either to the BHC Act generally or the Board's Regulation K, for example, because the foreign company controls a savings association or an FDIC-insured industrial loan company but not a bank or branch in the United States. Accordingly, the proposed rule clarifies when such a foreign banking entity would be considered to have conducted a transaction or activity ''pursuant to section 4(c)(9)'' for purposes of the exemption at § ____.13(c) of the proposed rule.[313] In particular, the proposed rule proposes that to qualify for the foreign banking entity exemption, such firms must meet at least two of three requirements that evaluate the extent to which the foreign entity's business is conducted outside the United States, as measured by assets, revenues, and income. This test largely mirrors the qualifying foreign banking organization test that is made applicable under section 4(c)(9) and § 211.23(a) of the Board's Regulation K, except that the relevant test under § ____.13(c)(2)(ii) of the proposed rule does not require such a foreign entity to demonstrate that more than half of its

[309] Section 13(d)(1)(I) of the BHC Act permits a banking entity to acquire or retain an ownership interest in, or have certain relationships with, a covered fund notwithstanding the prohibition on proprietary trading and restrictions on investments in, and relationships with, a covered fund, if: (i) such activity or investment is conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; (ii) the activity occurs solely outside of the United States; (iii) no ownership interest in such fund is offered for sale or sold to a resident of the United States; and (iv) the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. *See* 12 U.S.C. 1851(d)(1)(I).

[310] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[311] Section ____.13(c)(2) of the proposed rule only addresses when a transaction or activity will be considered to have been conducted pursuant to section 4(c)(9) of the BHC Act; although the statute also references section 4(c)(13) of the BHC Act, the CFTC notes that the Board has applied the authority contained in that section only to include certain foreign activities of U.S. banking organizations. The express language of section 13(d)(1)(I) of the BHC Act limits its availability to foreign banking entities that are not controlled by a banking entity organized under the laws of the United States or of one or more States. A foreign banking entity may not rely on the exemptive authority of section 4(c)(13) and, so, that section is not addressed in the proposed rule.

[312] *See* 12 U.S.C. 1843(c)(9).

[313] The CFTC notes that the Board emphasizes that this clarification would be applicable *solely in the context of sections 13(d)(1)(H) and (I) of the BHC Act.* The application of section 4(c)(9) to such foreign companies in other contexts is likely to involve different legal and policy issues and may therefore merit different approaches.

business is banking conducted outside the United States.[314]

ii. Transactions and Activities Solely Outside of the United States

Section ____.13(c) of the proposed rule also clarifies when a transaction or activity will be considered to have occurred solely outside of the United States for purposes of the exemption. In interpreting this aspect of the statutory language, the proposal focuses on the extent to which material elements of the transaction occur within, or are effected by personnel within, the United States. This aspect of the proposal reflects the apparent intent of the foreign funds exemption to avoid extraterritorial application of the restrictions on covered funds activities and investments outside the United States while preserving competitive parity within U.S. market. The proposed rule does not evaluate solely whether the risk of the transaction or activity, or management or decision-making with respect to such transaction or activity, rests outside the United States. Rather, the proposal also provides that foreign banking entities may not structure a transaction or activity so as to be ''outside of the United States'' for risk and booking purposes while simultaneously engaging in transactions within U.S. markets that are prohibited for U.S. banking entities.

In particular, § ____.13(c)(3) of the proposed rule provides that a transaction or activity will be considered to have occurred solely outside of the United States only if all of the following three conditions are satisfied:

- The transaction or activity is conducted by a banking entity that is not organized under the laws of the United States or of one or more States;
- No subsidiary, affiliate, or employee of the banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States; and
- No ownership interest in such covered fund is offered for sale or sold to a resident of the United States.

These three criteria reflect statutory constraints and are intended to ensure that a transaction or activity conducted in reliance on the exemption does not involve either investors that are residents of the United States or a relevant U.S. employee of the banking entity, as such involvement would appear to constitute a sufficient locus of activity in the U.S. marketplace so as to preclude the availability of the exemption.

A resident of the United States is defined in § ____.2(t) of the proposed rule, and is described in detail in Part III.B.4.d of this **SUPPLEMENTARY INFORMATION**. The proposed rule applies this definition in the context of the foreign covered funds exemption because it would appear to appropriately capture the scope of counterparties (including investors that are residents of the United States) or relevant U.S. personnel of the banking entity, that, if involved in the transaction or activity, would preclude such transaction or activity from being considered to have occurred solely outside the United States. Under the proposed rule, an employee or entity engaged in the offer or sale of an ownership interest (or booking such transaction) must be outside of the United States; however, an employee or entity with no customer relationship and involved solely in providing administrative services or so-called ''back office'' functions to the fund as incident to the activity permitted under § ____.13(c) of the proposed rule (such as clearing and settlement or maintaining and preserving records of the fund with respect to a transaction where no ownership interest is offered for sale or sold to a resident of the United States) would not be subject to this requirement.

iii. Request for Comment

The CFTC requests comment on the proposed rule's approach to implementing the foreign covered funds activity and investment exemption. In particular, the CFTC request comment on the following questions:

Question 291. Is the proposed rule's implementation of the ''foreign funds'' exemption effective? If not, what alternative would be more effective and/or clearer?

Question 292. Are the proposed rule's provisions regarding when an activity will be considered to be conducted pursuant to section 4(c)(9) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Does it effectively address application of the foreign funds exemption to foreign banking entities not subject to the BHC Act generally? If not, how could it better address application of the exemption?

Question 293. Are the proposed rule's provisions regarding when a transaction or activity will be considered to have occurred solely outside the United States effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should additional requirements be added? If so, what requirements and why? Should additional requirements be modified or removed? If so, what requirements and why or how?

Question 294. Is the proposed exemption consistent with the purpose of the statute? Is the proposed exemption consistent with respect to national treatment for foreign banking organizations? Is the proposed exemption consistent with the concept of competitive equity?

Question 295. Does the proposed rule effectively define a resident of the United States for these purposes? If not, how should the definition be altered? What definitions of resident of the United States are currently used by banking entities? Would using any one of these definitions reduce the burden of complying with section 13 of the BHC Act? Why or why not?

d. Sale and Securitization of Loans

Section ____.13(d) of the proposed rule permits a banking entity to acquire and retain an ownership interest in a covered fund that is an issuer of asset-backed securities, the assets or holdings of which are solely comprised of: (i) Loans; (ii) contractual rights or assets directly arising from those loans supporting the asset-backed securities; and (iii) interest rate or foreign exchange derivatives that (A) materially relate to the terms of such loans or contractual rights or assets and (B) are used for hedging purposes with respect to the securitization structure.[315] The authority contained in this section of the proposed rule would therefore allow a banking entity to engage in the sale and securitization of loans by acquiring and retaining an ownership interest in certain securitization vehicles (which could qualify as a covered fund for purposes of section 13(h)(2) of the BHC Act and the proposed rule) that the banking entity organizes and offers, or acts as sponsor to, in excess of and

[314] *See* 12 U.S.C. 1843(c)(9); 12 CFR 211.23(a); proposed rule § ____.13(c)(2). This difference reflects the fact that foreign entities subject to section 13 of the BHC Act but not the BHC Act are, in many cases, predominantly commercial firms. A requirement that a firm also demonstrate that more than half of its banking business is outside the United States would likely make the exemption unavailable to many such firms and subject their global activities to the prohibition on acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund, a result that the statute does not appear to have intended.

[315] *See* proposed rule § ____.13(d). The types of derivatives permitted under § ____.13(d)(3) of the proposed rule are not meant to include a synthetic securitization or a securitization of derivatives, but rather to include those derivatives that are used to hedge foreign exchange or interest rate risk resulting from loans held by the issuer of asset-backed securities.

without being subject to the limitations contained in § ____.12 of the proposed rule. Proposed § ____.13(d) is designed to assist in implementing section 13(g)(2) of the BHC Act, which provides that nothing in section 13 of the BHC Act shall be construed to limit or restrict the ability of a banking entity or nonbank financial company supervised by the Board to sell or securitize loans in a manner otherwise permitted by law.[316]

The CFTC notes that the phrase ''materially relate to terms of such loans'' is intended to quantitatively limit the derivatives permitted in a ''securitization of loans'' under § ____.13(d) of the proposed rule to include only those derivatives where the notional amount of the derivative is tied to the outstanding principal balance of the loans supporting the asset-backed securities of such issuer, either individually or in the aggregate. Additionally, such derivatives must be used solely to hedge risks that result from a mismatch between the loans and the related asset-backed securities (*e.g.,* fixed rate loans with floating rate asset-backed securities, loans tied to the Prime Rate with LIBOR asset-backed securities, or Euro-denominated loans with Dollar-denominated asset-backed securities). Therefore, § ____.13(d)(3) of the proposed rule would not allow the use of a credit default swap by an issuer of asset-backed securities.

The CFTC requests comment on the proposed rule's approach to implementing the rule of construction related to the sale and securitization of loans. In particular, the CFTC requests comment on the following questions:

Question 296. Is the proposed rule's implementation of the statute's ''sale and securitization of loans'' rule of construction effective? If not, what alternative would be more effective and/or clearer?

Question 296.1. Should the proposed CFTC Rule include the securitization exemption in § ____.13(d)? Please explain the rationale for including or excluding the securitization exemption in the proposed CFTC Rule.

Question 297. Are there other entities or activities that should be included in the proposed rule's implementation of the rule of construction related to the sale and securitization of loans? If so, what entity or activity and why?

Question 298. Is the proposed rule's application of the rule of construction contained in section 13(g)(2) of the BHC Act appropriate?

Question 299. Are the proposed rule and this **SUPPLEMENTARY INFORMATION** sufficiently clear regarding which derivatives would be allowed in a ''securitization of loans'' under § ____.13(d)(3) of the proposed rule? Is additional guidance necessary with respect to the types of derivatives that would be included in or excluded from a securitization of loans for purposes of interpreting the rule of construction contained in section 13(g)(2) of the BHC Act? If so, what topics should the additional guidance discuss and why?

Question 300. Should derivatives other than interest rate or foreign exchange derivatives be allowed in a ''securitization of loans'' for purposes of interpreting the rule of construction contained in section 13(g)(2) of the BHC Act? Why or why not? What would be the legal and economic impact of not allowing the use of derivatives other than interest rate or foreign exchange derivatives in a ''securitization of loans'' under § ____.13(d)(3) of the proposed rule for existing issuers of asset-backed securities and for future issuers of asset-backed securities?

Question 301. Should the CFTC consider providing additional guidance for when a transaction with intermediate steps constitutes one or more securitization transactions that each would be subject to the rule? For example, both auto lease securitizations and asset-backed commercial paper conduits typically involve intermediate securitizations. The asset-backed securities issued to investors in such covered funds are technically supported by the intermediate asset-backed securities. Should these kinds of securitizations be viewed as a single transaction and included within a securitization of loans for purposes of the proposed rule? Should each step be viewed as a separate securitization?

5. Section ____.14: Covered Fund Activities and Investments Determined To Be Permissible

Section ____.14 of the proposed rule, which implements section 13(d)(1)(J) of the BHC Act,[317] permits a banking entity to engage in any covered funds activity that the CFTC determines promotes and protects the safety and soundness of a banking entity and the financial stability of the United States.[318] Any activity authorized under § ____.14 of the proposed rule must still comply with the prohibition and limitations governing relationships with covered funds contained in section 13(f) of the BHC Act, as implemented by § ____.16 of this proposal.[319] Additionally, like other activities permissible under section 13(d)(1) of the BHC Act and as implemented by subpart C of the proposed rule, activities found permissible under § ____.14 of the proposed rule and section 13(d)(1)(J) remain subject to other provisions of section 13 of the BHC Act, including the sections limiting conflicts of interest and high-risk assets or trading strategies, as well as the section designed to prevent evasion of section 13 of the BHC Act.[320]

The CFTC has proposed to permit three activities at this time under this authority. These activities involve acquiring or retaining an ownership interest in and sponsoring of (i) certain BOLI separate accounts; (ii) certain entities that, although within the definition of covered fund are, in fact, common corporate organizational vehicles; and (iii) a covered fund in the ordinary course of collecting a debt previously contracted in good faith or pursuant to and in compliance with the conformance or extended transition period provided for under the Board's rules issued under section 13(c)(6) of the BHC Act.

a. Investments in Certain Bank Owned Life Insurance Separate Accounts

Banking entities have for many years invested in life insurance policies that cover key employees, in accordance with supervisory policies established by the Federal banking agencies.[321] These BOLI investments are typically structured as investments in separate accounts that are excluded from the definition of ''investment company'' under the Investment Company Act by virtue of section 3(c)(1) or 3(c)(7) of that

[316] *See* 12 U.S.C. 1851(g)(2).

[317] Section 13(d)(1)(J) of the BHC Act provides the CFTC discretion to determine that other activities not specifically identified by sections 13(d)(1)(A)–(I) of the BHC Act are exempted from the general prohibitions contained in section 13(a) of that Act, and are thus permitted activities. In order to make such a determination, the CFTC must find that such activity or activities promote and protect the safety and soundness of a banking entity, as well as promote and protect the financial stability of the United States. *See* 12 U.S.C. 1851(d)(1)(J).

[318] *See* 12 U.S.C. 1851(d)(1)(J).

[319] Section 13(d)(1)(J) of the BHC Act only provides the CFTC with the ability to provide additional exemptions from the prohibitions contained in section 13(a)(1) of the BHC Act. Section 13(f) of the BHC Act, which deals with relationships and transactions with a fund that is, directly or indirectly, organized and offered or sponsored by a banking entity, operates as an independent prohibition and set of limitations on the activities of banking entities. As such, § ____.14 of the proposed rule cannot and does not provide any exemptions from the prohibition on relationships or transaction with a covered fund contained in section 13(f) of the BHC Act or § ____.16 of the proposed rule.

[320] *See* 12 U.S.C. 1851(d)(2), (e)(1).

[321] *See, e.g.,* Bank Owned Life Insurance, Interagency Statement on the Purchase and Risk Management of Life Insurance (''Interagency BOLI Guidance'') (Dec. 7, 2004).

Act. By virtue of reliance on these exclusions, these BOLI accounts would be covered by the definition of ''hedge fund'' or ''private equity fund'' in section 13 of the BHC Act.[322]

However, when made in the normal course, these investments do not involve the speculative risks intended to be addressed by section 13 of the BHC Act. Moreover, applying the prohibitions in section 13 to these investments would eliminate an investment that helps banking entities to reduce their costs of providing employee benefits as well as other costs.

Section ____.14(a)(1) of the proposed rule permits a banking entity to acquire and retain these BOLI investments, as well as act as sponsor to a BOLI separate account.[323] The proposal includes a number of conditions designed to ensure that BOLI investments are not conducted in a manner that raises the concerns that section 13 of the BHC Act is intended to address. In particular, in order for a banking entity to invest in or sponsor a BOLI separate account, the banking entity that purchases the insurance policy: (i) May not control the investment decisions regarding the underlying assets or holdings of the separate account; and (ii) must hold its ownership interests in the separate account in compliance with applicable supervisory guidance provided by the appropriate Federal regulatory agency regarding BOLI.[324]

The CFTC has structured this exemption in the proposed rule so as to allow a banking entity to continue to manage and structure its risks and obligations related to its employee compensation or benefit plan obligations in a manner that promotes and protects the safety and soundness of banking entities, which on an industry-wide level has the concomitant effect of promoting and protecting the financial stability of the United States.

b. Investments in Certain Other Covered Funds

As noted above, the definition of ''covered fund'' as contained in § ____.10(b)(1) of the proposed rule potentially includes within its scope many entities and corporate structures that would not usually be thought of as a ''hedge fund'' or ''private equity fund.'' Additionally, the Dodd-Frank Act contains other provisions that permit or require a banking entity to acquire or retain an ownership interest in or act as sponsor to a covered fund in a manner not specifically described under section 13 of the BHC Act.

Section ____.14(a)(2) of the proposed rule permits a banking entity to own certain specified entities that are often part of corporate structures and that, by themselves and without other extenuating circumstances or factors, do not raise the type of concerns which section 13 of the BHC Act was intended to address but which nevertheless may be captured by the definition of ''hedge fund'' or ''private equity fund'' in section 13(h)(2) of the BHC Act. Specifically, § ____.14(a)(2) of the proposed rule permits a banking entity to acquire or retain an ownership interest in or act as sponsor to (i) a joint venture between the banking entity and any other person, provided that the joint venture is an operating company and does not engage in any activity or any investment not permitted under the proposed rule; (ii) an acquisition vehicle, provided that the sole purpose and effect of such entity is to effectuate a transaction involving the acquisition or merger of one entity with or into the banking entity or one of its affiliates; and (iii) a wholly-owned subsidiary of the banking entity that is (A) engaged principally in providing *bona fide* liquidity management services described under § ____.3(b)(2)(iii)(C) of the proposed rule, and (B) carried on the balance sheet of the banking entity.[325]

The CFTC notes that these types of entities may meet the definition of covered fund contained in § ____.10(b)(1) of the proposed rule (and as contained in section 13(h)(2) of the BHC Act), to the extent these entities rely solely on section 3(c)(1) or 3(c)(7) of the Investment Company Act. However, these types of entities do not engage in the type and scope of activities to which Congress intended section 13 of the BHC Act to apply.[326] Additionally, without this exemption, many entities would be forced to alter their corporate structure without achieving any reduction in risk. Permitting such investments in these entities would thus appear to promote and protect the safety and soundness of banking entities and promote and protect the financial stability of the United States.

Section ____.14(a)(2) of the proposed rule also permits a banking entity to comply with section 15G of the Exchange Act (15 U.S.C. 78o–11), added by section 941 of the Dodd-Frank Act, which requires a banking entity to maintain a certain minimum interest in certain sponsored or originated asset-backed securities.[327] In order to give effect to this separate requirement under the Dodd-Frank Act, § ____.14(a)(2)(iii) of the proposed rule permits a banking entity to acquire or retain an ownership interest in or act as sponsor to an issuer of asset-backed securities, but only with respect to that amount or value of economic interest in a portion of the credit risk for an asset-backed security that is retained by a banking entity that is a ''securitizer'' or ''originator'' in compliance with the minimum requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and any implementing regulations issued thereunder.[328] The Agencies have structured this exemption to recognize that Congress imposed other requirements on firms that are banking entities under section 13 of the BHC Act. Additionally, permitting a banking entity to retain the minimum level of economic interest will incent banking entities to engage in more careful and prudent underwriting and evaluation of the risks and obligations that may accompany asset-backed securitizations, which would promote and protect the safety and soundness of banking entities and the financial stability of the United States.

Section 14(a)(2) of the proposed rule permits a banking entity to acquire and retain an ownership interest in a covered fund that is an issuer of asset-backed securities described in § 13(d) of the proposed rule, the assets or holdings of which are solely comprised of: (i) Loans; (ii) contractual rights or assets directly arising from those loans

[322] *See* 12 U.S.C. 1851(h)(2).

[323] The proposed rule defines ''separate account'' as ''an account established and maintained by an insurance company subject to regulation by a State insurance regulatory or a foreign insurance regulator under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.'' *See* proposed rule § ____.2(z).

[324] *See* proposed rule § ____.14(a)(1)(i)–(ii). While other guidance or requirements may be imposed by the CFTC or other Agencies for a specific banking entity for which it serves as the primary financial regulator, the CFTC notes that, at a minimum, investments under authority of this section must comply with the Interagency BOLI Guidance. This guidance requires, among other things, that a banking entity generally: (i) Not control the investment decisions regarding the underlying assets or holdings of the separate account; (ii) demonstrate to the satisfaction of the CFTC that the potential returns from the investments in such separate account are appropriately matched to the banking entity's employee compensation or benefit plan obligations; and (iii) not use such separate account to take speculative positions or to support the general operations of the banking entity.

[325] *See* proposed rule § ____.14(a)(2).

[326] *See* 156 Cong. Rec. H5226 (daily ed. June 30, 2010) (statement of Reps. Hymes and Frank).

[327] The SEC and certain banking agencies issued a proposed rule to implement the requirements of section 15G of the Exchange Act, as required under section 941 of the Dodd-Frank Act. *See* Credit Risk Retention, 76 FR 24090 (Apr. 29, 2011).

[328] *See* proposed rule § ____.14(a)(2)(iii).

supporting the asset-backed securities; and (iii) interest rate or foreign exchange derivatives that (A) materially relate to the terms of such loans or contractual rights or assets and (B) are used for hedging purposes with respect to the securitization structure. This exemption augments the authority regarding the sale and securitization of loans available under § ____.13(d) of the proposed rule (which partially implements the rule of construction under section 13(g)(2) of the BHC Act) and permits a banking entity to engage in the purchase, and not only the sale and securitization, of loans through authorizing the acquisition or retention of an ownership interest in such securitization vehicles that the banking entity does not organize and offer, or for which it does not act as sponsor, provided that the assets or holdings of such vehicles are solely comprised of the instruments or obligations referenced above.[329]

Permitting banking entities to acquire or retain an ownership interest in these loan securitizations will provide a deeper and richer pool of potential participants and a more liquid market for the sale of such securitizations, which in turn should result in increased availability of funds to individuals and small businesses, as well as provide greater efficiency and diversification of risk. The CFTC believes this exemption would promote and protect the safety and soundness of a banking entity, and would also promote and protect the financial stability of the United States.[330]

c. Acquiring or Retaining an Ownership Interest in or Acting a Sponsor to a Covered Fund Under Certain Specified Authorities

Section ____.14(b) of the proposed rule permits a banking entity to acquire or retain an ownership interest in or act as sponsor to a covered fund in those instances where the ownership interest is acquired or retained by a banking entity (i) in the ordinary course of collecting a debt previously contracted in good faith, if the banking entity divests the ownership interest within applicable time periods provided for by the CFTC, or (ii) pursuant to and in compliance with the Conformance or Extended Transition Period authorities provided for under the proposed rule.[331]

Allowing banking entities to rely on these authorities for acquiring or retaining an ownership interest in or acting as sponsor to a covered fund will enable banking entities to manage their risks and structure their business in a manner consistent with their chosen corporate form and in a manner that otherwise complies with applicable laws. Thus, permitting such activities would promote and protect the safety and soundness of a banking entity, and would also promote and protect the financial stability of the United States.

d. Request for Comment

The CFTC requests comment on the proposed rule's approach to implementing the exemption related to activities specifically determined to be permissible under section 13(d)(1)(J) of the BHC Act. In particular, the CFTC requests comment on the following questions:

Question 302. Is the proposed rule's implementation of exemptions for covered fund activities and investments pursuant to section 13(d)(1)(J) of the BHC Act effective? If not, what alternative would be more effective and/or clearer?

Question 302.1. Should the proposed CFTC Rule include the additional exemptions listed in section 13(d)(1)(J) of the BHC Act in Section ____.14 (*e.g.,* BOLI, certain acquisition vehicles)? Please explain the rationale for including or excluding the exemptions in the proposed CFTC Rule.

Question 303. Is the proposed rule's approach to utilizing section 13(d)(1)(J) of the BHC Act to permit a banking entity to acquire or retain an ownership interest in, or act as sponsor to, certain entities that would fall into the definition of covered fund effective? Why or why not? If not, what alternative would be more effective and why? What legal authority under the statute would permit such an alternative?

Question 304. Are the proposed rule's provisions regarding when a covered fund activity will be deemed to be permitted under authority of section 13(d)(1)(J) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer?

Question 305. Do the exemptions provided for in § ____.14 of the proposed rule effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?

Question 306. Are the proposed rule's provisions regarding what qualifications must be satisfied in order to qualify for an exemption under § ____.14 of the proposed rule effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should additional requirements be added? If so, what requirements and why? Should additional requirements be modified or removed? If so, what requirements and why or how?

Question 307. Does the proposed rule effectively cover the scope of covered funds activities which the Agencies should specifically determine to be permissible under section 13(d)(1)(J) of the BHC Act? If not, what activity or activities should be permitted? For additional activities that should be permitted, on what grounds would these activities promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 308. Does the proposed rule effectively address the interplay between the restrictions on covered fund activities and investments in section 13 of the BHC Act and the requirements imposed on certain banking entities under section 15G of the Exchange Act? Why or why not?

Question 309. Rather than permitting the acquisition or retentions of an ownership interest in, or acting as sponsor to, specific covered funds under section 13(d)(1)(J) of the BHC Act, should the CFTC use the authority provided under section 13(d)(1)(J) to permit investments in a covered fund that display certain characteristics? If so, what characteristics should the Agencies consider? How would investments with such characteristics promote and protect the safety and soundness of the banking entity and promote the financial stability of the United States?

Question 310. Should venture capital funds be excluded from the definition of ''covered fund''? Why or why not? If so, should the definition contained in rule 203(*l*)–1 under the Advisers Act be used? Should any modification to that definition of venture capital fund be made? How would permitting a banking entity to invest in such a fund meet the standards contained in section 13(d)(1)(J) of the BHC Act?

Question 311. Should non-U.S. funds or entities be included in the definition of ''covered fund''? Should any non-U.S. funds or entities be excluded from this definition? Why or why not? How would permitting a banking entity to invest in such a fund meet the standards contained in section 13(d)(1)(J) of the BHC Act?

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[329] *See id.* at § ____.14(a)(2)(v).

[330] The CFTC notes that proposed exemption applies only to the covered fund-related provisions of the proposed rule, and not to its prohibition on proprietary trading.

[331] *See* proposed rule § ____.14(b). The Conformance or Extended Transition period authorities are substantially similar to those proposed by the Board in its February 2011 final rule governing such conformance periods under section 13 of the BHC Act.

Question 312. Should so-called ''loan funds'' that invest principally in loans and not equity be excluded from the definition of ''covered fund''? Why or why not? What characteristics would be most effective in determining whether a fund invests principally in loans and not equity? How would permitting a banking entity to invest in such a fund meet the standards contained in section 13(d)(1)(J) of the BHC Act?

Question 313. Are the proposed rule's proposed determinations that the specified covered funds activities or investments promote and protect the safety and soundness of banking entities and the financial stability of the United States appropriate? If not, how should the determinations be amended or altered?

6. Section ____.15: Internal Controls, Reporting and Recordkeeping Requirements Applicable to Covered Fund Activities and Investments

Section ____.15 of the proposed rule, which implements section 13(e)(1) of the BHC Act,[332] requires a banking entity engaged in covered fund activities and investments to comply with (i) the internal controls, reporting, and recordkeeping requirements required under § ____.20 and Appendix C of the proposed rule, as applicable and (ii) such other reporting and recordkeeping requirements as the CFTC may deem necessary to appropriately evaluate the banking entity's compliance with this subpart C.[333] These requirements are discussed in detail in Part III.D of this **SUPPLEMENTARY INFORMATION.**

7. Section ____.16: Limitations on Relationships With a Covered Fund

Section 13(f) of the BHC Act generally prohibits a banking entity from entering into certain transactions with a covered fund that would be a covered transaction as defined in section 23A of the FR Act.[334] Section ____.16 of the proposed rule implements this provision. Section ____.16(a)(2) of the proposed rule clarifies that, for reasons explained in detail below, certain transactions between a banking entity and a covered fund remain permissible. Section ____.16(b) of the proposed rule implements the statute's requirement that any transaction permitted under section 13(f) of the BHC Act (including a prime brokerage transaction) between the banking entity and covered fund is subject to section 23B of the FR Act,[335] which, in general, requires that the transaction be on market terms or on terms at least as favorable to the banking entity as a comparable transaction by the banking entity with an unaffiliated third party.

a. General Prohibition on Certain Transactions and Relationships

Section 13(f)(1) of the BHC Act generally prohibits a banking entity that, directly or indirectly, serves as investment manager, investment adviser, commodity trading adviser, or sponsor to a covered fund (or that organizes and offers a covered fund pursuant to section 13(d)(1)(G) of the BHC Act) from engaging in any transaction with the covered fund, or with any covered fund that is controlled by such fund, if the transaction would be a ''covered transaction'' as defined in section 23A of the FR Act, as if the banking entity and any affiliate thereof were a member bank and the covered fund were an affiliate thereof.[336] Section ____.16(a)(1) of the proposed rule includes this prohibition.

Consistent with the requirements of section 13(f)(1) of the BHC Act, § ____.16(a)(1) of the proposed rule is more restrictive than section 23A of the FR Act because § ____.16(a)(1) generally prohibits a banking entity and any of its affiliates from entering into any such transaction, while section 23A permits covered transactions with affiliates so long as the transactions meet specified quantitative and qualitative requirements.[337]

b. Transactions That Would Be a ''Covered Transaction''

Section 13(f) of the BHC Act applies to covered transactions as defined in section 23A of the FR Act without incorporating any of the provisions in section 23A that provide exemptions from the prohibitions in that section for certain types of covered transactions.[338] Section ____.16 of the proposed rule adopts the same language as the statute. The definition of ''covered transaction'' contained in section 23A of the FR Act itself includes an explicit exemption from the definition of ''covered transaction'' for ''such purchase of real and personal property as may be specifically exempted by the Board by order or regulation.'' [339] Since these transactions are, by definition, excluded from the definition of ''covered transaction,'' any transaction that is specifically exempted by the Board pursuant to this specific authority would not be deemed to be a covered transaction as defined in section 23A of the FR Act.

c. Certain Transactions and Relationships Permitted

While section 13(f)(1) of the BHC Act operates as a general prohibition on a banking entity's ability to enter into a transaction with a related covered fund that would be a covered transaction as defined under section 23A of the FR Act, other specific portions of the statute expressly provide for, or make reference to, a banking entity's ability to engage in certain transactions or relationships with such funds.[340] Section ____.16(a)(2) of the proposed rule implements and clarifies these authorities.

i. Permitted Investments and Ownerships Interests

Section____.16(a)(2) of the proposed rule clarifies that a banking entity may acquire or retain an ownership interest in a covered fund in accordance with the requirements of subpart C of the

[332] Section 13(e)(1) of the BHC Act requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1).

[333] *See* proposed rule § ____.15.

[334] 12 U.S.C. 371c.

[335] 12 U.S.C. 371c–1.

[336] As noted above, the proposed rule implements the definition of ''banking entity'' in a manner that does not include covered funds for which a banking entity acts as sponsor or organizes and offers pursuant to section 13(d)(1)(G) of the BHC Act, or any covered fund in which such related covered fund invests. Accordingly, these covered funds (and any covered fund in which such covered fund acquired or retains a controlling investment) are not generally subject to the prohibitions contained in § ____.16 of the proposed rule.

[337] Section 23A of the FR Act limits the aggregate amount of covered transactions by a member bank to no more than (i) 10 per centum of the capital stock and surplus of the member bank in the case of any affiliate, and (ii) 20 per centum of the capital stock and surplus of the member bank in the case of all affiliates. *See* 12 U.S.C. 371c(a). Conversely, section 13(f) of the BHC Act operates as a general prohibition on such transactions without providing any similar amount of permitted transactions.

[338] The term ''covered transaction'' is defined in section 23A of the FR Act to mean, with respect to an affiliate of a member bank: (i) a loan or extension of credit to the affiliate, including a purchase of assets subject to an agreement to repurchase; (ii) a purchase of or an investment in securities issued by the affiliate; (iii) a purchase of assets from the affiliate, except such purchase of real and personal property as may be specifically exempted by the Board by order or regulation; (iv) the acceptance of securities or other debt obligations issued by the affiliate as collateral security for a loan or extension of credit to any person or company; (v) the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate; (vi) a transaction with an affiliate that involves the borrowing or lending of securities, to the extent that the transaction causes a member bank or subsidiary to have credit exposure to the affiliate; or (vii) a derivative transaction, as defined in paragraph (3) of section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b)), with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate. *See* 12 U.S.C. 371c(b)(7), *as amended* by section 608 of the Dodd-Frank Act.

[339] *Id.* at 371c(b)(7)(C).

[340] *See, e.g.,*12 U.S.C. 1851(d)(1)(G), (d)(4), and (f)(3).

proposed rule.[341] This clarification is proposed in order to remove any ambiguity regarding whether the section prohibits a banking entity from acquiring or retaining an interest in securities issued by a related covered fund in accordance with the other provisions of the rule, since the purchase of securities of a related covered fund would be a covered transaction as defined by section 23A of the FR Act. There is no evidence that Congress intended section 13(f)(1) of the BHC Act to override the other provisions of section 13 with regard to the acquisition or retention of ownership interests specifically permitted by the section. Moreover, a contrary reading would make these more specific sections that permit covered transactions between a banking entity and a covered fund mere surplusage.

ii. Prime Brokerage Transactions Also Permitted

Section ____.16(a)(2)(ii) of the proposed rule implements section 13(f)(3)(A) of the BHC Act, which provides that a banking entity may enter into any prime brokerage transaction with a covered fund in which a covered fund managed, sponsored, or advised by such banking entity has taken an ownership interest, so long as certain enumerated conditions are satisfied.[342] The proposed rule defines ''prime brokerage transaction'' to mean one or more products or services provided by the banking entity to a covered fund, such as custody, clearance, securities borrowing or lending services, trade execution, or financing, and data, operational, and portfolio management support.[343] To engage in a prime brokerage transaction with a covered fund pursuant to § ____.16(a)(2)(ii) of the proposed rule, a banking entity must be in compliance with the limitations set forth in § ____.11 of the proposed rule with respect to a covered fund organized and offered by such banking entity. In addition, as required by statute, the chief executive officer (or equivalent officer) of the banking entity must certify in writing annually that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests. Finally, the Board must not have determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

d. Restrictions on Transactions With Any Permitted Covered Fund

Section ____.16(b) of the proposed rule implements sections 13(f)(2) and 13(f)(3)(B) of the BHC Act and applies section 23B of the FR Act [344] to certain transactions and investments between a banking entity and a covered fund as if such banking entity were a member bank and such covered fund were an affiliate thereof.[345] Section 23B provides that transactions between a member bank and an affiliate must be on terms and under circumstances, including credit standards, that are substantially the same or at least as favorable to such banking entity as those prevailing at the time for comparable transactions with or involving other unaffiliated companies or, in the absence of comparable transactions, on terms and under circumstances, including credit standards, that in good faith would be offered to, or would apply to, nonaffiliated companies.[346]

Section ____.16(b) applies this requirement to transactions between a banking entity that serves as investment manager, investment adviser, commodity trading adviser, or sponsor to a covered fund and that fund and any other fund controlled by that fund. It also applies this condition to a permissible prime brokerage transaction in which a banking entity may engage pursuant to § ____.16(a)(2)(ii) of the proposed rule.[347]

e. Request for Comment

The CFTC requests comment on the proposed rule's approach to implementing the limitations on certain relationships with covered funds and, in particular, the manner in which the CFTC has proposed to apply a banking entity's ability to make explicitly permitted investments for these purposes, as described above. In particular, the CFTC requests comment on the following questions:

Question 314. Is the proposed rule's approach to implementing the limitations on certain transactions with a covered fund effective? If not, what alternative approach would be more effective and why?

Question 315. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 316. What types of transactions or relationships that currently exist between banking entities and a covered fund (or another covered fund in which such covered fund makes a controlling investment) would be prohibited under the proposed rule? What would be the effect of the proposed rule on banking entities' ability to continue to meet the needs and demands of their clients? Are there other transactions between a banking entity and such covered funds that are not already covered but that should be prohibited or limited under the proposed rule?

Question 317. Should the CFTC provide a different definition of ''prime brokerage transaction'' under the proposed rule? If so, what definition would be appropriate? Are there any transactions that should be included in the definition of ''prime brokerage transaction''? Are there transactions or practices provided by banking entities that should be excluded in order to mitigate the burdens of complying with section 13 of the BHC Act?

Question 318. With respect to the CEO (or equivalent officer) certification required under section 13(f)(3)(A) (ii) of the BHC Act and § ____.16(a)(2)(ii)(B) of the proposed rule, what would be the most useful, efficient method of certification (*e.g.,* a new stand-alone certification, a certification incorporated into an existing form or filing, Web site certification, or certification filed directly with the CFTC)?

8. Section ____.17: Other Limitations on Permitted Covered Funds Activities

Section ____.17 of the proposed rule implements section 13(d)(2) of the BHC Act, which places certain limitations on the permitted covered fund activities and investments in which a banking entity may engage. Consistent with the statute and § ____.8 of the proposed rule, § ____.17 provides that no transaction, class of transactions, or activity is permissible under §§ ____.11 through ____.16 of the proposed rule if the transaction, class of transactions, or activity would:

- Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;
- Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or
- Pose a threat to the safety and soundness of the banking entity or the financial stability of the United States.

Section ____.17 of the proposed rule further defines ''material conflict of interest,'' ''high-risk assets,'' and ''high-

[341] *See* proposed rule § ____.16(a)(2)(i).

[342] *See* proposed rule § ____.16(a)(2)(ii).

[343] *See* proposed rule § ____.10(b)(4).

[344] 12 U.S.C. 371c–1.

[345] *See* proposed rule § ____.16(b).

[346] 12 U.S.C. 371c–1(a); 12 CFR 223.51.

[347] *See* 12 U.S.C. 1851(f)(2), (f)(3)(B); proposed rule § ____.16(b).

risk trading strategies for these purposes, which are identical to the definitions of the same terms for purposes of § ____.8 of the proposed rule related to proprietary trading, and are described in detail in Part III.B.6 of this **SUPPLEMENTARY INFORMATION.**[348]

The CFTC requests comment on the proposed limitations on permitted covered fund activities and investments, including with respect to the questions in Part III.B.6 of the Supplemental Information as they pertain to covered fund activities and investments in particular.

D. Subpart D (Compliance Program Requirement) and Appendix C (Minimum Standards for Programmatic Compliance)

Subpart D of the proposed rule, which implements section 13(e)(1) of the BHC Act,[349] requires certain banking entities to develop and provide for the continued administration of a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on covered trading activities and covered fund activities and investments set forth in section 13 of the BHC Act and the proposed rule.[350] This compliance program requirement forms a key part of the proposal's multi-faceted approach to implementing section 13 of the BHC Act, and is intended to ensure that banking entities establish, maintain and enforce compliance procedures and controls to prevent violation or evasion of the prohibitions and restrictions on covered trading activities and covered fund activities and investments.

1. Section ____.20: Compliance Program Mandate

The proposed rule adopts a tiered approach to implementing the compliance program mandate, requiring a banking entity engaged in covered trading activities or covered fund activities and investments to establish a compliance program that contains specific elements and, if the banking entity's activities are significant, meet a number of minimum standards. If a banking entity does not engage in covered trading activities and covered fund activities and investments, it must ensure that its existing compliance policies and procedures include measures that are designed to prevent the banking entity from becoming engaged in such activities and making such investments and must develop and provide for the required compliance program under proposed § ____.20(a) of the proposed rule prior to engaging in such activities or making such investments, but is not otherwise required to meet the requirements of subpart D of the proposed rule.[351]

Section ____.20(a) of the proposed rule contains the core requirement that each banking entity engaged in covered trading activities or covered fund activities and investments must establish, maintain and enforce a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading activities and covered fund activities and investments set forth in section 13 of the BHC Act and the proposed rule and that such program must be suitable for the size, scope, and complexity of activities and business structure of the banking entity. Section ____.20(b) of the proposed rule specifies the following six elements that each compliance program established under subpart D must provide for, at a minimum:

- Internal written policies and procedures reasonably designed to document, describe, and monitor the covered trading activities and covered fund activities and investments of the banking entity to ensure that such activities and investments comply with section 13 of the BHC Act and the proposed rule;
- A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and the proposed rule in the banking entity's covered trading activities and covered fund activities and investments and to prevent the occurrence of activities that are prohibited by section 13 of the BHC Act and the proposed rule;
- A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and the proposed rule;
- Independent testing for the effectiveness of the compliance program, conducted by qualified banking entity personnel or a qualified outside party;
- Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and
- Making and keeping records sufficient to demonstrate compliance with section 13 of the BHC Act and the proposed rule, which a banking entity must promptly provide to the CFTC upon request and retain for a period of no less than 5 years.

In addition, for a banking entity with significant covered trading activities or covered fund activities and investments, § ____.20(c) requires the compliance program established under subpart D to meet a number of minimum standards, which are specified in Appendix C of the proposed rule. In particular, a banking entity must comply with the minimum standards specified in Appendix C of the proposed rule if:

- With respect to its covered trading activities, it engages in any covered trading activities and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, (i) is equal to or greater than $1 billion or (ii) equals 10 percent or more of its total assets; and
- With respect to its covered fund activities and investments, it engages in any covered fund activities and investments and either (i) has, together with its affiliates and subsidiaries, aggregate investments in one or more covered funds the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion or (ii) sponsors or advises, together with its affiliates and subsidiaries, one or more covered funds the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

The application of detailed minimum standards to these types of banking entities is intended to reflect the heightened compliance risks of large covered trading and large covered fund activities and investments and provide guidance to such banking entities regarding the minimum compliance measures that would be required under the proposed rule.

If a banking entity does not meet the thresholds specified in § ____.20(c)(2), it need not comply with each of the minimum standards specified in Appendix C. However, the proposed rule would require such a banking

[348] As noted in the discussion of the definition of ''material conflict of interest in Part III.B.6 of this Supplementary Information, the proposed disclosure provisions of that definition are provided solely for purposes of the proposed rule's definition of material conflict of interest, and do not affect a banking entity's obligation to comply with additional or different disclosure or other requirements with respect to a conflict under applicable securities, banking, or other laws (*e.g.,* section 27B of the Securities Act, which governs conflicts of interest relating to certain securitizations; section 206 of the Investment Advisers Act of 1940, which applies to conflicts of interest between investment advisers and their clients; or 12 CFR 9.12, which applies to conflicts of interest in the context of a national bank's fiduciary activities).

[349] *See* 12 U.S.C. 1851(e)(1).

[350] *See* proposed rule § ____.20.

[351] *See* proposed rule § ____.20(d).

entity to establish a compliance program that effectively implements the six elements specified in § ____.20(b). Banking entities engaged in a relatively small amount of covered fund activities are encouraged to look to the minimum standards of Appendix C for guidance. Generally, the CFTC would expect that the closer a banking entity is to the thresholds specified in § ____.20(c)(2), the more its compliance program should generally include the specific requirements described in Appendix C. Within the bounds of subpart D and Appendix C, a banking entity has discretion to structure and manage its program for compliance with section 13 of the BHC Act and the proposed rule in a manner that best reflects the unique organization and operation of the banking entity and its affiliates and subsidiaries, and is suitable taking account of the size, scope, and complexity of activities in which the banking entity and its affiliates and subsidiaries engage.

As described above, § ____.20(d) of the proposed rule clarifies that, if a banking entity does not engage in covered trading activities and/or covered fund activities or investments, it will have satisfied the requirements of this section if its existing compliance policies and procedures include measures that are designed to prevent the banking entity from becoming engaged in such activities or making such investments and which require the banking entity to develop and provide for the compliance program required under paragraph (a) of this section prior to engaging in such activities or making such investments.

2. Appendix C—Minimum Standards for Programmatic Compliance

Appendix C of the proposed rule specifies a variety of minimum standards applicable to the compliance program of a banking entity with significant covered trading activities or covered fund activities and investments.[352] Section I.A of proposed Appendix C sets forth the purpose of the required compliance program, which is to ensure that each banking entity establishes, maintains, and enforces an effective compliance program, consisting of written policies and procedures, internal controls, a management framework, independent testing, training, and recordkeeping, that:

- Is designed to clearly document, describe, and monitor the covered trading activities and covered fund activities or investments and the risks of the banking entity related to such activities or investments, identify potential areas of noncompliance, and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and the proposed rule;
- Specifically addresses the varying nature of activities or investments conducted by different units of the banking entity's organization, including the size, scope, complexity, and risks of the individual activity or investment;
- Subjects the effectiveness of the compliance program to independent review and testing;
- Makes senior management and intermediate managers accountable for the effective implementation of the compliance program, and ensures that the board of directors or chief executive office (''CEO'') review the effectiveness of the compliance program; and
- Facilitate supervision of the banking entity's covered trading activities and covered fund activities or investments by the CFTC.

A banking entity's compliance program should not be developed through a generic, one-size-fits-all approach, but rather should carefully take into account and reflect the unique manner in which a banking entity operates, as well as the particular compliance risks and challenges that its businesses present. In light of the complexities presented in differentiating prohibited proprietary trading from permitted market making-related activities in particular, the CFTC expects that such a dynamic, carefully-tailored approach to internal compliance will play an important role in ensuring that banking entities comply with section 13's prohibitions and restrictions. In addition, although this statement of purpose appears within the text of proposed Appendix C, the CFTC notes the statement equally describes the general purpose of any compliance program required under subpart D of the proposed rule, regardless of whether proposed Appendix C specifically applies.

Section I.B of proposed Appendix C provides for several definitions used throughout the appendix, including the definition of ''trading unit'' and ''asset management unit'' to which the minimum standards apply. The term ''trading unit'' is defined in the same way as in Appendix A, as described in Part II.B.5 of the Supplementary Information, and is intended to identify multiple layers of a banking entity's organizational structure because any effective compliance program will need to manage, limit and monitor covered trading activity at each such level of organization in order to effectively support compliance with the prohibition on proprietary trading. The term ''asset management unit'' is defined as any unit of organization of a banking entity that makes an investment in, acts as sponsor to, or has relationships with, a covered fund that the banking entity sponsors, organizes and offers, or in which a covered fund sponsored or advised by a banking entity invests.

Section I.C of proposed Appendix C incorporates by reference the six elements that must be included in the compliance program under § ____.20 of the proposed rule, and section I.D describes the structure of a compliance program meeting the minimum standards. In particular, section I.D permits a banking entity to establish a compliance program on an enterprise-wide basis to satisfy the requirements of § ____.20 of the proposed rule and the appendix, which program could cover the banking entity and all of its affiliates and subsidiaries collectively. In order to do so, the program must (i) be clearly applicable, both by its terms and in operation, to all such affiliates and subsidiaries, (ii) specifically address the requirements set forth in proposed Appendix C, (iii) take into account and address the consolidated organization's business structure, size, and complexity, as well as the particular activities, risks, and applicable legal requirements of each subsidiary and affiliate, and (iv) be determined through periodic independent testing to be effective for the banking entity and its affiliates and subsidiaries. In addition, the enterprise-wide program would be subject to supervisory review and examination by any Agency vested with rulewriting authority under section 13 of the BHC Act with respect to the compliance program and the activities of any banking entity for which the Agency has such authority. Further, such Agency would have access to all records related to the enterprise-wide compliance program pertaining to any banking entity that is supervised by the Agency vested with such rulewriting authority.

a. Internal Policies and Procedures

Section II of proposed Appendix C articulates minimum standards for the first element of the compliance program, internal policies and procedures, for both covered trading activities and covered fund activities and investments. With respect to covered trading activities, the proposal would require

[352] The CFTC has proposed to include these minimum standards as part of the regulation itself, rather than as accompanying guidance, reflecting the compliance program's importance within the general implementation framework.

that internal policies and procedures: (i) Specify how the banking entity identifies its trading accounts; (ii) identify the trading activity in which the banking entity is engaged and how that activity is organized; (iii) thoroughly articulate the mission, strategy, risks, and compliance controls for each trading unit; (iv) include for each trader a mandate that describes the scope of his or her trading activity; (v) clearly articulate and document a comprehensive description of the risks associated with the trading unit's activities; (vi) document a comprehensive explanation of how the mission and strategy of the trading unit, and its related risk levels, comply with the proposed rule; and (vii) require the banking entity to promptly address and remedy any violation of section 13 of the BHC Act and the proposed rule. These internal policies and procedures would require banking entities to have the data and standards to prevent prohibited proprietary trading and to identify abnormalities and discrepancies that may be indicative of prohibited proprietary trading. The internal policies and procedures should also provide the Agencies with a clear, comprehensive picture of a banking entity's covered trading activities that can be effectively reviewed. With respect to covered fund activities and investments, the proposal would require that internal policies and procedures describe all covered fund activities in which the banking entity engages and the procedures used by the banking entity to ensure that it complies with the restrictions of section 13 of the BHC Act and the proposed rule.

The CFTC expects that these internal policies and procedures will be regularly reviewed and updated to reflect changes in business practices, strategies, or laws and regulations, though frequent, unexplained changes to policies and procedures or other aspects of the compliance program—particularly changes to reduce their stringency—would warrant additional scrutiny from banking entity management, independent testing personnel, and CFTC examiners.

b. Internal Controls

Section III of proposed Appendix C articulates minimum standards for the second element of the compliance program, internal controls. With respect to covered trading activities, the proposal would require internal controls that: (i) Are reasonably designed to ensure that the covered trading activity is conducted in conformance with a trading unit's authorized risks, instruments and products, as documented in the banking entity's written policies and procedures; (ii) establish and enforce risk limits for each trading unit; and (iii) perform robust analysis and quantitative measurement of covered trading activity for conformance with section 13 of the BHC Act and the proposed rule. In particular, the banking entity must perform analysis and quantitative measurement that is reasonably designed to: (i) Ensure that the activity of each trading unit is appropriate to the mission, strategy, and risk of each trading unit, as documented in the banking entity's internal written policies and procedures; (ii) monitor and assist in the identification of potential and actual prohibited trading activity; and (iii) prevent the occurrence of prohibited proprietary trading. This analysis and measurement should incorporate the quantitative measurements calculated and reported under Appendix A of the proposed rule, but should also include other analysis and measurements developed by the banking entity that are specifically tailored to the business, risks, practices, and strategies of its trading units. The Agencies expect that the thoughtful use of these types of quantitative tools to monitor the extent to which the activities of a trading unit are consistent with its stated mission, strategy, and risk profile may help identify, for banking entities and the CFTC, abnormalities or discrepancies in permitted trading activity that may be indicative of prohibited proprietary trading. In addition, these internal controls must provide for regular monitoring of the effectiveness of the banking entity's compliance program and require the banking entity to take prompt action to address and remedy any deficiencies identified and to provide timely notification to the CFTC of any investigation and remedial action taken.

With respect to covered fund activities and investments, the internal controls required under section III of proposed Appendix C generally focus on ensuring that a banking entity has effective controls in place to monitor its investments in, and relationships with, covered funds to ensure its compliance with the covered fund activity and investments restrictions, including controls that relate to implementing remedies in the event of a violation of the requirements of section 13 of the BHC Act and the proposed rule.

c. Responsibility and Accountability

Section IV of proposed Appendix C articulates minimum standards for the third element of the compliance program, responsibility and accountability. These standards focus on four key constituencies—the board of directors, the CEO, senior management, and managers at each trading unit and asset management unit level. Section IV makes clear that the board of directors, or similar corporate body, and the CEO are responsible for creating an appropriate ''tone at the top'' by setting an appropriate culture of compliance and establishing clear policies regarding the management of covered trading activities and covered fund activities and investments. Senior management must be made responsible for communicating and reinforcing the culture of compliance established by the board of directors and the CEO, for the actual implementation and enforcement of the approved compliance program, and for taking effective corrective action, where appropriate. Managers with responsibility for one or more trading units or asset management units of the banking entity that are engaged in covered trading activity or covered fund activity and investments are accountable for effective implementation and enforcement of the compliance program for the applicable trading unit or asset management unit.

d. Independent Testing

Section V of proposed Appendix C articulates minimum standards for the fourth element of the compliance program, independent testing. A banking entity subject to the appendix must ensure that its independent testing is conducted by a qualified independent party, such as the banking entity's internal audit department, outside auditors, consultants or other qualified independent parties. The independent testing must examine both the banking entity's compliance program and its actual compliance with the proposed rule. Such testing must include not only the general adequacy and effectiveness of the compliance program and compliance efforts, but also the effectiveness of each element of the compliance program and the banking entity's compliance with each provision of the proposed rule. This requirement is intended to ensure that a banking entity continually reviews and assesses, in an objective manner, the strength of its compliance efforts and promptly identifies and remedies any weaknesses or matters requiring attention within the compliance framework.

e. Training

Section VI of proposed Appendix C articulates minimum standards for the fifth element of the compliance program, training. It proposes to require that a banking entity provide adequate

training to its trading personnel and managers, as well as other appropriate personnel, in order to effectively implement and enforce the compliance program. In particular, personnel engaged in covered trading activities or covered fund activities and investments should be educated with respect to applicable prohibitions and restrictions, exemptions, and compliance program elements to an extent sufficient to permit them to make informed, day-to-day decisions that support the banking entity's compliance with the proposed rule and section 13 of the BHC Act. In particular, any personnel with discretionary authority to trade, in any amount, should be appropriately trained regarding the differentiation of prohibited proprietary trading and permitted trading activities and given detailed guidance regarding what types of trading activities are prohibited. Similarly, personnel providing investment management or advisory services, or acting as general partner, managing member, or trustee of a covered fund, should be appropriately trained regarding what covered fund activities and investments are permitted and prohibited.

f. Recordkeeping

Section VII of proposed Appendix C articulates minimum standards for the sixth element of the compliance program, recordkeeping. Generally, a banking entity must create records sufficient to demonstrate compliance and support the operation and effectiveness of its compliance program (*i.e.,* records demonstrating the banking entity's compliance with the requirements of section 13 of the BHC Act and the proposed rule, any scrutiny or investigation by compliance personnel or risk managers, and any remedies taken in the event of a violation or non-compliance), and retain these records for no less than five years in a form that allows the banking entity to promptly produce these records to the CFTC upon request. Records created and retained under the compliance program shall include trading records of the trading units, including trades and positions of each such unit.

g. Request for Comment

The CFTC requests comment on the compliance program requirement contained in § ____.20 of the proposed rule and the minimum standards specified in proposed Appendix C. In particular, the CFTC requests comment on the following questions:

Question 319. Is the proposed rule's inclusion of a compliance program requirement effective in light of the purpose and language of the statute? If not, what alternative would be more effective?

Question 320. Is the proposed application of § ____.20's compliance program requirement to all banking entities engaged in covered trading activity or covered trading investments and activities and the minimum standards of proposed Appendix C to only banking entities with significant covered trading or covered fund activities, effective? If not, what alternative would be more effective? Should proposed Appendix C apply to all banking entities? If so, why? Are the thresholds proposed for determining whether a banking entity must comply with proposed Appendix C appropriate? If not, what alternative would be more effective?

Question 321. What implementation, operational, or other burdens or expenses might be associated with the compliance program requirement? How could those burdens or expenses be reduced or eliminated in a manner consistent with the purpose and language of the statute?

Question 322. Do the proposed compliance program requirement and minimum standards provide sufficient guidance and clarity regarding how compliance programs should be structured? If not, what additional guidance or clarity is needed? Do the proposed compliance program requirement and minimum standards provide sufficient discretion to banking entities to structure a compliance program that appropriately reflects the unique nature of their businesses? If not, how could additional discretion be provided in a manner consistent with the purpose and language of the statute?

Question 323. Are the six proposed elements of a required compliance program effective? If not, what alternative would be more effective? Should elements be added or removed? If so, which ones and why?

Question 324. For each of the six proposed elements of a required compliance program for which minimum standards are provided in proposed Appendix C, are the proposed minimum standards effective? If not, what alternative would be more effective? Should minimum standards be added or removed? If so, which ones and why?

Question 325. Does the requirement that a banking entity provide timely notification to the relevant Agency provide sufficient guidance as to what activities must be reported and how and when such reporting should be made? Should more specific standards be provided (*e.g.,* regarding the timing of reporting and the types of activities that must be reported)? If so, what additional criteria should be implemented? Should the notification requirement be applied explicitly to banking entities that are not required to comply with the minimum standards specified in Appendix C because they are below the thresholds specified in § ____.20(c)(2)? Why or why not?

Question 326. Are there specific records that banking entities should be required to make and keep to document compliance with section 13 of the BHC Act and the proposed rule? Please explain.

Question 327. What process should the Agencies use in determining whether to require a banking entity that, based on its size, would not be subject to Appendix C to comply with all or portions of the appendix under section I.E of the proposed appendix? What considerations should the CFTC take into account in making such a determination? Should this requirement be implemented by a CFTC order, by authority delegated to the CFTC staff, or a different method? Please explain.

Question 328. Should the proposed rule permit banking entities to comply with Appendix C of the proposed rule on an enterprise-wide basis? If so, why? What are the advantages and disadvantages of an enterprise-wide compliance program? Should the proposed appendix provide additional clarity or discretion regarding how such an enterprise-wide program should be structured? If so, how? Please include a discussion relating to the infrastructure of an enterprise-wide compliance program and its management. If enterprise-wide compliance or similar programs are used in other contexts, please describe your experience with such programs and how those experiences influence your judgment concerning whether or not you would choose an enterprise-wide compliance program in this context.

Question 329. Should the proposed rule permit banking entities to comply with § ____.20(b) of the proposed rule on an enterprise-wide basis? If so, why? What are the advantages and disadvantages of an enterprise-wide compliance program for smaller banking entities that are not subject to Appendix C? Please include a discussion relating to the infrastructure of an enterprise-wide compliance program and its management in the context of smaller banking entities. If enterprise-wide compliance or similar programs are used in other contexts, please describe your experience with such programs and how those experiences influence your judgment concerning whether or

not you would choose an enterprise-wide compliance program in this context. Are there particular reasons why a enterprise-wide compliance program should be permitted for larger banking entities subject to the requirements of Appendix C, but not those that are subject to § ____.20(b) of the proposed rule?

Question 330. What are the particular challenges that should be considered in connection with establishing a compliance program on an enterprise-wide basis? How will such challenges be addressed? Can an enterprise-wide compliance program be appropriately tailored to each of the subsidiaries and affiliates of a banking entity?

Question 331. Are there efficiencies that can be gained through an enterprise-wide compliance program? If so, how and what efficiencies?

Question 332. Would the complexities of various types of covered trading activity be adequately reflected in an enterprise-wide compliance program?

Question 333. Should only outside parties be permitted to conduct independent testing for the effectiveness of the proposed compliance program to satisfy certain minimum standards? If so, why? Under the proposal, the independent testing requirement may be satisfied by testing conducted by an internal audit department or a third party. Should the rule specify the minimum standards for ''independence'' as applied to internal and/or external parties testing the effectiveness of the compliance program? For example, would an internal audit be deemed to be independent if none of the persons involved in the testing are involved with, or report to persons that are involved with, activities implicated by section 13 of the BHC Act? Why or why not?

Question 334. Do you anticipate that banking entities that do not meet the thresholds specified in § ____.20(c) would voluntarily comply with the proposed minimum standards in Appendix C in order to effectively implement the six elements specified in § ____.20(b)? Are there specific minimum standards that would not be practical or would be unattainable for a banking entity that does not meet the § _____.20(c) thresholds? Please identify the minimum standard(s) and explain.

Question 335. In light of the size, scope, complexity, and risk of covered trading activities, do commenters anticipate the need to hire new staff with particular expertise in order to establish, maintain, and enforce the proposed compliance program requirement concerning covered trading activities or any subset of covered trading activities?

Question 336. With respect to the proposed requirement that training should occur with a frequency appropriate to the size and risk profile of the banking entity's covered trading activities and covered fund activities, should there be a minimum requirement that such training shall be conducted no less than once every twelve (12) months? If so, why?

Question 337. Should proposed rule's Appendix C be revised to require a banking entity's CEO to annually certify that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established pursuant to Appendix C in a manner that is reasonably designed to achieve compliance with section 13 of the BHC Act and this proposal? If so, why? If so, what would be the most useful, efficient method of certification (*e.g.,* a new stand-alone certification, a certification incorporated into an existing form or filing, Web site certification, or certification filed directly with the CFTC)? Would a central data repository with a CEO attestation to the CFTC be a preferable approach?

Question 338. Do the proposed rule requirements relating to establishment and implementation of a compliance program pose unique concerns or challenges to issuers of asset-backed securities that are banking entities, and if so, why? Are certain asset classes particularly impacted by the proposed rule requirements, and if so, how?

Question 339. How would existing issuers of asset-backed securities that are banking entities pay for establishing and implementing a compliance program? Should existing issuers of asset-backed securities that cannot comply with the compliance program requirements be excluded from the proposed definition of ''banking entity''? Should such exclusion be limited, and if so, based on what factors? Are the proposed thresholds specified in § ____.20(c) of the proposed rule and/or the allowance of an enterprise-wide compliance program as set forth in Appendix C of the proposed rule sufficient to minimize these concerns for issuers of asset-backed securities?

Question 340. With respect to future securitizations, what would be the impact of the establishment and implementation of the compliance program related to the provisions of the proposed rule as required by § ____.20 of the proposed rule (including Appendix C, where applicable)? Are the proposed thresholds specified in § ____.20(c) of the proposed rule and/or the allowance of an enterprise-wide compliance program as set forth in Appendix C of the proposed rule sufficient to minimize these concerns for issuers of asset-backed securities?

Question 341. Would existing issuers of asset-backed securities that are banking entities be able to establish and implement a compliance program related to the provisions of the proposed rule as required by § ____.20 of the proposed rule (including Appendix C, where applicable)? If amendments to transactional documents are necessary, are there any obstacles that would make such amendments difficult to execute? If existing issuers of asset-backed securities cannot establish and implement a compliance program, what would be the impact on such existing issuers of asset-backed securities and the holders of securities issued by a non-compliant issuer of asset-backed securities? Is the allowance of an enterprise-wide compliance program as set forth in Appendix C of the proposed rule sufficient to minimize these concerns for issuers of asset-backed securities?

Question 342. To rely on the exemptions for permitted underwriting, market making-related, and risk-mitigating hedging activities, the proposed rule requires banking entities to establish the internal compliance program under § ____.20 and, where applicable, Appendix C, designed to ensure compliance with the requirements of the applicable exemption (*e.g.,* policies and procedures, internal controls and monitoring procedures, *etc.*). Do these requirements in the proposed rule impose undue cumulative burdens, such that the marginal benefit of a given requirement is not justified by the cost that the requirement imposes? If so, why does the proposed rule impose cumulative burdens and what are the costs of those burdens? Please explain the circumstances under which these burdens may arise. Is there a way to reduce or eliminate such burdens or requirements in a manner consistent with the language and purpose of the statute? For any requirements that impose undue burdens, are there other requirements that could be substituted that would more efficiently ensure compliance with the statute? Are there any requirements that the proposed rule imposes that are particularly effective, and if so, how can the Agencies make better use of these requirements?

Question 343. Are the six elements of the proposed compliance program requirement mutually reinforcing and

cost effective, or are there redundancies in the six elements? Please explain any redundant requirements in the policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping requirements in § ____.20(b) of the proposed rule or proposed Appendix C. Why are such requirements redundant, and how should the redundancy be addressed and remedied in the rule?

Question 344. A banking entity that meets the $1 billion or greater trading assets and liabilities threshold would be required under the proposed rule to comply with both the reporting and recordkeeping requirements in Appendix A with respect to quantitative measurements and the compliance program requirement in Appendix C. Are the requirements in these appendices mutually reinforcing and cost effective, or do the appendices impose redundant requirements on banking entities that meet the $1 billion threshold? Please explain any redundant requirements in the appendices and how such redundancy should be addressed and remedied in the rule.

Question 345. Proposed Appendix C incorporates the quantitative measurements provided in proposed Appendix A in the internal controls requirement for banking entities that are engaged in covered trading activity and meet the $1 billion or greater trading assets and liabilities threshold. Do the requirements in proposed Appendix A and Appendix C impose undue cumulative burdens with respect to any elements (*e.g.,* quantitative measurements), such that the marginal benefit of a given requirement is not justified by the cost that the requirement imposes? Please explain why the proposed appendices impose cumulative burdens, the costs of those burdens, and the circumstances under which these burdens may arise. Is there a way to reduce or eliminate such burdens or requirements in a manner consistent with the language and purpose of the statute? For any requirements in the appendices that impose undue burdens, are there other requirements that could be substituted that would more efficiently ensure compliance with the statute? Are there any requirements that the proposed appendices impose that are particularly effective, and if so, how can the CFTC make better use of these requirements?

Question 346. Should the CFTC prescribe any specific method by which the board of directors or similar corporate body reviews and approves the compliance program? For example, should the CFTC require that: (i) A chief compliance officer or similar officer present an annual compliance report including, as appropriate, recommended actions to be taken by the banking entity to improve compliance or correct any compliance deficiencies; (ii) the board review any such recommendations and determine whether to approve them; and (iii) the banking entity notify the CFTC if the board declines to approve such recommendations, or approves different actions than those recommended in the compliance report? What are the advantages and disadvantages of such an approach?

3. Section ____.21: Termination of Activities or Investments; Penalties for Violations

Section ____.21 of the proposed rule implements section 13(e)(2) of the BHC Act, which requires the termination of activities or investments that violate or function as an evasion of section 13 of the Act.[353] In particular, § ____.21(a) of the proposed rule requires any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or the proposed rule or in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or the proposed rule, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or the proposed rule, to terminate the activity and, as relevant, dispose of the investment.[354] Section ____.21(b) of the proposed rule provides that if a relevant Agency finds reasonable cause to believe any banking entity has engaged in an activity or made an investment described in paragraph (a), the CFTC may, after due notice and an opportunity for hearing, by order, direct the banking entity to restrict, limit, or terminate the activity and, as relevant, dispose of the investment.[355]

IV. Request for Comments

The CFTC is interested in receiving comments on all aspects of the proposed rule.

[353] *See* 12 U.S.C. 1851(e)(2).

[354] *See* proposed rule § ____,21(a). The CFTC has proposed to include § __.21(a), in addition to the provisions of § ____.21(b) of the proposed rule, to make clear that the requirement to terminate an activity or, as relevant, dispose of an investment would be triggered where a banking entity discovers a violation or evasion, regardless of whether an Agency order has been issued.

[355] *See* proposed rule § ____,21(b).

V. The Economic Impact of the Proposed Rule Under Section 13 of the BHC Act—Request for Comment

Section 13 of the BHC Act imposes on all banking entities prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, a covered fund,[356] which apply to banking entities whether or not the CFTC adopts implementing rules. In formulating the proposed rule to implement these provisions, which is required by statute, the CFTC has chosen a multi-faceted approach to establish a regulatory framework that provides for clear, robust, and effective implementation of the statute's provisions in a consistent manner, while also not unduly constraining the ability of banking entities to engage in permitted activities and investments.[357] The CFTC has proposed this approach after considering the Council's findings and recommendations regarding how to implement section 13 of the BHC Act and a variety of alternatives described throughout this Supplemental Information.[358] The CFTC seeks comment, in particular, on the potential costs and benefits of those aspects of the proposed rule that involve choices made, or the exercise of discretion, by the CFTC in implementing section 13 of the BHC Act.[359]

The CFTC recognizes that there are economic impacts that may arise from the proposed rule and its implementation of section 13 of the BHC Act and invite comment on the manner in which the proposed rule implements section 13 of the BHC Act, including commenters' views on the potential economic impacts discussed in this Part of the Supplemental

[356] As noted above in connection with the conformance and extended transition periods, the proposed rule would not require an immediate application of these restrictions for any activity or investment entered into prior to the effective date of section 13 of the BHC Act (July 21, 2012). However, any activity or investment entered into after the effective date would be required to comply with section 13 of the BHC Act and the proposed rule, if adopted. *See* Supplemental Information Part III.E.

[357] *See* Supplemental Information Part II.A.

[358] *See* 12 U.S.C. 1851(b)(2)(A); *see also* Financial Stability Oversight Council, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds (Jan. 2011), *available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.*

[359] This CFTC Rule is being promulgated exclusively under section 13 of the BHC. Therefore, the Commission will not be conducting a cost-benefit consideration under Section 15(a) of the Commodity Exchange Act. However, the Commission will consider the responses to the questions posed in this section when finalizing this rulemaking.

Information. In addition, the CFTC seeks comment on whether the proposed rule represents a balanced and effective approach to implementing section 13 of the BHC Act or whether alternative approaches to implementing section 13 of the BHC Act exist that would provide greater benefits or involve fewer costs, consistent with the statutory purpose. We also request comment on the potential competitive effects of the manner in which the proposed rule implements the statute.[360]

In addition to the questions posed throughout Part II of the Supplemental Information with respect to the potential costs and benefits of particular aspects of the statute and proposed rule, in order to assist in the analysis of the economic impacts associated with the final rule and any alternatives the CFTC may evaluate, the CFTC encourages commenters to provide quantitative information about the rule's impact on banking entities, their clients, customers, and counterparties, specific markets or asset classes, and any other entities potentially affected by the proposed rule with respect to:

1. The direct and indirect costs and benefits of compliance with section 13 of the BHC Act, as proposed to be implemented;

2. The effect of section 13 of the BHC Act, as proposed to be implemented, on competition; and

3. Any other economic impacts of the proposal.

In addition, to assist with potential estimates of the proposed rule's quantitative impacts, we request specific comment on: (i) The extent to which banking entities currently engage in proprietary trading activity or covered funds activities or investments that are prohibited or restricted by the statute, or have otherwise divested or conformed such activities; and (ii) the potential costs and benefits or other quantitative impacts of various aspects of the proposed rule, such as the compliance program requirement, the required reporting of quantitative measurements, and the conditions and requirements for relying on the proposed exemptions.

To further facilitate public comment on the economic effects of the manner in which the proposed rule implements the statute, the CFTC has identified below a number of significant aspects of the proposed rule and potential economic impacts that may result from section 13 of the BHC Act's requirements, as proposed to be implemented. We seek commenters' views on the likelihood of the potential economic impacts identified in this Part and whether there are additional costs, benefits, or other impacts that may arise from the proposed rule. To the extent that such costs, benefits, or other impacts are quantifiable, commenters are encouraged to identify, discuss, analyze, and supply relevant data, information, or statistics related to such costs, benefits, and other impacts and the quantification of such costs, benefits, and other impacts. In addition, commenters are asked to identify or estimate start-up, or non-recurring, costs separately from costs or effects they believe would be ongoing.

A. Proprietary Trading Provisions

1. Definition of Trading Account

Section ____.3 of the proposed rule, which implements the statutory definition of ''trading account,'' provides a multi-pronged definition of that term that is intended to ensure that banking entities do not engage in ''hidden'' proprietary trading by characterizing trading activity as being conducted outside a trading account. In addition to positions taken principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging another trading account position, the proposed definition also includes: (i) With respect to a banking entity subject to the Federal banking agencies' Market Risk Capital Rules, all positions in financial instruments subject to the prohibition on proprietary trading that are treated as ''covered positions'' under those capital rules, other than certain foreign exchange and commodities positions; and (ii) all positions acquired or taken by certain registered securities and derivatives dealers (or, in the case of financial institutions that are government securities dealers, that have filed notice with an appropriate regulatory agency) in connection with their activities that require such registration or notice. Although these prongs of the definition are proposed to prevent evasion of the statutory requirements, we seek comment on the extent to which either of these two prongs may create a competitive disadvantage for certain banking entities vis-à-vis competitors that are either not subject to section 13 of the BHC Act and/or competitors subject to different prongs of the proposed definition.

2. Exemption for Underwriting Activities

Section 13(d)(1)(B) of the BHC Act provides an exemption from the prohibition on proprietary trading for purchases and sales in connection with underwriting activities, to the extent that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties. In implementing this exemption in § ____.4(a) of the proposed rule, the CFTC has endeavored to establish a regime that clearly sets forth the requirements for relying on the underwriting exemption established in the statute to facilitate banking entities' compliance with the statutory requirements. In considering potential requirements for the underwriting exemption, and assessing the potential economic impacts of each such requirement, the CFTC strived to propose an appropriate balance between considerations related to: (i) The potential for evasion of the statutory prohibition on proprietary trading through misuse of the underwriting exemption; and (ii) the potential costs that may arise from constraints on legitimate underwriting activities.

The CFTC has proposed to use, wherever practicable, common terms from existing laws and regulations in the context of underwriting to facilitate market participants' understanding and use of the exemption and to promote consistency across laws and regulations. Specifically, the proposed definitions of ''distribution'' and ''underwriter'' established in the proposed rule largely mirror the definitions provided for these terms in the SEC's Regulation M. Because the proposed rule uses a modified version of the Regulation M definition of ''underwriter'' to include selling group members, the proposed definition would permit the current market practice of members of the underwriting syndicate entering into an agreement with other selling group members to collectively distribute the securities, rather than requiring all members of a distribution to join the underwriting syndicate.

In addition, the definition of ''distribution'' from Regulation M that the CFTC has proposed in § ____.4(a) of the proposed rule is intended to ensure that the underwriting exemption does not unduly constrain banking entities from providing underwriting services, while at the same time preventing banking entities from relying on the underwriting exemption to evade the proposed rule and the statutory prohibition on proprietary trading. The CFTC anticipates that the proposed

[360] For example, implementation of section 13(d)(1)(H) of the BHC Act may result in a competitive advantage for foreign-controlled banking entities over U.S.-controlled banking entities with respect to activities that occur solely outside of the United States.

approach to implementing the underwriting exemption should permit legitimate forms of underwriting in which market participants currently engage and, thus, should not unduly burden capital formation. In addition, the proposed rule would permit underwriters to continue to employ existing practices to stabilize a distribution of securities, which stabilization promotes confidence among issuers, selling security holders, and investors and further supports capital formation.

Under the proposed rule, the underwriting activities of a banking entity must be designed to generate revenues primarily from fees, commissions, underwriting spreads or other income, not from appreciation in value of covered financial positions that the banking entity holds related to such activities or the hedging of such covered financial positions. This proposed requirement should promote investor confidence by ensuring that the activities conducted in reliance on the underwriting exemption are designed to benefit the interests of clients seeking to bring their securities to market, not the interests of the underwriters themselves. The proposed requirement should also help prevent evasion of the statutory prohibition on proprietary trading, as trading activity designed to generate revenues from appreciation in the value of positions held by the banking entity would be indicative of prohibited proprietary trading, not underwriting activity. We seek comment on whether this approach of identifying underwriting activity by reference to revenue source could also make underwriting less profitable to the extent that it precludes or discourages certain types of profitability for *bona fide* underwriting services.

In addition to commenters' views on the potential economic impacts identified above, we request comment on whether the proposed rule may cause some banking entities to choose to decrease the supply of underwriting services in response to potential costs of the proposed rule and whether this result would adversely affect competition among underwriters or have a harmful impact on capital formation. In addition, if banking entities were to pass the increased costs of complying with the proposed exemption on to issuers, selling security holders, or their customers, we seek comment on whether the effect would be to increase the cost of raising capital and whether this would harm capital formation to the extent that such cost increases were sufficient to preclude issuers from accessing the capital markets. As described above, the CFTC has designed the proposal to balance such potential costs with provisions intended to permit banking entities' legitimate underwriting activities to continue as provided by the statute, while also establishing sufficient requirements to prevent evasion of the statutory goals through misuse of the underwriting exemption.

3. Exemption for Market Making-Related Activities

Section 13(d)(1)(B) of the BHC Act provides an exemption from the prohibition on proprietary trading for purchases and sales in connection with market making-related activities, to the extent that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties. In setting forth the requirements for eligibility for this exemption in § ____.4(b) of the proposed rule, the CFTC has endeavored to establish a regime that clearly sets forth the requirements for relying on the exemption for market making-related activity established in the statute to facilitate banking entities' compliance with the statutory requirements. In considering potential requirements for the market-making exemption, and assessing the potential economic impacts of each such requirement, the CFTC tried to strike an appropriate balance between considerations related to: (i) The potential for evasion of the statutory prohibition on proprietary trading through misuse of the exemption for market making-related activity; (ii) the potential difficulties related to distinguishing market making-related activity from prohibited proprietary trading; and (iii) potential costs that may arise from constraints on legitimate market making-related activities.

The CFTC has proposed to use, where practicable, terms and concepts used in current laws and regulations in the context of market making to promote clarity and consistency. Recognizing that there are differences in market making activities between different types of asset classes (*e.g.,* liquid and illiquid instruments) and market structures (*e.g.,* organized trading facilities and the over-the-counter markets), the CFTC has proposed to implement the market-making exemption in a manner that accounts for these distinctions and permits market making activities in different asset classes and market structures. Permitting legitimate market making in its different forms should promote market liquidity and efficiency by allowing banking entities to continue to provide customer intermediation and liquidity services in both liquid and illiquid instruments. The CFTC also recognizes, however, that market making-related activities in the over-the-counter markets or activities involving less liquid instruments are sometimes less transparent than similar activities on organized trading facilities or in liquid markets. We seek comment on whether, in order to comply with the statutory prohibition on proprietary trading, some banking entities may be inclined to abstain from some market-making activities in an effort to reduce the risk of noncompliance. We also request comment on whether, if banking entities did so, this could result in reduced liquidity for certain types of trades or for certain less liquid instruments.

In addition, the proposed exemption permits anticipatory market making, block positioning, and hedging of market making positions under certain circumstances, which should further facilitate customer intermediation and market liquidity and efficiency. However, certain conditions are placed on such market making-related activities in the proposal in an effort to ensure that such activities are, in fact, market making-related activities, and are not hidden proprietary trading activities subject to the statutory prohibition.

The proposal requires that the market making-related activities be designed to generate revenues primarily from fees, commissions, bid/ask spreads or other income not attributable to appreciation in the value of covered financial positions a banking entity holds in trading accounts or the hedging of such positions. This proposed requirement should promote investor confidence by helping to ensure that market making serves customer needs. The proposed requirement should also help prevent evasion of the statutory prohibition on proprietary trading, as trading activity designed to generate revenues from appreciation in the value of positions held by the banking entity would be indicative of prohibited proprietary trading, not market making-related activity. The CFTC requests comment on whether this approach of identifying market making activity by reference to a market making trading unit's revenue source would also make market making activity less profitable and whether it would preclude or discourage certain types of profitability for *bona fide* market making services. Commenters should also address whether this requirement would reduce the willingness of some banking entities to continue to provide market making-related services and whether this could

reduce liquidity, harm capital formation, or make market making-related services more expensive. The CFTC notes that, in order to balance the potential for such effects with the statutory purpose, the proposed rule does not expressly prohibit all types of non-client income, and recognizes that the precise type and source of revenues generated by *bona fide* market making services can and will vary depending on the relevant market, asset, and facts and circumstances.

4. Exemption for Risk-Mitigating Hedging Activities

Section 13(d)(1)(C) provides an exemption from the prohibition on proprietary trading for risk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings. The proposed exemption requires that the hedging transaction be reasonably correlated to these risks that the transaction is intended to hedge or otherwise mitigate. This proposed requirement is intended to address the potential for misuse of the exemption where a transaction is not closely tied to risk mitigation, while also providing some flexibility in the degree of correlation that is required in order to promote consistency with the statutory goals and requirements.

In addition, the proposed exemption requires that the hedging transaction: (i) Not give rise, at the inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction; and (ii) be subject to continuing review, monitoring, and management. Together, these proposed requirements are designed to ensure that a banking entity does not use the hedging exemption to conduct prohibited proprietary trading in the guise of hedging activity and to prevent evasion of the proprietary trading prohibition contained in section 13 of the BHC Act and the proposed rule. These proposed requirements are intended to ensure that an exempt hedging transaction will mitigate, not amplify, risk. Moreover, such requirements should further the goals of compliance with the statutory requirements and reducing banking entities' risks.

We seek comment on whether the proposed requirements for relying on the hedging exemption are more restrictive than necessary to implement the statutory language and purpose, and to prevent evasion of the statutory provisions, and whether a banking entity's hedging activities could be unduly constrained by the proposed rule. Further, commenters should address the extent to which a banking entity may be unable or unwilling to execute certain hedges and whether, as a result, a banking entity could be limited in its means to reduce its risk. In addition, would banking entities be dissuaded from engaging in other permitted activities or activities outside the scope of the statute (*e.g.,* long-term investments) if the requirements of the proposed hedging exemption unduly limits or prevents them from mitigating the risks associated with such activities? We request comment on whether a reduction in efficiency could result from a reduced ability of covered banking entities to transfer risks to those more willing to bear them. Commenters should also address whether the proposed rule would reduce a banking entity's willingness to engage in permitted risk-mitigating hedging activities in order to avoid costs related to ensuring compliance with the exemption's requirements and whether this would increase the banking entity's risk exposure. In order to balance the potential for such effects with the statutory purpose, the proposed rule attempts to implement the risk-mitigating hedging exemption in a manner that recognizes that the precise nature and execution of risk mitigation through hedging transactions can and will vary depending on the relevant market, asset, and facts and circumstances, while also establishing requirements designed to ensure that transactions relying on the hedging exemption are, in fact, hedges and not hidden proprietary trading prohibited by the statute.

The proposed exemption would require documentation with respect to hedges established at a different level of organization than that responsible for the underlying positions or risks that are being hedged. This proposed documentation requirement is intended to facilitate review by banking entities and Agency supervisors and examiners in assessing whether the hedge position was established to hedge or otherwise mitigate another unit's risks. Without such documentation, there could be an increased risk of evasion of the statute's prohibition on proprietary trading, as it would be difficult to assess whether a purported hedging transaction was established to mitigate another level of organization's risk or solely to profit from price appreciation of the position established by the purported hedge. We seek comment on the costs of the proposed documentation requirement for certain hedging transactions, such as the costs related to systems changes and maintenance, employee resources and time, and recordkeeping.[361] The CFTC also requests comment on the extent to which the proposed documentation requirement would reduce the speed in which a banking entity could execute a hedge at a different level within the entity and whether this could reduce efficiency or result in a banking entity being exposed to a greater amount of risk. Further, we seek commenters' views on whether potentially slower execution times could also reduce profitability associated with the position as it remains unhedged (or, alternatively, increase profitability, depending on whether the value of the unhedged position is increasing or decreasing in the market). To balance the potential for such consequences with the statutory purpose, the CFTC has proposed to apply the documentation requirement to only a subset of hedging transactions that pose the greatest compliance risk (*i.e.,* hedges that are established at a different level of organization than that establishing or responsible for the underlying positions or risks that are being hedged). In addition, the CFTC expects that the preparation of required documentation would become less burdensome and more efficient over time as systems are developed and personnel become more accustomed to the proposed requirement.

5. Compensation Related to Permitted Activities

The proposed rule would require that the compensation arrangements of persons performing underwriting, market making-related, and risk-mitigating hedging activities be designed not to reward proprietary risk-taking. These proposed requirements are intended to reduce incentives for personnel of the banking entity to violate the statutory prohibition on proprietary trading and expose the banking entity to risks arising from prohibited proprietary trading. We request comment on whether the proposed rule's requirements regarding compensation arrangements would reduce the banking entity's ability to attract talented and experienced trading personnel or would harm the banking entity's ability to compete with entities that are not subject to section 13 of the BHC Act and the proposed rule. In order

[361] The Agencies note that, for some costs of the proposed rule, hour burden estimates are provided in Part [internal cite to PRA] of this **SUPPLEMENTARY INFORMATION** for purposes of the Agencies' compliance with the Paperwork Reduction Act.

to balance the potential for such effects with the statutory goals, the proposed rule does not expressly prescribe how a banking entity must compensate its personnel or prohibit all types of compensation incentives related to non-client income, but instead proposes an approach that leaves banking entities with a degree of flexibility to compensate their personnel as they deem appropriate.

6. Exemption for Trading on Behalf of Customers

Section ____.6(b) of the proposed rule implements section 13(d)(1)(D) of the BHC Act, which permits a banking entity, notwithstanding the prohibition on proprietary trading, to purchase or sell a covered financial position on behalf of customers. Because the statute does not define when a transaction would be conducted on behalf of customers, the proposed rule identifies three categories of transactions that would qualify under this exemption. By providing that only transactions meeting the terms of the three categories would be considered to be on behalf of customers for purposes of the exemption, the proposed rule addresses the potential for evasion of the statutory prohibition. At the same time, the proposed rule also would not permit banking entities to rely on the exemption with respect to other, unanticipated transactions that banking entities may undertake on behalf of customers. The CFTC seeks comment on whether banking entities currently engage in principal transactions on behalf of customers that are not covered by the proposed exemption or other permitted activities and whether the lack of an exemption in the proposed rule for such activities would impact beneficial customer facilitation, market liquidity, efficiency, or capital formation.

7. Exemption for Trading Outside of the United States

Section ____.6(d) of the proposed rule implements section 13(d)(1)(H) of the BHC Act, which permits certain foreign banking entities to engage in proprietary trading that occurs ''solely outside of the United States.'' The proposed exemption provides a number of specific criteria for determining when trading will be considered to have occurred solely outside of the United States to help prevent evasion of the statutory restriction. The proposed exemption also provides a definition of ''resident of the United States'' that is similar to the SEC's definition of ''U.S. person'' in Regulation S, which should promote consistency and understanding among market participants that have experience with the concept from the SEC's Regulation S. In addition, the proposed exemption clarifies when a foreign banking entity will be considered to engage in such trading pursuant to sections 4(c)(9) and 4(c)(13) of the BHC Act, as required by the statute, including with respect to a foreign banking entity that is not a ''foreign banking organization'' under the Board's Regulation K. This implementation of section 13(d)(1)(H) of the BHC Act would permit certain foreign banking entities that are not ''qualifying foreign banking organizations'' under the Board's Regulation K to also rely on the exemption, notwithstanding the fact such foreign banking entities are not currently subject to the BHC Act generally or the Board's Regulation K. As a result, such foreign banking entities should encounter fewer costs related to complying with the proprietary trading prohibitions than if they were unable to rely on the exemption in section 13(d)(1)(H) of the BHC Act.

Despite the reference to section 4(c)(13) of the BHC Act, the statute provides that the exemption for trading outside of the United States is only available to banking entities that are not directly or indirectly controlled by U.S. banking entities (*i.e.,* not any U.S. banking entities or their foreign subsidiaries and affiliates). Under the statute, the prohibition on proprietary trading applies to the consolidated, worldwide operations of U.S. firms. As required by statute, the proposal prohibits U.S. banking entities from engaging in proprietary trading unless the requirements of one or more relevant exemptions (other than the exemption for trading by foreign banking entities) are satisfied. As a result, the statute creates a competitive difference between the foreign activities of U.S. banking entities, which must monitor and limit their foreign activities in accordance with the requirements of section 13 of the BHC Act, relative to the foreign activities of foreign-based banking entities, which may not be subject to restrictions similar to those in section 13 of BHC Act. The CFTC seeks commenters' views on whether the proposed rule's implementation of section 13(d)(1)(H) of the BHC Act imposes additional competitive differences, beyond those recognized above, and the potential economic impact of such competitive differences.

8. Quantitative Measurements

Section ____.7 of the proposed rule, which implements in part section 13(e)(1) of the BHC Act,[362] requires certain banking entities to comply with the reporting and recordkeeping requirements specified in Appendix A of the proposed rule. Proposed Appendix A requires a banking entity with significant trading activities to furnish periodic reports to the relevant Agency regarding various quantitative measurements of its trading activities and create and retain records documenting the preparation and content of these reports. The proposed measurements would vary depending on the scope, type, and size of trading activities. In addition, proposed Appendix B contains a detailed commentary regarding the characteristics of permitted market making-related activities and how such activities may be distinguished from trading activities that, even if conducted in the context of banking entity's market making operations, would constitute prohibited proprietary trading. These proposed requirements are intended, in particular, to address some of the difficulties associated with (i) identifying permitted market making-related activities and distinguishing such activities from prohibited proprietary trading and (ii) identifying certain trading activities resulting in material exposure to high-risk assets or high-risk strategies. In combination, § ____.7 and Appendix A of the proposed rule provide a quantitative overlay designed to help banking entities and the CFTC identify trading activities that warrant further analysis or review in a variety of levels and contexts.

The various quantitative measurements that would be required to be reported focus on assessing banking entities' risk management, sources of revenue, revenues in relation to risk, customer servicing, and fee generation. Aberrant patterns among the measurements with respect to these areas would warrant further review to determine whether trading activities have occurred that are proprietary in nature and whether such activities may be exposing banking entities to disproportionate risk. For example, quantitative measurements should provide banking entities with a useful starting point for assessing whether their trading activities are consistent with the proposed rule and whether traders are exposing the entity to disproportionate risks. In addition,

[362] Section 13(e)(1) of the BHC Act requires the CFTC to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1). Section ____.20 and Appendix C of the proposed rule also implement section 13(e)(1) of the BHC Act.

proposed Appendix A applies a standardized description and general method of calculating each quantitative measurement that, while taking into account the potential variation among trading practices and asset classes, is intended to facilitate reporting of sufficiently uniform information across different banking entities so as to permit horizontal reviews and comparisons of the quantitative profile of trading units across firms. This proposed approach, which recognizes that quantitative measurements must be applied with respect to differences within a banking entity's structure, business lines, and trading desks, should facilitate efficient application within firms and efficient examination across firms. The proposed use of a suite of quantitative measurements for these purposes may also limit erroneous indications of potential violations or erroneous indications of compliance (*i.e.,* false positives and false negatives), thus allowing banking entities and examiners and supervisors to focus upon the measurements that may be most relevant in identifying prohibited conduct. The uniformity of the proposed measurements across different types of banking entities is also intended to ensure that banking entities are calculating comparable measurements consistently and that comparable measurements are being evaluated consistently by the CFTC. The CFTC expects that as the implementation of quantitative measurements and the internal compliance and external oversight processes become more efficient over time, banking entities will find compliance efforts less burdensome.

The CFTC seeks comment on the extent to which banking entities will incur costs associated with implementing, monitoring, and attributing financial and personnel resources for purposes of complying with the requirements of proposed Appendix A. Specifically, please discuss the extent to which banking entities are unlikely to currently calculate certain quantitative measurements in the manner required under the proposal (*e.g.,* Spread Profit and Loss or Customer-facing Trade Ratio) and whether this may result in significant start-up costs associated with developing these measurements. Under the proposal, banking entities would also need to dedicate personnel and supervisory staff to review for potential aberrant patterns of activity that warrant further review, as well as maintain appropriate records of that review. In order to limit these calculation and surveillance costs to the greatest extent practicable, the CFTC has proposed measurements that, in many cases, are already calculated by many banking entities to measure and manage trading risks and activities. The costs to banking entities associated with calculating the proposed quantitative metrics should also be mitigated by the tiered application of Appendix A, which would require banking entities with the most extensive trading activities to report the largest number of quantitative measurements, while imposing fewer or no reporting requirements on banking entities with smaller trading activities. By limiting the application of aspects of Appendix A to firms with greater than $1 billion in trading assets and liabilities, and all aspects of the appendix only to entities with greater than $5 billion in trading assets and liabilities, the costs imposed should be proportional to the market reach and complexity of a banking entity's trading activities.

B. Covered Fund Activities

Subpart C implements the statutory provisions of section 13(a)(1)(B) of the BHC Act, which prohibit banking entities from acquiring or retaining any equity, partnership, or other ownership interest in, or sponsoring, a covered fund, and other provisions of section 13 of the BHC Act which provide exemptions from, or otherwise relate to, that prohibition. In implementing the covered funds provisions of section 13 of the BHC Act, the CFTC has proposed to define and interpret several terms used in implementing these provisions and the goals of section 13. We seek comment on whether the proposed rule represents a balanced and effective approach to implementing the covered fund provisions of the statute.

1. General Scope

For banking entities that invest in, sponsor or have relationships with one or more covered funds, the economic impact of complying with the statute and the implementing rule will vary, depending on the size, scope and complexity of their respective business, operations and relationships with clients, customers and counterparties. Moreover, the types of covered funds advised or sponsored by an adviser, the types of business and other relationships that an adviser may conduct with such funds and the adviser's other business activities, including relationships with other third party advised covered funds, will affect whether a covered fund activity would be subject to the statutory prohibition, eligible for a particular exemption or subject to particular internal control requirements as specified by the proposed rule.

For example, with respect to a banking entity that does not ''sponsor,'' invest in, or otherwise provide ''prime brokerage transactions'' to, a ''covered fund,'' the statute, as implemented by the proposed rule, would not substantively restrict the banking entity's activity; instead, the proposed rule would only require the minimum internal controls reasonably designed to prevent the entity from engaging in the prohibited activities. As a result, we do not expect that the proposed rule would have a significant effect on most banking entities, such as investment advisers, that are primarily engaged in providing *bona fide* trust, fiduciary, or advisory services to unrelated parties. Although such advisers may incur some incremental costs to develop and implement a compliance program reasonably designed to ensure that they do not engage in otherwise prohibited activities, there should be no significant costs associated with modifying existing business practices and procedures. We request comment on the extent to which such banking entities would be required to modify their existing business practices and procedures to comply with the proposed rule. For instance, would a registered investment adviser that only advises registered investment companies and that does not trade for its own account incur costs, benefits or other impacts in addition to costs to implement the minimum internal controls reasonably designed to prevent it from engaging in prohibited activities? Would an adviser that trades on behalf of itself incur, with respect to such trading activities, additional costs, benefits or other impacts described above relating to the proposed restrictions on proprietary trading?

In contrast, a banking entity that seeks to invest in a covered fund could only do so in reliance on an exemption specified in the statute or the proposed rule, such as the exemption for organizing and offering certain covered funds provided in section 13(d)(1)(G), as implemented in § ____.11 of the proposed rule. Similarly, a banking entity that seeks to enter into ''prime brokerage transactions'' with a covered fund could only do so by meeting certain requirements under the proposed rule. Accordingly, the economic impact of the proposed rule will depend on whether an adviser's activities fall within the scope of the terms as proposed such that the banking entity would be subject to the limitations on covered fund activities. To the extent that these terms or

exemptions would result in more, or fewer, activities being captured by the proposed rule, what are the attendant costs and benefits that a covered banking may incur? We request commenters provide empirical data, or studies, where possible.

Definition of Covered Fund. The proposed rule's definition of ''covered fund'' includes hedge funds and private equity funds as defined by statute, but also identifies two types of similar funds—commodity pools and certain non-U.S. funds—that are subject to the covered fund restrictions and prohibitions of section 13 of the BHC Act, as implemented by the proposed rule. The CFTC has proposed to include these funds since they are generally managed and structured similar to a covered fund, but are not generally subject to the Federal securities laws due to the instruments in which they invest or the fact that they are not organized in the United States or one or more States. We request comment on whether applying the definition of covered fund in this way as proposed would increase the number of investment vehicles or similar entities that would be subject to the limitations under the proposed rule. Would this approach increase compliance costs for banking entities that sponsor, invest in, or have certain relationships with these types of funds?

The proposed rule also excludes certain types of investments in covered funds, pursuant to section 13(d)(1)(J) of the BHC Act, which authorizes the CFTC to exclude from the general covered fund activity prohibition those activities that would promote the safety and soundness of a banking entity. Section ____.14 of the proposed rule would exclude from the prohibition, among other things, a banking entity's investments in covered funds related to bank owned life insurance, certain joint ventures and interests in securitization vehicles retained in compliance with the minimum credit risk retention requirements of section 15G of the Exchange Act. We request comment on the potential economic impact of the proposal to exclude these types of investments from the general prohibition. For banking entities whose only covered fund activities are those described in § ____.14, what economic impact would be attributed to complying with this provision of the proposed rule? Would these costs and benefits differ from those of banking entities that conduct covered fund activities as well as engage in activities described in § ____.14? As described in the Supplementary Information, a banking entity that generally does not engage in any prohibited activities is only required to adopt and implement a compliance program reasonably designed to ensure that the entity does not engage in prohibited activities. To what extent will the proposed provisions in § __.14 increase or mitigate any costs, benefits or other impacts associated with the foregoing minimum internal controls requirement?

Definition of Sponsor. Under the proposed rule, the term ''sponsor'' is defined by incorporating the definition set forth in section 13(h)(5) of the BHC Act, but the CFTC has proposed to clarify that the term trustee, as used in the definition of sponsor, does not include a trustee that does not provide discretionary investment services to a covered fund. This exception distinguishes a trustee providing non-discretionary advisory services from trustees providing services similar to those associated with entities serving as general partner, managing member, commodity pool operator or investment adviser of a covered fund. We request comment on the economic impact associated with the proposed definition of ''sponsor.'' Will the economic impact differ depending on the scope of a banking entity's covered fund activities? For example, a banking entity whose only relationship with a covered fund involves the provision of non-discretionary investment services would not be a sponsor under the proposed rule. We request comment on whether such a banking entity would benefit from this exception. We also request comment on whether a covered fund's investors and counterparties would bear any costs associated with a banking entity's modification of its business practices or its relationship to the covered fund.

Other Definitions. The covered fund provisions also define, among other things, ''director'' and ''prime brokerage transaction.'' What are the costs, benefits or other impacts associated with the way the proposed rule defines these terms? For example, would the proposed definition of ''prime brokerage transaction'' enable a banking entity to provide services to a covered fund that would not ordinarily be understood to be prime brokerage as long as it met certain conditions? What costs, or benefits, for banking entities, clients, customers or counterparties may be associated with this approach to defining prime brokerage transaction?

2. Exemptions

In implementing the covered funds provisions of section 13 of the BHC Act, the CFTC also has interpreted or defined terms contained in the three principal exemptions related to covered fund activities by a banking entity: (i) The exemption for organizing and offering covered funds; (ii) the exemption for investment in a covered fund in the case of risk-mitigating hedging; and (iii) the exemption for covered fund activities outside of the United States. We request comment generally on the potential impact of these statutory exemptions, as implemented by the proposed rule. The CFTC notes that there are multiple factors that could affect the impact of the statute and the proposed rule on a banking entity's covered fund activities, including other conditions set forth in the statute or the proposed rule that could mitigate costs or enhance benefits associated with a particular element or condition of an exemption.

Organize and Offer Exemption. Section ____.11 of the proposed rule implements the exemption set forth in section 13(d)(1)(G) of the BHC Act and generally incorporates all of the conditions specified in the statute. As required by the statute, the exemption for organizing and offering covered funds is available only to banking entities that provide *bona fide* trust, fiduciary, commodity trading or investment advisory services, which must meet certain requirements. As a result, the exemption should not preclude banking entities, such as registered advisers, registered operators, or other advisers, from providing trust or advisory services to their clients. We request comment on whether the proposed requirements of the exemption would result in a banking entity modifying its business practices or bearing higher costs to comply with the limitations and requirements applicable to this statutory exemption, as implemented by the proposed rule. These costs may include, for example, developing a credible plan that documents how advisory services would be provided to banking entity customers through organizing and offering covered funds and making the specified disclosures required by the exemption. We also request comment on whether the banking entity will pass these costs on to covered fund investors and counterparties.

In implementing this statutory exemption, the CFTC has defined or clarified several key terms or requirements, including (i) the definition of ownership interest and (ii) the method for calculating the 3% ownership interest limit. The proposed definition of ownership interest is designed to describe the typical types of relationships through which an investor has exposure to the profits and losses of

a covered fund. Consistent with this approach, carried interest is not included within the proposed definition of ownership interest. As discussed in the Supplementary Information above, carried interest generally entitles service providers, such as banking entities that provide advisory services, to receive compensation for such services determined as a share of a covered fund's profits. As a result, the proposed rule does not treat carried interest as an ownership interest, which could have costs and benefits. To help discern these costs and benefits, we request comment on whether this is consistent with how providers of advisory services view the receipt of such ''carried interest'' (*i.e.,* as compensation for services rather than as an ''ownership interest'' equivalent to an investor's interest that shares in a fund's profits and losses). The proposed definition of carried interest has limitations designed to prevent a banking entity from circumscribing the proposed rule's limitations on ownership. For instance, among other things, the proposed definition requires that the ''sole purpose and effect of the interest is to allow banking entity * * * to share in the profits of the covered fund. [363] For banking entities receiving compensation that would satisfy all of the elements of the proposed definition, there should be no burden associated with modifying existing business practices. For other banking entities, however, the conditions specified in the proposed definition could result in more banking entities being deemed to hold ''ownership interests'' and hence subject to the limitations under the statute and the proposed rule, including the limitations on material conflicts of interest, high-risk trading activities and exposure to high-risk assets. We request comment on whether these banking entities would need to modify their existing practices and develop alternatives, and, if so, whether these modifications will impose costs and benefits. For example, costs associated with modifying business practices could include developing and implementing a compliance program in accordance with the proposed rule; benefits that may arise as a result of modifying business practices could include limiting the extent to which material conflicts of interest may arise between clients, customer and counterparties of banking entities. We also request comment on whether such costs, if any, are likely to be passed on to fund investors, clients and counterparties.

As required by statute, a banking entity that seeks to invest in a covered fund under the exemption for organizing and offering covered funds could not, after the expiration of an initial one-year period (plus any applicable extensions), hold more than 3% of the total outstanding ownership interests of such fund. The proposed rule would require that a banking entity calculate the per-fund limit whenever the covered fund calculates its value or permits investor investments or redemptions, but in no case less frequently than quarterly. We request comment on whether this approach will limit any additional burden associated with calculating the per-fund limit for banking entities that invest in covered funds that determine their value on at least a quarterly basis. We also request comment on whether such banking entities will incur any additional significant costs in determining their compliance with the 3% ownership limitation.

Risk-mitigating Hedging Exemption. The proposed rule specifies an exemption from the general prohibition on covered fund activities in the case of risk-mitigating hedging. Similar to the hedging exemption in the case of proprietary trading (discussed above), the hedging exemption for covered fund activities specifies a number of conditions that are identical except for two conditions. In the case of the hedging exemption for covered fund activities, the hedging must generally ''offset'' the exposure of the banking entity to the liabilities associated with (i) the facilitation of customer transactions or (ii) compensation arrangements for certain employees. Consistent with the statute, the proposed exemption would enable a banking entity to invest in a covered fund without limit if the investment is for risk-mitigating hedging purposes.

We request comment on whether the proposed requirements will have benefits of furthering the goals of compliance with the statute and reducing banking entities' risks. We also request comment on whether the proposed requirements are more restrictive than necessary to implement the statute and whether they could unnecessarily limit a banking entity's hedging activities and ability to reduce risk. Commenters should also address whether the proposed requirements will dissuade banking entities from engaging in other permitted activities (*e.g.,* organizing and offering covered funds) or those activities outside the scope of the statute to the extent that the exemption prevents them from mitigating the risks associated with such activities. We request comment on whether a reduction in efficiency could result from a reduced ability of covered banking entities to transfer risks to those more willing to bear them. Commentators should also address whether the proposed rule could reduce a banking entity's willingness to engage in permitted risk-mitigating hedging activities in order to avoid costs related to ensuring compliance with the exemption's requirements, and whether this would increase the banking entity's risk exposure.

Exemption for Covered Fund Activities Outside of the United States. Section ____.13(c) of the proposed rule implements section 13(d)(1)(I) of the BHC Act, which permits certain foreign banking entities to sponsor or invest in covered funds ''solely outside of the United States,'' so long as the covered fund is not offered or sold to a resident of the United States. The proposed exemption provides a number of specific criteria for determining when a banking entity will be considered to have invested or sponsored a covered fund solely outside of the United States. The proposed exemption provides a definition of ''resident of the United States'' that is similar, but not identical, to the SEC's definition of ''U.S. person'' in Regulation S, which should promote consistency and understanding among market participants that have experience with the concept from the SEC's Regulation S. In addition, the proposed exemption clarifies when a foreign banking entity will be considered to engage in such trading pursuant to sections 4(c)(9) and 4(c)(13) of the BHC Act, as required by the statute, including with respect to a foreign banking entity that is not a ''foreign banking organization'' under the Board's Regulation K. This implementation of section 13(d)(1)(I) of the BHC Act would permit certain foreign banking entities that are not ''qualifying foreign banking organizations'' under the Board's Regulation K to also rely on the exemption, notwithstanding the fact such foreign banking entities are not currently subject to the BHC Act generally or the Board's Regulation K. As a result, such foreign banking entities should encounter fewer costs related to complying with the covered fund activity prohibitions than if they were unable to rely on the exemption in section 13(d)(1)(I) of the BHC Act.

Despite the reference to section 4(c)(13) of the BHC Act, the statute provides that the exemption for covered fund activities outside of the United States is only available to banking entities that are not directly or indirectly controlled by U.S. banking entities (*i.e.,* not any U.S. banking

[363] Proposed rule § ____.10(b)(3)(i).

entities or their foreign subsidiaries and affiliates). Under the statute, the prohibition and restrictions on covered fund activities apply to the consolidated, worldwide operations of U.S. firms. As required by statute, the proposal prohibits U.S. banking entities from investing in or sponsoring covered funds unless the requirements of one or more relevant exemptions (other than the exemption for trading by foreign banking entities) are satisfied. As a result, the statute creates a competitive difference between the foreign activities of U.S. banking entities, which must monitor and limit their foreign activities in accordance with the requirements of section 13 of the BHC Act, relative to the foreign activities of foreign-based banking entities, which may not be subject to restrictions similar to those in section 13 of the BHC Act. The CFTC seeks commenters' views on whether the proposed rule's implementation of section 13(d)(1)(I) of the BHC Act imposes additional competitive differences, beyond those discussed above, and the potential economic impact of such competitive differences.

3. Securitizations

The CFTC recognizes that by defining ''covered fund'' and ''banking entity'' broadly, securitization vehicles may be affected by the restrictions and requirements of the proposed rule, and this may give rise to various economic effects. The CFTC preliminarily believes that the proposed rule should mitigate the impact of securitization market participants and investors in some non-loan asset classes (including, for example, banking entities that are participants in a securitization that may acquire or retain ownership interests in a securitization vehicle that falls within the definition of covered fund) by excluding loan securitizations from the restrictions on sponsoring or acquiring and retaining ownership interests in covered funds.

Costs may be incurred to establish internal compliance programs to track compliance for any securitization vehicle that falls within the definition of banking entity. These costs may be minimized for future securitization vehicles, however, because such securitizations may be able both to incorporate any internal compliance program requirements into their documentation prior to execution and to minimize (or eliminate) any activities that may trigger greater compliance costs. The proposed rule should further minimize the costs of the internal compliance programs by (i) allowing for enterprise-wide compliance programs and minimal requirements for banking entities that do not engage in covered trading activities and/or covered fund activities or investments (each as described below), and (ii) allowing for reduced compliance program requirements by establishing financial thresholds for ''significant'' covered trading activities or covered fund activities or investments (as described below).

There could be initial costs both for banking entities that have an ownership interest in a securitization vehicle and for other securitization participants to determine if a particular vehicle falls within the definition of covered fund. Additional costs could be incurred to the extent that banking entities divest their ownership interests in any securitization vehicle that is a covered fund and is not otherwise eligible for one of the exceptions allowed under the proposed rule. This divestment could result in selling pressure that may have a negative impact on the market prices for the vehicles that fall within the definition of covered fund, which in turn could impact all investors in those securitization vehicles. Additionally, under the proposed rule, banking entities would no longer be allowed to acquire and retain such ownership interests, which may result in fewer potential investors and reduced liquidity in the market for ownership interests in these covered funds.

For example, the proposed rule could lead to significant potential market impacts if, with respect to an issuance of asset-backed securities secured by assets which are not loans, the market requires credit risk retention in excess of the minimum requirements to be adopted pursuant to Section 941 of the Dodd-Frank Act (*i.e.,* the market believes that 5% credit risk retention is insufficient to address potential misalignment of incentives in a particular transaction). In such circumstances, the proposed rule could reduce potential investors' demand for such securitizations and could make such securitizations more expensive.

C. Limitations on Permitted Activities for Material Conflicts of Interest and High-Risk Assets and High-Risk Trading Strategies

Section 13(d)(2)(A)(i) of the BHC Act provides that an otherwise-permitted activity would not qualify for a statutory exemption if it would involve or result in a material conflict of interest. The proposed rule's definition of material conflict of interest, as discussed in more detail in Part II of the Supplemental Information, would provide flexibility to banking entities and their clients, customers, and counterparties with respect to how transactions are structured, while also establishing a structure to prevent banking entities from engaging in transactions and activities in reliance on a statutory exemption when the transaction or activity would have a materially adverse effect on the clients, customers, or counterparties of the banking entity. Specifically, the proposed definition would permit the use of timely and effective disclosure and/or information barriers in certain circumstances to address and mitigate conflicts of interest, while prohibiting transactions or activities where such a conflict of interest cannot be addressed or mitigated in the specified manner. The CFTC has endeavored to establish a workable definition that sets forth when a banking entity may not rely on an exemption because it would involve or result in a material conflict of interest, consistent with the statutory goals, to facilitate banking entities' compliance with the statutory requirements. We seek comment on whether the statutory prohibition, as implemented by the proposal, may impose costs on banking entities or their clients, customers, or counterparties. For instance, by permitting a client, customer or counterparty the option of negating or mitigating the conflict after the banking entity has disclosed the conflict, would the banking entity incur certain costs related to terminating the transaction, providing compensation or other means of mitigating the conflict, or administrative costs associated with negotiating the extent of any such compensation or other means of mitigating the conflict, depending on the actions of the client, customer, or counterparty in response to the disclosure?

In addition, section 13(d)(2)(A)(ii) of the BHC Act provides that an otherwise-permitted activity would not qualify for a statutory exemption if it would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies. This statutory limitation, as implemented in the proposed rule, would prevent a banking entity from engaging in certain high-risk activity. The CFTC requests comment on whether the proposed definitions of high-risk asset and high-risk trading strategy would potentially reduce liquidity or create a reduction in efficiency for assets or markets related to that high-risk activity.

D. Compliance Program

Under § ____.20 of the proposed rule, all covered banking entities that are engaged in covered trading activities or

covered fund activities or investments would be required to have a compliance program that provides for the following six elements, at a minimum: (i) Internal written policies and procedures; (ii) internal controls; (iii) a management framework; (iv) independent testing; (v) training; and (vi) recordkeeping. For those banking entities with significant covered trading activities or covered fund activities or investments under § ____.20(c) of the proposed rule, additional standards in proposed Appendix C must be met with respect to these six elements.[364] Collectively, the six proposed requirements would facilitate a banking entity's review and assessment of its compliance with section 13 of the BHC Act and the proposed rule, including identifying potential areas of deficiency in a banking entity's compliance program and providing the banking entity the opportunity to take appropriate corrective or disciplinary action, where warranted. The proposed compliance program would also facilitate Agency examination and supervision for compliance with the requirements of the statute and the proposed rule. By requiring that a banking entity have in place specific, documented elements (*e.g.,* written policies and procedures and internal controls, recordkeeping requirements), the proposed rule would ensure that Agency examiners and supervisors can effectively review a banking entity's activities and investments to assess compliance and, where a banking entity is not in compliance with the proposed rule, take appropriate action.

Beyond the benefits recognized above, the individual elements of the proposed compliance program should also provide certain benefits. For example, the proposed management framework requirement is designed to give management a greater incentive to comply with the proposed rule and to ascertain that the employees they are responsible for overseeing are also complying with the proposed rule. Further, by establishing a management framework for compliance, the banking entity would be required to set a strong compliance tone at the top of the banking entity's organization and signal to its employees that management is serious about compliance, which should foster a strong culture of compliance throughout the banking entity. Similarly, the proposed independent testing requirement would provide a third-party assessment of a banking entity's compliance with the proposed rule, which should provide assurances to the banking entity, its clients, customers, and counterparties, and current or prospective investors that the banking entity is in compliance with the proposed rule. In addition, the proposed training requirement should help the various employees of a banking entity that have responsibilities and obligations under the proposed rule (*e.g.,* complying with the requirements for permitted market making-related activity) understand such responsibilities and obligations and facilitate the banking entity's compliance with the proposed rule. This proposed requirement may also promote market confidence by assuring that trading personnel, and other appropriate personnel of the banking entity, are familiar with their regulatory responsibilities and are complying with the applicable laws and regulations in their interactions with clients, customers, and counterparties.

Because the six elements would be required to be established by all banking entities, other than those that are not engaged in covered trading activities or covered fund activities or investments, the proposed compliance program requirement should promote consistency across banking entities. However, the proposed elements are also intended to give a banking entity a degree of flexibility in establishing and maintaining its compliance program in order to address the varying nature of activities or investments conducted by different units of the banking entity's organization, including the size, scope, complexity, and risks of the activity or investment.

We seek comment on whether developing and providing for the continued administration of a compliance program under § ____.20 of the proposed rule is likely to impose material costs on banking entities. Costs related to the proposed compliance program requirement are likely to be higher for those banking entities that are engaged in significant covered trading or covered fund activities or investments and, as a result, are required to comply with the more detailed, specific requirements of proposed Appendix C. Potential costs related to implementation of a compliance program under the proposal include those associated with: Hiring additional personnel or other personnel modifications, new or additional systems (including computer hardware or software), developing exception reports, and consultation with outside experts (*e.g.,* attorneys, accountants). The proposed compliance program requirement would also impose ongoing costs related to maintenance and enforcement of the compliance program elements, which may include those associated with: Ongoing system maintenance, surveillance (*e.g.,* reviewing and monitoring exception reports), recordkeeping, independent testing, and training. For example, the independent testing requirement in the proposal may necessitate that additional resources be provided to the internal audit department of the covered banking entity that is a registered broker-dealer or security-based swap dealer, if such testing is conducted by a qualified internal tester. Alternatively, if an outside party is used to conduct the independent testing, the covered banking entity would incur costs associated with paying the qualified outside partys for its services. The CFTC does not anticipate significant costs related to the proposed management framework requirement, as banking entities should already have relevant management structures in place.

The tiered approach with which the proposal applies the proposed compliance program requirement to banking entities of varying size should reduce the costs associated with developing and providing for the continued administration of a compliance program. In setting forth the proposed compliance program requirement in § ____.20 of the proposed rule and Appendix C, the CFTC has taken into consideration the size, scope, and complexity of a banking entity's covered trading activities and covered fund activities and investments in developing requirements targeted to the compliance risks of large and small banking entities. Specifically, banking entities that do not meet the thresholds established in § ____.20(c) of the proposed rule would not be required to comply with the more detailed and burdensome requirements set forth in Appendix C. In addition, banking entities that do not engage in covered trading activities and covered fund activities and investments would not be required to establish a compliance program under the proposed rule, and therefore should incur only minimal costs associated with adding measures to their existing compliance policies and procedures to prevent the banking entity from becoming engaged in such activities or making such investments. Together, these provisions have been proposed in order to permit a banking entity to tailor its compliance program to its activities and investments and,

[364] Proposed rule § ____.20 and Appendix C implement section 13(e) of the BHC Act, which requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13.

where possible, leverage its existing compliance structures, all of which should minimize the incremental costs associated with establishing a compliance program under the proposed rule. However, banking entities that are engaged in significant covered trading and covered fund activities and investments and thereby present a heightened compliance risk due to the size and nature of their activities and investments would be required to comply with the additional standards set forth in proposed Appendix C.

Costs associated with the requirements of proposed Appendix C should also be reduced by aspects of the proposed rule that would permit a banking entity to establish an enterprise-wide compliance program under certain circumstances. An enterprise-wide compliance program would generally permit one compliance program to be established for a banking entity and all of its affiliates and subsidiaries collectively, rather than each legal entity being required to establish its own separate compliance program. The CFTC expects that an enterprise-wide compliance program should promote efficiencies and economies of scale, and reduce costs, associated with establishing separate compliance programs.

E. Additional Request for Comment

In addition to the requests for comment discussed above, we seek commenters' views on the following additional questions related to the potential economic impacts of the proposed framework for implementing section 13 of the BHC Act:

Question 348. What are the expected costs and benefits of complying with the requirements of the proposed rule? We seek commenters' estimates of the aggregate cost or benefit that would be incurred or received by banking entities subject to section 13 of the BHC Act to comply. We also ask commenters to break out the costs or benefits of compliance to banking entities with each individual aspect of the proposed rule. Please provide an explanation of how cost or benefit estimates were derived. Please also identify any costs or benefits that would occur on a one time basis and costs that would recur. Would particular costs or benefits decrease or increase over time? If certain costs or benefits cannot be estimated, please discuss why such costs or benefits cannot be estimated.

*Question 348.*1 The CFTC seeks comment on the proposed rule's effects on market-making and liquidity, the costs of borrowing by businesses and consumers, the prices of financial assets, and the competitiveness of the United States financial services sector. The Commission also solicits comment on the benefits that will result from the proposed regulations and how these benefits compare to the costs of complying with the proposed regulations. The Commission also solicits comment on the CFTC's assessments of the costs and benefits of the regulations proposed herein.

Question 349. Please identify any costs or benefits that would occur on a one-time basis and costs or benefits that would recur (*e.g.,* training and compliance monitoring). Please identify any costs or benefits that you believe would decrease over time. Please identify any costs or benefits that you believe may increase over time or remain static.

Question 350. Are there circumstances in which registered dealers, security-based swap dealers, and/or swap dealers (i) hold accounts other than trading accounts or (ii) hold investment positions for activities for which they are required to be registered? If so, would including all such dealer positions within the trading account definition create competitive burdens as well as additional burdens on the operations of such dealers that may not be consistent with the language and purpose of the statute? Please describe how this may occur, and to what extent it may occur.

Question 351. Please identify the ways, if any, that banking entities might alter the ways they currently conduct business as a result of the costs that could be incurred to comply with the requirements of the proposed rule. Do you anticipate that banking entities will terminate any services or products currently offered to clients, customers, or counterparties due to the proposed rule, if adopted? Please explain.

Question 352. How would trading systems and practices used in today's marketplace be impacted by the proposed rule? What would be the costs and/or benefits of such changes in trading practices and systems?

Question 353. Would the proposed rule create any additional implementation or operational costs or benefits associated with systems (including computer hardware and software), surveillance, procedural, recordkeeping, or personnel modifications, beyond those discussed in the above analysis? Would smaller banking entities be disproportionately impacted by any of these additional implementation or operational costs?

Question 354. We seek specific comments on the costs and benefits associated with systems changes on banking entities with respect to the proposed rule, including the type of systems changes necessary and quantification of costs associated with changing the systems, including both start-up and maintenance costs. We request comments on the types of jobs and staff that would be affected by systems modifications and training with respect to the proposed rule, the number of labor hours that would be required to accomplish these matters, and the compensation rates of these staff members.

Question 355. Please discuss any human resources costs associated with the proposed rule, along with any associated overhead costs.

Question 356. What are the benefits and costs associated with the requirements for relying on the underwriting exemption? What impact will these requirements have on capital formation, efficiency, competition, liquidity, price efficiency, if any? Please estimate any resulting benefits and costs or discuss why such benefits and costs cannot be estimated. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 357. What are the benefits and costs associated with the requirements for relying on the exemption for market-making-related activity, including the requirement that such activity be consistent with the commentary in Appendix B? What impact will these requirements have on liquidity, price efficiency, capital formation, efficiency, and competition, if any? Please estimate any resulting benefits and costs or discuss why such benefits and costs cannot be estimated. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 358. What are the benefits and costs associated with the requirements for relying on the exemption for risk-mitigating hedging activity, including the requirement that certain hedge transactions be documented? What impact will these requirements have on liquidity, price efficiency, capital formation, efficiency, and competition, if any? Please estimate any resulting benefits and costs or discuss why such benefits and costs cannot be estimated. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 359. Are there traditional risk management activities of banking entities that are not covered by the liquidity management and risk-

mitigating hedging exemptions as currently proposed? What risks do banking entities face that go beyond market, counterparty/credit, currency/foreign exchange, interest rate, and basis risk? Could the proposed construction of the liquidity management and risk-mitigating hedging exemptions increase the costs of management or impede the ability of banking entities to effectively manage risk?

Question 360. To rely on the exemptions from the proposed rule for permitted underwriting, market-making-related activity, and risk-mitigating hedging, banking entities must establish, maintain, and enforce a compliance program, including written policies and procedures and internal controls. Please discuss how the costs incurred, or benefits received, by banking entities related to initial implementation and ongoing maintenance of the compliance program would impact their customers and their businesses with respect to underwriting, market making, and hedging activity.

Question 361. Please discuss benefits and costs related to the limitations on permitted activities for material conflicts of interest, high-risk assets and trading strategies, and threats to the safety and soundness of banking entities or to the financial stability of the U.S. in the proposed rule. Are there particular benefits and costs related to the proposed definitions of material conflict of interest, high-risk asset, and high-risk trading strategy in the proposed rule? Would these definitions have any unintended costs, such as creating undue burdens and limitations on permitted underwriting, market making-related, or hedging activity? Please explain. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 362. Please discuss the benefits and costs related to the definition of derivative in the proposed rule and the application of the restrictions on proprietary trading to transactions in the different types of derivatives covered by the definition. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 363. What costs and benefits would be associated with calculating, reviewing, and analyzing the proposed quantitative measurements? What costs and benefits would be associated with reporting the proposed quantitative measurements to an Agency? Please identify any of the proposed quantitative measurements that are already reported to an Agency and discuss whether the current reporting regime would mitigate costs associated with the proposed rule. With respect to any quantitative measurement that is not already reported to an Agency, what are the costs and benefits of beginning to report the measurement? Would banking entities have to create or purchase new systems or implement changes to existing systems in order to report these quantitative measurements? Please discuss the costs and benefits associated with such systems changes.

Question 364. How much of the data necessary to calculate the quantitative measurements in Appendix A is currently captured, retained, and utilized by banking entities? If the applicable data is not currently used by banking entities, is it readily available? Is it possible to collect all of the data that is necessary for calculating the required measurements? Please identify any data that banking entities do not currently utilize that would need to be captured and retained for purposes of proposed Appendix A and discuss the costs and benefits of capturing and retaining such data.

Question 365. Do the costs and benefits of calculating, analyzing, and reporting certain or all quantitative measurements differ between trading units and their trading activities, including trading strategies, asset classes, market structure, experience and market share, and market competitiveness? Are any quantitative measurements particularly costly to calculate or analyze for specific trading activities or, alternatively, particularly beneficial? If so, which quantitative measurement, what type of trading activity, and what factor(s) of that trading activity make the quantitative measurement particularly costly or beneficial? Please discuss how these costs, if any, could be mitigated or benefits, if any, could be enhanced.

Question 366. The proposed definition of trading unit would require a tiered approach to calculating and reporting quantitative measurements, such that the measurements would be calculated and reported for different levels within the banking entity, with higher levels encompassing smaller units (*e.g.,* trading desks, business lines, and all trading operations). What are the costs and benefits of calculating the quantitative measurements for each level within the definition of trading unit? Can the higher level calculations incorporate the lower level calculations such that the higher level calculations result in small, incremental costs? Why or why not? Are there particular costs or benefits associated with calculating, analyzing, and reporting a quantitative measurement at one of the levels within the definition of trading unit that would not be experienced at the other levels? Please explain. What are the costs, if any, of ''noise,'' ''false positives,'' or ''false negatives'' with respect to the quantitative measurements and calculations at different levels? Can these costs be mitigated and, if so, how? What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 367. We seek comment on whether the requirement that banking entities employ a suite of quantitative measurements may lead to redundancies and/or inefficiencies in the application of the measurements for some types of trading units within some banking entities. Despite the flexibility of Appendix A via recognition that quantitative measurements will be applied with respect to differences within a banking entity's structure, business lines, and trading desks, we seek comment on whether the requirement of a mandatory suite of quantitative measurements may prove burdensome. For instance, is the application of certain quantitative measurements not efficient, appropriate, or calculable for certain asset classes or trading units or would the benefits of applying such quantitative measurements be negligible in relation to the costs of applying such measurements? In addition, would the overlay divert a banking entity from allocating resources toward quantitative—or other—measurements that might prove more useful and better tailored to its specific and unique trading practices?

Question 368. What are the benefits and costs of the recordkeeping requirement in proposed Appendix A? Please explain and quantify, to the extent possible. To what extent would the proposed recordkeeping requirement impose new or additional costs and benefits beyond the current recordkeeping obligations of different types of banking entities (*e.g.,* affiliated broker-dealers, affiliated investment advisers, insured depository institutions, *etc.*)? What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 369. Please identify any cost savings that would be achieved through the use of an enterprise-wide compliance program. Alternatively, would you expect certain costs to increase when using an enterprise-wide compliance program? Please explain. Please identify any benefits that might

be amplified or reduced when using an enterprise-wide compliance program.

Question 370. Are there tools or elements in the contents of the compliance program set forth in § ____.20(b) for which the costs may be negligible because banking entities use the same or similar elements for other purposes (*e.g.,* satisfying other regulatory requirements, risk management, *etc.*) and could utilize existing infrastructure for purposes of the proposed rule? For example, could existing trader mandates or an existing training program be expanded to meet the requirements of the proposed rule, rather than developing an entirely new infrastructure? Alternatively, would the proposed rule require redundancies or duplications within a banking entity's infrastructure (*e.g.,* the trader mandates currently used for one purpose do not conform to the requirements of the proposed rule, so a banking entity would have to utilize both in different circumstances)? Please identify and explain any such redundancies and how the rule could be modified to reduce or eliminate such redundancies, if possible.

Question 371. How would the proposed rule affect compliance costs (*e.g.,* personnel or system changes) or benefits for each category of banking entity: small, medium, and large? Please discuss any differences between the costs and benefits of the compliance program required under § ____.20(b) for smaller banking entities and the compliance program requirements of Appendix C for larger banking entities. Are the differences between these benefits and costs justified due to the differences in size and complexity of smaller and larger banking entities?

Question 372. The definition of trading unit in proposed Appendix C covers different levels of a banking entity and, as a result, requires a tiered approach to establishing, maintaining, and enforcing the compliance program requirements with respect to covered trading activities. What are the costs and benefits of applying the compliance program requirements at several levels within the banking entity? To what extent does the ability to incorporate written policies and procedures of lower-level units by reference, rather than establishing separate written policies and procedures, mitigate the costs of the proposed requirements? Are there other ways that the proposed requirements could be made more cost-effective for the different levels within the banking entity?

Question 373. How will the proposed definition of ''covered fund'' affect a banking entity's investment advisory activities, in particular activities and relationships with investment funds that would be treated as ''covered funds''? Please estimate any resulting costs or benefits or discuss why such costs or benefits cannot be estimated.

Question 374. How have banking entities traditionally organized and offered covered funds? What are the benefits and costs associated with the proposed requirements for relying on the exception for organizing and offering covered funds? Please estimate any resulting costs or benefits or discuss why such costs or benefits cannot be estimated.

Question 375. What are the costs and benefits associated with the way the proposed rule implements the ''customers of such services'' requirement in the exception for organizing and offering covered funds? What alternative, if any, may be more cost-effective while still being consistent with the language and purpose of the statute?

Question 376. Is it common for a banking entity to share a name with the covered funds that it invests in or sponsors? If yes, what entity in the banking structure typically shares a name with such covered funds? What costs and benefits will result from the proposed rule's implementation of the name sharing requirement in exception for organizing and offering a covered fund? What alternatives, if any, may be more cost-effective while still being consistent with the purpose of the statute?

Question 377. Under what circumstances do directors and employees of a banking entity invest in covered funds? What are the benefits and costs associated with the proposed provisions regarding director and employee investments in covered funds? What alternatives, if any, may be more cost-effective while still being consistent with the purpose of the statute?

Question 378. Do banking entities currently invest in or sponsor SBICs and public welfare and qualified rehabilitation investments? If yes, to what extent? What are the benefits and costs associated with the proposed rule's implementation of the exception for investment in SBICs and public welfare and qualified rehabilitation investments?

Question 379. Do banking entities currently invest in or sponsor each of the vehicles that the proposed rule permits banking entities to continue to invest in and sponsor under section 12(d)(1)(J) of the BHC Act? If yes, to what extent? What are the benefits and costs associated with the proposed rule's implementation of these exceptions?

Question 380. For banking entities that are affiliated investment advisers, are there additional costs or benefits to complying with section 13 of the BHC Act and the proposed rule? For example, do affiliated investment advisers typically maintain records that would enable them to demonstrate compliance with the 3% ownership limits or restrictions on transactions that would be subject to sections 23A and 23B of the FR Act?

Question 381. Would complying with section 13 of the BHC Act and the proposed rule affect an affiliated investment adviser's other business activities (benefit or burden) that are not subject to restrictions on proprietary trading or other covered fund activities? For example, would advisers incur additional burdens to distinguish covered fund activities from non-covered fund activities?

Question 382. For banking entities that are affiliated investment advisers, are there particular costs or benefits to complying with the portions of Appendix C that are applicable to each asset management unit of the adviser? Do these costs and benefits differ depending on whether the adviser complies with Appendix C individually or on an enterprise basis? Does the rule provide sufficient clarify for how Appendix C applies to unregistered affiliates of an affiliated investment adviser?

Question 383. To the extent applicable, please address each of the questions above with respect to securitization vehicles that would be included in the proposed definition of covered fund.

VI. Administrative Law Matters

A. Paperwork Reduction Act Analysis; Request for Comment on Proposed Information Collection

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (''PRA''), the CFTC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (''OMB'') control number. In conjunction with the Joint Release, the OCC, FDIC, and the Board obtained OMB control numbers. The information collection requirements contained in the Joint Release, to the extent they apply to banking entities that are not under a holding company, were submitted by the OCC and FDIC to OMB for review and approval under section 3506 of the PRA and section

1320.11 of OMB's implementing regulations (5 C.F.R. § 1320).[365] Under the Joint Release, the Board will submit to OMB once the final rule is published and the submission will include burden for Federal Reserve-supervised institutions, as well as burden for OCC-, FDIC-, SEC-, and CFTC-supervised institutions under a holding company.[366] Under the Joint Release, the OCC or the FDIC will take burden for banking entities that are not under a holding company.[367]

In this CFTC Rule, the CFTC is proposing a separate rulemaking under which the CFTC would adopt the same substantive requirements as proposed in the Joint Release. Accordingly, the burden for CFTC-supervised institutions under the CFTC Rule would be the same as the burdens set forth and assumed by the Board and the OCC in the Joint Release.[368]

In the Joint Release, the proposed collection of information is titled ''Reporting, Recordkeeping, and Disclosure Requirements Associated with Restrictions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds.'' The collection of information request submitted to OMB by the FDIC is titled ''Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships with, Hedge Funds and Private Equity Funds.''

In the Joint Release, the Board stated that it would take burden for all institutions under a holding company, including, among other things, banking entities for which the CFTC is the primary financial regulatory agency, as defined in section 2(12)(C) of the Dodd-Frank Act.[369]

In the Joint Release, the OCC stated that it will take the burden with respect to registered investment advisers and commodity trading advisers and commodity pool operators that are subsidiaries of national banks, federal savings associations, and federal savings banks not under a bank holding company.

The CFTC seeks comment on whether there are any banking entities supervised by the FDIC or are subsidiaries or affiliates of an FDIC-supervised banking entity (''FDIC supervised-entities) for which the CFTC will be the primary financial regulatory agency under section 2(12)(C) of the Dodd-Frank Act. The Joint Release does not identify any such entities.

The CFTC will request, pursuant to 44 U.S.C. 3509, that the director of the OMB designate the Board or the OCC as the respective collection agency for PRA purposes for the banking entities for which the CFTC is the primary financial regulatory agency under section 2(12)(C). This does not affect the CFTC's obligation and authority to receive and review the relevant information (as set forth in the PRA section of the Joint Release for all banking entities) for those entities.[370]

B. Initial Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.[371] If so, the agency must prepare an initial and final regulatory flexibility analysis respecting the significant economic impact. Pursuant to section 605(b) of the RFA, the regulatory flexibility analysis otherwise required under sections 603 and 604 of the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Agencies have considered the potential impact of the proposed rule on small entities in accordance with the RFA. The proposed rule would not appear to have a significant economic impact on small entities for several reasons.

First, while the proposed rule will affect all banking organizations, including those that have been defined to be ''small businesses'' under the RFA, only certain limited requirements would be imposed on entities that engage in little or no covered trading activities or covered fund activities and investments. Significantly, the reporting and recordkeeping requirements of § ____.7 and Appendix A of the proposed rule apply only to banking entities with average trading assets and liabilities on a consolidated, worldwide basis equal to or greater than $1 billion for the preceding year. This is a threshold that a small banking entity typically would not meet.

Second, the scope and size of the compliance program requirements set forth in subpart D and Appendix C of the proposed rule would vary based on the size and activities of each covered banking entity. Only banking entities with average trading assets and liabilities on a worldwide consolidated basis equal to or greater than $1 billion or 10 percent or more of their total assets, or that have aggregate investments in, or sponsor or advise, covered funds with aggregate total assets of more than $1 billion must establish, maintain and enforce a full compliance program under the proposed rule. Banking entities that engage in trading activities or covered fund activities and investments under these thresholds must adopt, at a minimum, only the six core compliance requirements set forth in § ____.20 of the proposed rule. Banking entities that do not engage in any covered trading or fund activities, typical of small banking entities, must ensure only that their compliance programs include measures designed to prevent the entities from becoming engaged in covered activities unless they first adopt a compliance program. These compliance requirements would not appear to have a significant economic impact on a substantial number of small entities.

For the reasons stated above, the head of the CFTC certifies, for the covered banking entities subject to the CFTC's jurisdiction, that the proposed rule would not result in a significant economic impact on a substantial number of small entities. The CFTC encourages written comments regarding this certification, and request that commenters describe the nature of any impact on small entities and provide empirical data, or studies, to illustrate and support the extent of the impact.

VII. CFTC: Additional Matters

A. Commodity Pool Operators and Commodity Trading Advisors

As discussed above, under the proposed rule, a covered banking entity as defined in § ____.2(j) would generally be subject to the substantive requirements contained in the CFTC Rule. These substantive requirements implement the provisions on proprietary trading and covered fund activities under section 13 of the BHC Act. Thus for example, a covered banking entity that is a registered swap dealer would be required to comply with subparts A through D of the CFTC Rule, including Appendices A, B and C, where applicable. With respect to covered fund activities, investments, or relationships set forth in subpart C and

[365] *See* 76 FR 68936.

[366] *See id.*

[367] *See id.*

[368] *See id.*

[369] *See id.*

[370] *See* 76 FR 68936–38.

[371] A banking organization is generally considered to be a small banking entity for the purposes of the RFA if it has assets less than or equal to $175 million. *See also* 13 CFR 121.1302(a)(6) (noting factors that the Small Business Administration considers in determining whether an entity qualifies as a small business, including receipts, employees, and other measures of its domestic and foreign affiliates).

§ ____.20 of subpart D (''covered fund restrictions''), however, the CFTC's proposed rule would require that a covered banking entity that is a covered banking entity because it is a commodity pool operator or commodity trading advisor for which the CFTC is the primary financial regulatory agency under sections 2(12)(C)(ii) and 2(12)(C)(iii) of the Dodd-Frank Act comply with the covered fund restrictions issued by the appropriate Federal banking agency that regulates the banking entity specified in § ____.2(e)(1), (2) and (3) with which the commodity pool operator or commodity trading advisor is affiliated.[372] Under this approach, a commodity pool operator or commodity trading advisor would be required to comply with the rules and related guidance issued by the appropriate Federal banking agency. The CFTC would, however, retain enforcement authority over all activities of commodity pool operators or commodity trading advisors (*i.e.,* both proprietary trading and covered fund restrictions).

The covered fund restrictions of section 13 of the BHC Act and the proposed implementing rules make reference to or incorporate a number of banking law and supervision concepts that traditionally appear in Federal banking law and are interpreted and applied by the Federal banking agencies. For example, as discussed in greater detail in the Supplementary Information, the limitations on ownership interests in a covered fund set forth in the statute and the proposed rule generally reference the tier 1 capital of the affiliated insured depository institution or the affiliated holding company. Similarly, capital deductions under the proposed rule refer to the tier 1 capital of the affiliated insured depository institution or the affiliated holding company. In addition, the covered fund restrictions of the statute and the proposed rule incorporate by reference sections 23A and 23B of the FR Act and are administered by the Federal banking agencies. These sections of the FR Act restrict and limit transactions between certain banking organizations and their affiliates, some of which are based on a percentage of bank capital. Further, other covered fund restrictions, including for example exemptions for investments involving the public welfare and bank-owned life insurance and the extension of time to divest of investments after the seeding period, reference other banking laws or regulations that are administered by the Federal banking agencies.

In light of these considerations, the proposed CFTC Rule would require a commodity pool operator or commodity trading advisor to comply with the covered fund restrictions contained in subpart C and § .____20 of subpart D of rules implementing section 13 of the BHC that are issued by the appropriate Federal banking agency that regulates the banking entity with which the commodity pool operator or commodity trading advisor is affiliated. Under the proposed approach, a commodity pool operator or commodity trading advisor complying with the CFTC Rule would do so by complying with the rule issued by the appropriate Federal banking agency, including any related interpretations or guidance regarding such requirements. Similarly, under the proposed approach, the foregoing determinations regarding capital or other banking law requirements that may be applicable to a commodity pool operator or commodity trading advisor would be made by the appropriate Federal banking agency that regulates the banking entity with which the commodity pool operator or commodity trading advisor is affiliated. This approach would mitigate the burdens of complying with the covered fund restrictions for commodity pool operators or commodity trading advisors and would avoid creating incentives for covered fund activities to be moved from a commodity pool operator or commodity trading advisor to a bank.

The proposed CFTC Rule specifies that a commodity operator or commodity trading advisor must comply with the covered fund restrictions contained in subpart C and § ____.20 of subpart D that are issued by the appropriate Federal banking agency that regulates the banking entity with which the commodity pool operator or commodity trading advisor is affiliated. Subpart C, which uses terms defined in subpart A, specifies the covered fund restrictions. Subpart D § ____.20 requires the establishment of a compliance program when engaging in covered fund activities. A commodity pool operator or commodity trading advisor complying with subpart C and § ____.20 of subpart D, as issued by the appropriate Federal banking agency, would also rely on interpretative guidance issued by the appropriate Federal banking agency with respect to those subparts of the proposed rule. Because § ____.20 of subpart D relates to both the prohibitions and restrictions on proprietary trading activity as well as the prohibitions and restrictions on covered fund activities and investments, a commodity pool operator or commodity trading advisor would be required to comply with the relevant covered fund provisions issued by the appropriate Federal banking agency. A commodity pool operator or commodity trading advisor, however, would be subject to the provisions set forth in subpart D of the proposed CFTC Rule, including § ____.20, that relate to covered trading activities.

Nothing set forth in the discussion above, or in § ____.10(a)(2) of the proposed CFTC Rule, however, is intended, or shall be deemed, to limit the CFTC's authority under any other provision of law, including pursuant to section 13 of the BHC Act.

The CFTC requests comment on the its proposed approach to implementing section 13 of the BHC Act as it applies to commodity pool operators or commodity trading advisors with respect to the covered fund restrictions. In particular, the CFTC requests comment on the following:

Question CFTC–5. Should the CFTC instead require commodity pool operators or commodity pool advisors to comply with the covered fund restrictions proposed by the CFTC, instead of those issued the appropriate Federal banking agency? If so, could this create incentives to move the advisory business between the commodity pool operator or commodity trading advisor and its affiliated bank? Are there benefits to this alternate approach? If so, please explain.

Question CFTC–6. Are there other alternative approaches to the proposed rule that would be more effective? If yes, what alternatives and why?

Question CFTC–7. Would commodity pool operators or commodity trading advisors affiliated with insured depository institutions benefit from the proposed approach? Why or why not?

Question CFTC–8. Would a commodity pool operator or commodity trading advisor that is affiliated with insured depository institutions that are regulated by multiple Federal banking agencies encounter additional burdens in implementing the proposed approach? With respect to these commodity pool operators or commodity trading advisors, which Federal banking agency's rules should be applicable to the commodity pool operator or commodity trading advisor? For example, should the commodity pool operator or commodity trading advisor be subject to the rules applicable to the commodity pool operator or commodity trading advisor's

[372] A commodity pool operator or commodity trading advisor would, however, be required to comply with the provisions that implement the proprietary trading restrictions set forth in subparts A, B and § ____.20 of subpart D of the proposed rule as promulgated by the CFTC, including Appendix C, where applicable.

immediate parent that is an insured depository institution?

Question CFTC–9. Is the proposed requirement that commodity pool operators or commodity trading advisors comply with the covered fund restrictions in §____.20 issued by the Federal banking agency that regulates the banking entity specified in §____.2(e)(1), (2) and (3) of the proposed rule with which the commodity pool operator or commodity trading advisor is affiliated sufficiently clear? Are there particular compliance program requirements in §____.20 with respect to the covered fund restrictions that overlap with the proprietary trading restrictions, such that it would be difficult to identify which requirements are related to the covered fund restrictions and which requirements are related to the proprietary trading restrictions? If so, which requirements and how should this overlap be addressed? Should commodity pool operators or commodity trading advisors be required to comply with §____.20 of the CFTC Rule in its entirety? Why or why not?

Question CFTC–10. Will the CFTC's proposed approach limit the potential for inconsistent application of the proposed rules with respect to affiliates of entities specified in §____.2(e)(1), (2) and (3)? Why or why not?

Question CFTC–11. Will the CFTC's proposed approach be effective in avoiding the creation of incentives for covered fund activities to move from a commodity pool operator or commodity trading advisor to a bank? Why or why not?

Text of the Proposed Common Rules [373] (applicable to the OCC, Board, FDIC, and SEC under the Joint Release)

The text of the proposed common rules appears below:

PART [ ]—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS.

Subpart A—Authority and Definitions

Sec.

____.1 Authority, purpose, scope, and relationship to other authorities [Reserved].
____.2 Definitions.

Subpart B—Proprietary Trading

____.3 Prohibition on proprietary trading.
____.4 Permitted underwriting and market making-related activities.
____.5 Permitted risk-mitigating hedging activities.
____.6 Other permitted proprietary trading activities.
____.7 Reporting and recordkeeping requirements applicable to trading activities.
____.8 Limitations on permitted proprietary trading activities.
____.9 [Reserved]

Subpart C—Covered Fund Activities and Investments

____.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.
____.11 Permitted organizing and offering of a covered fund.
____.12 Permitted investment in a covered fund.
____.13 Other permitted covered fund activities and investments.
____.14 Covered fund activities and investments determined to be permissible.
____.15 Internal controls, reporting and recordkeeping requirements applicable to covered fund activities and investments.
____.16 Limitations on relationships with a covered fund.
____.17 Other limitations on permitted covered fund activities and investments.
____.18 [Reserved]
____.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

____.20 Program for monitoring compliance; enforcement.
____.21 Termination of activities or investments; penalties for violations.
Appendix A to Part [ ]—Reporting and Recordkeeping Requirements for Covered Trading Activities
Appendix B to Part [ ]—Commentary Regarding Identification of Permitted Market Making-Related Activities
Appendix C to Part [ ]—Minimum Standards for Programmatic Compliance

Subpart A—Authority and Definitions

§____.1 Authority, purpose, scope, and relationship to other authorities. [*Reserved*]

§____.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the BHC Act (12 U.S.C. 1841(k)).

(b) *Applicable accounting standards* means U.S. generally accepted accounting principles or such other accounting standards applicable to a covered banking entity that the [Agency] determines are appropriate, that the covered banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(c) *BHC Act* means the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).

(d) *Bank holding company* has the same meaning as in section 2 of the BHC Act (12 U.S.C. 1841).

(e) *Banking entity* means:

(1) Any insured depository institution;

(2) Any company that controls an insured depository institution;

(3) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(4) Any affiliate or subsidiary of any entity described in paragraphs (e)(1), (2), or (3) of this section, other than an affiliate or subsidiary that is:

(i) A covered fund that is organized, offered and held by a banking entity pursuant to §____.11 and in accordance with the provisions of subpart C of this part, including the provisions governing relationships between a covered fund and a banking entity; or

(ii) An entity that is controlled by a covered fund described in paragraph (e)(4)(i) of this section.

(f) *Board* means the Board of Governors of the Federal Reserve System.

(g) *Buy* and *purchase* each include any contract to buy, purchase, or otherwise acquire. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(h) *CFTC* means the Commodity Futures Trading Commission.

(i) *Commodity Exchange Act* means the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

(j) [Reserved]

(k) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(l) (i) *Derivative* means:

(A) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)), and as those terms are further jointly defined by the CFTC and SEC by joint regulation, interpretation, guidance, or other action, in consultation with the

[373] The text of the Proposed Common Rules section of the CFTC Rule is identical to the text of the Proposed Common Rules adopted in the Joint Release. *See* 76 FR 68944–68967.

Board pursuant to section 712(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 8302(d));

(B) Any purchase or sale of a nonfinancial commodity for deferred shipment or delivery that is intended to be physically settled;

(C) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(D) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(E) Any agreement, contract, or transactions in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(F) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(ii) A derivative does not include:

(A) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(B) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(m) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(n) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

(o) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)).

(p) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include any insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)).

(q) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable.

(r) *Nonbank financial company supervised by the Board* has the meaning specified in section 102 of the Financial Stability Act of 2010 (12 U.S.C. 5311).

(s) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a) of the Board's Regulation K (12 CFR 211.23(a)).

(t) *Resident of the United States* means:

(1) Any natural person resident in the United States;

(2) Any partnership, corporation or other business entity organized or incorporated under the laws of the United States or any State;

(3) Any estate of which any executor or administrator is a resident of the United States;

(4) Any trust of which any trustee, beneficiary or, if the trust is revocable, any settlor is a resident of the United States;

(5) Any agency or branch of a foreign entity located in the United States;

(6) Any discretionary or non-discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary for the benefit or account of a resident of the United States;

(7) Any discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary organized or incorporated in the United States, or (if an individual) a resident of the United States; or

(8) Any person organized or incorporated under the laws of any foreign jurisdiction formed by or for a resident of the United States principally for the purpose of engaging in one or more transactions described in §____.6(d)(1) or §____.13(c)(1).

(u) *SEC* means the Securities and Exchange Commission.

(v) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(w) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(x) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(y) *Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a *et seq.*).

(z) *Separate account* means an account established and maintained by an insurance company subject to regulation by a State insurance regulator or a foreign insurance regulator under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(aa) *State* means any State, territory or possession of the United States, and the District of Columbia.

(bb) *Subsidiary* has the same meaning as in section 2(d) of the BHC Act (12 U.S.C. 1841(d)).

Subpart B—Proprietary Trading

§____.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a covered banking entity may not engage in proprietary trading.

(b) *Definition of ''proprietary trading'' and related terms.* For purposes of this subpart:

(1) *Proprietary trading* means engaging as principal for the trading account of the covered banking entity in any purchase or sale of one or more covered financial positions. Proprietary trading does not include acting solely as agent, broker, or custodian for an unaffiliated third party.

(2) *Trading account.*

(i) *Trading account* means any account that is used by a covered banking entity to:

(A) Acquire or take one or more covered financial positions principally for the purpose of:

(1) Short-term resale;

(2) Benefitting from actual or expected short-term price movements;

(3) Realizing short-term arbitrage profits; or

(4) Hedging one or more positions described in paragraphs (b)(2)(i)(A)(*1*), (*2*), or (*3*) of this section;

(B) Acquire or take one or more covered financial positions, other than positions that are foreign exchange derivatives, commodity derivatives, or contracts of sale of a commodity for future delivery, that are market risk capital rule covered positions, if the covered banking entity, or any affiliate of the covered banking entity that is a bank holding company, calculates risk-based capital ratios under the market risk capital rule; or

(C) Acquire or take one or more covered financial position for any purpose, if the covered banking entity is:

(1) A dealer or municipal securities dealer that is registered with the SEC under the Exchange Act, to the extent the position is acquired or taken in connection with the activities of the dealer or municipal securities dealer that require it to be registered under that Act;

(2) A government securities dealer that is registered, or that has filed notice, with an appropriate regulatory agency (as that term is defined in section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), to the extent the position is acquired or taken in connection with the activities of the government securities dealer that require it to be registered, or to file notice, under that Act;

(3) A swap dealer that is registered with the CFTC under the Commodity Exchange Act, to the extent the position is acquired or taken in connection with the activities of the swap dealer that require it to be registered under that Act;

(4) A security-based swap dealer that is registered with the SEC under the Exchange Act, to the extent the position is acquired or taken in connection with the activities of the security-based swap dealer that require it to be registered under that Act; or

(5) Engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States to the extent the position is acquired or taken in connection with the activities of such business.

(ii) *Rebuttable presumption for certain positions.* An account shall be presumed to be a trading account if it is used to acquire or take a covered financial position, other than a covered financial position described in paragraph (b)(2)(i)(B) or (C) of this section, that the covered banking entity holds for a period of sixty days or less, unless the covered banking entity can demonstrate, based on all the facts and circumstances, that the covered financial position, either individually or as a category, was not acquired or taken principally for any of the purposes described in paragraph (b)(2)(i)(A) of this section.

(iii) An account shall not be deemed a trading account for purposes of paragraph (b)(2)(i) of this section to the extent that such account is used to acquire or take a position in one or more covered financial positions:

(A) That arise under a repurchase or reverse repurchase agreement pursuant to which the covered banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(B) That arise under a transaction in which the covered banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(C) For the *bona fide* purpose of liquidity management and in accordance with a documented liquidity management plan of the covered banking entity that:

(1) Specifically contemplates and authorizes the particular instrument to be used for liquidity management purposes, its profile with respect to market, credit and other risks, and the liquidity circumstances in which the particular instrument may or must be used;

(2) Requires that any transaction contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the covered banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(3) Requires that any position taken for liquidity management purposes be highly liquid and limited to financial instruments the market, credit and other risks of which the covered banking entity does not expect to give rise to appreciable profits or losses as a result of short-term price movements;

(4) Limits any position taken for liquidity management purposes, together with any other positions taken for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations, as estimated and documented pursuant to methods specified in the plan; and

(5) Is consistent with [Agency]'s supervisory requirements, guidance and expectations regarding liquidity management; or

(D) That are acquired or taken by a covered banking entity that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the SEC under section 17A of the Exchange Act (15 U.S.C. 78q–1) in connection with clearing derivatives or securities transactions.

(3) *Covered financial position.*

(i) *Covered financial position* means any position, including any long, short, synthetic or other position, in:

(A) A security, including an option on a security;

(B) A derivative, including an option on a derivative; or

(C) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(ii) A covered financial position does not include any position that is:

(A) A loan;

(B) A commodity; or

(C) Foreign exchange or currency.

(c) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(2) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27)).

(3) *Exempted security* has the same meaning as in section 3(a)(12)(A) of the Exchange Act (15 U.S.C. 78c(a)(12)(A)).

(4) *Foreign insurance regulator* means the insurance commission, or a similar official or agency, of one or more countries other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(5) *General account* means, with respect to an insurance company, all of the assets of the insurance company that are not legally segregated and allocated to separate accounts under applicable State or foreign law.

(6) *Government securities* has the same meaning as in section 3(a)(42) of the Exchange Act (15 U.S.C. 78c(a)(42)).

(7) *Market risk capital rule covered position* means a covered position as that term is defined for purposes of:

(i) In the case of a covered banking entity that is a bank holding company or insured depository institution, the market risk capital rule that is applicable to the covered banking entity; and

(ii) In the case of a covered banking entity that is affiliated with a bank holding company, other than a covered banking entity to which a market risk capital rule is applicable, the market risk capital rule that is applicable to the affiliated bank holding company.

(8) *Market risk capital rule* means 12 CFR 3, Appendix B, 12 CFR 208, Appendix E, 12 CFR 225, Appendix E, and 12 CFR 325, Appendix C, as applicable.

(9) *Municipal securities* has the same meaning as in section 3(a)(29) of the Exchange Act (15 U.S.C. 78c(a)(29)).

(10) *Security-based swap* has the meaning specified in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)).

(11) *Swap* has the meaning specified in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)).

(12) *State insurance regulator* means the insurance commission, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

§ ____.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities.*

(1) *Permitted underwriting activities.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity that is made in connection with the covered banking entity's underwriting activities.

(2) *Requirements.* For purposes of paragraph (a)(1) of this section, a purchase or sale of a covered financial position shall be deemed to be made in connection with a covered banking entity's underwriting activities only if:

(i) The covered banking entity has established the internal compliance program required by subpart D of this part that is designed to ensure the covered banking entity's compliance with the requirements of paragraph (a)(2) of this section, including reasonably designed written policies and procedures, internal controls, and independent testing;

(ii) The covered financial position is a security;

(iii) The purchase or sale is effected solely in connection with a distribution of securities for which the covered banking entity is acting as underwriter;

(iv) The covered banking entity is:

(A) With respect to a purchase or sale effected in connection with a distribution of one or more covered financial positions that are securities, other than exempted securities, security-based swaps, commercial paper, bankers' acceptances, or commercial bills:

(1) A dealer that is registered with the SEC under section 15 of the Exchange Act (15 U.S.C. 78*o*), or a person that is exempt from registration or excluded from regulation as a dealer thereunder; or

(2) Engaged in the business of a dealer outside of the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(B) With respect to a purchase or sale effected as part of a distribution of one or more covered financial positions that are municipal securities, a municipal securities dealer that is registered under section 15B of the Exchange Act (15 U.S.C. 78*o*–4) or exempt from registration thereunder; or

(C) With respect to a purchase or sale effected as part of a distribution of one or more covered financial positions that are government securities, a government securities dealer that is registered, or that has filed notice, under section 15C of the Exchange Act (15 U.S.C. 78*o*–5) or exempt from registration thereunder;

(v) The underwriting activities of the covered banking entity with respect to the covered financial position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties;

(vi) The underwriting activities of the covered banking entity are designed to generate revenues primarily from fees, commissions, underwriting spreads or other income not attributable to:

(A) Appreciation in the value of covered financial positions related to such activities; or

(B) The hedging of covered financial positions related to such activities; and

(vii) The compensation arrangements of persons performing underwriting activities are designed not to reward proprietary risk-taking.

(3) *Definition of distribution.* For purposes of paragraph (a) of this section, a *distribution* of securities means an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

(4) *Definition of underwriter.* For purposes of paragraph (a) of this section, *underwriter* means:

(i) A person who has agreed with an issuer of securities or selling security holder:

(A) To purchase securities for distribution;

(B) To engage in a distribution of securities for or on behalf of such issuer or selling security holder; or

(C) To manage a distribution of securities for or on behalf of such issuer or selling security holder; and

(ii) A person who has an agreement with another person described in paragraph (a)(4)(i) of this section to engage in a distribution of such securities for or on behalf of the issuer or selling security holder.

(b) *Market making-related activities.*

(1) *Permitted market making-related activities.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity that is made in connection with the covered banking entity's market making-related activities.

(2) *Requirements.* For purposes of paragraph (b)(1) of this section, a purchase or sale of a covered financial position shall be deemed to be made in connection with a covered banking entity's market making-related activities only if:

(i) The covered banking entity has established the internal compliance program required by subpart D that is designed to ensure the covered banking entity's compliance with the requirements of paragraph (b)(2) of this section, including reasonably designed written policies and procedures, internal controls, and independent testing;

(ii) The trading desk or other organizational unit that conducts the purchase or sale holds itself out as being willing to buy and sell, including through entering into long and short positions in, the covered financial position for its own account on a regular or continuous basis;

(iii) The market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are, with respect to the covered financial position, designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties;

(iv) The covered banking entity is:

(A) With respect to a purchase or sale of one or more covered financial positions that are securities, other than exempted securities, security-based swaps, commercial paper, bankers' acceptances, or commercial bills:

(1) A dealer that is registered with the SEC under section 15 of the Exchange Act (15 U.S.C. 78*o*), or a person that is exempt from registration or excluded from regulation as a dealer thereunder; or

(2) Engaged in the business of a dealer outside of the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(B) With respect to a purchase or sale of one or more covered financial positions that are swaps:

(1) A swap dealer that is registered with the CFTC under the Commodity Exchange Act (7 U.S.C. 1a) or a person that is exempt from registration thereunder; or

(2) Engaged in the business of a swap dealer outside the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(C) With respect to a purchase or sale of one or more covered financial positions that are security-based swaps:

(1) A security-based swap dealer that is registered with the SEC under section 15F of the Exchange Act (15 U.S.C. 78*o*–10) or a person that is exempt from registration thereunder; or

(2) Engaged in the business of a security-based swap dealer outside of the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(D) With respect to a purchase or sale of one or more covered financial positions that are municipal securities, a municipal securities dealer that is registered under section 15B of the Exchange Act (15 U.S.C. 78*o*–4) or a person that is exempt from registration thereunder; or

(E) With respect to a purchase or sale of one or more covered financial positions that are government securities, a government securities dealer that is registered, or that has filed notice, under section 15C of the Exchange Act (15 U.S.C. 78*o*–5) or a person that is exempt from registration thereunder;

(v) The market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are designed to generate revenues primarily from fees, commissions, bid/ask spreads or other income not attributable to:

(A) Appreciation in the value of covered financial positions it holds in trading accounts; or

(B) The hedging of covered financial positions it holds in trading accounts;

(vi) The market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are consistent with the commentary provided in appendix B to this part; and

(vii) The compensation arrangements of persons performing the market making-related activities are designed not to reward proprietary risk-taking.

(3) *Market making-related hedging.* For purposes of paragraph (b)(1) of this section, a purchase or sale of a covered financial position shall also be deemed to be made in connection with a covered banking entity's market making-related activities if:

(i) The covered financial position is purchased or sold to reduce the specific risks to the covered banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings acquired pursuant to paragraph (b) of this section; and

(ii) The purchase or sale meets all of the requirements described in § ____.5(b) and, if applicable, § ____.5(c).

§ ____.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity that is made in connection with and related to individual or aggregated positions, contracts, or other holdings of a covered banking entity and is designed to reduce the specific risks to the covered banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* For purposes of paragraph (a) of this section, a purchase or sale of a covered financial position shall be deemed to be in connection with and related to individual or aggregated positions, contracts, or other holdings of a covered banking entity and designed to reduce the specific risks to the covered banking entity in connection with and related to such positions, contracts, or other holdings only if:

(1) The covered banking entity has established the internal compliance program required by subpart D of this part designed to ensure the covered banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures regarding the instruments, techniques and strategies that may be used for hedging, internal controls and monitoring procedures, and independent testing;

(2) The purchase or sale:

(i) Is made in accordance with the written policies, procedures and internal controls established by the covered banking entity pursuant to subpart D of this part;

(ii) Hedges or otherwise mitigates one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with and related to individual or aggregated positions, contracts, or other holdings of a covered banking entity;

(iii) Is reasonably correlated, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate;

(iv) Does not give rise, at the inception of the hedge, to significant exposures that were not already present in the individual or aggregated positions, contracts, or other holdings of a covered banking entity and that are not hedged contemporaneously;

(v) Is subject to continuing review, monitoring and management by the covered banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section; and

(B) Maintains a reasonable level of correlation, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and

(C) Mitigates any significant exposure arising out of the hedge after inception; and

(vi) The compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking.

(c) *Documentation.* With respect to any purchase, sale, or series of purchases or sales conducted by a covered banking entity pursuant to this § ____.5 for risk-mitigating hedging purposes that is established at a level of organization that is different than the level of organization establishing or responsible for the positions, contracts, or other holdings the risks of which the purchase, sale, or series of purchases or sales are designed to reduce, the covered banking entity must, at a minimum, document, at the time the purchase, sale, or series of purchases or sales are conducted:

(1) The risk-mitigating purpose of the purchase, sale, or series of purchases or sales;

(2) The risks of the individual or aggregated positions, contracts, or other holdings of a covered banking entity that the purchase, sale, or series of purchases or sales are designed to reduce; and

(3) The level of organization that is establishing the hedge.

§ ____.6 Other permitted proprietary trading activities.

(a) *Permitted trading in government obligations.*

(1) The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale by a covered banking entity of a covered financial position that is:

(i) An obligation of the United States or any agency thereof;

(ii) An obligation, participation, or other instrument of or issued by the Government National Mortgage

Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or

(iii) An obligation of any State or any political subdivision thereof.

(2) An obligation or other instrument described in paragraphs (a)(1)(i), (ii) or (iii) of this section shall include both general obligations and limited obligations, such as revenue bonds.

(b) *Permitted trading on behalf of customers.* (1) The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity on behalf of customers.

(2) For purposes of paragraph (b)(1) of this section, a purchase or sale of a covered financial position by a covered banking entity shall be considered to be on behalf of customers if:

(i) The purchase or sale:

(A) Is conducted by a covered banking entity acting as investment adviser, commodity trading advisor, trustee, or in a similar fiduciary capacity for a customer;

(B) Is conducted for the account of the customer; and

(C) Involves solely covered financial positions of which the customer, and not the covered banking entity or any subsidiary or affiliate of the covered banking entity, is beneficial owner (including as a result of having long or short exposure under the relevant covered financial position);

(ii) The covered banking entity is acting as riskless principal in a transaction in which the covered banking entity, after receiving an order to purchase (or sell) a covered financial position from a customer, purchases (or sells) the covered financial position for its own account to offset a contemporaneous sale to (or purchase from) the customer; or

(iii) The covered banking entity is an insurance company that purchases or sells a covered financial position for a separate account, if:

(A) The insurance company is directly engaged in the business of insurance and subject to regulation by a State insurance regulator or foreign insurance regulator;

(B) The insurance company purchases or sells the covered financial position solely for a separate account established by the insurance company in connection with one or more insurance policies issued by that insurance company;

(C) All profits and losses arising from the purchase or sale of a covered financial position are allocated to the separate account and inure to the benefit or detriment of the owners of the insurance policies supported by the separate account, and not the insurance company; and

(D) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment and other laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled.

(c) *Permitted trading by a regulated insurance company.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by an insurance company or any affiliate of an insurance company if:

(1) The insurance company is directly engaged in the business of insurance and subject to regulation by a State insurance regulator or foreign insurance regulator;

(2) The insurance company or its affiliate purchases or sells the covered financial position solely for the general account of the insurance company;

(3) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(4) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(3) of this section is insufficient to protect the safety and soundness of the covered banking entity, or of the financial stability of the United States.

(d) *Permitted trading outside of the United States.*

(1) The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity if:

(i) The covered banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The purchase or sale is conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale occurs solely outside of the United States.

(2) A purchase or sale shall be deemed to be conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act only if:

(i) With respect to a covered banking entity that is a foreign banking organization, the banking entity is a qualifying foreign banking organization and is conducting the purchase or sale in compliance with subpart B of the Board's Regulation K (12 CFR 211.20 through 211.30); or

(ii) With respect to a covered banking entity that is not a foreign banking organization, the covered banking entity meets at least two of the following requirements:

(A) Total assets of the covered banking entity held outside of the United States exceed total assets of the covered banking entity held in the United States;

(B) Total revenues derived from the business of the covered banking entity outside of the United States exceed total revenues derived from the business of the covered banking entity in the United States; or

(C) Total net income derived from the business of the covered banking entity outside of the United States exceeds total net income derived from the business of the covered banking entity in the United States.

(3) A purchase or sale shall be deemed to have occurred solely outside of the United States only if:

(i) The covered banking entity conducting the purchase or sale is not organized under the laws of the United States or of one or more States;

(ii) No party to the purchase or sale is a resident of the United States;

(iii) No personnel of the covered banking entity who is directly involved in the purchase or sale is physically located in the United States; and

(iv) The purchase or sale is executed wholly outside of the United States.

§ ____.7 Reporting and recordkeeping requirements applicable to trading activities.

A covered banking entity engaged in any proprietary trading activity permitted under §§ ____.4 through ____.6 shall comply with:

(a) The reporting and recordkeeping requirements described in appendix A to this part, if the covered banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion;

(b) The recordkeeping requirements required under § ____.20 and appendix C to this part, as applicable; and

(c) Such other reporting and recordkeeping requirements as [Agency] may impose to evaluate the covered banking entity's compliance with this subpart.

§ ____.8 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ ____.4 through ____.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the covered banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the covered banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the covered banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* For purposes of this section, a material conflict of interest between a covered banking entity and its clients, customers, or counterparties exists if the covered banking entity engages in any transaction, class of transactions, or activity that would involve or result in the covered banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, unless:

(1) *Timely and effective disclosure and opportunity to negate or substantially mitigate.* Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, for which a conflict of interest may arise, the covered banking entity:

(i) Makes clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(ii) Makes such disclosure explicitly and effectively, and in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(2) *Information barriers.* The covered banking entity has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the covered banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A covered banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the covered banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

Subpart C—Covered Funds Activities and Investments

§ ____.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* Except as otherwise provided in this subpart, a covered banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(b) *Definitions.* For purposes of this part:

(1) *Covered fund* means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) A commodity pool, as defined in section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10));

(iii) Any issuer, as defined in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)), that is organized or offered outside of the United States that would be a covered fund as defined in paragraphs (b)(1)(i), (ii), or (iv) of this section, were it organized or offered under the laws, or offered to one or more residents, of the United States or of one or more States; and

(iv) Any such similar fund as the appropriate Federal banking agencies, the SEC, and the CFTC may determine, by rule, as provided in section 13(b)(2) of the BHC Act.

(2) *Director* has the same meaning as provided in § 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(3) *Ownership interest.*

(i) *Ownership interest* means any equity, partnership, or other similar interest (including, without limitation, a share, equity security, warrant, option, general partnership interest, limited partnership interest, membership interest, trust certificate, or other similar instrument) in a covered fund, whether voting or nonvoting, or any derivative of such interest.

(ii) *Ownership interest* does not include, with respect to a covered fund:

(A) *Carried interest.* An interest held by a covered banking entity (or an affiliate, subsidiary or employee thereof) in a covered fund for which the covered banking entity (or an affiliate, subsidiary or employee thereof) serves as investment manager, investment adviser or commodity trading adviser, so long as:

(*1*) The sole purpose and effect of the interest is to allow the covered banking entity (or the affiliate, subsidiary or employee thereof) to share in the profits of the covered fund as performance compensation for services provided to the covered fund by the covered banking entity (or the affiliate, subsidiary or employee thereof), provided that the covered banking entity (or the affiliate, subsidiary or employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the covered banking entity (or the affiliate, subsidiary or employee thereof) promptly after being earned or, if not so distributed, the reinvested profit of the covered banking entity (or the affiliate, subsidiary or employee thereof) does not share in the subsequent profits and losses of the covered fund;

(*3*) The covered banking entity (or the affiliate, subsidiary or employee thereof) does not provide funds to the covered fund in connection with acquiring or retaining this interest; and

(*4*) The interest is not transferable by the covered banking entity (or the affiliate, subsidiary or employee thereof) except to another affiliate or subsidiary thereof.

(4) *Prime brokerage transaction* means one or more products or services provided by a covered banking entity to a covered fund, such as custody, clearance, securities borrowing or lending services, trade execution, or financing, data, operational, and portfolio management support.

(5) *Sponsor,* with respect to a covered fund, means:

(i) To serve as a general partner, managing member, trustee, or commodity pool operator of a covered fund;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name.

(6) *Trustee.* (i) For purposes of this subpart, a trustee does *not* include a trustee that does not exercise investment discretion with respect to a covered fund, including a directed trustee, as that term is used in section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)).

(ii) Any covered banking entity that directs a person identified in paragraph (b)(6)(i) of this section, or that possesses authority and discretion to manage and control the assets of a covered fund for which such person identified in paragraph (b)(6)(i) of this section serves as trustee, shall be considered a trustee of such covered fund.

§ ____.11 Permitted organizing and offering of a covered fund.

Section ____.10(a) does not prohibit a covered banking entity from, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(a) The covered banking entity provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(b) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the covered banking entity, pursuant to a credible plan or similar documentation outlining how the covered banking entity intends to provide advisory or similar services to its customers through organizing and offering such fund;

(c) The covered banking entity does not acquire or retain an ownership interest in the covered fund except as permitted under this subpart;

(d) The covered banking entity complies with the restrictions under § ____.16 of this subpart;

(e) The covered banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(f) The covered fund, for corporate, marketing, promotional, or other purposes:

(1) Does not share the same name or a variation of the same name with the covered banking entity (or an affiliate or subsidiary thereof); and

(2) Does not use the word ''bank'' in its name;

(g) No director or employee of the covered banking entity takes or retains an ownership interest in the covered fund, except for any director or employee of the covered banking entity who is directly engaged in providing investment advisory or other services to the covered fund; and

(h) The covered banking entity:

(1) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(i) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the covered banking entity and its affiliates or subsidiaries]; therefore, [the covered banking entity's and its affiliates' or subsidiaries'] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by the [covered banking entity and its affiliates or subsidiaries] in their capacity as investors in the [covered fund]'';

(ii) That such investor should read the fund offering documents before investing in the covered fund;

(iii) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case);

(iv) The role of the covered banking entity and its affiliates, subsidiaries and employees in sponsoring or providing any services to the covered fund; and

(2) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates or subsidiaries.

§ ____.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) The prohibition contained in § ____.10(a) does not apply with respect to a covered banking entity acquiring and retaining any ownership interest in a covered fund that the covered banking entity or an affiliate or subsidiary thereof organizes and offers, for the purposes of:

(i) *Establishment.* Establishing the covered fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors as required by paragraph (a)(2)(i) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund that does not exceed 3 percent of the total outstanding ownership interests in the fund.

(2) *Ownership limits.*

(i) With respect to an investment in any covered fund pursuant to paragraph (a)(1)(i) of this section, the covered banking entity:

(A) Must actively seek unaffiliated investors to reduce through redemption, sale, dilution, or other methods the aggregate amount of all ownership interests of the covered banking entity in any covered fund under § ____.12 to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) May not exceed 3 percent of the total amount or value of outstanding ownership interests of the fund not later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section); and

(ii) The aggregate value of all ownership interests of the covered banking entity in all covered funds under § ____.12 may not exceed 3 percent of the tier 1 capital of the covered banking entity, as provided under paragraph (c) of this section.

(b) *Limitations on investments in a single covered fund.* For purposes of determining whether a covered banking entity is in compliance with the limitations and restrictions on permitted investments in covered funds contained in paragraph (a) of this section, a covered banking entity shall calculate its amount and value of a permitted

investment in a single covered fund as follows:

(1) *Attribution of ownership interests to a covered banking entity.* The amount and value of a banking entity's permitted investment in any single covered fund shall include:

(i) *Controlled investments.* Any ownership interest held under § ____.12 by any entity that is controlled, directly or indirectly, by the covered banking entity for purposes of this part; and

(ii) *Noncontrolled investments.* The *pro rata* share of any ownership interest held under § ____.12 by any covered fund that is not controlled by the covered banking entity but in which the covered banking entity owns, controls, or holds with the power to vote more than 5 percent of the voting shares.

(2) *Calculation of amount of ownership interests in a single covered fund.* For purposes of determining whether an investment in a single covered fund does not exceed 3 percent of the total outstanding ownership interests of the fund under paragraph (a)(2)(i)(B) of this section:

(i) The aggregate amount of all ownership interests of the covered banking entity shall be the greater of (without regard to committed funds not yet called for investment):

(A) The value of any investment or capital contribution made with respect to all ownership interests held under § ____.12 by the covered banking entity in the covered fund, divided by the value of all investments or capital contributions, respectively, made by all persons in that covered fund; or

(B) The total number of ownership interests held under § ____.12 by the covered banking entity in a covered fund divided by the total number of ownership interests held by all persons in that covered fund.

(ii) *Inclusion of certain parallel investments.* To the extent that a covered banking entity is contractually obligated to directly invest in, or is found to be acting in concert through knowing participation in a joint activity or parallel action toward a common goal of investing in, one or more investments with a covered fund that is organized and offered by the covered banking entity, whether or not pursuant to an express agreement, such investments shall be included in any calculation required under paragraph (a)(2) of this section.

(3) *Timing of single covered fund investment calculation.* The aggregate amount of all ownership interests of a covered banking entity in a single covered fund may at no time exceed the limits in this paragraph after the conclusion of the period provided in paragraph (a)(2)(i)(B) of this section.

(4) *Methodology and standards for calculation.* For purposes of determining the amount or value of its investment in a covered fund under this paragraph (b), a covered banking entity must calculate its investment in the same manner and according to the same standards utilized by the covered fund for determining the aggregate value of the fund's assets and ownership interests.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of determining the aggregate value of all permitted investments in all covered funds by a covered banking entity under paragraph (a)(2)(ii) of this section, the aggregate value of all ownership interests held by that covered banking entity shall be the sum of the value of each investment in a covered fund held under § ____.12, as determined in accordance with applicable accounting standards.

(2) *Calculation of tier 1 capital.* For purposes of determining compliance with paragraph (a)(2)(ii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a covered banking entity is required to calculate and report tier 1 capital, the covered banking entity's tier 1 capital shall be equal to the amount of tier 1 capital calculated by that covered banking entity as of the last day of the most recent calendar quarter that has ended, as reported to its primary financial regulatory agency, as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(ii) If a covered banking entity is not required to calculate and report tier 1 capital, the covered banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a covered banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, the amount of tier 1 capital reported by such controlling depository institution pursuant to paragraph (c)(2)(i) of this section;

(B) In the case of a covered banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the covered banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital, pursuant to paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the covered banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(*3*) A covered banking entity's aggregate permitted investment in all covered funds shall be calculated as of the last day of each calendar quarter.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating capital pursuant to the applicable capital rules, a covered banking entity shall deduct the aggregate value of all permitted investments in all covered funds made or retained by a covered banking entity pursuant to this section (as determined under paragraph (c)(1) of this section) from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section).

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a covered banking entity, the Board may extend the period of time to meet the requirements under paragraphs (a)(2)(i)(A) and (B) of this section for up to 2 additional years, if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the covered banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2)(i) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would:

(A) Involve or result in material conflicts of interest between the covered banking entity and its clients, customers or counterparties;

(B) Result, directly or indirectly, in a material exposure by the covered

banking entity to high-risk assets or high-risk trading strategies;

(C) Pose a threat to the safety and soundness of the covered banking entity; or

(D) Pose a threat to the financial stability of the United States;

(ii) Market conditions;

(iii) The contractual terms governing the covered banking entity's interest in the covered fund;

(iv) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the covered banking entity to enable the covered banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the covered banking entity and the financial stability of the United States;

(v) The cost to the covered banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the divestiture or conformance of the investment would involve or result in a material conflict of interest between the covered banking entity and unaffiliated clients, customers or counterparties to which it owes a duty;

(vii) The covered banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund; and

(viii) Any other factor that the Board believes appropriate.

(3) *Consultation.* In the case of a covered banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to approval of an application by the covered banking entity for an extension under paragraph (e)(1) of this section.

(4) *Authority to impose restrictions on activities or investment during any extension period.* (i) The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the covered banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act (12 U.S.C. 1851) and this part.

(ii) *Consultation.* In the case of a covered banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to imposing conditions on the approval of a request by the covered banking entity for an extension under paragraph (e)(1) of this section.

§ ____.13 Other permitted covered fund activities and investments.

(a) *Permitted investments in SBICs and related investments.* The prohibition contained in § ____.10(a) does not apply with respect to acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund by a covered banking entity or an affiliate or subsidiary thereof:

(1) In one or more small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(2) That is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(3) That is a qualified rehabilitation expenditure with respect to a qualified rehabilitation building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(b) *Permitted Risk-Mitigating Hedging Activities.*

(1) The prohibition contained in § ____.10(a) does not apply with respect to an ownership interest in a covered fund by a covered banking entity, provided that the acquisition or retention of the ownership interest is:

(i) Made in connection with and related to individual or aggregated obligations or liabilities of the covered banking entity that are:

(A) Taken by the covered banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or

(B) Directly connected to a compensation arrangement with an employee that directly provides investment advisory or other services to the covered fund; and

(ii) Designed to reduce the specific risks to the covered banking entity in connection with and related to such obligations or liabilities.

(2) *Requirements.* For purposes of paragraph (b)(1) of this section, acquiring or retaining an ownership interest in a covered fund by a covered banking entity shall be a permissible risk-mitigating hedging activity under this section only if:

(i) The covered banking entity has established the internal compliance program required by subpart D designed to ensure the covered banking entity's compliance with the requirements of this paragraph (b)(2) of this section including reasonably designed written policies and procedures regarding the instruments, techniques and strategies that may be used for hedging, internal controls and monitoring procedures, and independent testing;

(ii) The acquisition or retention of an ownership interest in a covered fund:

(A) Is made in accordance with the written policies, procedures and internal controls established by the covered banking entity pursuant to subpart D of this part;

(B) Hedges or otherwise mitigates an exposure to a covered fund through an offsetting exposure to the same covered fund and in the same amount of ownership interest in that covered fund that:

(*1*) Arises out of a transaction conducted solely to accommodate a specific customer request with respect to, or

(*2*) Is directly connected to its compensation arrangement with an employee that directly provides investment advisory or other services to, that covered fund;

(C) Does not give rise, at the inception of the hedge, to significant exposures that were not already present in individual or aggregated positions, contracts, or other holdings of a covered banking entity and that are not hedged contemporaneously; and

(D) Is subject to continuing review, monitoring and management by the covered banking entity that:

(*1*) Is consistent with its written hedging policies and procedures;

(*2*) Maintains a substantially similar offsetting exposure to the same amount and type of ownership interest, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and

(*3*) Mitigates any significant exposure arising out of the hedge after inception; and

(iii) The compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking.

(3) *Documentation.* With respect to any acquisition or retention of an ownership interest in a covered fund by a covered banking entity pursuant to this paragraph (b), the covered banking entity must document, at the time the transaction is conducted:

(i) The risk-mitigating purpose of the acquisition or retention of an ownership interest in a covered fund;

(ii) The risks of the individual or aggregated obligation or liability of a covered banking entity that the acquisition or retention of an ownership interest in a covered fund is designed to reduce; and

(iii) The level of organization that is establishing the hedge.

(c) *Certain permitted covered fund activities and investments outside of the United States.*

(1) The prohibition contained in § ____.10(a) does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a covered banking entity if:

(i) The covered banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity is conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in such covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity occurs solely outside of the United States.

(2) An activity shall be considered to be conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act only if:

(i) With respect to a covered banking entity that is a foreign banking organization, the covered banking entity is a qualifying foreign banking organization and is conducting the activity in compliance with subpart B of the Board's Regulation K (12 CFR 211.20 through 211.30); or

(ii) With respect to a covered banking entity that is not a foreign banking organization, the covered banking entity meets at least two of the following requirements:

(A) Total assets of the covered banking entity held outside of the United States exceed total assets of the covered banking entity held in the United States;

(B) Total revenues derived from the business of the covered banking entity outside of the United States exceed total revenues derived from the business of the covered banking entity in the United States; or

(C) Total net income derived from the business of the covered banking entity outside of the United States exceeds total net income derived from the business of the covered banking entity in the United States.

(3) An activity shall be considered to have occurred solely outside of the United States only if:

(i) The covered banking entity engaging in the activity is not organized under the laws of the United States or of one or more States;

(ii) No subsidiary, affiliate, or employee of the covered banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States or in one or more States; and

(iii) No ownership interest in such covered fund is offered for sale or sold to a resident of the United States.

(d) *Loan securitizations.* The prohibition contained in § ____.10(a) does not apply with respect to the acquisition or retention by a covered banking entity of any ownership interest in, or acting as sponsor to, a covered fund that is an issuer of asset-backed securities, the assets or holdings of which are solely comprised of:

(1) Loans;

(2) Contractual rights or assets directly arising from those loans supporting the asset-backed securities; and

(3) Interest rate or foreign exchange derivatives that:

(i) Materially relate to the terms of such loans or contractual rights or assets; and

(ii) Are used for hedging purposes with respect to the securitization structure.

§ ____.14 Covered fund activities determined to be permissible.

(a) The prohibition contained in § ____.10(a) does not apply to the acquisition or retention by a covered banking entity of any ownership interest in or acting as sponsor to:

(1) *Bank owned life insurance.* A separate account which is used solely for the purpose of allowing a covered banking entity to purchase an insurance policy for which the covered banking entity is the beneficiary, provided that the covered banking entity that purchases the insurance policy:

(i) Does not control the investment decisions regarding the underlying assets or holdings of the separate account; and

(ii) Holds its ownership interest in the separate account in compliance with applicable supervisory guidance regarding bank owned life insurance.

(2) *Certain other covered funds.* Any of the following entities that would otherwise qualify as a covered fund:

(i) A joint venture between the covered banking entity or one of its affiliates and any other person, provided that the joint venture:

(A) Is an operating company; and

(B) Does not engage in any activity or make any investment that is prohibited under this part;

(ii) An acquisition vehicle, provided that the sole purpose and effect of such entity is to effectuate a transaction involving the acquisition or merger of one entity with or into the covered banking entity or one of its affiliates;

(iii) An issuer of an asset-backed security, but only with respect to that amount or value of economic interest in a portion of the credit risk for an asset-backed security that is retained by a covered banking entity that is a ''securitizer'' or ''originator'' in compliance with the minimum requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and any implementing regulations issued thereunder;

(iv) A wholly-owned subsidiary of the covered banking entity that is:

(A) Engaged principally in performing *bona fide* liquidity management activities described in § ____.3(b)(2)(iii)(C), and

(B) Carried on the balance sheet of the covered banking entity; and

(v) A covered fund that is an issuer of asset-backed securities described in § ____.13(d), the assets or holdings of which are solely comprised of:

(A) Loans;

(B) Contractual rights or assets directly arising from those loans supporting the asset-backed securities; and

(C) Interest rate or foreign exchange derivatives that:

(*1*) Materially relate to the terms of such loans or contractual rights or assets, and

(*2*) Are used for hedging purposes with respect to the securitization structure.

(b) The prohibition contained in § ____.10(a) does not apply to the acquisition or retention by a covered banking entity of any ownership interest in, or acting as sponsor to, a covered fund, but only if such ownership interest is acquired or retained by a covered banking entity (or an affiliate or subsidiary thereof):

(1) In the ordinary course of collecting a debt previously contracted in good faith, if the covered banking entity divests the ownership interest within applicable time periods provided for by the [Agency]; or

(2) Pursuant to and in compliance with the conformance or extended transition period authorities provided for in subpart E of the Board's rules implementing section 13 of the BHC Act (12 CFR 248.30 through 248.35).

§ ____.15 Internal controls, reporting and recordkeeping requirements applicable to covered fund activities and investments.

A covered banking entity engaged in any covered fund activity or making or holding any investment permitted under this subpart shall comply with:

(a) The internal controls, reporting, and recordkeeping requirements required under § ____.20 and appendix C to this part, as applicable; and

(b) Such other reporting and recordkeeping requirements as the [Agency] may deem necessary to appropriately evaluate the covered banking entity's compliance with this subpart.

§ ____.16 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.*

(1) Except as provided for in paragraph (a)(2) of this section, no covered banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § ____.11, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c), as if such covered banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a covered banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such covered banking entity (or an affiliate or subsidiary thereof) has taken an ownership interest, if:

(A) The covered banking entity is in compliance with each of the limitations set forth in § ____.11 with respect to a covered fund organized and offered by such covered banking entity (or an affiliate or subsidiary thereof);

(B) The chief executive officer (or equivalent officer) of the top-tier affiliate of the covered banking entity certifies in writing annually (with a duty to update the certification if the information in the certification materially changes) that the covered banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the covered banking entity.

(b) *Restrictions on transactions with covered funds.* A covered banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § ____.11, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such covered banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the covered banking entity.

§ ____.17 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ ____.11 through ____.14 and § ____.16 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the covered banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the covered banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the covered banking entity or the financial stability of the United States.

(b) *Definition of material conflict of interest.* For purposes of this section, a material conflict of interest between a covered banking entity and its clients, customers, or counterparties exists if the covered banking entity engages in any transaction, class of transactions, or activity that would involve or result in the covered banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, unless:

(1) *Timely and effective disclosure and opportunity to negate or substantially mitigate.* Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, for which a conflict of interest may arise, the covered banking entity:

(i) Makes clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(ii) Makes such disclosure explicitly and effectively, and in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(2) *Information barriers.* The covered banking entity has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the covered banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A covered banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the covered banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

§ ____.18 [Reserved]

§ ____.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ ____.20 Program for monitoring compliance; enforcement.

(a) *Program requirement.* Except as provided in paragraph (d) of this section, each covered banking entity shall develop and provide for the continued administration of a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part, and such program shall be appropriate for the size, scope and complexity of activities and business structure of the covered banking entity.

(b) *Contents of compliance program.* The compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Internal written policies and procedures reasonably designed to document, describe, and monitor trading activities subject to subpart B and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ ____.4 through ____.6 or §§ ____.11 through ____.16) to ensure that such activities and investments comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and this part in the covered banking entity's trading activities subject to subpart B and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ ____.4 through ____.6 or §§ ____.11 through ____.16) and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part;

(4) Independent testing for the effectiveness of the compliance program conducted by qualified personnel of the covered banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Making and keeping records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a covered banking entity must promptly provide to [Agency] upon request and retain for a period of no less than 5 years.

(c) *Additional Standards.* (1) In the case of any covered banking entity described in paragraph (c)(2) of this section, the compliance program required by paragraph (a) of this section shall also satisfy the requirements and other standards contained in appendix C to this part.

(2) A covered banking entity is subject to paragraph (c)(1) of this section if:

(i) The covered banking entity engages in proprietary trading and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters:

(A) Is equal to or greater than $1 billion; or

(B) Equals 10 percent or more of its total assets;

(ii) The covered banking entity invests in, or has relationships with, a covered fund and:

(A) The covered banking entity has, together with its affiliates and subsidiaries, aggregate investments in one or more covered funds, the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion; or

(B) Sponsors or advises, together with its affiliates and subsidiaries, one or more covered funds, the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion; or

(iii) [Agency] deems it appropriate.

(d) *No program required for certain banking entities.* To the extent that a covered banking entity does not engage in activities or investments prohibited or restricted by subpart B or subpart C of this part, a covered banking entity will have satisfied the requirements of this section if its existing compliance policies and procedures include measures that are designed to prevent the covered banking entity from becoming engaged in such activities or making such investments and which require the covered banking entity to develop and provide for the compliance program required under paragraph (a) of this section prior to engaging in such activities or making such investments.

§ ____.21 Termination of activities or investments; penalties for violations.

(a) Any covered banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part or in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C of this part, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall terminate the activity and, as relevant, dispose of the investment.

(b) After due notice and an opportunity for hearing, if the [Agency] finds reasonable cause to believe any covered banking entity has engaged in an activity or made an investment described in paragraph (a) of this section, the [Agency] may, by order, direct the banking entity to restrict, limit, or terminate the activity and, as relevant, dispose of the investment.

(c) [Reserved]

Appendix A to Part [ ]—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

This appendix sets forth reporting and recordkeeping requirements that certain covered banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § ____.7, this appendix generally applies to a covered banking entity that has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion. These entities are required to (i) furnish periodic reports to [Agency] regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix should be incorporated into the covered banking entity's internal compliance program under § ____.20 and Appendix C.

The purpose of this appendix is to assist covered banking entities and [Agency] in:

(i) Better understanding and evaluating the scope, type, and profile of the covered banking entity's trading activities;

(ii) Monitoring the covered banking entity's trading activities;

(iii) Identifying trading activities that warrant further review or examination by the covered banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the trading activities of trading units engaged in market making-related activities subject to § ____.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading units that are engaged in permitted trading activity subject to

§§ ____.4, ____.5, or ____.6(a) (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular trading activities of the covered banking entity, and the individual trading units of the banking entity, to help establish the appropriate frequency and scope of examination by [Agency] of such activities; and

(vii) Assessing and addressing the risks associated with the covered banking entity's covered trading activities.

The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

In addition to the quantitative measurements required in this appendix, a covered banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § ____.20 and appendix C to this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading unit, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, covered banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the covered banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

On an ongoing basis, covered banking entities should carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ ____.4 through ____.6 that result in a material exposure to high-risk assets or high-risk trading strategies, should be escalated within the banking entity for review, further analysis, explanation to [Agency], and remediation, where appropriate. Many of the quantitative measurements discussed in this appendix will also be helpful to covered banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ ____.2 and ____.3. In addition, for purposes of this appendix, the following definitions apply:

Covered trading activity means proprietary trading, as defined in paragraph (b)(1) of § ____.3.

Trading unit means each of the following units of organization of a covered banking entity:

(i) Each discrete unit that is engaged in the coordinated implementation of a revenue-generation strategy and that participates in the execution of any covered trading activity; [1]

(ii) Each organizational unit that is used to structure and control the aggregate risk-taking activities and employees of one or more trading units described in paragraph (i); [2]

(iii) All trading operations, collectively; and

(iv) Any other unit of organization specified by the [Agency] with respect to a particular banking entity.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

III. Reporting and Recordkeeping of Quantitative Measurements

A. Scope of Required Reporting

General scope. The quantitative measurements that must be furnished by a covered banking entity depend on the aggregate size of the covered banking entity's trading activities and the activities in which its trading units engage, as follows:

(i) With respect to any covered banking entity that is engaged in any covered trading activity, and has trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $5 billion:

(a) Each trading unit of the covered banking entity that is engaged in market making-related activities subject to § ____.4(b) must furnish the following quantitative measurements, calculated in accordance with this appendix:

- Value-at-Risk and Stress VaR;
- VaR Exceedance;
- Risk Factor Sensitivities;
- Risk and Position Limits;
- Comprehensive Profit and Loss;
- Portfolio Profit and Loss;
- Fee Income and Expense;
- Spread Profit and Loss;
- Comprehensive Profit and Loss Attribution;
- Pay-to-Receive Spread Ratio;
- Unprofitable Trading Days Based on Comprehensive Profit and Loss and Unprofitable Trading Days Based on Portfolio Profit and Loss;
- Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss;
- Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss;
- Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio;
- Inventory Risk Turnover;
- Inventory Aging; and
- Customer-facing Trade Ratio; and

(b) Each trading unit of the covered banking entity that is engaged in permitted trading activity subject to §§ ____.4(a), ____.5, or ____.6(a) must furnish the following quantitative measurements, calculated in accordance with this appendix:

- Value-at-Risk and Stress VaR;
- Risk Factor Sensitivities;
- Risk and Position Limits;
- Comprehensive Profit and Loss; and
- Comprehensive Profit and Loss Attribution; and

(ii) With respect to any covered banking entity that is engaged in any covered trading activity, and has trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion and less than $5 billion, each trading unit of the covered banking entity that is engaged in market making-related activities under § ____.4(b) must furnish the following quantitative measurement, calculated in accordance with this appendix:

- Comprehensive Profit and Loss;
- Portfolio Profit and Loss;
- Fee Income and Expense;
- Spread Profit and Loss;
- Value-at-Risk;
- Comprehensive Profit and Loss Attribution;
- Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss; and
- Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio.

B. Frequency of Required Calculation and Reporting

A covered banking entity must calculate any applicable quantitative measurement for each trading day. A covered banking entity must report each applicable quantitative measurement to [Agency] on a monthly basis, or on any other reporting schedule requested by [Agency]. All quantitative measurements for any calendar month must be reported to [Agency] no later than 30 days after the end of that calendar month or on any other time basis requested by [Agency].[3]

C. Recordkeeping

A covered banking entity must, for any quantitative measurement furnished to [Agency] pursuant to this appendix and § ____.7, create and maintain records documenting the preparation and content of

[1] [Agency] expects that this will generally be the smallest unit of organization used by the covered banking entity to structure and control its risk-taking activities and employees, and will include each unit generally understood to be a single ''trading desk.''

[2] [Agency] expects that this will generally include management or reporting divisions, groups, subgroups, or other intermediate units of organization used by the covered banking entity to manage one or more discrete trading units (*e.g.,* ''North American Credit Trading,'' ''Global Credit Trading,'' *etc.*).

[3] For example, under section IV.B.1 of this appendix, a banking entity is required to report to [Agency] the Comprehensive Profit and Loss quantitative measurement, as calculated for all trading days in June of any year, no later than July 30 of that year.

these reports, as well as such information as is necessary to permit [Agency] to verify the accuracy of such reports, for a period of 5 years.

IV. Quantitative Measurements

A. Risk-Management Measurements

1. Value-at-Risk and Stress Value-at-Risk

Description: For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given portfolio over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given portfolio over a specified period of time, based on market conditions during a period of significant financial stress.

General Calculation Guidance: Banking entities should compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading unit that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR should be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading unit does not have a standalone VaR or Stress VaR calculation but is part of a larger portfolio for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading unit's holdings should be performed consistent with the VaR or Stress VaR model and methodology used by the larger portfolio.

Calculation Period: One trading day.

2. VaR Exceedance

Description: For purposes of this appendix, VaR Exceedance is the difference between VaR and Portfolio Profit and Loss, exclusive of Spread Profit and Loss, for a trading unit for any given calculation period.

Calculation Period: One trading day.

3. *Risk Factor Sensitivities*

Description: For purposes of this appendix, Risk Factor Sensitivities are changes in a trading unit's Portfolio Profit and Loss, exclusive of Spread Profit and Loss, that are expected to occur in the event of a change in a trading unit's ''risk factors'' (i.e., one or more underlying market variables that are significant sources of the trading unit's profitability and risk).

General Calculation Guidance: A covered banking entity should report the Risk Factor Sensitivities that are monitored and managed as part of the trading unit's overall risk management policy. The underlying data and methods used to compute a trading unit's Risk Factor Sensitivities should depend on the specific function of the trading unit and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading unit, and furnished to [Agency], should depend on the explicit risks assumed by the trading unit. In general, however, reported Risk Factor Sensitivities should be sufficient to account for a preponderance of the price variation in the trading unit's holdings.

Trading units should take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

- *Commodity derivative positions:* sensitivities with respect to the related commodity type (e.g., precious metals, oil and petroleum or agricultural products), the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Credit positions:* sensitivities with respect to credit spread factors that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and sensitivities to interest rates at all relevant maturities;
- *Credit-related derivative positions:* credit positions sensitivities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity positions:* sensitivity to equity prices and sensitivities that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;
- *Equity derivative positions:* equity position sensitivities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Foreign exchange derivative positions:* sensitivities with respect to major currency pairs and maturities, sensitivity to interest rates at relevant maturities, and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and
- *Interest rate positions, including interest rate derivative positions:* sensitivities with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions.

The methods used by a covered banking entity to calculate sensitivities to a common factor shared by multiple trading units, such as an equity price factor, should be applied consistently across its trading units so that the sensitivities can be compared from one trading unit to another.

Calculation Period: One trading day.

4. Risk and Position Limits

Description: For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading unit is permitted to take at a point in time, as defined by the covered banking entity for a specific trading unit.

General Calculation Guidance: Risk and Position Limits should be reported in the format used by the covered banking entity for the purposes of risk management of each trading unit. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached should be reported.

Calculation Period: One trading day.

B. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss

Description: For purposes of this appendix, Comprehensive Profit and Loss is the net profit or loss of a trading unit's material sources of trading revenue, including, for example, dividend and interest income and expense, over a specific period of time. A trading unit's Comprehensive Profit and Loss for any given calculation period should generally equal the sum of the trading unit's Portfolio Profit and Loss and Fee Income.

General Calculation Guidance: Comprehensive Profit and Loss generally should be computed using data on the value of a trading unit's underlying holdings, the prices at which those holdings were bought and sold, and the value of any fees, commissions, sales credits, spreads, dividends, interest income and expense, or other sources of income from trading activities, whether realized or unrealized. Comprehensive Profit and Loss should not include: compensation costs or other costs required to operate the unit, such as information technology costs; or charges and adjustments made for internal reporting and management purposes, such as accounting reserves.

Calculation Period: One trading day.

2. Portfolio Profit and Loss

Description: For purposes of this appendix, Portfolio Profit and Loss is a trading unit's net profit or loss on its underlying holdings over a specific period of time, whether realized or unrealized. Portfolio Profit and Loss should generally include any increase or decrease in the market value of a trading unit's holdings, including, for example, any dividend, interest income, or expense of a trading unit's holdings. Portfolio Profit and Loss should not include direct fees, commissions, sales credits, or other sources of trading revenue that are not directly related to the market value of the trading unit's holdings.

General Calculation Guidance: In general, Portfolio Profit and Loss should be computed using data on a trading unit's underlying holdings and the prices at which those holdings are marked for valuation purposes. Portfolio Profit and Loss should not include: compensation costs or other costs required to operate the trading unit, such as information technology costs; or charges and adjustments made for internal reporting and management purposes, such as accounting reserves.

Calculation Period: One trading day.

3. Fee Income and Expense

Description: For purposes of this appendix, Fee Income and Expense generally includes direct fees, commissions and other distinct

income for services provided by or to a trading unit over a specific period of time.

General Calculation Guidance: Fee Income and Expense should be computed using data on direct fees that are earned by the trading unit for services it provides to clients, customers, or counterparties, such as fees earned for structured transactions or sales commissions and credits earned for fulfilling a customer request, whether realized or unrealized, and similar fees paid by the trading unit to other service providers.

Calculation Period: One trading day.

4. Spread Profit and Loss

Description: For purposes of this appendix, Spread Profit and Loss is the portion of Portfolio Profit and Loss that generally includes revenue generated by a trading unit from charging higher prices to buyers than the trading unit pays to sellers of comparable instruments over the same period of time (i.e., charging a ''spread,'' such as the bid-ask spread).

General Calculation Guidance: Spread Profit and Loss generally should be computed using data on the prices at which comparable instruments are either bought or sold by the trading unit, as well as the turnover of these instruments. Spread Profit and Loss should be measured with respect to both the purchase and the sale of any position, and should include both the spreads that are earned by the trading unit to execute transactions (expressed as positive amounts), and the spreads that are paid by the trading unit to initiate transactions (expressed as negative amounts). Spread Profit and Loss should be computed by calculating the difference between the bid price or the ask price (whichever is paid or received) and the mid-market price. The mid-market price is the average of bid and ask.

For some asset classes in which a trading unit is engaged in market making-related activities, bid-ask or similar spreads are widely disseminated, constantly updated, and readily available, or otherwise reasonably ascertainable. For purposes of calculating the Spread Profit and Loss attributable to a transaction in such asset classes, the trading unit should utilize the prevailing bid-ask or similar spread on the relevant position at the time the purchase or sale is completed.

For other asset classes in which a trading unit is engaged in market making-related activities, bid-ask or similar spreads may not be widely disseminated on a consistent basis or otherwise reasonably ascertainable. A covered banking entity must identify any trading unit engaged in market making-related activities in an asset class for which the covered banking entity believes bid-ask or similar spreads are not widely disseminated on a consistent basis or are not otherwise reasonably ascertainable and must be able to demonstrate that bid-ask or similar spreads for the asset class are not reasonably ascertainable. In such cases, the trading unit should calculate the Spread Profit and Loss for the relevant purchase or sale of a position in a particular asset class by using whichever of the following three alternatives the banking entity believes more accurately reflects prevailing bid-ask or similar spreads for transactions in that asset class:

(i) End of Day Spread Proxy: A proxy based on the bid-ask or similar spread that is used to estimate, or is otherwise implied by, the market price at which the trading entity marks (or in the case of a sale, would have marked) the position for accounting purposes at the close of business on the day it executes the purchase or sale (''End of Day Spread Proxy'');

(ii) Historical Data Spread Proxy: A proxy based on historical bid-ask or similar spread data in similar market conditions (''Historical Data Spread Proxy''); or

(iii) Any other proxy that the banking entity can demonstrate accurately reflects prevailing bid-ask or similar spreads for transactions in the specific asset class.

A covered banking entity selecting any of these alternatives should be able to demonstrate that the alternative it has chosen most accurately reflects prevailing bid-ask or similar spreads for the relevant asset class. If a covered banking entity chooses to calculate Spread Profit and Loss for a particular trading unit using the End of Day Spread Proxy, then the banking entity should separately identify the portion of Spread Profit and Loss that is attributable to positions acquired and disposed of on the same trading day. If a banking entity chooses to calculate Spread Profit and Loss for a particular trading unit using the Historical Data Spread Proxy, the covered banking entity should be able to demonstrate that the Historical Data Proxy is appropriate and continually monitor market conditions and adjust, as necessary, the Historical Data Proxy to reflect any changes.

Calculation Period: One trading day.

5. Comprehensive Profit and Loss Attribution

Description: For purposes of this appendix, Comprehensive Profit and Loss Attribution is an attribution analysis that divides the trading unit's Comprehensive Profit and Loss into the separate sources of risk and revenue that have caused any observed variation in Comprehensive Profit and Loss. This attribution analysis should attribute Comprehensive Profit and Loss to specific market and risk factors that can be accurately and consistently measured over time. Any component of Comprehensive Profit and Loss that cannot be specifically identified in the attribution analysis should be identified as an unexplained portion of the Comprehensive Profit and Loss.

General Calculation Guidance: The specific market and risk factors used by a trading unit in the attribution analysis should be tailored to the trading activities undertaken by the unit. These factors should be measured consistently over time to facilitate historical comparisons. The attribution analysis should also identify any significant factors that have a consistent and regular influence on Comprehensive Profit and Loss, such as Risk Factor Sensitivities that have a significant influence on portfolio income, customer spreads, bid-ask spreads, or commissions that are earned. Factors that influence Comprehensive Profit and Loss across different trading units should be measured and included in the attribution analysis in a comparable fashion.

Calculation Period: One trading day.

C. Revenue-Relative-to-Risk Measurements

1. Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss

Description: For purposes of this appendix, Volatility of Comprehensive Profit and Loss generally is the standard deviation of the trading unit's Comprehensive Profit and Loss estimated over a given calculation period. For purposes of this appendix, Volatility of Portfolio Profit and Loss generally is the standard deviation of the trading unit's Portfolio Profit and Loss, exclusive of Spread Profit and Loss, estimated over a given calculation period.

Calculation Period: 30 days, 60 days, and 90 days.

2. Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio

Description: For purposes of this appendix, Comprehensive Profit and Loss to Volatility Ratio is a ratio of Comprehensive Profit and Loss to the Volatility of Comprehensive Profit and Loss for a trading unit over a given calculation period. For purposes of this appendix, Portfolio Profit and Loss to Volatility Ratio is a ratio of Portfolio Profit and Loss, exclusive of Spread Profit and Loss, to the Volatility of Portfolio Profit and Loss, exclusive of Spread Profit and Loss, for a trading unit over a given calculation period.

Calculation Period: 30 days, 60 days, and 90 days.

3. Unprofitable Trading Days Based on Comprehensive Profit and Loss and Unprofitable Trading Days Based on Portfolio Profit and Loss

Description: For purposes of this appendix, Unprofitable Trading Days Based on Comprehensive Profit and Loss is the number or proportion of trading days on which a trading unit's Comprehensive Profit and Loss is less than zero over a given calculation period. For purposes of this appendix, Unprofitable Trading Days Based on Portfolio Profit and Loss, exclusive of Spread Profit and Loss, is the number or proportion of trading days on which a trading unit's Portfolio Profit and Loss, exclusive of Spread Profit and Loss, is less than zero over a given calculation period.

Calculation Period: 30 days, 90 days, and 360 days.

4. Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss

Description: Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss should be calculated using standard statistical methods with respect to Portfolio Profit and Loss, exclusive of Spread Profit and Loss.

Calculation Period: 30 days, 60 days, and 90 days.

D. Customer-Facing Activity Measurements

1. Inventory Risk Turnover

Description: For purposes of this appendix, Inventory Risk Turnover is a ratio that measures the amount of risk associated with a trading unit's inventory, as measured by Risk Factor Sensitivities, that is turned over by the trading unit over a specific period of

time. For each Risk Factor Sensitivity, the numerator of the Inventory Risk Turnover ratio generally should be the absolute value of the Risk Factor Sensitivity associated with each transaction over the calculation period. The denominator of the Inventory Risk Turnover ratio generally should be the value of each Risk Factor Sensitivity for all of the trading unit's holdings at the beginning of the calculation period.

General Calculation Guidance: As a general matter, a trading unit should measure and report the Inventory Risk Turnover ratio for each of the Risk Factor Sensitivities calculated and furnished for that trading unit.

Calculation Period: 30 days, 60 days, and 90 days.

2. Inventory Aging

Description: For purposes of this appendix, Inventory Aging generally describes the trading unit's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held for the following periods: 0–30 days; 30–60 days; 60–90 days; 90–180 days; 180–360 days; and greater than 360 days. Inventory Aging should measure the age profile of the trading unit's assets and liabilities.

General Calculation Guidance: In general, Inventory Aging should be computed using a trading unit's trading activity data and should identify the trading unit's aggregate assets and liabilities. In addition, Inventory Aging should include two schedules, an asset-aging schedule and a liability-aging schedule. The asset-aging schedule should record the value of the trading unit's assets that have been held for: 0–30 days; 30–60 days; 60–90 days; 90–180 days; 180–360 days; and greater than 360 days. The liability-aging schedule should record the value of the trading unit's liabilities that have been held for: 0–30 days; 30–60 days; 60–90 days; 90–180 days; 180–360 days; and more than 360 days.

Calculation Period: 30 days, 60 days, and 90 days.

3. Customer-Facing Trade Ratio

Description: For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing the number of transactions involving a counterparty that is a customer of the trading unit to the number of transactions involving a counterparty that is not a customer of the trading unit. For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading unit if the counterparty is neither (i) a counterparty to a transaction executed on a designated contract market registered under the Commodity Exchange Act or national securities exchange registered under the Exchange Act, nor (ii) a broker-dealer, swap dealer, security-based swap dealer, any other entity engaged in market making-related activities, or any affiliate thereof. A broker-dealer, swap dealer, or security-based swap dealer, any other entity engaged in market making-related activities, or any affiliate thereof may be considered a customer of the trading unit for these purposes if the covered banking entity treats that entity as a customer and has documented how and why the entity is treated as such.

Calculation Period: 30 days, 60 days, and 90 days.

E. Payment of Fees, Commissions, and Spreads Measurement

1. Pay-to-Receive Spread Ratio

Description: For purposes of this appendix, the Pay-to-Receive Spread Ratio is a ratio comparing the amount of Spread Profit and Loss and Fee Income that is earned by a trading unit to the amount of Spread Profit and Loss and Fee Income that is paid by the trading unit.

General Calculation Guidance: The Pay-to-Receive Spread Ratio will depend on the amount of Spread Profit and Loss and Fee Income that is earned by the trading unit for facilitating buy and sell orders and the amount of Spread Profit and Loss that is paid by a trading unit as it initiates buy and sell orders. The Pay-to-Receive Spread Ratio generally should be computed using the calculation of Spread Profit and Loss described in this appendix, except that spread paid should include the aggregate Spread Profit and Loss of all transactions producing a negative Spread Profit and Loss, and spread received should include the aggregate Spread Profit and Loss of all transactions producing a positive Spread Profit and Loss.

Calculation Period: One trading day.

Appendix B to Part [ ]—Commentary Regarding Identification of Permitted Market Making-Related Activities

I. Purpose

This appendix provides commentary describing the features of permitted market making-related activities and distinctions between permitted market making-related activities and prohibited proprietary trading. The appendix applies to all covered banking entities that are engaged in market making-related activities in reliance on § ____.4(b). The following commentary must be incorporated into the covered banking entity's internal compliance program under § ____.20, as applicable.

II. Definitions

The terms used in this appendix have the same meanings as those set forth in §§ ____.2 and ____.3 and appendix A to this part.

III. Commentary

Section 13 of the BHC Act and § ____.3 prohibit any covered banking entity from engaging in proprietary trading, which is generally defined as engaging as principal for the trading account of the covered banking entity in any transaction to purchase or sell a covered financial position. However, section 13(d)(1)(B) of the BHC Act and § ____.4(b) permit a covered banking entity to engage in proprietary trading that would otherwise be prohibited if the activity is conducted in connection with the covered banking entity's market making-related activities, to the extent that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, and counterparties. This commentary is intended to assist covered banking entities in identifying permitted market making-related activities and distinguishing such activities from trading activities that, even if conducted in the context of the covered banking entity's market making operations, would constitute prohibited proprietary trading.

A. Overview of Market Making-Related Activities

In the context of trading activities in which a covered banking entity acts as principal, market making-related activities generally involve the covered banking entity either (i) in the case of market making in a security that is executed on an organized trading facility or exchange, passively providing liquidity by submitting resting orders that interact with the orders of others on an organized trading facility or exchange and acting as a registered market maker, where such exchange or organized trading facility provides the ability to register as a market maker,[1] or (ii) in other cases, providing an intermediation service to its customers by assuming the role of a counterparty that stands ready to buy or sell a position that the customer wishes to sell or buy. A market maker's ''customers'' generally vary depending on the asset class and market in which the market maker is providing intermediation services. In the context of market making in a security that is executed on an organized trading facility or an exchange, a ''customer'' is any person on behalf of whom a buy or sell order has been submitted by a broker-dealer or any other market participant. In the context of market making in a covered financial position in an over-the-counter market, a ''customer'' generally would be a market participant that makes use of the market's maker intermediation services, either by requesting such services or entering into a continuing relationship with the market maker with respect to such services.[2]

The primary purpose of market making-related activities is to intermediate between buyers and sellers of similar positions, for which service market makers are compensated, resulting in more liquid markets and less volatile prices. The purpose of such activities is *not* to earn profits as a result of movements in the price of positions and risks acquired or retained; rather, a market maker generally manages and limits the extent to which it is exposed to movements in the price of principal positions and risks that it acquires or retains, or in the price of one or more material elements of those positions. To the extent that it can, a

[1] The status of being a registered market maker is *not,* on its own, a sufficient basis for relying on the exemption for market making-related activity contained in § ____.4(b). Registration as a market maker generally involves filing a prescribed form with an exchange or organized trading facility, in accordance with its rules and procedures, and complying with the applicable requirements for market makers set forth in the rules of that exchange or organized trading facility. *See, e.g.,* Nasdaq Rule 4612, New York Stock Exchange Rule 104, CBOE Futures Exchange Rule 515, BATS Exchange Rule 11.5.

[2] In certain cases, depending on the conventions of the relevant market (e.g., the over-the-counter derivatives market), such a ''customer'' may consider itself or refer to itself more generally as a ''counterparty.''

market maker will eliminate some or all of the price risks to which it is exposed. However, in some cases, the risks posed by one or more positions may be sufficiently complex or specific that the risk cannot be fully hedged. In other cases, although it may be possible to hedge the risks posed by one or more positions, the cost of doing so may be so high as to effectively make market making in those positions uneconomic if complete hedges were acquired. In such cases, in order to provide effective intermediation services, market makers are required to retain at least some risk for at least some period of time with respect to price movements of retained principal positions and risks. The size and type of risk that must be retained in such cases may vary widely depending on the type and size of the positions, the liquidity of the specific market, and the market's structure. As the liquidity of positions increases, the frequency with which a market maker must take or retain risk in order to make a market in those positions generally decreases.

The profitability of market making-related activities relies on forms of revenues that reflect the value of the intermediation services that are provided to the market maker's customers. These revenues typically take the form of explicit fees and commissions or, in markets where no such fees or commission are charged, a bid-ask or similar spread that is generated by charging higher prices to buyers than is paid to sellers of comparable instruments. In the case of a derivative contract, these revenues reflect the difference between the cost of entering into the derivative contract and the cost of hedging incremental, residual risks arising from the contract. These types of ''customer revenues'' provide the primary source of a market maker's profitability. Typically, a market maker holds at least some risk with respect to price movements of retained principal positions and risks. As a result, the market maker also incurs losses or generates profits as price movements actually occur, but such losses or profits are incidental to customer revenues and significantly limited by the banking entity's hedging activities. Customer revenues, not revenues from price movements, predominate. The appropriate proportion of ''customer revenues'' to profits and losses resulting from price movements of retained principal positions and risks varies depending on the type of positions involved, the typical fees, commissions, and spreads payable for transactions in those positions, and the risks of those positions. As a general matter, the proportion of ''customer revenues'' generated when making a market in certain positions increases as the fees, commissions, or spreads payable for those positions increase, the volatility of those positions' prices decrease, and the prices for those positions are less transparent.

Because a market maker's business model entails managing and limiting the extent to which it is exposed to movements in the prices of retained principal positions and risks while generating customer revenues that are earned, regardless of movements in the price of retained principal positions and risks, a market maker typically generates significant revenue relative to the risks that it retains. Accordingly, a market maker will typically demonstrate consistent profitability and low earnings volatility under normal market conditions. The appropriate extent to which a market maker will demonstrate consistent profitability and low earnings volatility varies depending on the type of positions involved, the liquidity of the positions, the price transparency of the positions, and the volatility of the positions' prices. As a general matter, consistent profitability will decrease and earnings volatility will increase as the liquidity of the positions decrease, the volatility of the positions' prices increase, and the prices for the positions are less transparent.

As the primary purpose of market making-related activities is to provide intermediation services to its customers, market makers focus their activities on servicing customer demands and typically only engage in transactions with non-customers to the extent that these transactions directly facilitate or support customer transactions. In particular, a market maker generally only transacts with non-customers to the extent necessary to hedge or otherwise manage the risks of its market making-related activities, including managing its risk with respect to movements of the price of retained principal positions and risks, to acquire positions in amounts consistent with reasonably expected near term demand of its customers, or to sell positions acquired from its customers. The appropriate proportion of a market maker's transactions that are with customers versus non-customers varies depending on the type of positions involved and the extent to which the positions are typically hedged in non-customer transactions. In the case of a derivatives market maker that engages in dynamic hedging, the number of non-customer transactions significantly outweighs the number of customer transactions, as the derivatives market maker must constantly enter into transactions to appropriately manage its retained principal positions and risks as market prices for the positions and risks move and additional transactions with customers change the risk profile of the market makers retained principal positions.

Because a market maker generates revenues primarily by transacting with, and providing intermediation services to, customers, a market maker typically engages in transactions that earn fees, commissions, or spreads as payment for its services. Transactions in which the market maker *pays* fees, commissions, or spreads—i.e., where it pays another market maker for providing it with liquidity services–are much less frequent, although in some cases obtaining liquidity services from another market maker and paying fees, commissions, or spreads may be necessary to prudently manage its risk with respect to price movements of retained principal positions and risks. The appropriate proportion of a market maker's transactions that earn, rather than pay, fees, commissions or spreads varies depending on the type of positions involved, the liquidity of the positions, and the extent to which market trends increase the volatility of its risk with respect to price movements of retained principal positions and risks. As a general matter, the proportion of a market maker's transactions that earn rather than pay fees, commissions or spreads decreases as the liquidity of the positions decreases, and the extent to which the price volatility of retained principal positions and risks increases.

Finally, because the primary purpose of market making-related activities is to provide intermediation services to its customers, a market maker does not provide compensation incentives to its personnel that primarily reward proprietary risk-taking. Although a market maker may take into account revenues resulting from movements in the price of retained principal positions and risks to the extent that such revenues reflect the effectiveness with which personnel have effectively managed the risk of movements in the price of retained principal positions and risks, a market maker that provides compensation incentives relating to revenues generally does so through incentives that primarily reward customer revenues and effective customer service.

B. Overview of Prohibited Proprietary Trading Activities

Like permitted market making-related activities, prohibited proprietary trading involves the taking of principal positions by a covered banking entity. Unlike permitted market making-related activities, the purpose of prohibited proprietary trading is to generate profits as a result of, or otherwise benefit from, changes in the price of positions and risks taken. Whereas a market maker attempts to eliminate some or all of the price risks inherent in its retained principal positions and risks by hedging or otherwise managing those risks in a reasonable period of time after positions are acquired or risks arise, a proprietary trader seeks to capitalize on those risks, and generally only hedges or manages a portion of those risks when doing so would improve the potential profitability of the risk it retains. A proprietary trader does not have ''customers'' because a proprietary trader simply seeks to obtain the best price and execution in purchasing or selling its proprietary positions. A proprietary trader generates few if any fees, commissions, or spreads from its trading activities because it is not providing an intermediation service to any customer or other third party. Instead, a proprietary trader is likely to pay fees, commissions, or spreads to other market makers when obtaining their liquidity services is beneficial to execution of its trading strategy. Because a proprietary trader seeks to generate profits from changes in the price of positions taken, a proprietary trader typically provides compensation incentives to its personnel that primarily reward successful proprietary risk taking.

C. Distinguishing Permitted Market Making-Related Activities From Prohibited Proprietary Trading

Because both permitted market making-related activities and prohibited proprietary trading involve the taking of principal positions, certain challenges arise in distinguishing permitted market making-related activities and prohibited proprietary

trading, particularly in cases where both of these activities occur in the context of a market making operation. Particularly during periods of significant market disruption, it may be difficult to distinguish between retained principal positions and risks that appropriately support market making-related activities and positions taken, or positions or risks not hedged, for proprietary purposes.

In connection with these challenges, [Agency] will apply the following factors in distinguishing permitted market making-related activities from trading activities that, even if conducted in the context of the covered banking entity's market making operations, would constitute prohibited proprietary trading. The particular types of trading activity described in this appendix may involve the aggregate trading activities of a single trading unit, a significant number or series of transactions occurring at one or more trading units, or a single significant transaction, among other potential scenarios. In addition to meeting the terms of this appendix, any transaction or activity for which a covered banking entity intends to rely on the market making exemption in § ____.4(b) must also satisfy all the requirements specified in § ____.4(b), as well as the other applicable requirements and conditions of this part.

1. Risk Management

Absent explanatory facts and circumstances, particular trading activity in which a trading unit retains risk in excess of the size and type required to provide intermediation services to customers will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[Agency] will base a determination of whether a trading unit retains risk in excess of the size and type required for these purposes on all available facts and circumstances, including a comparison of retained principal risk to: the amount of risk that is generally required to execute a particular market making function; hedging options that are available in the market and permissible under the covered banking entity's hedging policy at the time the particular trading activity occurred; the trading unit's prior levels of retained risk and its hedging practices with respect to similar positions; and the levels of retained risk and the hedging practices of other trading units with respect to similar positions.

To help assess the extent to which a trading unit's risks are potentially being retained in excess of amounts required to provide intermediation services to customers, [Agency] will utilize the VaR and Stress VaR, VaR Exceedance, and Risk Factor Sensitivities quantitative measurements, as applicable, among other risks measurements described in Appendix A and any other relevant factor. This assessment will focus primarily on the risk measurements relative to: the risk required for conducting market making-related activities, and any significant changes in the risk over time and across similarly-situated trading units and banking entities.

Explanatory facts and circumstances might include, among other things, market-wide changes in risk, changes in the specific composition of market making-related activities, temporary market disruptions, or other market changes that result in previously-used hedging or other risk management techniques no longer being possible or cost-effective.

2. Source of Revenues

Absent explanatory facts and circumstances, particular trading activity in which a trading unit primarily generates revenues from price movements of retained principal positions and risks, rather than customer revenues, will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[Agency] will base a determination of whether a trading activity primarily generates revenues from price movements of retained principal positions and risks, rather than customer revenues, on all available facts and circumstances, including: an evaluation of the revenues derived from price movements of retained principal positions and risks relative to its customer revenues; and a comparison of these revenue figures to the trading unit's prior revenues with respect to similar positions, and the revenues of other covered banking entities' trading units with respect to similar positions.

To help assess the extent to which a trading unit's revenues are potentially derived from movements in the price of retained principal positions and risks, [Agency] will utilize the Comprehensive Profit and Loss, Portfolio Profit and Loss, Fee Income and Expense, and Spread Profit and Loss quantitative measurements, as applicable, both individually and in combination with one another (e.g., by comparing the ratio of Spread Profit and Loss to Portfolio Profit and Loss), and any other relevant factor.

Explanatory facts and circumstances might include, among other things: general upward or downward price trends in the broader markets in which the trading unit is making a market, provided revenues from price movements in retained principal positions and risks are consistent; sudden market disruptions or other changes causing significant, unanticipated alterations in the price of retained principal positions and risks; sudden and/or temporary changes in the market (e.g., narrowing of bid/ask spreads) that cause significant, unanticipated reductions in customer revenues; or efforts to expand or contract a trading unit's market share.

3. Revenues Relative to Risk

Absent explanatory facts and circumstances, particular trading activity will be considered to be prohibited proprietary trading, and not permitted market making-related activity, if the trading unit: generates only very small or very large amounts of revenue per unit of risk taken; does not demonstrate consistent profitability; or demonstrates high earnings volatility.

[Agency] will base such a determination on all available facts and circumstances, including: an evaluation of the amount of revenue per unit of risk taken, earnings volatility, profitability, exposure to risks, and overall level of risk taking for the particular trading activities; and a comparison of these figures to the trading unit's prior results with respect to similar positions, and the results of other covered banking entities' trading units with respect to similar positions.

To help assess the riskiness of revenues and the amount of revenue per unit of risk taken, [Agency] will utilize the Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss, Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio, and Comprehensive Profit and Loss Attribution quantitative measurements, as applicable, and any other relevant factor.

To help assess the extent to which a trading unit demonstrates consistent profitability, [Agency] will utilize the Unprofitable Trading Days Based on Comprehensive Profit and Loss and Unprofitable Trading Days Based on Portfolio Profit and Loss quantitative measurements, as applicable, and any other relevant factor.

To help assess the extent to which a trading unit is exposed to outsized risk, [Agency] will utilize the Skewness of Portfolio Profit and Loss and Kurtosis of Profit and Loss quantitative measurements, as applicable, and any other relevant factor.

Explanatory facts and circumstances might include, among other things: market disruptions or other changes causing significant, unanticipated increases in a trading unit's risk with respect to movements in the price of retained principal positions and risks; market disruptions or other changes causing significant, unanticipated increases in the volatility of positions in which the trading unit makes a market; sudden and/or temporary changes in the market (e.g., narrowing of bid-ask spreads) that cause significant, unanticipated reductions in customer revenues and decrease overall profitability; or efforts to expand or contract a trading unit's market share.

4. Customer-Facing Activity

Absent explanatory facts and circumstances, particular trading activity will be considered to be prohibited proprietary trading, and not permitted market making-related activity, if the trading unit: does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services; or retains principal positions and risks in excess of reasonably expected near term customer demands.

[Agency] will base such a determination on all available facts and circumstances, including, among other things: an evaluation of the extent to which a trading unit's transactions are with customers versus non-customers and the frequency with which the trading unit's retained principal positions and risks turn over; and a comparison of these figures to the trading unit's prior results with respect to similar positions and market situations, and the results of other covered banking entities' trading units with respect to similar positions.

To help assess the extent to which a trading unit's transactions are with customers versus non-customers, [Agency] will utilize the Customer-Facing Trade Ratio quantitative measurement, as applicable, and any other

relevant factor. To help assess the frequency with which the trading unit's retained principal positions and risks turn over, [Agency] will utilize the Inventory Risk Turnover and Inventory Aging quantitative measurements, as applicable, and any other relevant factor.

With respect to a particular trading activity in which a trading unit either does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services, explanatory facts and circumstances might include, among other things: sudden market disruptions or other changes causing significant increases in a trading unit's hedging transactions with non-customers; or substantial intermediary trading required to satisfy customer demands and hedging management. With respect to particular trading activity in which a trading unit retains principal positions and risks in excess of reasonably expected near term customer demands, explanatory facts and circumstances might include, among other things: sudden market disruptions or other changes causing a significant reduction in actual customer demand relative to expected customer demand; documented and reasonable expectations for temporary increases in customer demand in the near term; and sudden market disruptions or other changes causing a significant reduction in the value of retained principal positions and risks, such that it would be imprudent for the trading unit to dispose of the positions in the near term.

5. Payment of Fees, Commissions, and Spreads

Absent explanatory facts and circumstances, particular trading activity in which a trading unit routinely pays rather than earns fees, commissions, or spreads will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[Agency] will base such a determination on all available facts and circumstances, including, among other things: an evaluation of the frequency with which the trading unit pay fees, commissions, or spreads and the relative amount of fees, commissions, or spreads that is paid versus earned; and a comparison of these figures to the trading unit's prior results with respect to similar positions, and the results of other covered banking entities' trading units with respect to similar positions.

To help assess the extent to which a trading unit is paying versus earning fees, commissions, and spreads, [Agency] will utilize the Pay-to-Receive Spread Ratio quantitative measurement, as applicable, and any other relevant factor.

Explanatory facts and circumstances might include, among other things, sudden market disruptions or other changes causing significant, increases in a trading unit's hedging transactions with non-customers for which it must pay fees, commissions, or spreads, sudden, unanticipated customer demand for liquidity that requires the trading unit itself to pay fees, commissions, or spreads to other market makers for liquidity services to obtain the inventory needed to meet that customer demand, or significant, unanticipated reductions in fees, commissions, or spreads earned by the trading unit. Explanatory facts and circumstances might also include a trading unit's efforts to expand or contract its market share.

6. Compensation Incentives

Absent explanatory facts and circumstances, the trading activity of a trading unit that provides compensation incentives to employees that primarily reward proprietary risk taking will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[Agency] will base such a determination on all available facts and circumstances, including, among other things, an evaluation of: the extent to which compensation incentives are provided to trading unit personnel that reward revenues from movements in the price of retained principal positions and risks; the extent to which compensation incentives are provided to trading unit personnel that reward customer revenues; and the compensation incentives provided by other covered banking entities to similarly-situated personnel.

Appendix C to Part [ ]—Minimum Standards for Programmatic Compliance

I. Overview

A. Purpose

This appendix sets forth the minimum standards with respect to the establishment, maintenance, and enforcement by banking entities of internal compliance programs for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities or investments set forth in section 13 of the BHC Act and this part.

This appendix requires that banking entities establish, maintain, and enforce an effective compliance program, consisting of written policies and procedures, internal controls, a management framework, independent testing, training, and recordkeeping, that:

- Is reasonably designed to clearly document, describe, and monitor the covered trading and covered fund activities or investments and the risks of the covered banking entity related to such activities or investments, identify potential areas of noncompliance, and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;
- Specifically addresses the varying nature of activities or investments conducted by different units of the covered banking entity's organization, including the size, scope, complexity, and risks of the individual activities or investments;
- Subjects the effectiveness of the compliance program to independent review and testing;
- Makes senior management and intermediate managers accountable for the effective implementation of the compliance program, and ensures that the board of directors and CEO review the effectiveness of the compliance program; and
- Facilitates supervision and examination of the covered banking entity's covered trading and covered fund activities or investments by the Agencies.

B. Definitions

The terms used in this Appendix have the same meanings as set forth in §§ ____.2, ____.3, and ____.10. In addition, for purposes of this appendix, the following definitions apply:

Asset management unit means any unit of organization of a covered banking entity that makes investments in, or acts as sponsor to, covered funds, or has relationships with covered funds, that the covered banking entity (or an affiliate of subsidiary thereof) has sponsored, organized and offered, or in which a covered fund sponsored or advised by the covered banking entity invests.

Compliance program means the internal compliance program established by a covered banking entity in accordance with § ____.20 and this appendix.

Covered fund activity or investment means sponsoring any covered fund or making investments in, or otherwise having relationships with, any covered fund for which the covered banking entity (or an affiliate or subsidiary thereof) acts as sponsor or organizes and offers.

Covered fund restrictions means the restrictions on covered fund activities or investments set forth in subpart C.

Covered trading activity means proprietary trading, as defined in § ____.3(b)(1).

Trading unit means each of the following units of organization of a covered banking entity:

(i) Each discrete unit that is engaged in the coordinated implementation of a revenue-generation strategy and that participates in the execution of any covered trading activity; [1]

(ii) Each organizational unit that is used to structure and control the aggregate risk-taking activities and employees of one or more trading units described in paragraph (i); [2]

(iii) All trading operations, collectively; and

(iv) Any other unit of organization specified by the [Agency] with respect to a particular banking entity.

C. Required Elements

Section ____.20 requires that covered banking entities establish, maintain, and enforce a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities or investments that effectively

[1] [Agency] expects that this will generally be the smallest unit of organization used by the covered banking entity to structure and control its risk-taking activities and employees, and will include each unit generally understood to be a single ''trading desk.''

[2] [Agency] expects that this will generally include management or reporting divisions, groups, sub-groups, or other intermediate units of organization used by the covered banking entity to manage one or more discrete trading units (e.g.,''North American Credit Trading,'' ''Global Credit Trading,'' etc.).

implements, at a minimum, the six elements required under paragraph (b) of § ____.20.

D. Compliance Program Structure

Each covered banking entity subject to § ____.20(c) must be governed by a compliance program meeting the requirements of this appendix. A covered banking entity may establish a compliance program on an enterprise-wide basis to satisfy the requirements of § ____.20 and this appendix with respect to the covered banking entity and all of its affiliates and subsidiaries collectively, provided that: the program is clearly applicable, both by its terms and in operation, to all such affiliates and subsidiaries; the program specifically addresses the requirements set forth in this appendix; the program takes into account and addresses the consolidated organization's business structure, size, and complexity, as well as the particular activities, risks, and applicable legal requirements of each subsidiary and affiliate; and the program is determined through periodic independent testing to be effective for the covered banking entity and all of its subsidiaries and affiliates. An enterprise-wide program established pursuant to this Appendix will be subject to supervisory review and examination by any Agency vested with rulewriting authority under section 13 of the BHC Act with respect to the compliance program and the activities or investments of any banking entity for which the Agency has such authority. Further, such Agency will have access to all records related to the enterprise-wide compliance program pertaining to any banking entity that is supervised by the Agency vested with such rulewriting authority.

E. Applicability

This appendix applies only to covered banking entities described in § ____.20(c)(2). In addition, [Agency] may require any covered banking entity to comply with all or portions of this appendix if [Agency] deems it appropriate for purposes the covered banking entity's compliance with this part.

Nothing in this appendix limits the authority of [Agency] under any other provision of law or regulation to take supervisory, examination, or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

II. Internal Policies and Procedures

A. Covered Trading Activities

A covered banking entity must establish, maintain, and enforce written policies and procedures reasonably designed to document, describe, and monitor the covered banking entity's covered trading activities and the risks taken in these activities, as follows:[3]

Identification of trading account: The covered banking entity's policies and procedures must specify how the banking entity evaluates the covered financial positions it acquires or takes and determines which of its accounts are trading accounts for purposes of subpart B.

Identification of trading units and organization structure: The covered banking entity's written policies and procedures must identify and document each trading unit within the organization and map each trading unit to the division, business line, or other organizational structure that the covered banking entity uses to manage or oversee the trading unit's activities.

Description of missions and strategies: The covered banking entity's written policies and procedures for each trading unit must clearly articulate and document a comprehensive description of the mission (i.e., the nature of the business conducted) and strategy (i.e., business model for the generation of revenues) of the trading unit, and include a description of:

- How revenues are intended to be generated by the trading unit;
- The activities that the trading unit is authorized to conduct, including authorized instruments and products and authorized hedging strategies and instruments;
- The expected holding period of, and the market risk associated with, covered financial positions in its trading account;
- The types of clients, customers, and counterparties with whom trading is conducted by the trading unit;
- How the trading unit, if engaged in market making-related activity under § __.4(b) of this part, identifies its customers for purposes of computing the Customer-Facing Trade Ratio, if applicable, including documentation explaining when, how, and why a broker-dealer, swap dealer, security-based swap dealer, any other entity engaged in market making-related activities, or any affiliate thereof is considered to be a customer of the trading unit for those purposes; and
- The compensation structure of the employees associated with the trading unit.

Trader mandates: The covered banking entity must establish, maintain, document, and enforce trader mandates for each trading unit. At a minimum, trader mandates must:

- Clearly inform each trader of the prohibitions and requirements set forth in section 13 of the BHC Act and this part and his or her responsibilities for compliance with such requirements;
- Set forth appropriate parameters for each trader engaged in covered trading activities, including:
  - The conditions for relying on the applicable exemptions in §§ ____.4 through ____.6;
  - The financial contracts, products, and underlying assets that the trader is permitted to trade pursuant to the covered banking entity's internal controls;
  - The risk limits of the trader's trading unit, and the types and levels of risk that may be taken; and
  - The applicable trading unit's hedging policy.

Description of risks and risk management processes: The written policies and procedures for each trading unit must clearly articulate and document a comprehensive description of the risks associated with the trading unit. Such descriptions must include, at a minimum, the following elements:

- A description of the supervisory and risk management structure governing the trading units, including a description of processes for initial and senior-level review of new products and new strategies;
- A description of the types of risks that may be taken to implement the mission and strategy of the trading unit, including an enumeration of material risks resulting from the activities in which the trading unit is engaged (including but not limited to all significant price risks, such as basis, volatility and correlation risks, as well as any significant counterparty credit risk associated with the trading activity);
- An articulation of the amount of risk allocated by the covered banking entity to such trading unit to implement the documented mission and strategy of the trading unit;
- An explanation of how the risks allocated to such trading unit will be measured; and
- An explanation of why the allocated risk levels are appropriate to the mission and strategy of the trading unit.

Hedging policies and procedures. The covered banking entity must establish, maintain, and enforce policies and procedures for all of its trading units regarding the use of risk-mitigating hedging instruments and strategies. At a minimum, these hedging policies and procedures must articulate the following:

- The manner in which the covered banking entity will determine that the risks generated by each trading unit have been properly and effectively hedged;
- The instruments, techniques and strategies the covered entity will use to hedge the risk of the positions or portfolios;
- The level of the organization at which hedging activity and management will occur;
- The manner in which hedging strategies will be monitored;
- The risk management processes used to control unhedged or residual risks; and
- The independent testing of hedging techniques and strategies.

Explanation of compliance. The covered banking entity's written policies and procedures must clearly articulate and document a comprehensive explanation of how the mission and strategy of each trading unit, and its related risk levels, comply with this part. Such explanation must:

- Identify which portions of the risk-taking activity of the trading unit would or would not constitute covered trading activity;
- Identify activities of the trading unit that will be conducted in reliance on exemptions contained in §§ ____.4 through ____.6, including an explanation of:
  - How and where the activity occurs; and
  - Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption.
- Describe how the covered banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading unit, which must take into account potential or actual exposure to:

[3] These policies and procedures must be updated with a frequency sufficient for the covered banking entity to adequately control the applicable trading unit for purposes of this part.

○ Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

○ Assets whose changes in values cannot be adequately mitigated by effective hedging;

○ New products with rapid growth, including those that do not have a market history;

○ Assets or strategies that include significant embedded leverage;

○ Assets or strategies that have demonstrated significant historical volatility;

○ Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

○ Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

• Explain how each trading unit will comply with the reporting and recordkeeping requirements of § ____.7 and Appendix A ;

• Describe how the covered banking entity monitors for and prohibits potential or actual material conflicts of interest between the covered banking entity and its clients, customers, or counterparties present in each trading unit; and

• Describe how the covered banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the covered banking entity.

Remediation of violations. The covered banking entity's written policies and procedures must require the covered banking entity to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. Further, such policies and procedures must include specific procedures that are reasonably designed to implement and monitor any required remediation and that assess the extent to which any violation indicates that modification to the covered banking entity's compliance program is warranted.

With respect to any trading unit that is either used by the covered banking entity to structure and control the aggregate risk-taking activities and employees of one or more other trading units, or comprised of the entire trading operation of the covered banking entity, the description of missions and strategies, description of risks and risk management processes, and explanation of compliance for such trading units may incorporate by reference the policies and procedures of the underlying trading units that the trading unit oversees and manages in the aggregate.

B. Covered Fund Activities or Investments

A covered banking entity must establish, maintain, and enforce written policies and procedures that are reasonably designed to document, describe, and monitor the covered banking entity's covered fund activities or investments and the risks taken in these activities or investments, as follows.

Identification of covered funds: The covered banking entity's policies and procedures must specify how the covered banking entity identifies covered funds that the covered banking entity sponsors, organizes and offers, or in which covered banking entity invests.

Identification of asset management units and organization structure: The covered banking entity's written policies and procedures must identify and document each asset management unit within the organization and map each asset management unit to the division, business line, or other organizational structure that the covered banking entity uses to manage or oversee the asset management unit's activities or investments.

Description of sponsorship activities related to covered funds: The covered banking entity's written policies and procedures for each asset management unit must clearly articulate and document a comprehensive description of the mission (i.e., the nature of the business conducted) and strategy (i.e., business model for the generation of revenues) of the asset management unit related to its sponsorship or organizing and offering of covered funds, including a description of how such activities comply with this part and, in particular:

• The activities that the asset management unit is authorized to conduct, including the nature of any trust, fiduciary, investment advisory, or commodity trading advisory services offered to customers of the covered banking entity;

• The types of customers to whom the asset management unit provides such services and to whom ownership interests in covered funds are sold;

• The extent of any co-investment activities of the covered banking entity (including its directors or employees) in covered funds offered to such customers; and

• How the asset management unit complies with the requirements of subpart C.

Description of investment activities of covered funds: The covered banking entity's written policies and procedures for each asset management unit must clearly articulate and document a comprehensive description of the mission (i.e., the nature of the business conducted) and strategy (i.e., business model for the generation of revenues) of the asset management unit related to its investments in covered funds, including a description of how such activities comply with this part and, in particular:

• The asset management unit's practices with respect to seed capital investments in covered funds, including how the asset management unit reduces its investments in covered funds to amounts that are permitted *de minimis* investments within the required period of time;

• The asset management unit's practices with respect to co-investments in covered funds, including certain parallel investments as identified in § ____.12;

• How the asset management unit complies with the requirements of § ____.12 with respect to individual and aggregate investments in covered funds;

• With respect to other permitted covered fund activities or investment, how the asset management unit complies with the requirements of §§ ____.13 and ____.14;

• How the asset management unit complies with the limitations on relationships with a covered fund under § ____.16;

• How the covered banking entity monitors for and prohibits potential or actual material conflicts of interest between the covered banking entity and its clients, customers, or counterparties related to the asset management unit;

• How the covered banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the covered banking entity related to the asset management unit; and

• How the covered banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each asset management unit.

Remediation of violations. The covered banking entity's written policies and procedures must require the covered banking entity to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. Further, such policies and procedures must include specific procedures that are designed to implement, monitor, and enforce any required remediation and that assess the extent to which any violation indicates that modification to the covered banking entity's compliance program is warranted.

III. Internal Controls

A. Covered Trading Activities

A covered banking entity must establish, maintain, and enforce written internal controls that are reasonably designed to ensure that the trading activity of each trading unit is appropriate and consistent with the description of mission, strategy, and risk mitigation for each trading unit contained in its written policies and procedures. These written internal controls must also be reasonably designed and established to effectively monitor and identify for further analysis any covered trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. Further, the internal controls must describe procedures for remedying violations of section 13 of the BHC Act and this part. The written internal controls must include, at a minimum, the following.

Authorized risks, instruments, and products. The covered banking entity must implement and enforce internal controls for each trading unit that are reasonably designed to ensure that trading activity is conducted in conformance with the trading unit's authorized risks, instruments, and products, as documented in the covered banking entity's written policies and procedures and trader mandates. At a minimum, these internal controls must monitor and govern:

• The types and levels of risks that may be taken by each trading unit, consistent with the covered banking entity's written policies and procedures;

• The type of hedging instruments used, hedging strategies employed, and the amount

of risk effectively hedged, consistent with the covered banking entity's written policies and procedures; and

• The financial contracts, products and underlying assets that the trading unit may trade, consistent with covered banking entity's written policies and procedures.

Risk limits. The covered banking entity must establish and enforce risk limits appropriate for each trading unit, which shall include limits based on probabilistic and non-probabilistic measures of potential loss (e.g., Value-at-Risk and notional exposure, respectively), measured under normal and stress market conditions.

Analysis and quantitative measurements. The covered banking entity must perform robust analysis and quantitative measurement of its covered trading activities that is reasonably designed to ensure that the trading activity of each trading unit is consistent with its mission, strategy and risk management process, as documented in the covered banking entity's written policies and procedures; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. In addition to the quantitative measurements reported by the covered banking entity to [Agency] pursuant to appendix A to this part, each covered banking entity must develop and implement, to the extent necessary to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading units. The covered banking entity's analysis and quantitative measurement must incorporate the quantitative measurements reported by the covered banking entity to [Agency] pursuant to appendix A to this part and include, at minimum, the following:

• Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

• Ongoing, timely monitoring and review of calculated quantitative measurements;

• Heightened review of a quantitative measurement when such quantitative measurement raises any question regarding compliance with section 13 of the BHC Act and this part, which shall include in-depth analysis, appropriate escalation procedures, and documentation related to the review, including the establishment of numerical thresholds for each trading unit for purposes of triggering such heightened review; and

• Immediate review and compliance investigation of the trading unit's activities, escalation to senior management with oversight responsibilities for the applicable trading unit, timely notification to [Agency], appropriate remedial action (e.g., divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when the quantitative measurement, considered together with the facts and circumstances, suggests a reasonable likelihood that the trading unit has violated any part of section 13 of the BHC Act and this part.

Surveillance of compliance program effectiveness. The covered banking entity must regularly monitor the effectiveness of its compliance program and take prompt action to address and remedy any deficiencies identified. Any actions taken to remedy deficiencies and violations shall be documented and maintained as a record of the banking entity.

B. Covered Fund Activities

A covered banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that the covered fund activities or investments of its asset management units are appropriate and consistent with the description of the asset management unit's mission, strategy, and risk management process contained in the covered banking entity's written policies and procedures. The internal controls must, at a minimum, be designed to ensure that the covered banking entity complies with the requirements of § ____.11 for any covered fund in which it invests, acts as sponsor, or organizes and offers, as well as the following:

Monitoring investments in a covered fund. The covered banking entity must implement and enforce internal controls in a way that monitors and limits the covered banking entity's individual and aggregate investments in covered funds. At a minimum, the covered banking entity shall establish, maintain, and enforce internal controls reasonably designed to ensure that such investments are in compliance with section 13 of the BHC Act and this part at all times, including:

• Monitoring the amount and timing of seed capital investments for compliance with the limitations (including but not limited to the redemption, sale or disposition requirements of § ____.12);

• Calculating the individual and aggregate levels of ownership interests in covered funds required by § ____.12;

• Describing procedures for remedying violations of section 13 of the BHC Act and this part;

• Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above; and

• Making the appropriate required disclosures, in writing, to prospective and actual investors in any covered fund organized and offered or sponsored by the covered banking entity, as provided under § ____.11(h).

Monitoring relationships with a covered fund. The covered banking entity must implement and enforce internal controls in a way that monitors and limits the covered banking entity's sponsorship of, and relationships with, covered funds. At a minimum, the covered banking entity shall establish, maintain, and enforce internal controls reasonably designed to ensure that such activities and relationships are in compliance with section 13 of the BHC Act and this part at all times, including monitoring for and preventing any relationship or transaction between the covered banking entity and a covered fund that is prohibited under § ____.16.

Surveillance of compliance program effectiveness. The covered banking entity must regularly monitor the effectiveness of its compliance program and take prompt action to address and remedy any deficiencies identified. Any actions taken to remedy deficiencies and violations shall be documented and maintained as a record of the covered banking entity.

IV. Responsibility and Accountability for the Compliance Program

A covered banking entity must establish, maintain, and enforce a management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A covered banking entity must have an appropriate management framework reasonably designed to ensure that: appropriate personnel are made responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the board of directors, or similar corporate body, and CEO reviews and approves the compliance program. This management framework must include, at a minimum:

Corporate governance. The covered banking entity must ensure that its compliance program is reduced to writing, approved by the board of directors or similar corporate body, and noted in the minutes.

Trader mandates. The covered banking entity must establish, maintain, and enforce the trader mandates required by this appendix to clearly inform each trader within a trading unit of his or her responsibilities for compliance with section 13 of the BHC Act and this part.

Management procedures. The covered banking entity must establish, maintain, and enforce management procedures that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provide for:

• The designation of at least one person with authority to carry out the management responsibilities of the covered banking entity for each trading unit;

• Written procedures addressing the management of the activities of the covered banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

○ Procedures for the review by a manager of activities of the trading unit and the quantitative measurements pursuant to appendix A and any other quantitative measurements developed and tailored to the particular risks, practices, and strategies of the covered banking entity's trading units;

○ A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the covered banking entity's trading units; and

○ Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § ____.4 or risk-mitigating hedging activities under § ____.5 so that such compensation arrangements are designed not to reward proprietary risk taking.

Business line managers. Managers with responsibility for one or more trading units or asset management units of the covered

banking entity engaged in covered trading activities or covered fund activities or investments are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading unit or asset management unit.

Senior management. Senior management is responsible for communicating and reinforcing the culture of compliance with section 13 of the BHC Act and this part, as established by the board of directors or similar corporate body, and implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified.[4] Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the covered banking entity's covered trading activities and covered fund activities or investments, which shall be at least once every twelve months.

Board of directors, or similar corporate body, and CEO. The board of directors, or similar corporate body, and CEO are responsible for setting an appropriate culture of compliance with this part and establishing clear policies regarding the management of covered trading activities and covered fund activities or investments in compliance with section 13 of the BHC Act and this part. The board of directors or similar corporate body must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the covered banking entity.

V. Independent Testing

A covered banking entity must ensure that independent testing is conducted by a qualified independent party, such as the covered banking entity's internal audit department, outside auditors, consultants, or other qualified independent parties, regarding the effectiveness of the covered banking entity's compliance program established pursuant to this appendix and §____.20 and the covered banking entity's compliance with this part. A banking entity must take appropriate action to remedy any concerns identified by the independent testing (e.g., remedying deficiencies in its written policies and procedures and internal controls, etc.).

The required independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the covered banking entity's covered trading and covered fund activities or investments, which shall be no less than once every twelve months. This independent testing must include an evaluation of:

- The overall adequacy and effectiveness of the covered banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;
- The effectiveness of the covered banking entity's written policies and procedures;
- The effectiveness of the covered banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and
- The effectiveness of the covered banking entity's management procedures.

VI. Training

Covered banking entities must provide adequate training to trading personnel and managers of the covered banking entity, as well as other appropriate personnel, as determined by the covered banking entity, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the covered banking entity's covered trading activities and covered fund activities or investments. The training may be conducted by internal personnel or independent parties deemed appropriate by the covered banking entity based on its size and risk profile.

VII. Recordkeeping

Covered banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A covered banking entity must retain these records for a period that is no less than 5 years in a form that allows it to promptly produce such records to [Agency] on request.

END OF COMMON RULE

[END OF COMMON TEXT]

Adoption of the Common Rule Text

The proposed adoption of the common rules set forth above by the CFTC, which are identical to the common rules adopted by the OCC, Board, FDIC, and SEC in the Joint Release, is modified by CFTC-specific text, as set forth below:

List of Subjects in 17 CFR Part 75

Commodity pool operators, Commodity trading advisors, Futures commission merchants, Reporting and recordkeeping requirements, Swaps, Futures.

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Commodity Futures Trading Commission proposes to amend 17 CFR Chapter I as follows:

PART 75—PROPRIETARY TRADING AND RELATIONSHIPS WITH COVERED FUNDS

1. The authority citation for part 75 is added to read as follows:

Authority: 12 U.S.C. 1851.

2. Part 75 is added as set forth at the end of the Common Preamble.

3. Part 75 is amended by:

a. Removing ''[Agency]'' wherever it appears and adding in its place ''CFTC''; and

b. Removing ''[The Agency]'' wherever it appears and adding in its place ''The CFTC.''

4. Section 75.1 is added to read as follows:

§ 75.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the CFTC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including registered commodity pool operators, registered commodity trading advisors, registered swap dealers, and registered major swap participants, among others identified in section 2(12)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)(C)). This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to covered banking entities described in § 75.2(j). This part takes effect on July 21, 2012.

(d) *Relationship to other authorities.* Except as otherwise provided in under section 13 of the BHC Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of BHC Act shall apply to the activities of a covered banking entity, even if such activities are authorized for a covered banking entity under other applicable provisions of law.

5. Paragraph (j) of § 75.2 is added to read as follows:

§ 75.2 Definitions.

* * * * *

[4] Such corrective action may include, among other things divesture of the position, cessation of the activity, or disciplinary measures.

(j) *Covered banking entity* means any entity described in paragraph (e) of this section for which the CFTC is the primary financial regulatory agency, as defined in section 2(12)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)(C)).

* * * * *

6. Section 75.10(a) is revised to read as follows:

§ 75.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(a)(1) *General Prohibition.* Except as otherwise provided in this subpart, a covered banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) *Commodity Pool Operators and Commodity Trading Advisors.* A covered banking entity that is a covered banking entity because it is a commodity pool operator or commodity trading advisor identified in sections 2(12)(C)(ii) or 2(12)(C)(iii) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 shall comply with the restrictions on covered fund activities or investments set forth in subpart C and § ____.20 of subpart D issued by the agency identified in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) that regulates the banking entity described in § 75.2 (e)(1), (2) or (3) with which the commodity pool operator or commodity trading advisor is affiliated.

Note to paragraph (a): Nothing set forth in paragraph (a)(2) of this section shall limit the CFTC's authority under any other provision of law, including pursuant to section 13 of the Bank Holding Company Act.

* * * * *

Issued on January 11, 2012 in Washington, DC.

David A. Stawick,

Secretary of the Commission.

Appendices to Prohibitions and Restrictions on Proprietary Trading and Certain Interest In and Relationships With, Hedge Funds and Covered Funds. Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule implementing the ''Volcker Rule'' requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Dodd-Frank amended the Banking Holding Company Act to provide the Commodity Futures Trading Commission with authority to implement Volcker Rule requirements for the entities for which we are the primary financial regulator.

Today's proposal mirrors the joint rule proposed in October by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

Consistent with the joint proposed rule, this proposal prohibits certain banking entities from engaging in proprietary trading. The proposal permits, as Congress prescribed, market-making and risk-mitigating hedging.

I look forward to receiving comments from market participants and the public on the proposed rule.

[FR Doc. 2012–935 Filed 2–13–12; 8:45 am]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Nine Bexar County, TX, Invertebrates; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2010–0091; 4500030114]

RIN 1018–AX11

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Nine Bexar County, TX, Invertebrates

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for *Rhadine exilis* (ground beetle, no common name), *Rhadine infernalis* (ground beetle, no common name), Helotes mold beetle (*Batrisodes venyivi*), Cokendolpher Cave harvestman (*Texella cokendolpheri*), Robber Baron Cave meshweaver (*Cicurina baronia*), Madla Cave meshweaver (*Cicurina madla*), Braken Bat Cave meshweaver (*Cicurina venii*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), and Government Canyon Bat Cave spider (*Neoleptoneta microps*) under the Endangered Species Act of 1973, as amended (Act). These species are collectively known as the nine Bexar County invertebrates. In total, approximately 4,216 acres (ac) (1,706 hectares (ha)) in Bexar County, Texas, fall within the boundaries of the critical habitat designation. Also, we announce a 12-month finding on a petition to revise critical habitat designation by removing unit 13 from designation under the Act. After review of all available scientific and commercial information, we find that the petitioned action is not warranted at this time.

DATES: This rule becomes effective on March 15, 2012.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758; telephone 512–450–0057; facsimile 512–490–0974.

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758; telephone 512–490–0057 x248; facsimile 512–490–0974. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the *Rhadine exilis* (ground beetle, no common name), *Rhadine infernalis* (ground beetle, no common name), Helotes mold beetle, Cokendolpher Cave harvestman, Robber Baron Cave meshweaver, Madla Cave meshweaver, Braken Bat Cave meshweaver, Government Canyon Bat Cave meshweaver, and Government Canyon Bat Cave spider under the Act (16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of the nine Bexar County invertebrates, refer to the final listing rule published in the **Federal Register** on December 26, 2000 (65 FR 81419), and to our September 2011 final recovery plan (Service 2011), which is available from the Austin Ecological Services Field Office (see **ADDRESSES** section). For information on the nine Bexar County invertebrates' critical habitat, refer to the proposed rule to designate critical habitat for the nine Bexar County invertebrates published in the **Federal Register** on August 27, 2002 (67 FR 55063), the final critical habitat designation published April 8, 2003 (68 FR 17155), and the proposed revised critical habitat designation published on February 22, 2011 (76 FR 9872). Information on the associated draft economic analysis for the February 22, 2011 (76 FR 9872), proposed rule to designate revised critical habitat was published in the **Federal Register** on August 2, 2011 (76 FR 46234).

We use the terms karst fauna regions (KFRs), karst zones, and karst fauna areas (KFAs) in this document. The term ''karst'' refers to a subterranean terrain that is formed by the slow dissolution of calcium carbonate from limestone bedrock by mildly acidic groundwater. This process creates numerous cave openings, cracks, fissures, fractures, sinkholes, and bedrock resembling Swiss cheese.

Veni (1994, pp. 68–76) delineated six KFRs within Bexar County: Stone Oak, University of Texas at San Antonio (UTSA), Helotes, Government Canyon, Culebra Anticline, and Alamo Heights (Figure 1). These KFRs are bounded by geological or geographical features that may represent obstructions to the movement (on a geologic timescale) of troglobites (small, cave-dwelling animals that have adapted to their dark surroundings), which has resulted in the present-day distribution of endemic (restricted to a given region) karst invertebrates in the Bexar County area. The basis for these divisions is the lack of continuity between caves, which may form complete barriers or significant restrictions to migration of troglobites over modern or geologic timescales. These discontinuities result from cave development and the geologic history of the area.

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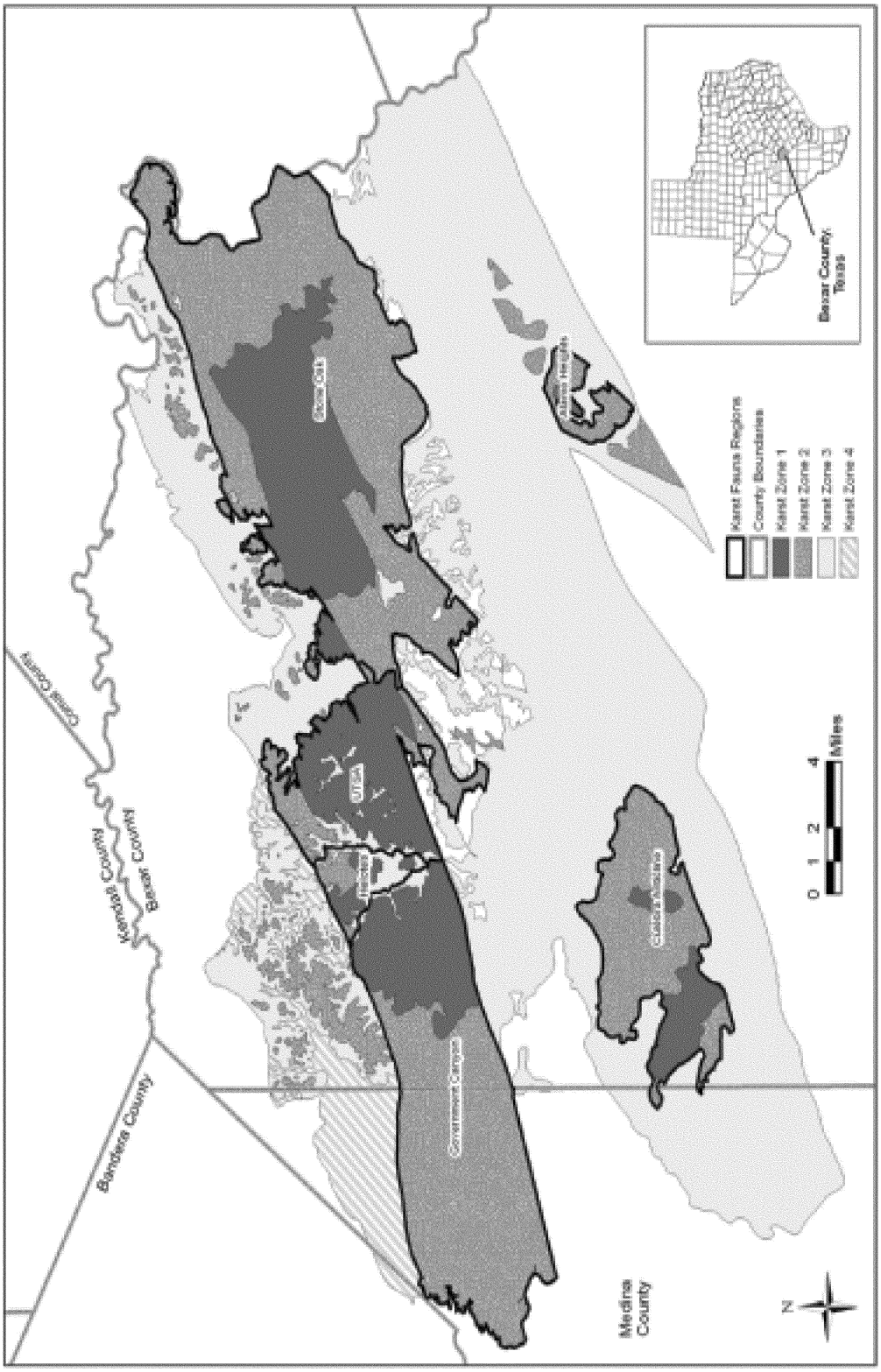


Figure 1. Karst Fauna Regions and Karst Zones in Bexar County, Texas.

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The KFRs were analyzed by Veni (1994, pp. 72–73) using the then current range of 19 troglobitic species, including the 9 Bexar County invertebrates. The KFRs are important because they are used to establish recovery criteria for individual species in the Bexar County Karst Invertebrate Recovery Plan (Service 2011, pp. 17–26). To meet those criteria, specified numbers of preserves of a given quality must be protected within each KFR in which they occur.

Also, the six KFRs were delineated by Veni (2003, pp. 10–18) into five karst zones that reflect the likelihood of finding a karst feature that will provide habitat for the endangered invertebrates, based on geology, distribution of known caves, distribution of cave fauna, and primary factors that determine the presence, size, shape, and extent of

caves with respect to cave development. As described by Veni (2003, pp. 10–18), these five zones (Figure 1) are defined as:

Zone 1: Areas known to contain one or more of the nine Bexar County invertebrates (areas where species are present).

Zone 2: Areas having a high probability of suitable habitat for the invertebrates (areas that may contain one or more invertebrates, but have not been fully surveyed).

Zone 3: Areas that probably do not contain the invertebrates (because there is very little suitable karst habitat).

Zone 4: Areas that require further research, but are generally equivalent to Zone 3, although they may include sections that could be classified as Zone 2 or 5 (areas where less is known about the karst structure than with Zone 3).

Zone 5: Areas that do not contain the nine Bexar County invertebrates (areas with units of rock that do not contain karst habitat).

A karst fauna area (Service 1994, p. 76) is a geographic area known to support one or more locations of an endangered species. A KFA is distinct in that it acts as a system that is separated from other KFAs by geologic and hydrologic features and/or processes or distances that create barriers to movement of water, contaminants, and troglobitic fauna.

Previous Federal Actions

We published a proposed rule to list the nine Bexar County karst invertebrate species as endangered in the **Federal Register** on December 30, 1998 (63 FR 71855). On November 1, 2000, the Center for Biological Diversity filed a complaint against the Service alleging that we exceeded our 1-year obligation to publish a final listing rule and make a determination whether to designate critical habitat for the nine Bexar County karst invertebrates. We published a final listing rule on December 26, 2000 (65 FR 81419). In the final listing rule, we determined that critical habitat designation was prudent. On August 27, 2002, we proposed that 25 units encompassing approximately 9,516 ac (3,857 ha) in Bexar County, Texas, be designated as critical habitat for the nine karst invertebrates (67 FR 55063). The final critical habitat rule, designating approximately 1,063 ac (431 ha) in 22 units, was published on April 8, 2003 (68 FR 17155).

On July 17, 2007, the Center for Biological Diversity, Citizens Alliance for Smart Expansion, and Aquifer Guardians in Urban Areas provided us with a 60-day notice of intent to sue on the final critical habitat rule. On January 14, 2009, the plaintiffs (*CBD* v. *FWS,* case number 1:09–cv–00031–LY) filed suit in Federal Court (Western District of Texas), alleging that the Service failed to use the best available science, and incorrectly made exclusions according to sections 3(5)(A) and 4(b)(2) of the Act. On December 18, 2009, the parties filed a settlement agreement where we agreed to submit a revised proposed critical habitat determination for publication in the **Federal Register** on or before February 7, 2011, and a final revised determination by February 7, 2012. The proposed rule was submitted to the **Federal Register** prior to the February 7, 2011, deadline, and it published on February 22, 2011 (76 FR 9872). On August 2, 2011 (76 FR 46234), we reopened the comment period and announced the availability of a draft economic analysis, an amended required determinations section of the proposal, and a public hearing to allow. This final rule is published in accordance with the settlement agreement.

12-Month Finding

On July 8, 2010, we received a petition from Capital Foresight Limited Partnership to revise designated critical habitat for *Rhadine exilis* by removing Unit 13. The petitioner alleges that the original specimens collected from Black Cat Cave were never positively identified as *R. exilis.* They stated that another species of *Rhadine* with a slender body form similar to *R. exilis* occurs in a cave a short distance from Black Cat Cave, which is likely connected by mesocaverns (small, human-inaccessible, interstitial spaces in karst limestone), and that two species of *Rhadine* with similar body forms have never been documented to occur in the same location. In addition, the petitioner asserted that drinking water is leaking into Black Cat Cave and that the habitat has been highly degraded by the Bulverde Road, rending the area no longer suitable for conservation of the species. However, information in our files at the time we received the petition indicated that a species expert had identified the original specimen collected from Black Cat Cave as *R. exilis* (T. Barr, pers. comm., 2010).

In our February 22, 2011 proposed rule (76 FR 9872), we issued a 90-day finding that the Capital Foresight Limited Partnership presented substantial information indicating that revising critical habitat for *Rhadine exilis* may be warranted. We initiated a review to determine if revising critical habitat for *R. exilis* is warranted. During that review, we received evidence that the cave entrance had been filled with dirt and rocks, and a concrete structure had been placed over the natural opening.

In addition, the species expert examined the original specimens and stated, ''My preliminary conclusions are that the Black Cat *Rhadine* are distinct from *Rhadine exilis* though closely related, but I want to spend about six hours or so on a final evaluation'' (T. Barr, pers. comm., 2011). Unfortunately, T. Barr died in May 2011, and his collection was donated to the Carnegie Museum of Natural History. The Texas Memorial Museum is working with the Carnegie Museum to locate, obtain, and examine the specimens from Black Cat Cave, but this task has not been accomplished to date.

The preliminary determination by the species expert (T. Barr) that this was not *Rhadine exilis* casts some additional doubt on whether the unit contains, or ever contained, the species. However, because the specimens are not currently available for examination, we give deference to the original identification of the species as *Rhadine exilis* by the species expert, T. Barr.

It has been 24 years since this *Rhadine* has been found in the cave, and nine surveys conducted since 2008 have not confirmed its presence. In addition, the surface habitat has been further degraded since the original specimens were collected. However, because of the cryptic nature of the karst invertebrates, it often takes intensive survey efforts to document a species' presence within a cave (Krejca and Weckerly 2007, p. 286), and the lack of positive survey results does not indicate with reasonable certainty that *R. exilis* is currently absent in Black Cat Cave. In addition, many of the surveys were conducted during either extreme drought or during temperature extremes, when karst species recede into mesocaverns that have a more favorable microclimate. Although the surface habitat has been degraded, Black Cat Cave and the surrounding mesocaverns still contain the physical or biological features essential to the conservation of the species. Even though recent survey efforts have failed to detect the *R. exilis* in Black Cat Cave, and the surface habitat has been degraded, we have determined that Unit 13 still meets the definition of critical habitat, as defined in section 3(5)(A)(i) of the Act, by being occupied at the time of listing, and currently containing the physical or biological features essential to the conservation of the species, which may require special management considerations or protection. In addition, the karst habitat within Unit

13 is needed to conserve *R. exilis* in the Stone Oak KFR.

At this time, we find that revising critical habitat by removing Unit 13 is not warranted. It is therefore included in this final designation. However, if at some future time further taxonomic studies reveal that the specimens collected in Black Cat Cave were not *Rhadine exilis,* or more intensive survey efforts do not reveal the species' presence, then we will consider revising this critical habitat designation. This document includes our 12-month finding on the petition, as well as our final designation of critical habitat for the nine Bexar County invertebrates, as provided in section 4(b)(3)(B) of the Act.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the nine Bexar County invertebrates during two comment periods. The first comment period associated with the publication of the proposed rule (76 FR 9872) opened on February 22, 2011, and closed on April 25, 2011. We also requested comments on the proposed critical habitat designation and associated draft economic analysis during a comment period that opened August 2, 2011, and closed on September 1, 2011 (76 FR 46234). We did receive three requests for a public hearing. Therefore, we held a public hearing on August 17, 2011. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these comment periods.

During the first comment period, we received 35 comment letters directly addressing the proposed critical habitat designation. During the second comment period, we received 27 comment letters addressing the proposed critical habitat designation or the draft economic analysis. During the August 17, 2011, public hearing, one individual made comments on the designation of critical habitat for the nine Bexar County invertebrates. All substantive information provided during comment periods has either been incorporated directly into this final determination or addressed below. Comments we received are grouped into seven general issues specifically relating to the proposed critical habitat designation for the nine Bexar County invertebrates, and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from eight knowledgeable individuals with scientific expertise that included familiarity with the nine Bexar County invertebrates, the geographic region in which the species occur, and conservation biology principles. We received responses from four of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the nine Bexar County invertebrates. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* One peer reviewer questioned whether tree roots were present in the Bexar County caves in critical habitat and therefore their nutrient importance.

Our Response: Tree roots are present in many of the Bexar County caves in designated critical habitat, and we believe they are important nutrient sources for the invertebrates.

(2) *Comment:* One peer reviewer stated that there should be more discussion of the potential impacts of global warming and the predicted increased drying expected in Texas (Banner *et al.* 2010). Another commented that loss of habitat or reduction of habitat quality are likely to be more immediate threats to the nine endangered karst invertebrates than climate change effects.

Our Response: We agree and added information to emphasize the threats of climate change on the species and the immediacy of habitat destruction (see section on *Special Management Considerations or Protection*).

(3) *Comment:* One peer reviewer stated that four of the listed invertebrates are known from one or very few specimens from a single or very few locations and are likely to suffer from the negative effects of small population sizes and lack of genetic diversity. The reviewer questions whether significant effort or expense should be directed to their protection and monitoring, except where their locations overlap with other species.

Our Response: While we agree that these species are rare and highly vulnerable, the Act does not provide for flexibility regarding whether or not they receive the protections of critical habitat.

(4) *Comment:* Two peer reviewers commented that monitoring plans should be added as part of the final critical habitat.

Our Response: While monitoring is important, it is a component of the recovery plan and is outside of the scope of critical habitat determination under the Act.

(5) *Comment:* One peer reviewer said that we should be clear in the document that the 100-meter (m) distance to protect cave crickets and other invertebrates from red imported fire ant (*Solenopsis invicta*) (fire ant) foraging comes from a study by Suarez *et al.* (1998) on Argentine ants in California.

Our Response: We clarified this point, and based on this and other comments, removed the 100-m distance.

Comments From the State

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' Comments received from the State regarding the proposal to designate critical habitat for the nine Bexar County invertebrates are addressed below.

(6) *Comment:* The proposed rule may have substantial impact on the State's transportation system in Bexar County and will increase costs and complexity of consultations. The State requested that the Service not designate critical habitat in Texas Department of Transportation (TxDOT) right of way (ROW).

Our Response: Because of changes in the criteria for delineation of critical habitat units, some of the total area in TxDOT ROW has been reduced. The impact of designation on transportation projects was analyzed in the draft and final economic analyses, and based on the estimated costs in that analysis, we did not find disproportionate economic impacts of designation.

(7) *Comment:* One State agency (TxDOT) and several other individuals commented that the use of the 0.3-mile (mi) distance for the theoretical mesocavern boundary is not supported by the geologic or genetic studies we cited.

Our Response: Based on these and other comments, and our own internal analysis of the issue, we removed the 0.3-mi (0.5-kilometer (km)) distance from this final rule. Please see the Summary of Changes from Proposed Rule section.

(8) *Comment:* One State agency (TxDOT) commented that a review of additional cave data for proposed Unit 16 indicates that the hydrological component of the primary constituent element (PCE) does not occur within the area of concern under and east of Loop 1604 and should not be included in designated critical habitat. The commenter also suggested that maintaining the intact surface communities in the undeveloped area to the west of Loop 1604 is a higher conservation priority and more likely to benefit the species in the cave.

Our Response: Based on these comments and other information provided, we are not including this area in critical habitat, because it does not meet the definition of critical habitat for any of the nine Bexar County invertebrates.

(9) *Comment:* One State agency (TxDOT) and several other individuals commented that the PCEs are too general and that critical habitat should contain more than one PCE.

Our Response: Based on this and other comments and information provided, we modified our PCEs and our criteria for delineation so that both PCEs needed to be present a unit in order to meet the definition of critical habitat.

(10) *Comment:* One State agency (TxDOT) and several other individuals commented that the derivation of the area of native vegetation required and the buffer against edge effects were not based on the best available science.

Our Response: We believe the derivation was based on the best available science for the vegetation requirements we identified in the proposed rule. However, while native vegetation is beneficial to promote the long-term viability of an area, the native vegetation species we identified in the proposed rule may not be necessary to the conservation of the nine Bexar County invertebrates. Based on these and other comments, we revised the area needed around each occupied cave entrance to focus on the optimal size necessary to provide long-term viability for the listed species. We dropped the focus on deriving the area based on native plant species and instead relied on the expert opinion of the Bexar County Karst Invertebrates Recovery Team (Service 2008, pp. B–1–B–5) for the size of area needed, which is 100 ac (40 ha) to meet conservation objectives.

(11) *Comment:* The State Comptroller stated that the proposed critical habitat could have substantial impacts to this region of the State and add additional costs to taxpayers without sufficient scientific basis. The Service should delay all action in order to re-examine this proposal and the available research.

Our Response: We have addressed the economic impacts of designation to all parties through an economic analysis and have determined that there will not be significant economic impacts due to this designation. In addition, we carefully considered and addressed all comments submitted. As a result of these comments and our analysis of the issues, this final designation is smaller in area, and thus smaller in the economic effects associated with the areas originally proposed. In regards to delaying our action to designate critical habitat, we are not able to delay because we are held to a February 7, 2012, deadline to submit a final rule to the **Federal Register** according to a court-ordered settlement agreement.

Public Comments

General Comments

Issue 1: Extent of mesocaverns to be included.

(12) *Comment:* Several commenters stated that site-specific geologic information limits or precludes the use of the 0.3-mi (0.5-km) distance as a measure of the distance that mesocaverns are likely to be connected to occupied features in several proposed units.

Our Response: We agree that there may be site-specific issues involved in some units. Based on this and other comments, we do not use the specific 0.3-mi (0.5-km) as a criterion for delineating specific mesocavern distance in this final critical habitat rule.

(13) *Comment:* The manner in which White (2006) is cited in the proposed rule seems to indicate that the author determined that this distance was appropriate for use in a critical habitat context and that it can be appropriately applied to sites other than those that were studied in detail. This is misleading.

Our Response: We have revised the wording in this final rule to clarify this issue.

(14) *Comment:* White's (2006) research was not intended to yield a buffer such as the 0.3-mi (0.5-km) distance. The distance was derived by the Service indirectly from the results of that research.

Our Response: The Service acknowledges that the 0.3-mi (0.5-km) distance was based on White's research, and that his research did not specifically suggest using this distance in this way. See our responses to comments (12) and (13), above.

(15) *Comment:* The Service's 0.3-mi (0.5-km) distance was derived from a site located within the Edwards karst, which is highly modified by the tremendous volume of fresh water that formed the Edwards Aquifer and is quite different from geology and hydrologic conditions in many other proposed units in Bexar County. A two-dimensional buffer cannot be applied to a three-dimensional landscape without misrepresenting the potential for gene flow through the karst. This is especially true in the older, more eroded karst landscapes of the Helotes area where many small islands of karst occur on hilltops. The distribution of genetic diversity was found to be controlled by geologic structure (primarily by faults), which imposes a linear, not radial, geometry on available habitat. Ignoring site-specific geologic structure nearly guarantees that a blanket radial buffer incorrectly represents the spatial distribution of habitat.

Our Response: We acknowledge there are problems with applying the 0.3-mi (0.5-km) distance to all units, and, ideally, the distance would be based on site-specific data or information. We have removed the 0.3-mi (0.5-km) distance from this final rule. See our responses to comments (12), (13), and (14), above.

(16) *Comment:* We believe the Service is misapplying the conclusions in White (2006). If the species did travel 0.3-mi (0.5-km) through connected mesocaverns, the genetics of *Cicurina madla* would be identical in Robbers Cave and Hills and Dales Pit.

(17) *Comment:* Even with identical signatures in separate caves, it is not possible to determine when that contact happened because it is not known how long it would take two isolated populations to become genetically different.

(18) *Comment:* The conclusion drawn by White (2006) is that, in general, gene flow is not occurring between troglobite populations and has not likely occurred in recent evolutionary timescale.

Our Response to Comments (16), (17), and (18): We agree that similar genetic signatures do not demonstrate positively that the Madla Cave meshweavers in the two caves we cited are not identical. We acknowledge the limitations on the use of data from Hedin and Paquin (2004, p. 3243) for this purpose. The question of whether identical signatures demonstrate current connectivity is dependent on the specific techniques used, sample sizes, and whether the genes being examined are slowly or quickly evolving genes. We clarified these points in, and removed any specific distance for mesocavern connectivity from, this final rule.

(19) *Comment:* Several commenters stated that we inappropriately used justification of genetic similarity of *Cicurina* in two caves to justify use of the 0.3-mi (0.5-km) mesocavern distance.

Our Response: We stated in our proposed rule that White (2006, pp. 97–99) indicated the species were similar, not identical, and we used this only as partially supporting information. Based on this and other comments, we removed the mesocavern distance from this final rule.

(20) *Comment:* Occurrence of many caves with the same or similar suites of species beyond the 0.3-mi (0.5-km) distance suggests that using the mesocavernous distances at Camp Bullis is in fact more representative of the distances of mesocavernous connectivity and perhaps conservative at that. I strongly suggest reevaluating and redrawing the proposed critical habitat areas with distances no less than those demonstrated at Camp Bullis.

Our Response: While the mesocaverns may be connected to the 0.3-mi (0.5-km) distance in some units, we are unable to find genetic information that is adequate to determine maximum distance over which population-level genetic exchange may occur. In the absence of that information, and due to differences in site-specific geological influences on connectivity, we decided not to use the 0.3-mi (0.5-km) distance as a criterion for delineation.

Issue 2: Amount and type of vegetation needed.

(21) *Comment:* For critical habitat areas that contain healthy native vegetation, a circular area of approximately 40 ac (16 ha) in size (assuming one cave per preserve) would incorporate the biological elements necessary to provide nutrient input into the caves and protect the surface component of the karst ecosystem from edge effects and fire ant infestation.

Our Response: We believe an area of 100 ac (40 ha) provides a higher probability of species survival and conservation. We base this on the expert opinion of the Bexar County Karst Invertebrates Recovery Team (Service 2008, pp. B–1–B–5), and on the size of area needed to meet certain conservation objectives. The area needed is based in part on the fact that we believe the karst invertebrates occupy a larger area than the caves, may be using mesocaverns more than caves, and may spend the majority of their time in such retreats, only leaving the mesocaverns during temporary forays into the larger cave passages to forage (Howarth 1987, p. 377). We modified the justification for the area needed to provide for the conservation of the species, focusing on overall need for nutrient input, moisture, and mesocaverns.

(22) *Comment:* Several commenters stated that the 10-ac (4-ha) grassland component was not present in some units and should not be included as a component for all units.

Our Response: We modified the justification for the area needed to provide for the conservation of the species, focusing on overall need for nutrient input, moisture, and mesocaverns, rather than on specific vegetation components.

(23) *Comment:* Comments on several units stated that site-specific plant survey data should be utilized when available. In the absence of this data, commenters suggest an area of roughly 33 ac (13 ha) would be required to include 15 to 20 species of the Edwards plateau at a population size of 80 individuals plus a distance of 66 feet (ft) (20 meters (m)) to protect against edge effects.

Our Response: We revised the criteria for designating critical habitat by using an area with an overall size of 100 ac (40 ha) to provide for the conservation of the species, focusing on overall need for nutrient input, moisture, and mesocaverns, rather than on specific vegetation components.

Issue 3: Cave cricket foraging area.

(24) *Comment:* Given the extremely low expected density of foraging crickets in the outer 42 percent of cave cricket foraging distance, and given the distance fire ants are known to travel from a mound, a continuous woody canopy within 344 ft (105 m) of a cave is sufficient to protect cave crickets from adjacent disturbance activities.

Our Response: We have revised this final rule to be consistent with the final Bexar County Karst Invertebrates Recovery Plan's Karst Invertebrates Preserve Design Recommendations Document (Service 2011a, p. 4).

Issue 4: Amount of critical habitat proposed.

(25) *Comment:* All of Karst Zones 1 and 2 should be included in critical habitat because long-term stewardship necessitates that protected karst formations and associated mesocaverns contiguous to occupied features be larger to provide microclimate refugia to counter the adverse impacts of climate change, pollution, invasive species, and stochastic events.

Our Response: While we agree that additional mesocavernous areas may be desirable for species conservation, we lack adequate data to justify designating as critical habitat all of Karst Zones 1 and 2. We made our final critical habitat designation consistent with recovery criteria for high-quality KFRs in the final Bexar County Karst Invertebrates Recovery Plan's Karst Invertebrates Preserve Design Recommendations Document (Service 2011a, pp. 3–5).

(26) *Comment:* The Service seems to be ignoring the 2008 Draft Recovery Plan for the Bexar County Invertebrates. An analysis of the required KFAs across each KFR for the species indicates that 4,350 ac (1,760 ha) would be required to meet downlisting criteria. The Service now proposes 6,906 ac (2,795 ha) that, when combined with the Camp Bullis Karst Management Areas, now totals 8,976 ac (3,632 ha). We do not understand why, if 4,350 ac (1,760 ha) can result in downlisting of the species, 8,976 ac (3,632 ha) are essential for the conservation of the species.

Our Response: In this final critical habitat designation, we relied heavily on the 2011 Final Recovery Plan for the nine Bexar County invertebrates (Service 2011). Because we have a final recovery plan, the recommendations to use the draft recovery plan are not followed. Also, we designated low-quality units that do not count for the recovery of individual species, because not enough high- and medium-quality KFAs are available in the proper configuration to meet recovery criteria for some KFRs. In addition, none of the KFAs is currently fully protected, and we have no way of predicting which, if any, will be fully protected in the future. Therefore, we believe all areas designated meet the definition of critical habitat and are necessary for the conservation of the species. The total area designated in this rule, however, has been reduced to 4,216 ac (1,706 ha) as a result of exemptions and exclusions (explained later in this rule).

Issue 5: Information quality and general comments.

(27) *Comment:* The Service has created critical habitat units that, in many cases, may only include one of the primary constituent elements, with no hope of ever creating the other two. This seriously calls into question the method used to develop areas of critical habitat.

Our Response: We acknowledged in the proposed rule that not all units contain all the PCEs. For some species, we believed it was appropriate to propose some units that did not have all of the PCEs. For species that occur in only a few locations that have had substantial negative impacts to one or more of the PCEs, we still proposed to designate critical habitat, because the PCEs that are present can support the listed species to some extent. For example, surface habitat without a healthy plant and animal community

can continue to support listed invertebrates below the surface, and clean water from modified surface areas can provide the humidity needed by the listed invertebrates. However, in this final rule, we have reduced the number of PCEs to two and only included areas in the critical habitat designation that contain both PCEs in close enough proximity to each other to be used by the invertebrate population in the area.

(28) *Comment:* Cave crickets and fire ants do not have significant overlap and are not competitive in their natural environment.

Our Response: We have evaluated the available information and believe that the preponderance of information on the topic indicates there is some overlap. We added language to this final rule to acknowledge the information submitted by the commenter and to explain the reason for our conclusion.

(29) *Comment:* It appears certain boundaries have been intentionally drawn to create a negative impact on property owners and the State of Texas, with no conservation or recovery benefit to the species.

Our Response: We had no agenda in proposing certain areas as critical habitat except to designate the appropriate areas essential for conservation of the species. We based the proposed boundaries on the best available information. We have revised the boundaries of critical habitat designation in this final rule based on the best available scientific and commercial data available, including comments we received as a result of our proposed rule.

(30) *Comment:* The proposed rule is legally insufficient. The Service has insufficiently identified critical habitat. The Service has not demonstrated that the proposed critical habitat is occupied.

Our Response: We believe the proposed rule was legally sufficient. As part of section 3(5)(A)(ii) of the Act's definition of critical habitat, proposed areas do not have to be occupied at the time of listing if such areas are essential for the conservation of the species. Additional descriptions of the criteria used to designate critical habitat and the PCEs have been added to this final rule.

(31) *Comment:* The Service's approach circumvents the additional findings that the Service is required to make before designating unoccupied habitat (see *Cape Hatteras Access Preservation Alliance* v. *Dep't of Interior,* 344 F.Supp.2d 108, 124 (D.D.C. 2004) (''Cape Hatteras''); *Home Builders Ass'n of Northern California* v. *U.S. Fish and Wildlife Serv.,* 268 F.Supp.2d 1197 (E.D. Cal. 2002)).

Our Response: We believe that all units we are designating are currently occupied and contain the physical and biological features essential to the conservation of the species, which may require special management considerations or protection. Even though recent survey efforts have failed to detect a listed invertebrate species in one or more of the units, the lack of positive survey results does not indicate with reasonable certainty that a listed species is absent from a cave. In many cases, it takes intensive survey efforts conducted over several years to find a specimen. At one time or another, a specimen has been documented in all the units we are designating, and at this time, we lack substantial evidence to indicate that certain units are no longer occupied. Therefore, we consider all critical habitat units as being occupied at the time of listing.

(32) *Comment:* The Service has insufficiently identified the PCEs. The Service does not ''identify the physical or biological features essential to the conservation [of the species] in a meaningful way'' (*Homebuilders Association of Northern California* v. *U.S. Fish and Wildlife Serv.,* 268 F.Supp.2d 1197, 1213 (E.D. Ca. 2003). The court in the 2003 Homebuilder's case (hereinafter referred to as the Whipsnake case) found that very similar PCE descriptions were insufficient.

Our Response: We added additional language to this final rule to describe why the PCEs are essential to the conservation of the species.

(33) *Comment:* The Whipsnake case also criticized the Service for designating areas that were without one or more PCEs within the designated boundaries. Throughout the proposed rule there are units proposed in heavily developed areas that cannot be assumed to contain the necessary elements for the conservation of the karst species. The Service gives only a generic, cursory indication of how these proposed units provide the PCEs identified in the proposed rule.

Our Response: See our response to comment (27), above. In this final rule, we have reduced the number of PCEs to two and only included areas in the critical habitat designation that contain both PCEs in close enough proximity to each other to be used by the invertebrate population in the area.

(34) *Comment:* The Service does not provide information as to why each identified PCE would need special management or protection at the unit. Courts have required that the Service, in demonstrating that the designated areas meet the statutory requirements, provide an analysis for why the proposed critical habitat may require special management (Cape Hatteras, 344 F.Supp.2d at 124). Courts have found that the Service did not meet its burden where the Service did not provide analysis: ''Rather than discuss how each identified PCE would need management or protection, the Service lists activities that once resulted in consultations and makes a conclusory statement that dredging or shoreline management could result in permanent habitat loss. This does not meet the Service's burden'' (Cape Hatteras, 344 F.Supp.2d at 124; Whipsnake case, 268 F.Supp.2d at 1218).

(35) *Comment:* It is hard to imagine, for example, what special management may be required for those units proposed in heavily developed areas that do not contain PCEs for surface water or a healthy surface native plants, but rather have been designated solely for the area's subterranean spaces. With that sort of development and lack of surface PCEs, how can the Service reasonably state that special management may be required? The Service is statutorily required to provide this analysis, and the designation is legally deficient without it.

Our Response to Comments (34) and (35): We added language to the section on special management to describe specifically why such management was required for each PCE. Because of the changes in criteria for delineation, we have revised some of the boundaries of critical habitat for low-quality units and added additional description of the special management and protection needs.

(36) *Comment:* The Service has not complied with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). The Service has not prepared an environmental impact statement in accordance with the National Environmental Policy Act (NEPA). The U.S. Court of Appeals for the 10th Circuit and the U.S. District Court of the District of Columbia have both held that the Service must comply with NEPA when designating critical habitat.

Our Response: As we stated in the proposed rule, it is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d

1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

(37) *Comment:* In general, it appears that some delineation may not adequately consider hydrogeologic conditions that may affect the boundaries. If the comment suggesting that the distances demonstrated at Camp Bullis is accepted and the unit boundaries reevaluated on that basis, I suggest that geologic maps and previous reports on the hydrogeology of all of the caves be re-examined.

Our Response: For this final rule, we reevaluated the available information, eliminated the 0.3-mi (0.5-km) distance, and did not accept the distance of mesocaverns for Camp Bullis to apply as a rule of thumb for designation of critical habitat.

(38) *Comment:* Please update your information at the bottom of the page on the number of caves in Bexar County at the time of listing. In September 2000, 437 caves were known in Bexar County. More significantly, about 25 percent had been sealed or destroyed, including some that had not been biologically studied but which by observation of fauna had likely contained some of the listed species. As of today, 523 caves are registered in the county (the actual number is probably about 530) with 103 confirmed as sealed or destroyed and about 40 suspected as sealed or destroyed but which need to be visited for confirmation.

Our Response: We have modified this final rule accordingly.

Issue 6: Exclusions.

(39) *Comment:* The designation of Unit 1e is imprudent under 16 U.S.C. 1533(a)(3). The Act's regulations provide that, ''A designation of critical habitat is not prudent when one or both of the following situations exist: (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) Such designation of critical habitat would not be beneficial to the species'' (50 CFR 424.12(a)(1)).

Our Response: We do not believe either situation applies to Unit 1e. This unit contains the physical or biological features essential to the conservation of the species and which may require special management or protection, thus meeting definition of critical habitat in accordance with section 3(5)(A)(i) of the Act. Also, proposed critical habitat was published for the unit, so designation is not likely to increase the threats from human activity. Designation of critical habitat will provide additional protection from future Federal activities that would adversely modify critical habitat and help to educate Federal agencies and the public about the sensitivity of the area.

(40) *Comment:* Proposed Unit 1e should not be included in the designation of critical habitat for the nine karst invertebrate species of Bexar County, Texas. The benefits of excluding Unit 1e far outweigh the benefits of its inclusion. The economic taint of the designation is far more powerful than any unnecessary conservation benefit conferred by a designation. The benefits of promoting voluntary conservation efforts far outweigh the benefit of including Unit 1e as designated critical habitat.

Our Response: Under section 4(b)(2) of the Act, we are exluding approximately 64 ac (26 ha) of preserve land in Unit 1e, which is being managed in perpetuity under the La Cantera Habitat Conservation Plan (HCP) for the conservation of the listed species. Also, an economic analysis was performed and did not demonstrate substantial economic impacts from critical habitat designation. Finally, the remaining 410 ac (166 ha) of critical habitat in Unit 1e does provide additional protection for the listed species and their habitat.

Comments on Developmental Impacts

(41) *Comment:* The draft economic analysis (DEA) underestimates potential economic impacts of critical habitat on development in Unit 1e. The comment states that the Canyon Ranch parcel is well-suited for development and that the developer has already obtained a Water Pollution Abatement Plan from the Texas Commission on Environmental Quality, a Utility Service Agreement with the San Antonio Water System, and an approved Master Development Plan from the City of San Antonio. In addition, substantial engineering, soil testing, surveying, staking, and construction of a portion of Phase I water line has also been completed. The commenter estimates that undiscounted losses would range between $2.90 million (based on an undeveloped land value of $24,744 per acre) to $7.83 million (based on the sales price of lots less cost of development).

Our Response: The draft economic analysis (DEA) evaluates two scenarios with respect to development impacts. Scenario 1 assumes that the project reduces habitat quality to the extent that jeopardy is a concern and therefore development restrictions are recommended regardless of critical habitat designation (i.e., impacts are baseline). Scenario 2 assumes that the project has a lesser effect on habitat quality (i.e., reducing it from high to medium) and therefore development is precluded because of critical habitat designation (jeopardy is not a concern). Under scenario 2, impacts to development are incremental. For the 118 acres within Unit 1e, the DEA applied a per-acre land value of $6,900 as determined from review of county land appraisal data. In response to this comment, however, we followed up with the Bexar Appraisal District to affirm the statement in the comment that land value in this unit is underestimated. The Appraisal District indicated that the land value in the unit is likely between $14,000 and $17,000 per acre. Consequently, the final economic analysis (FEA) revises the land value loss estimate from that provided in the DEA. Specifically, the FEA applies a range of per-acre land values from a low end of $14,000 as suggested by the Appraisal District, to a high end of $24,700 as suggested in the public comment. This change results in the estimated present value incremental impacts to development in Unit 1e under scenario 2 being revised from $770,000 in the DEA to between $1,550,000 and $2,740,000 in the FEA. This revision is discussed in detail in section 4.2 of the FEA.

(42) *Comment:* The use of appraisal data to determine land values results in an underestimate of impacts to development. Appraisal data does not take into consideration land development entitlements, master plan approvals, offsite infrastructure improvements, utility agreements, onsite road extensions, or the highest and best use for the property. The commenter estimates that land values are off by a factor of four for Unit 14, a factor of 10 for Unit 21, and a factor of 4 for Unit 26.

Our Response: In general, appraisal data reflect the best available information regarding the potential value of parcels within the critical habitat. The appraised estimates are based on the information available regarding future uses of the parcel at the time of the appraisal (including any ongoing master plan efforts, land use agreements, and entitlements). To the extent that the latest assessment of a parcel occurred prior approval of a master plan, utility agreement, or other such improvements, the assessed value may underestimate the value of a parcel. Exhibit 4–5 in the DEA presents the appraised, average per-acre land values of $10,500 in Unit 14, $43,100 in Unit 21, and $34,500 in Unit 26 applied in the DEA. In response to this comment, we followed up with the Bexar Appraisal District and an independent broker to affirm the statement in the comment that the land values in these

units are underestimated. The broker indicated that the land value in Unit 14 is approximately $43,600 per acre and land value in Unit 26 is $87,100 per acre. The appraiser and broker provided average land values for the developable portion of Unit 21 located outside of the 100-year flood plain ranging from $174,000 to $218,000. Consequently, the FEA revises the land value loss estimates from those provided in the DEA. Specifically, the FEA applies a range of per-acre land values from a low end of $42,100 to a high end of $43,600 in Unit 14, $174,000 to $431,000 in Unit 21, and $87,100 to $138,000 in Unit 26. These changes result in the estimated present value incremental impacts to development in Unit 14 under scenario 2 being revised from $3,250,000 in the DEA to between $13,000,000 and $13,400,000 in the FEA; from $12,000,000 to between $3,260,000 and $8,050,000 in Unit 21; and from $3,790,000 to between $9,530,000 and $15,100,000 in Unit 26. This revision is discussed in detail in section 4.2 of the FEA.

(43) *Comment:* The DEA underestimates potential economic impacts of critical habitat on development within Unit 13. The comment asserts that the designation would eliminate the development value of these parcels, resulting in a direct impact on the landowners' revenues in excess of $6 million. Similarly, another comment states that incremental impacts on future development in Unit 25 would be $20 million, taking into account land value and the future value of development. A third similar comment states that the DEA does not include impacts to development in Units 12 and 16. The comment asserts that multi-family sites in these units subject to Housing and Urban Development (HUD) financing have already lost sales to apartment developers as a result of the proposed critical habitat designation.

Our Response: Chapter 4 of the DEA describes that development would be precluded in Units 12, 13, 16, and 25 regardless of critical habitat designation because they are low-quality units in Karst Zones 1 and 2. As described in Section 3.7 of the DEA, in low-quality units, the Service anticipates recommending development be precluded in order to avoid jeopardy. Therefore, development restrictions are anticipated regardless of critical habitat designation, and incremental impacts of critical habitat designation are expected to be limited to additional administrative effort during consultation.

(44) *Comment:* Two comments assert that the DEA underestimates potential economic impacts of critical habitat designation on development in Unit 8. One commenter estimates the lost development value to 200 single-family lots in the Cedar Creek Development to be $4.5 million. These lots have been engineered and entitled at Cedar Creek over the past 6 years. Another commenter estimates that the development site is worth $7 million. In addition, the commenter estimates a loss of $35 million in construction-related expenditures and $200 million in home and business sales. Similarly, multiple comments assert that the DEA underestimates impacts to development by not including the loss of taxes to local governments and by failing to include the ''multiplier effect'' of development, such as the increase in demand for furniture and landscaping.

Our Response: Chapter 4 of the DEA estimates incremental impacts to development in Unit 8 ranging from $0 (scenario 1) to $5,590,000 (scenario 2) in the first 20 years and $0 to $17,100 after 20 years. Scenario 2 assumes development restrictions on 299.5 acres of developable land in Unit 8 will reduce the land value by $19,600 per acre based on county appraisal data. The DEA estimate of land value losses of $5.59 million is within the range of the value losses described by these comments ($4.5 million to $7 million).

As explained in paragraphs 154 and 155 of the DEA, the proposed critical habitat area accounts for only 1.6 percent of the total land area projected for development within the next 29 years within the northern portion of Bexar County. Consequently, the designation of critical habitat is not expected to have an effect on broader regional real estate demand and supply due to the existence of substitute sites for development activities. As a result, impacts to the regional construction industry and loss in revenue associated with home and business sales (estimated in a comment at $200 million) are not anticipated to occur. In addition, a reduction in housing supply is unlikely due to the existence of substitute sites, and a measurable loss of tax revenue is not expected to result from critical habitat designation.

(45) *Comment:* Multiple comments state that, unrelated to the designation of critical habitat for the invertebrates, recent undertakings will decrease land values in northwest Bexar County (in particular Unit 3). These undertakings include: (1) San Antonio Water System's decision to abandon all plans to extend water and sewer services into northwest Bexar County and (2) a recent decision to allow properties within a 5-mile buffer of the Edwards Aquifer recharge zone to be purchased using Proposition 1 funds.

Our Response: The DEA estimates the average per-acre value of unimproved, developable land within each unit using Bexar County land value appraisal data. These data represent the best available information regarding land values. To the extent that recent decisions may impact the value of land in northwest Bexar County, these values may be over- or understated.

(46) *Comment:* The DEA should reassess the incremental impacts of the proposed rule by carefully measuring the impact of critical habitat designation on the areas covered by the La Cantera HCP, including the acres of the La Cantera development land in Unit 9.

Our Response: The areas preserved as part of the La Cantera HCP in Units 1e, 3, 6, 8, and 17 are being excluded from critical habitat, and the areas authorized for development under the La Cantera HCP in Unit 9 are excluded as well in this final designation.

(47) *Comment:* The DEA underestimates the impacts of the expansion of several proposed critical habitat units from the previous 2003 critical habitat for these species.

Our Response: The DEA estimates impacts associated with the revised proposed critical habitat designation. This revised designation includes a number of proposed revised units that are larger than they were in the 2003 designation. Section 3.7 of the DEA describes the Service's approach to section 7 consultation in these expanded units, as evaluated in the DEA. Currently, the Service notifies project proponents of the need to consult on the impacts to the invertebrate species of activities with a Federal nexus within Karst Zones 1 and 2 regardless of critical habitat designation. Consultation on projects within Karst Zone 3 would not occur absent critical habitat designation, and therefore these impacts are considered incremental of the designation.

(48) *Comment:* The third party and biological assessment incremental administrative costs applied in the DEA are underestimated. The commenter believes that third party and biological assessment costs should be at least 10 times greater due to the amount of time and effort necessary to analyze potential impacts within a critical habitat unit.

Our Response: The administrative costs applied in the DEA are based on a review of consultation records from several Service field offices across Bexar County conducted in 2002. For consultations that would occur absent

critical habitat designation (*i.e.,* those in Karst Zones 1 and 2), the incremental administrative cost only represents the additional effort needed to address adverse modification of critical habitat. As the Service is not expected to request any additional conservation efforts as a result of the adverse modification analysis (which arises from a critical habitat designation), we anticipate that the additional effort necessary to address this standard within any biological assessments is relatively minimal compared to the effort required to consider jeopardy to the species (which arises from the listing of the nine invertebrate species).

(49) *Comment:* Two comments state that even absent a Federal nexus, the sigma of critical habitat will eliminate the development value of properties located within Units 13 and 25.

Our Response: The potential for critical habitat to result in a stigma effect, for example, on property values, is described on page 2–17 of the DEA. In some cases, the public may perceive that critical habitat designation results in limitations on private property uses above and beyond those associated with anticipated project modifications. The DEA assumes that all future development projects within the proposed critical habitat would be subject to a Federal nexus and therefore section 7 consultation regarding the invertebrates. Because scenario 2 of the DEA assumes a complete loss in development value for developable lands, further reductions in land value due to stigma are not expected.

Comments on the DEA's Small Business Analysis

(50) *Comment:* Two comments note that the developers in Units 1e and 13 are not accounted for in Exhibit A–1 as the number of private landowners is zero.

Our Response: As described in paragraph 1 of Appendix A of the DEA, this appendix considers the extent to which incremental impacts from critical habitat designation may be borne by small entities. Exhibit A–1 of the DEA highlights the number of private landowners of parcels for which incremental impacts to development are estimated. The DEA analyzes two scenarios, in the first scenario, no incremental impacts are expected in Unit 1e and therefore no landowners are affected. In the second scenario, the analysis assumes that five landowners are affected in Unit 1e. If the developer in Unit 1e is also the landowner, then the developer would be included in this number. Because Unit 13 is of low quality and located in Karst Zones 1 and 2, all impacts are expected to be baseline. No incremental impacts are forecast in Unit 13, and therefore no landowners are affected.

(51) *Comment:* Exhibit A–1 inappropriately omits those lands that are being considered for exclusion.

Our Response: The areas being excluded are preserved as part of the La Cantera Habitat Conservation Plan. These areas are not considered developable lands and therefore no impacts to future development are anticipated. The footnote to Exhibit A–1 has been revised in the FEA to better explain why lands considered for exclusion are not included in the FEA's small business analysis.

Comments on Biological Issues That Inform the DEA

(52) *Comment:* Two comments state that the assumption that there are no incremental impacts in areas that are presently low-quality habitat is incorrect. The commenters assert that because these areas do not fit into the ''minimum conservation criteria'' described in the DEA, the Service could not sustain a jeopardy determination and therefore any project modifications requested by the Service would be due to critical habitat designation.

Our Response: As described in section 3.7 of the DEA, the Service anticipates that a jeopardy finding is likely in low-quality units in Karst Zones 1 and 2 if the project further reduces the habitat quality. Projects that would further reduce quality include those that fill in cave entrances or those that substantially reduce the remaining cave cricket foraging area. Such actions would likely result in jeopardy because they would appreciably reduce the likelihood that the species would persist in that unit. If the recovery criteria have not been met for the species (and they have not for any of the KFRs where low-quality units are being designated), recovery would also be substantially reduced. Therefore, the action would likely result in a jeopardy determination.

(53) *Comment:* Two comments state that the previous protocols issued by the Service on March 8, 2006, indicate that projects that may affect the listed species can avoid doing so by preserving the cave entrance and as little as nine acres of ''core habitat'' around the entrance. The DEA assumes that complete avoidance of critical habitat would be recommended to avoid jeopardy or adverse modification in Karst Zones 1 and 2. Assuming that complete avoidance of critical habitat would be recommended to avoid jeopardy leads to an overstatement of baseline impacts.

Our Response: As described in section 3.7 of the DEA, the Service has recommended the minimum conservation criteria as outlined in the Recovery Plan as part of section 7 consultation on past development projects. Following these past examples, the Service anticipates making these recommendations to future projects that may jeopardize the species. The document issued on March 8, 2006, United States Fish and Wildlife Service, Section 10(a)(1)(A) Scientific Permit Requirements for Conducting Presence/Absence Surveys for Endangered Karst Invertebrates in Central Texas, makes no statements about effects of development to listed species or to core habitat that should be preserved. These recommendations were updated on September 8, 2011.

Other Economic-Related Comments

(54) *Comment:* In exhibit ES–4, it appears that the minimum conservation criteria have only been met in one unit (Unit 22), while according to exhibit 4–2, the minimum conservation criteria have been met in three units (Units 7, 22, and 23).

Our Response: Exhibit ES–4 presents key uncertainties associated with the estimated incremental impacts of critical habitat designation for the invertebrates. While the minimum conservation criteria have been met in three units (Units 7, 22, and 23), incremental impacts are only anticipated in Unit 22, as Unit 22 is the only high-quality unit of the three. Units 7 and 23 are low-quality units, and thus the Service anticipates recommending development be precluded in order to avoid jeopardy (i.e., they are included in the baseline). Text has been added to exhibit ES–4 in the FEA to clarify this point.

(55) *Comment:* One comment requests that better explanation be given to if and how habitat quality and project modification relate.

Our Response: As described in section 3.7 of the DEA, the project modifications recommended to avoid jeopardy and adverse modification are the same. The initial habitat quality of a unit, along with how the project impacts the unit's quality and the project's location within a Karst Zone, affects whether the request for the project modification is generated by jeopardy concerns (*i.e.,* the recommendation would be made regardless of critical habitat designation) or by adverse modification concerns (*i.e.,* specifically because of critical habitat designation).

Summary of Changes From Proposed Rule

In the February 22, 2011, proposed rule (76 FR 9872), we delineated critical habitat boundaries on the basis of the following criteria: (1) Known occupied caves; (2) the cave footprint with surface and subsurface drainage areas associated with the occupied cave; (3) the cave cricket foraging area that is a 344-ft (105-m) circle around the cave entrance, plus an additional 330-ft (100-m) distance to protect against edge effects from invasive species; (4) contiguous geological formations of Karst Zone 1 to protect mesocaverns likely connected to the caves to a distance of 0.3 mi (0.5 km) from the cave entrance; and (5) native vegetation of an area of at least 100 ac (40 ha) needed to support the diversity of native plant species normally found in the Edwards Plateau communities.

Based on the best available scientific and commercial information and information provided from the public and peer reviews, we reviewed our methodology for determining the extent of critical habitat designation for the Bexar County karst invertebrates. We refined the boundaries of our proposed critical habitat units for this final designation and revised our description of the methodology and rationale used in defining the critical habitat boundaries. We made several changes from the proposed rule in this final rule. The changes include: (1) Modifying and reducing the number of PCEs from three to two; (2) removing the 0.3–mi (0.5-km) mesocavern protection area; (3) removing the additional 330-ft (100-m) distance beyond the 344-ft (105-m) cave cricket foraging area to protect against edge effects from invasive species (the 344-ft (105-m) cave cricket foraging area remains a criterion); (4) changing the justification for 100 ac (40 ha) needed around a cave; and (5) removing five previously proposed units that no longer meet the revised criteria used to designate critical habitat. Overall, these changes result in our designation of 4,216 ac (1,706 ha) in 30 units as critical habitat, as compared to our proposed designation of 6,906 ac (2,795 ha) in 35 units. Table 1 provides a unit-by-unit list of the changes in this final rule. The changes are described in more detail below.

TABLE 1—COMPARISON OF PROPOSED AND FINAL CRITICAL HABITAT UNIT SIZES FOR THE NINE BEXAR COUNTY INVERTEBRATES

Unit	Size of proposed units in acres (hectares)	Size of final units in acres (hectares)	Land ownership type	Listed species in unit
1a	238 ac (96 ha)	144 ac (58 ha).	State	*R. infernalis* *C. madla*
1b	178 ac (72 ha)	100 ac (40 ha).	State	*C. vespera* *N. microps* *R. exilis* *R. infernalis*
1c	178 ac (72 ha)	100 ac (40 ha).	State	*C. madla*
1d	349 ac (141 ha)	225 ac (91 ha).	State	*C. madla* *R. exilis* *R. infernalis*
1e *	690 ac (279 ha)	410 ac (166 ha)	State City Private	*R. infernalis* *R. exilis* *B. venyivi* *C. madla*
1f	178 ac (72 ha)	100 ac (40 ha).	State	*R. infernalis*
2	252 ac (102 ha)	180 ac (73 ha).	Private	*C. madla* *R. exilis* *R. infernalis*
3 *	125 ac (51 ha)	85 ac (34 ha).	Private	*C. madla* *R. exilis* *R. infernalis* *B. venyivi*
4	255 ac (103 ha)	210 ac (85 ha).	Private	*R. exilis* *R. infernalis*
5	117 ac (47 ha)	100 ac (40 ha).	Private	*C. madla* *R. exilis* *R. infernalis* *B. venyivi*
6 *	105 ac (42 ha)	96 ac (39 ha)	Private City	*C. madla* *R. exilis* *R. infernalis*
7	158 ac (64 ha)	100 ac (40 ha).	Private	*R. exilis*
8 *	471 ac (191 ha)	243 ac (98 ha)	Private City	*C. madla* *R. infernalis* *R. exilis*
9	286 ac (116 ha)	105 ac (42 ha)	State Private	*C. madla* *R. exilis*
10a [1]	67 ac (27 ha)	38 ac (15 ha)	City Private.	*R. infernalis*
10b [1]	66 ac (27 ha)	35 ac (14 ha).	City	*R. infernalis*
11a [1]	21 ac (8.5 ha)	Removed (0 ac, 0 ha).	Private	*R. exilis*

TABLE 1—COMPARISON OF PROPOSED AND FINAL CRITICAL HABITAT UNIT SIZES FOR THE NINE BEXAR COUNTY INVERTEBRATES—Continued

Unit	Size of proposed units in acres (hectares)	Size of final units in acres (hectares)	Land ownership type	Listed species in unit
11b [1]	16 ac 6.5 ha	Removed (0 ac, 0 ha).	Private	*R. exilis*
11c [1]	21 ac 8.5 ha	Removed (0 ac, 0 ha).	Private	*R. exilis*
11d [1]	52 ac 21 ha	Removed (0 ac, 0 ha).	Private	*R. exilis*
11e	102 ac (41 ha)	89 ac (36 ha).	Private	*R. exilis*
12	371 ac (150 ha)	166 ac (67 ha).	Private	*R. exilis*
13	187 ac (76 ha)	100 ac (41 ha).	Private	*R. exilis*
14	330 ac (134 ha)	292 ac (118 ha).	Private	*R. infernalis*
15	339 ac (137 ha)	217 ac (88 ha).	Private	*C. venii* *R. infernalis*
16	194 ac (76 ha)	103 ac (42 ha).	Private	*R. infernalis*
17 *	114 ac (46 ha)	96 ac (39 ha).	Private	*C. madla* *R. infernalis*
19	142 ac (57 ha)	81 ac (33 ha).	Private	*R. infernalis*
20	247 ac (100 ha)	247 ac (100 ha).	Private	*T. cokendolpheri* *C. baronia*
21	396 ac (160 ha)	154 ac (62 ha)	City Private.	*R. exilis*
22	178 ac (72 ha)	100 ac (40 ha)	City Private.	*C. madla*
23	178 ac (72 ha)	100 ac (40 ha)	City Private.	*R. infernalis*
24 [1]	11 ac (4.5 ha)	Removed (0 ac, 0 ha).	Private	*R. exilis*
25	177 ac (72 ha)	100 ac (41 ha).	Private	*C. baronia*
26	117 ac (47 ha)	100 ac (41 ha).	Private	*R. infernalis*
Totals	6,906 ac (2,795 ha)	4,365 ac. (1,766 ha).		

* Indicates unit where lands managed under the La Cantera HCP have been excluded in accordance with section 4(b)(2) of the Act.
[1] Cave is located on Camp Bullis; final critical habitat is outside Camp Bullis.
Note: Area sizes may not sum due to rounding.

Based on information we received in comments regarding the clarity of the PCEs necessary to provide for conservation of the species, we reduced the number of PCEs from three to two. In this final rule, we omit proposed PCE 2 (surface water free of pollutants that flows into the karst features) and include pollutant-free moisture as a component of karst (PCE 1), because the function of surface water free of pollutants is to maintain the high humidity needed by the invertebrates in the karst features, and this is now described in PCE 1. We also change proposed PCE 3 to include more general sources of nutrient input, rather than focusing on native plant communities, because we do not know the precise vegetative community requirements needed for the conservation of the species. Although we believe that native plant communities are preferred, are important, and can increase the long-term stability of habitat, nonnative plant species may also serve as sources of nutrients, particularly in units that are partially developed.

In the proposed rule, we delineated unit boundaries to a distance of 0.3 mi (0.5 km) from the caves to capture the amount of contiguous karst deposit we estimated was necessary to provide for subsurface movement of listed species through mesocaverns between and around occupied caves. However, because of comments we received and an internal review of the available information on the reliability of the genetic and geologic studies information, upon which we relied to propose this distance, we determined that we did not have sufficient information to justify this distance as a criterion. We also removed the justification of an area needed to support an assemblage of vegetation native to the Edwards Plateau. Instead, we used the Bexar County Karst Invertebrates Recovery Team's expert opinion (Service 2008, pp. B–1–B–5) that an area of 100 ac (40 ha) provides a higher probability of species survival and conservation, including nutrient input, moisture, and mesocaverns. Therefore, in this final rule, we delineate the boundaries to include an area of about 100 ac (40 ha) that includes subsurface karst deposits, the cave footprint, surface and subsurface drainage areas, a cave cricket foraging area, and, where possible, at least 100 ac (40 ha) of undisturbed or restorable vegetation. Because of these revisions, the size of many units is reduced substantially (see Table 1, above). See

the *Criteria Used to Identify Critical Habitat* section for additional details.

As a result in these changes in criteria used to identify critical habitat, we completely removed five units from this final designation that had been proposed for designation (Units 11a, 11b, 11c, 11d, and 24). All of these units were located adjacent to Department of Defense lands (Camp Bullis Military Reservation (Camp Bullis)), and because applying the new criteria for delineation left little or no habitat associated with the occupied cave and associated karst on Camp Bullis, the lands are not designated as critical habitat in this rule. In addition, a large portion of Unit 9 north of highway Loop 1604 is not included in this final designation because most of the property was authorized for development under La Cantera's HCP, and the small, undisturbed area around the remaining features is not considered to be essential to the conservation of the species because of its small size and because highly impervious cover in the surrounding area has reduced the input of nutrients and moisture (see Exclusions section for more details).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply; even in the event of a destruction or adverse modification finding, however, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that together provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. In addition, our knowledge of species' locations and habitat requirements are incomplete. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat

designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential for the nine Bexar County invertebrates from studies of this species' habitat, ecology, and life history as described in the *Critical Habitat* section of the proposed rule to designate critical habitat published in the **Federal Register** on February 22, 2011 (76 FR 9872), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on December 26, 2000 (65 FR 81419), and the Bexar County Karst Invertebrates Recovery Plan (Service 2011). We have determined that each of the nine Bexar County invertebrates require the physical or biological features described below.

Space for Individual and Population Growth and for Normal Behavior

The nine Bexar County invertebrates are terrestrial troglobites that require underground passages with stable temperatures (Howarth 1983, p. 373; Dunlap 1995, p. 76) and constant, high humidity (Barr 1968, p. 47; Mitchell 1971a, p. 250). In addition to the larger cave passages that are accessible by humans where the species are collected, the species also need mesocaverns (tiny voids that are connected to larger cave passages) (Howarth 1983, p. 371), which provide additional habitat to sustain viable populations of the species (White 2006, pp. 100–101). During temperature extremes, small mesocavernous spaces connected to caves may have more favorable humidity and temperature levels than the cave (Howarth 1983, p. 371); however, the abundance of food may be less in mesocaverns than in the larger cave passages. Therefore, the nine Bexar County invertebrates may spend the majority of their time in mesocaverns, only leaving during temporary forays into the larger cave passages to forage (Howarth 1987, p. 377). Based on the information above, we identify karst-forming rock containing subterranean spaces (caves and connected mesocaverns) with stable temperatures, high humidities (near saturation), and suitable substrates (spaces between and underneath rocks for foraging and sheltering) to be a physical and biological feature needed by these species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Water

The nine Bexar County invertebrates need clean water that is free of pollutants to maintain stable humidity and temperatures. To maintain stable humidity, the amount of clean water varies depending on the size of the drainage basin, caves, and mesocaverns. Water enters the karst ecosystem through surface and subsurface drainage basins. Well-developed pathways, such as cave openings and fractures, rapidly transport water through the karst with little or no purification. Caves are susceptible to pollution from contaminated water entering the ground because karst has little capacity for self-purification. The route that has the greatest potential to carry water-borne contaminants into the karst ecosystem is through the drainage basins that supply water to the ecosystem. Because cave fauna require material washed in through entrances (including human inaccessible cracks), and because they require generally high humidity, it is essential to have drainage basins with unpolluted water. The surface drainage basin consists of the cave entrance and other surface input sources, such as neighboring sinkholes and soil percolation. The subsurface or groundwater drainage basin includes mesocaverns, as well as subterranean streams that have a connection to the surface but that connection is often not observable from the surface. The surface and subsurface drainage basins do not necessarily overlap, and they may be of different size and direction (Veni 2003, pp. 7–8).

In conclusion, we identify clean surface water that flows into the karst features to be a physical and biological feature needed by these species. Sources may include runoff that flows into the caves' entrances or associated features through sinkholes or fractures, and through-ground flows via fractures, conduits, and passages.

Surface Plant and Animal Communities

The nine Bexar County invertebrates need healthy surface plant and animal communities in areas around and over the karst they occupy (see discussion under Background). Surface vegetation provides nutrients that support trogloxene (species that regularly inhabit caves for refuge, but return to the surface to feed) and accidental species (those that wander in or are trapped in a cave) and provides nutrients through leaf litter and root masses that grow directly into caves (Howarth 1983, p. 373; Jackson *et al.* 1999, p. 11387). Because the nine Bexar County invertebrates are at the top of their food chain (Service 2011c, p.7), habitat changes that affect their food sources (including plants and cave crickets) can affect them (Culver *et al.* 2000, p. 395).

Surface vegetation also protects the subsurface environment against drastic changes in the temperature and moisture regime. It serves to filter pollutants (to a limited degree) before they enter the karst system and protects against nonnative species invasions (Biological Advisory Team 1990, p. 38).

Surface invertebrates provide food for trogloxenes, such as cave crickets, bats, toads, and frogs. Other animals wash or accidentally stumble into caves and are food sources for cave-limited species. A

healthy, native arthropod community may also better stave off fire ants (Porter *et al.* 1988, p. 914), which pose a threat to the karst ecosystem.

Cave crickets are an important source of nutrient input for karst ecosystems (Barr 1968, p. 48; Reddell 1993, p. 2). The cave crickets forage on the surface at night and roost in the cave during the day. Cave crickets provide food for karst species, which feed on their eggs, young, and feces (Mitchell 1971b, p. 250; Barr 1968, pp. 51–53; Poulson *et al.* 1995, p. 26). Many of the vertebrate species that occasionally use caves bring in a significant amount of energy in the form of scat, nesting material, and carcasses.

Natural quantities of plants and animals are an important part of a functioning ecosystem. Therefore, based on the information above, we identify a healthy surface community of plants (for example, juniper-oak woodland) and animals (for example, cave crickets) living in and near the karst feature that provides nutrient input and protects the karst ecosystem from adverse effects (nonnative species invasions, contaminants, and fluctuations in temperature and humidity), as being a essential biological feature.

Primary Constituent Elements for the Nine Bexar County Invertebrates

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the nine Bexar County invertebrates in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements (PCEs) to be the elements of physical or biological features that together provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the PCEs specific to each of the nine Bexar County invertebrates are:

(1) Karst-forming rock containing subterranean spaces (caves and connected mesocaverns) with stable temperatures, high humidities (near saturation), and suitable substrates (for example, spaces between and underneath rocks for foraging and sheltering) that are free of contaminants and

(2) Surface and subsurface sources (such as plants and their roots, fruits, and leaves, and animal (*e.g.,* cave cricket) eggs, feces, and carcasses) that provide nutrient input into the karst ecosystem.

With this designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species, through the identification of the appropriate existing or restorable quantity and spatial arrangement of the features' primary constituent elements sufficient to support the life-history processes of the species. All units designated as critical habitat are currently occupied by one or more of the nine Bexar County invertebrates and some contain the primary constituent elements in the appropriate quantity and spatial arrangement sufficient to support the life-history needs of the species. Others are degraded, and some may never reach recovery criteria for the species.

Special Management Considerations or Protection

When designating critical habitat, we assess the physical or biological features within the geographical area occupied by the species at the time of listing that are essential to the conservation of the species and which may require special management considerations or protection.

The Bexar County human population is projected to increase 13.8 percent from 2010 to 2020, and 45.2 percent by 2050 (San Antonio Planning Department 2005, p. 1). Most of the threats to the nine Bexar County invertebrates and their PCEs are the result of this continued rapid population growth and associated urbanization. Threats include: Filling and collapsing caves; altering drainage patterns, decreasing water infiltration, and drying karst or increasing flooding; removing native vegetation and replacing it with impervious cover and nonnative plants; reducing nutrient input into caves; changing temperatures; decreasing humidity; contaminating habitat as a result of human activities in the surface and subsurface drainage basins of caves and in adjacent karst areas; increasing human visitation, resulting in alteration of the cave habitat and direct mortality of listed species; and increasing infestation by fire ants, a predator and competitor that can cause direct predation on and competition with trogloxenes like cave crickets, ultimately reducing nutrient input into the cave.

In 2000, 437 caves were known in Bexar County, and about 109 of the 437 had been sealed or destroyed, including some that had not been biologically studied, but by observation of fauna, had likely contained some of the listed species. Currently, 523 caves are registered in Bexar County, with 103 of those confirmed as sealed or destroyed, and about 40 more suspected as sealed or destroyed, but which need to be visited for confirmation (Veni 2011, pers. comm.).

Construction and development activities that may not destroy a cave entrance can still result in collapse of the cave ceiling or other adverse effects on the karst environment. On ranch land or in rural areas, it is not uncommon to use caves as trash dumps (Culver 1986, p. 434; Reddell 1993, p. 2) or to cover the entrances to prevent livestock from falling in (Elliott 2000, pp. 374–375). These activities can be detrimental to the karst ecosystem by causing direct destruction of habitat or altering the natural passage of organisms, water, detritus, and other organic matter into a cave. Quarrying of limestone and road base material is a widespread activity that can remove vegetation and destroy karst habitat. A number of occupied caves in Bexar County have been severely impacted in the past, and an examination of recent aerial photography reveals recent impacts to karst habitat near several other occupied caves.

Cave organisms are adapted to live in a narrow range of temperature and humidity. To sustain these conditions, both natural surface and subsurface flow of water and nutrients should be maintained. Decreases in water flow or infiltration can result in excessive drying and may slow decomposition of organic matter, while increases can cause flooding that drowns air-breathing species and carries away available nutrients. Alterations to surface topography, including decreasing or increasing soil depth or adding nonnative fill, can change the nutrient flow into the cave, and affect the cave community (Howarth 1983, p. 381). Changes in the amount of impermeable cover, collection of water in devices like storm sewers, increased erosion and sedimentation, and irrigation and sprinkler systems can affect water flow to caves and the surrounding karst. Changes in the quantity of water, its organic content, the timing and extent of flood pulses, or droughts may negatively impact the listed species.

Karst ecosystems are heavily reliant on surface plant and animal communities to maintain nutrient input, reduce sedimentation (in the case of plants), and resist exotic and invasive species. As the surface around a cave entrance or over the associated karst ecosystem is developed, native plant communities are often replaced with impermeable cover or exotic plants from

nurseries. The abundance and diversity of native animals may decline due to decreased food and habitat, combined with increased competition and predation from urban, exotic, and pet species. As surface plant and animal communities are destroyed, food and habitat once available to trogloxenes decreases. Destruction of plant communities can lead to increased erosion that causes sedimentation within caves. Where native woodland and grassland communities are present, a perimeter area is needed to shield the core vegetation habitat from impacts associated with edge effects or disturbance from adjacent urban development (Lovejoy *et al.* 1986, p. 284; Yahner 1988, pp. 333–334). Effects from such impacts can include increases in invasive species and pollutants, and changes in microclimates, which can adversely affect the listed species by impacting nutrient cycling processes important in cave/karst dynamics.

Much of the habitat occupied by the Bexar County invertebrates is particularly sensitive to groundwater contamination, because little or no filtration occurs, and water penetrates rapidly through bedrock conduits (White 1988, p. 149). The ranges of these species are becoming increasingly urbanized, and, thereby, they are becoming more susceptible to contaminants including sewage, oil, fertilizers, pesticides, herbicides, seepage from landfills, pipeline leaks, or leaks in storage structures and retaining ponds. Activities on the surface, such as disposing of toxic chemicals or motor oil, can contaminate caves (White 1988, p. 388). Materials like cleaning agents, industrial chemicals, and heavy metals can also easily infiltrate subterranean ecosystems by the pollutants leaching into the karst, for example, from leaking underground storage tanks, or by being washed into the surface or subsurface drainage area. Contamination of karst habitat can also occur from the deposition of air pollutants in the surface or subsurface drainage area and improper disposal of litter, motor oil, batteries, or other household products in or near caves (White 1988, pp. 399–400).

Continued urbanization will increase the likelihood that karst ecosystems are polluted by contamination from leaks and spills, which often have occurred in Bexar County. The Texas Commission on Environmental Quality (TCEQ 2010, pp. TCEQ—5 to TCEQ—8) summarized information on groundwater contamination reported by a number of agencies, and listed 109 groundwater contamination cases that occurred in Bexar County between 1980 and 2000; the majority of them were spills or leaks of petroleum products. Groundwater contamination poses a threat to entire karst ecosystems and is particularly difficult to manage because pollutants can originate far from the sensitive karst site and flow rapidly through the subsurface (White 1988, pp. 387–388).

Fire ants are a pervasive, nonnative ant species originally introduced to the United States from South America over 50 years ago and are an aggressive predator and competitor that has spread across the southern United States. They often replace native species, and evidence shows that overall arthropod diversity, as well as species richness and abundance, decreases in infested areas. Fire ants pose a threat to the listed invertebrates in Bexar County through direct predation and competition with native species (such as cave crickets) for food resources. This threat is exacerbated by activities that accompany urbanization and that result in soil disturbance and disruption to native ant communities (refer to previous detailed discussion in Background).

Maintaining native vegetation communities greater than 12 ac (5 ha) may help sustain native ant populations and further deter fire ant infestations (Porter *et al.* 1988, p. 914; 1991, p. 869). On Camp Bullis Military Reservation, in Bexar and Comal Counties, Texas, caves are located in large expanses of undeveloped land. Although there is some ground disturbance in portions of the area, caves on Camp Bullis had less fire ant infestation than caves in more urbanized areas, even prior to beginning a fire ant treatment regime (Veni and Associates 1999, p. 55). In addition, Suarez *et al.* (1998, p. 2047) found that protection of a core area zone that is at least 330 ft (100 m) wide helps to reduce the severity of infestations of Argentine ant (*Linepithema humile*), a species similar to the fire ant.

Karst invertebrates in central Texas are especially susceptible to fire ant predation because most caves are relatively short and shallow. Fire ants have been found within and near many caves in central Texas and have been observed feeding on dead troglobites, cave crickets, and other species within caves (Elliott 1992, p. 13; 1994, p. 15; 2000, pp. 668, 678; Reddell 1993a, p. 10; Taylor *et al.* 2003, p. 3). Hot and dry weather may also encourage fire ants to move into caves during summer months, and cold weather may cause them to seek refuge or prey in the caves during the winter. Besides direct predation, fire ants threaten listed invertebrates by reducing the nutrient input that fuels the karst ecosystem. Taylor *et al.* (2003, p. 3) found that cave crickets often arrived before fire ants at baits placed above ground at night, but the arrival of fire ants corresponded to the departure of cave crickets, indicating competition for at least some food resources. Lavoie *et al.* (2007, p. 126) also reported that cave crickets and fire ants ate the same baits. Of 36 caves visited during status surveys for the nine Bexar County karst invertebrates, fire ants were found in 26 of them (Reddell 1993a, p. 32).

Models suggest climate change may cause the southwestern United States to experience the greatest temperature increase of any area in the lower 48 States (IPCC 2007, p. 15). There is also high confidence that many semi-arid areas like the western United States will suffer a decrease in water resources due to climate change (IPCC 2007, p. 16), as a result of less annual mean precipitation and reduced length of snow season and snow depth (Christensen *et al.* 2007, p. 850). These predictions underscore the importance of special management to maintain karst moisture levels to ensure survival of the nine invertebrates.

In summary, threats to the nine Bexar County invertebrates include clearing of vegetation for commercial or residential development, road building, quarrying, or other purposes. Infestation by nonnative vegetation causes adverse changes in the plant and animal community and possibly in moisture availability. An increase in fire ants can occur with development and cause competition with and predation on other invertebrates in the karst ecosystem. In addition, filling cave features for construction, ranching, or other purposes can adversely affect the listed invertebrate species by reducing nutrient input, reducing small mammal access, and changing moisture regimes. Excavation for construction or operation of quarries can directly destroy karst features occupied by any of the nine Bexar County invertebrates, including the mesocaverns they use. Examples of management that would alleviate these threats include: (1) Protecting vegetation around occupied karst features and overlying connected mesocaverns; (2) protecting subsurface karst habitat to allow movement of karst invertebrates through caves and mesocaverns; (3) controlling nonnative fire ants around cave features and within the karst cricket foraging area; (4) preventing unauthorized access to karst features by installing fencing and cave gates; and (5) keeping the surface and subsurface areas surrounding cave features and associated mesocaverns free from sources of contamination.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific and commercial data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of these species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we considered whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 2000. We also are designating specific areas outside the geographical area known to be occupied by the species at the time of listing, which are currently occupied, because we have determined that such areas are essential for the conservation of the species.

We relied on information in presence/absence survey reports submitted during project consultations with the Service, annual reports on research and recovery activities conducted under section 10(a)(1)(A) scientific permits, annual section 10(a)(1)(B) reports, section 6 species status reports, and literature published in peer-reviewed journals. We also used information from the proposed (67 FR 55063; August 27, 2002) and final (68 FR 17155; April 8, 2003) critical habitat rules, draft recovery plan (Service 2008), final recovery plan (Service 2011), and other information in our files. Critical habitat units were delineated by creating approximate areas for the units by screen-digitizing polygons (map units) using ArcMap (Environmental Systems Research Institute, Inc.). We defined the boundaries of each unit based on the criteria below:

(1) We identified all areas known to be occupied by the species. We used verified identifications of specimens by recognized species experts. In the case of Madla Cave meshweaver, we also used genetic identification (Paquin and Hedin 2004, p. 3244).

(2) We included the cave footprint with the surface and subsurface drainage areas of the cave, where known.

(3) We included a cave cricket foraging area that is a 344-ft (105-m) circle around the cave entrance (Taylor *et al.* 2005, p. 97).

(4) We also included an area of at least 100 ac (40 ha) around the cave footprint of undisturbed or restorable vegetation as recommended by the Bexar County Karst Invertebrates Recovery Team (Recovery Team) (Service 2008, pp. B1–5). The Recovery Team used an expert opinion poll to query members about species conservation needs, relying on goals identified by the recovery team for maintaining a healthy karst ecosystem for the nine invertebrates. Recovery Team members ranked a preserve size of 60 to 90 ac (16 to 36 ha) with the occupied karst feature near its center as having the highest probability of achieving each goal (Service 2008, p. B–5). Specified goals included maintaining high humidity, stable temperatures, high water quality of surface and subsurface drainage basins, and good connectivity with mesocaverns for population dynamics of troglobites. The Preserve Design Recommendations document cited in the final recovery plan increased the preserve size to a minimum of 100 ac (40 ha) for a high-quality KFA based on peer-review comments (Service 2011, p. 3). Therefore, we used a circle encompassing 100 ac (40 ha), with the occupied feature near the center as a guide, for delineation of critical habitat, because that area and configuration are likely to provide the necessary nutrient input, maintain moisture, protect a substantial amount of the mesocaverns that are likely connected to the occupied karst feature, and remain viable over the long term. In units that are undeveloped, it will also protect a diverse assemblage of vegetation. We also used this target size for units that are at least partially developed because we believe that remaining vegetation can provide nutrients, moisture, and mesocavern protection for the listed species. Although such low-quality units may not count toward the recovery of the species, they do serve to increase the probability the species is likely to survive.

We used a circle with an area of 100 ac (40 ha) as a guide for mapping the physical or biological features essential to the conservation of the nine Bexar County invertebrates. We positioned the circle with the occupied feature at the center. Then we changed the shape of the edge to maintain at least 100 ac (40 ha). We gave preference to including undisturbed, existing or restorable vegetation in Karst Zone 1; the surface and subsurface drainage basins; and the cave cricket foraging areas of the occupied features. We did not include area for cave cricket foraging if it was on the other side of an urban edge, such as a major roadway, because such edges act as barriers to cricket movement. When the delineations around individual caves overlapped, we included those caves in the same unit.

In this designation, we included areas that possess those physical or biological features essential to the conservation of each of the species and that may require special management considerations or protection. Even though the nine Bexar County invertebrates spend their entire lives underground, we included specific surface features when identifying critical habitat units, because they are important drainage links into the caves, and because surface habitat is needed to support the plant and animal communities upon which the invertebrates depend for nutrients.

We identified critical habitat units that are known to be occupied based on one or more surveys that resulted in the collection of a specimen from the karst feature and verification of a species' identity by a taxonomic expert. Some of the rarer species are difficult to collect, and it may take many surveys over multiple years to detect even the more common species (Krejca and Weckerly 2007, p. 286). Therefore, we included all locations with historic records of species occupancy, regardless of date.

We determined the units based on the presence of both of the defined PCEs and the kind, amount, and quality of habitat associated with those occurrences. We only designated areas that include both PCEs in close enough proximity to each other to be used by the invertebrate population in the area. Some of the units contain the appropriate quantity and distribution of PCEs to support the life cycle stages we have determined as essential to the conservation of the species. In other units or portions of units, one or both of the PCEs have been degraded. We included such units because the portion of the PCEs that are present can support the listed species to some extent, even though the PCEs have been degraded. For example, surface habitat without a healthy plant and animal community can continue to support listed invertebrates below the surface for a limited time, and clean water from modified surface areas can provide the humidity needed by the listed invertebrates.

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas, such as lands covered by buildings, pavement, and other structures that lack the surface physical or biological features for the nine Bexar County invertebrates, and which do not contain the subsurface physical or biological features to support life-history processes essential for the conservation of the invertebrates. The

scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the non-inclusion of such developed lands in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultations with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

However, in some instances, we included some developed areas that had partially degraded surface features. We included these developed lands because they contain the subsurface physical or biological features, such as karst-forming rock containing subterranean spaces, and enough of the surface physical or biological features in close enough proximity to support life-history processes essential for the conservation of the invertebrates. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the non-inclusion of developed lands.

We are designating as critical habitat lands that we have determined were occupied at the time of listing and contain sufficient physical or biological features to support life-history processes essential for the conservation of the species, and lands outside of the geographical area not known to be occupied at the time of listing, which are currently occupied, and which we have determined are essential for the conservation of Bexar County invertebrates.

Final Critical Habitat Designation

We are designating 30 units as critical habitat for the nine Bexar County invertebrates. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. Table 2 lists the occupied units.

TABLE 2—OCCUPANCY BY ONE OR MORE OF THE NINE BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Known to be occupied at time of listing?	Currently occupied?
1a	Yes	Yes.
1b	Yes	Yes.
1c	Yes	Yes.
1d	Yes	Yes.
1e	No	Yes.
1f	No	Yes.
2	Yes	Yes.
3	Yes	Yes.
4	Yes	Yes.
5	Yes	Yes.
6	Yes	Yes.
7	Yes	Yes.
8	Yes	Yes.
9	Yes	Yes.
10a	Yes	Yes.
10b	Yes	Yes.
11e	No	Yes.
12	Yes	Yes.
13	Yes	Yes.
14	Yes	Yes.
15	Yes	Yes.
16	Yes	Yes.
17	Yes	Yes.
19	Yes	Yes.
20	Yes	Yes.
21	No	Yes.
22	No	Yes.
23	No	Yes.
25	No	Yes.
26	No	Yes.

The approximate area of each critical habitat unit is shown in Table 3.

TABLE 3—UNIT NUMBER, KNOWN OCCUPIED CAVES, UNIT SIZE, LAND OWNERSHIP, AND LISTED SPECIES THAT ARE KNOWN TO OCCUR WITHIN EACH CRITICAL HABITAT UNIT

Unit	Known occupied caves in unit	Size of unit in acres (Hectares)	Land ownership type	Listed species in unit
1a	Bone Pile Cave, Surprise Sink	144 ac (58 ha)	State	*R. infernalis, C. madla.*
1b	Government Canyon Bat Cave	100 ac (40 ha)	State	*C. vespera, N. microps, R. exilis, R. infernalis.*
1c	Lost Pothole Cave	100 ac (40 ha)	State	*C. madla.*
1d	Dancing Rattler Cave, Lithic Ridge Cave, Hackberry Sink.	225 ac (91 ha)	State	*C. madla, R. exilis, R. infernalis.*
1e	Canyon Ranch Pit*, Continental Park Cave, Creek Bank Cave, Fat Man's Nightmare Cave*, Pig Cave, San Antonio Ranch Pit, Scenic Overlook Cave*, Tight Cave.	410 ac (166 ha)	State, Private, City	*R. infernalis, R. exilis, B. venyivi, C. madla.*
1f	10K Cave	100 ac (40 ha)	State	*R. infernalis.*
2	Logan's Cave, Madla's Drop Cave	180 ac (73 ha)	Private	*C. madla, R. exilis, R. infernalis.*
3	Helotes Blowhole*, Helotes Hilltop Cave*	85 ac (34 ha)	Private	*C. madla, R. exilis, R. infernalis, B. venyivi.*
4	Kamikazi Cricket Cave, Mattke Cave, Scorpion Cave.	210 ac (85 ha)	Private	*R. exilis, R. infernalis.*
5	Christmas Cave	100 ac (40 ha)	Private	*C. madla, R. exilis, R. infernalis, B. venyivi.*
6	John Wagner Ranch Cave No. 3*	96 ac (39 ha)	Private, City	*C. madla, R. exilis, R. infernalis.*
7	Young Cave No. 1	100 ac (40 ha)	Private	*R. exilis.*
8	Three Fingers Cave, Hills and Dales Pit*, Robber's Cave.	243 ac (98 ha)	Private, City	*C. madla, R. infernalis, R. exilis.*
9	Mastodon Pit, Feature No. 50, La Cantera Cave No. 1*, La Cantera Cave No. 2*.	105 ac (42 ha)	State, Private	*C. madla, R. exilis.*
10a	Low Priority Cave [1]	38 ac (15 ha)	City, Private	*R. infernalis.*
10b	Flying Buzzworm Cave [1]	35 ac (14 ha)	City	*R. infernalis.*
11e	Blanco Cave	89 ac (36 ha)	Private	*R. exilis.*
12	Hairy Tooth Cave, Ragin' Cajun Cave	166 ac (67 ha)	Private, City	*R. exilis.*
13	Black Cat Cave	100 ac (41 ha)	Private	*R. exilis.*

TABLE 3—UNIT NUMBER, KNOWN OCCUPIED CAVES, UNIT SIZE, LAND OWNERSHIP, AND LISTED SPECIES THAT ARE KNOWN TO OCCUR WITHIN EACH CRITICAL HABITAT UNIT—Continued

Unit	Known occupied caves in unit	Size of unit in acres (Hectares)	Land ownership type	Listed species in unit
14	Game Pasture Cave No. 1, King Toad Cave, Stevens Ranch Trash Hole Cave, F2, F4.	292 ac (118 ha)	Private	*R. infernalis.*
15	Braken Bat Cave, Isopit, Obvious Little Cave, Wurzbach Bat Cave.	217 ac (88 ha)	Private	*C. venii, R. infernalis.*
16	Caracol Creek Coon Cave	103 ac (42 ha)	Private	*R. infernalis.*
17	Madla's Cave*	96 ac (39 ha)	Private	*C. madla, R. infernalis.*
19	Genesis Cave	81 ac (33 ha)	Private	*R. infernalis.*
20	Robber Baron Cave	247 ac (100 ha)	Private	*T. cokendolpheri, C. baronia.*
21	Hornet's Last Laugh Pit, Kick Start Cave, Springtail Crevice.	154 ac (62 ha)	City, Private	*R. exilis.*
22	Breathless Cave	100 ac (40 ha)	City, Private	*C. madla.*
23	Crownridge Canyon Cave	100 ac (40 ha)	City, Private	*R. infernalis.*
25	OB3	100 ac (40 ha)	Private	*C. baronia.*
26	Max and Roberts Cave	100 ac (40 ha)	Private	*R. infernalis.*
Totals	59 caves, 30 Units	4,216 ac (1,706 ha).		

* Indicates caves and associated lands excluded from critical habitat designation under the La Cantera HCP in accordance with section 4(b)(2) of the Act.

[1] Cave is located on Camp Bullis; critical habitat is outside Camp Bullis.

Note: Area sizes may not sum due to rounding.

We present brief descriptions of the units, and reasons why they meet the definition of critical habitat for each of the nine Bexar County invertebrates, below.

Unit 1a

Unit 1a consists of 144 ac (58 ha) of State-owned land located in northwestern Bexar County in the northwestern part of Government Canyon State Natural Area (GCSNA) in the Government Canyon KFR. The GCSNA is an area of approximately 8,622 ac (2,688 ha) owned and managed by the Texas Parks and Wildlife Department (TPWD). The GCSNA is accessible to the public under certain restrictions. This unit is all undeveloped woodland and is crossed by a wet weather stream and a trail. Unit 1a contains Surprise Sink, which is occupied by Madla Cave meshweaver and *R. infernalis,* and Bone Pile Cave, which is occupied by *R. infernalis.* Surprise Sink was believed to be occupied by Government Canyon Bat Cave spider, but further investigation showed that this identification could not be confirmed (Ledford 2011, pp. 160–161). The caves in this unit were occupied at the time of listing by each of the species listed above, and the unit contains the features essential to the conservation of each species (PCEs 1 and 2).

The features essential to the conservation of the species in this unit may require special management considerations or protection to address the main threat in this unit, which is infestation of fire ants. The GCSNA currently has a management plan in place that includes treating for fire ants and managing for the benefit of the Madla Cave meshweaver and *R. infernalis.* The treatment of fire ants only temporarily alleviates the threat, so special management is required in perpetuity to remove the threat.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the two caves and connecting the edges of the overlapping circles. Unit 1a is all Karst Zone 1.

Unit 1b

Unit 1b consists of 100 ac (40 ha) of State-owned land located in northwest Bexar County in the western portion of the GCSNA in the Government Canyon KFR. Land within the unit consists of undeveloped woodland. However, there are several one-lane gravel roads that serve primarily as pedestrian trails within the State natural area. A small portion of the vegetation appears to have been cleared for ranching prior to TPWD ownership. The unit contains one cave, Government Canyon Bat Cave, which is the only cave known to be occupied by the Government Canyon Bat Cave meshweaver. The cave is also occupied by Government Canyon Bat Cave spider, *R. exilis,* and *R. infernalis.* The Government Canyon Bat Cave was occupied at the time of listing, and the unit contains all the PCEs.

The main threat to species in this unit is infestation of fire ants. The GCSNA currently has a management plan in place that includes treating for fire ants and managing for the benefit of the species. Because the treatment for fire ants only temporarily alleviates the threat, special management is required in perpetuity.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave. A small piece of Karst Zone 2 on the northern part of the circle is included because removing it would increase the edge effects. The remainder of Unit 1b is Karst Zone 1.

Unit 1c

Unit 1c consists of 100 ac (40 ha) of State-owned land located in northwestern Bexar County in the central part of GCSNA in the Government Canyon KFR. This unit is primarily undeveloped native woodland that is crossed by a hiking trail. There is only one cave in this unit, Lost Pothole Cave. The cave was occupied at the time of listing, and the unit contains all the PCEs for the species. A small amount of the woody vegetation in this unit has been cleared in the past for ranching prior to TPWD ownership.

The main threat to species in the unit is infestation of fire ants. GCSNA currently has a management plan in place that includes treating for fire ants and managing for the benefit of the species. Because the treatment for fire ants only temporarily alleviates the threat, special management is required in perpetuity.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave. Unit 1c is all Karst Zone 1.

Unit 1d

Unit 1d consists of 225 ac (91 ha) of State-owned land located in northwestern Bexar County in the central part of the GCSNA in the Government Canyon KFR. This unit is wooded and undeveloped. The unit is primarily native vegetation, but small portions of the unit appear to have been thinned in the past for ranching prior to TPWD ownership. Unit 1d contains three caves: Dancing Rattler Cave, Lithic Ridge Cave, and Hackberry Sink. The Lithic Ridge Cave is occupied by Madla Cave meshweaver, *R. exilis,* and *R. infernalis.* The Dancing Rattler Cave and Hackberry Sink are occupied by *R. infernalis.* The caves in this unit were occupied at the time of listing, and the unit contains all the PCEs for the species.

The main threat to the unit is infestation of fire ants. The GCSNA currently has a management plan in place that includes treating for fire ants. Because the treatment for fire ants only temporarily alleviates the threat, special management is required in perpetuity.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the caves and connecting the edges of the overlapping circles. Unit 1d is all Karst Zone 1.

Unit 1e

Unit 1e consists of 410 ac (166 ha) in northwestern Bexar County that includes the northeastern part of State-owned GCSNA, adjacent City of San Antonio-owned land, and private land in the Government Canyon KFR for the Madla Cave meshweaver, *R. infernalis, R. exilis,* and Helotes mold beetle. About 64 ac (26 ha) of land managed under the La Cantera HCP are not included in this designation of critical habitat (see explanation below). The majority of Unit 1e consists of undeveloped land, with the exception of several small private and county roads. Woody vegetation has been thinned for ranching on a small area of the northeastern part of the unit. Unit 1e contains eight caves. Four caves are occupied by Madla Cave meshweaver (Fat Man's Nightmare Cave, Pig Cave, San Antonio Ranch Pit, and Scenic Overlook Cave). Fat Man's Nightmare Cave is also occupied by *R. infernalis;* Pig Cave is also occupied by *R. infernalis* and *R. exilis;* San Antonio Ranch Pit is occupied by *R. infernalis, R. exilis,* and Helotes mold beetle; and Scenic Overlook Cave is occupied by *R. infernalis* and Helotes mold beetle. The unit also contains Canyon Ranch Pit and Continental Park Cave, which are occupied by *R. infernalis;* Creek Bank Cave, which is occupied by *R. exilis;* and Tight Cave, which is occupied by *R. exilis* and Helotes mold beetle.

The caves were likely occupied at the time of listing, but surveys sufficient to detect the species were not conducted before the time of listing. Since listing, the species has been found in the caves. Due to the long lifespan of these critters, or lack of dispersal that occurs, we assume they must have been there all along. Therefore, we are considering these caves to be occupied at the time of listing. The unit contains all the PCEs for the species. In addition, populations and known occurrences are so low that all need to be conserved.

Special management is needed in this unit because of infestation of fire ants and vandalism from unauthorized access. Five of the caves in this unit are owned by GCSNA, and they currently have a management plan in place that includes treating for fire ants and managing for the benefit of the species. These five caves are San Antonio Ranch Pit, Pig Cave, Creek Bank Cave, Tight Cave, and Continental Park Cave.

Three of the eight known occupied caves within this unit and their associated preserve lands are part of the 75-ac (30-ha) Canyon Ranch Preserve. The Canyon Ranch Preserve, which was acquired and is managed by La Cantera under their HCP, contains Canyon Ranch Pit, Fat Man's Nightmare Cave, and Scenic Overlook Cave. In accordance with the La Cantera HCP, these three caves and the surrounding preserve lands will be managed in perpetuity for the conservation of the species. In accordance with section 4(b)(2) of the Act, we excluded from critical habitat designation approximately 64 ac (26 ha) of the preserve from this unit (see Exclusions section). When this unit was delineated, there was an 11-ac (4-ha) portion of the 75-ac (30-ha) preserve that fell outside the boundaries. Therefore, we excluded the approximately 64-ac (26-ha) portion of the preserve land that fell within the unit boundary.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the caves and generally connecting the edges of the overlapping circles. Unit 1e is all Karst Zone 1.

Unit 1f

Unit 1f consists of 100 ac (40 ha) of State-owned land in northwest Bexar County in the southeastern part of the GCSNA in the Government Canyon KFR for *R. infernalis.* The unit is entirely native woodland, but a small amount appears to have been cleared in the past for ranching prior to TPWD ownership. It contains only one cave, which is named 10K Cave. The cave was likely occupied at the time of listing, but surveys sufficient to detect the species were not conducted prior to listing *R. infernalis.* Since the time of listing, the species has been found in the cave. Therefore, we are considering it to be occupied at the time of listing. The unit contains both PCEs for the species. In addition, populations and known occurrences are so low that all need to be conserved. We believe 10K Cave is essential for the conservation of the species. The unit contains all the PCEs for the species.

The major threat to Unit 1f is fire ant infestation. The GCSNA currently has a management plan in place that includes controlling fire ants, limiting access, monitoring the status of habitat, prohibiting the use of pesticides, and constructing gates and fences.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave. Unit 1f is all Karst Zone 1.

Unit 2

Unit 2 consists of 180 ac (73 ha) of private land located in northwestern Bexar County north of Bandera Road and southeast of High Bluff Road in the Helotes KFR. This unit contains a mix of large, wooded tracts with several residential buildings, cleared areas, a quarry on the southeastern edge, and private or county roads.

Unit 2 contains two caves. Madla's Drop Cave is occupied by Madla Cave meshweaver and *R. infernalis.* Logan's Cave is occupied by *R. infernalis* and *R. exilis.* These caves were occupied at the time of listing, and the unit contains all the PCEs for the species. Two paved roads cross the cave cricket foraging area of this unit and act as barriers to cricket movement.

The features essential to the conservation of the species may require special management considerations or protection, because of residential development. Threats include the potential for destruction of habitat from vandalism, contamination of the subsurface drainage area of the unit, drying of karst, reduction of nutrient input, and infestation of fire ants.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the caves and generally connecting the edges of the overlapping circles. Areas of Karst Zone 3 karst along the southern portion of the unit were left out, and the unit was expanded outside the circles in a small area to the east and to the southwest to include the estimated subsurface drainage basin. Unit 2 is all Karst Zone 1.

Unit 3

Unit 3 consists of 110 ac (45 ha) of private land in northwestern Bexar County, east of Bandera Road and northwest of Scenic Loop in the Helotes KFR. About 25 ac (10 ha) of lands managed under the La Cantera HCP are not included in this designation of critical habitat (see explanation below). The unit contains relatively large, wooded tracts. This unit contains two caves, Helotes Blowhole and Helotes Hilltop Cave. Helotes Blowhole is occupied by Madla Cave meshweaver, *R. infernalis,* and *R. exilis.* The Helotes Hilltop Cave is occupied by Madla Cave meshweaver, *R. exilis,* and Helotes mold beetle. Both caves were occupied at the time of listing, and the unit contains all the PCEs for the species.

Special management is needed in this unit because of the potential for destruction of habitat from vandalism, contamination of the subsurface drainage area of the unit, and infestation of fire ants. In addition, a small portion of the northern side of the unit has been developed with residential homes. Unit 3 contains several small residential roads and is bordered on its southwestern edge by Bandera Road, a four-lane divided highway. This unit does not include the entire 344-ft (105-m) cave cricket foraging area around Helotes Hilltop Cave in Karst Zone 3, because a paved road creates a barrier to cave cricket movement. The road is located in Karst Zone 3, and the area east of the road is not included in critical habitat.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the caves and generally connecting the edges of the overlapping circles. Because of the large amount of Karst Zone 3 to the east was left out, we expanded the western circle to the north and northwest in Karst Zone 1 to the boundary proposed for the unit. Some areas of Zone 3 are included along the eastern boundary of the unit to include more of the cave cricket foraging area for Helotes Hilltop Cave. Areas of Zone 3 along all but a part of the northern portion of the unit were left out of this designation. The rest of Unit 3 is Karst Zone 1.

In accordance with section 4(b)(2) of the Act, we excluded from critical habitat designation approximately 25 ac (10 ha) of land surrounding the caves under the La Cantera HCP (see Exclusions section). These caves and the surrounding preserve lands will be managed in perpetuity for the conservation of the species. The remainder of the unit needs special management because of the presence of roads and residential development.

Unit 4

Unit 4 consists of 210 ac (85 ha) of private land in northwestern Bexar County, west of the intersection of Scenic Loop and Cross XD Road in the UTSA KFR. Tower View Road and Cash Mountain Road cross the northern part of the unit, and Rafter S and Cross XD cross the southern part. Unit 4 contains three caves. Kamikaze Cricket Cave is occupied by *R. exilis* and *R. infernalis*. Mattke and Scorpion Caves are occupied by *R. infernalis*. These three caves were occupied at the time of listing, and parts of the unit contain all the PCEs for the species.

Special management is needed in this unit because of the potential for destruction of habitat from vandalism and potential future development, contamination of the subsurface drainage area of the unit, drying of karst areas, reduction of nutrient input, and infestation of fire ants. In addition, this unit contains several residential roads, but no major roadways or highways. Lands surrounding Unit 4 consist mainly of relatively large, residential tracts. The unit requires special management because of threats from existing and potential future residential development.

This unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the caves and generally connecting the edges of the overlapping circles. Portions on the western edges of the circles were cut out because they are Karst Zone 3. The circles were extended outside the circles to the east and northeast to include undisturbed vegetation. Some areas of Karst Zone 3 are included along the western edges of the cave cricket foraging areas of Kamikaze Cricket and Mattke Caves. The remainder of the unit is Karst Zone 1 except for a small finger of Karst Zone 3, which is included to reduce edge effects.

Unit 5

Unit 5 consists of 100 ac (40 ha) of private land in northwestern Bexar County, northwest of Cedar Crest Drive and north of Madla Ranch Road in the Helotes KFR. The unit contains a large tract of undeveloped woodland and several smaller, wooded tracts developed with homes and associated residential roads. This unit contains one cave, Christmas Cave, which is occupied by *R. exilis, R. infernalis,* Helotes mold beetle, and Madla Cave meshweaver. The cave was occupied at the time of listing, and the unit contains all the PCEs for the species.

The unit requires special management because of the presence of residential development and impending future development. Threats include the potential for destruction of habitat from development and vandalism, contamination of the subsurface drainage area of the unit, reduction of moisture and nutrients, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave. Large areas of Zone 3 were then removed from the southeast portion, but a small amount of Karst Zone 3 is included along the southeastern boundary of the unit to include the cave cricket foraging area for Christmas Cave. The rest of Unit 5 is Karst Zone 1. The boundary circle was expanded to include more Karst Zone 1 along its northeast edge, around the northwest side, and to the southwest edge to include 100 ac (40 ha) of undisturbed vegetation. However, there are homes and associated roads within the cave cricket foraging area of the cave.

Unit 6

Unit 6 consists of 96 ac (39 ha) of private and City of San Antonio-owned land located in northwestern Bexar County, bordered to the south by Menchaca Road and to the west by Morningside Drive in the UTSA KFR. About 4 ac (1.6 ha) of land managed under the La Cantera HCP are not included in this designation of critical habitat (see explanation below). Unit 6 consists primarily of large, undeveloped, woodland tracts with several smaller areas developed with homes. John Wagner Ranch Cave No. 3 is the only cave in this unit, and it is occupied by Madla Cave meshweaver, *R. exilis,* and *R. infernalis.* The cave was occupied at the time of listing, and the unit contains all the PCEs for the species.

Special management is needed in this unit because of the destruction of habitat from development and vandalism, contamination of the subsurface drainage area of the unit, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave and then cutting most of Karst Zone 3 out of the circle, which is primarily the southern portion of the circle. A small portion of Karst Zone 3 is included in the unit to include the cave cricket foraging area on the south side. The unit was expanded outside the remaining circle on the northeastern side to include a minimum of 100 ac (40 ha) of native vegetation. The majority of

land included in Unit 6 is in Karst Zone 1.

In accordance with section 4(b)(2) of the Act, we excluded from critical habitat designation in this unit the John Wagner Ranch Cave No. 3 and approximately 4 ac (1.6 ha) surrounding the cave under the La Cantera HCP (see Exclusions section). The cave and surrounding preserve lands will be managed in perpetuity for the conservation of the species.

Unit 7

Unit 7 consists of 100 ac (40 ha) of private land located in northwestern Bexar County, south of Babcock Road near the intersection of Cielo Vista Drive and Luna Vista in the UTSA KFR. The unit is largely wooded, but there is some development in the extreme northern and eastern parts of the unit. Unit 7 contains one cave known as Young Cave No. 1, and it is occupied by *R. exilis.* The cave was occupied at the time of listing, and the unit contains all the PCEs for the species.

This unit requires special management because of residential development. There is a new road, Camino del Sol, which ends east of Young Cave No. 1 and is located within the cave cricket foraging area. Other threats include the potential for destruction of habitat from vandalism and new construction, contamination of the subsurface drainage area, drying of karst, reduction of nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around Young Cave No. 1. The circle was moved slightly to the southeast to avoid Karst Zone 3. A small finger in the northeast portion of the unit is Karst Zone 3. The remainder of the unit is entirely in Karst Zone 1.

Unit 8

Unit 8 consists of 243 ac (98 ha) of private and City of San Antonio's Thrift Tract land located in northwestern Bexar County in the UTSA KFR. About 52 ac (21 ha) of land managed under the La Cantera HCP are not included in this designation of critical habitat (see explanation below). The unit is bordered by Kyle Seale Parkway on the northwest, by Moss Brook Drive on the northeast, and by Cotton Trail Lane on the south. Some of the land is undeveloped woodland, but some areas on the edges of the unit have been developed or have been cleared for future development. This unit contains three caves: Three Fingers Cave, Hills and Dales Pit, and Robber's Cave. Hills and Dales Pit and Robber's Cave are occupied by Madla Cave meshweaver, *R. exilis,* and *R. infernalis.* Three Fingers Cave is occupied by *R. exilis* and *R. infernalis.* This unit was occupied at the time of listing, and the unit contains all the PCEs for the species.

The extreme southern portions of this unit have been subdivided and developed with homes. Several roads cross the unit. Threats in this unit include the potential for destruction of habitat from vandalism and development, contamination of the subsurface drainage area of the unit, drying of karst, reduction of nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the three caves and generally connecting the edges of the resulting circles. Areas with dense development were cut out of the circle along the northeastern and extreme southern edges. A quarry was cut out from the northwestern portion. The unit is entirely in Karst Zone 1.

In accordance with section 4(b)(2) of the Act, we excluded from critical habitat designation in this unit the Hills and Dales Pit and approximately 52 ac (21 ha) surrounding the cave under the La Cantera HCP (see Exclusions section). The cave and surrounding preserve lands will be managed in perpetuity for the conservation of the species. There is a total of approximately 70 ac (28 ha) of preserve area surrounding the cave and being managed under the La Canter HCP. However, approximately 18 ac (7 ha) of the 70 ac (28 ha) preserve fell outside the boundaries of this unit when the unit was delineated. Therefore, we excluded the approximately 52-ac (21-ha) portion of the preserve land that fell within the unit boundary.

Unit 9

Unit 9 consists of 105 ac (42 ha) of State and private land in north-central Bexar County on the South side of Loop 1604 and east of the Loop 1604 intersection with IH 10 in the UTSA KFR. This unit is primarily a large tract of undeveloped woodland. The unit is bordered to the west by the University of Texas at San Antonio campus and to the east by Valero Way. Unit 9 has two caves: Mastodon Pit and Feature No. 50. Feature No. 50 is occupied by Madla Cave meshweaver, and Mastodon Pit is occupied by *R. exilis.* Both caves were occupied at the time of listing, and the unit has all of the PCEs for the species.

Threats include the potential for destruction of habitat from vandalism and development, contamination of the subsurface drainage area of the unit, drying of karst, reduction of nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the two caves and generally connecting the edges of the resulting circles. The majority of the land included in Unit 9 is Karst Zone 1 or Karst Zone 2 (because Feature No. 50 was found to be occupied after Veni (2003) delineated the zones). We stopped the boundary of the unit on the north side at the southern edge of Loop 1604, because this major roadway and the major shopping mall north of it do not have one or more of the PCEs, including sources of nutrient input. The western edge generally follows the edge of development. The area to the north of Loop 1604 is not included in this final critical habitat designation, because it was authorized for adverse impacts under La Cantera's HCP (see Exclusions section). We expanded the edge of the circles to the south to include 100 ac (40 ha) of undisturbed vegetation and contiguous karst.

Unit 10a

Unit 10a consists of 38 ac (15 ha) of private and City of San Antonio land. The unit is located in north central Bexar County outside the southern boundary of the western portion of Camp Bullis (a military reservation) in the Stone Oak KFR. The eastern part of the unit is in Eisenhower Park, operated by the City of San Antonio for picnicking, jogging, and nature study. The remainder of the unit is in private ownership. The unit is almost entirely undeveloped, but contains some unpaved roads and hiking trails. This unit was occupied at the time of listing and contains all the PCEs of the species.

Low Priority Cave is located on Camp Bullis and contains *R. infernalis.* However, the Low Priority Cave's entrance is not included in the unit (because it is exempt under section 4(a)(3) of the Act; see Exemptions below), but part of its cave cricket foraging area and mesocaverns likely connected to the cave are included in this unit.

The unit requires special management because of human use of the park, possible future development on private land, and the presence of trails and a secondary roadway in the unit. Main threats include the potential for destruction of surface vegetation, contamination of the subsurface drainage area of the unit, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave entrance and removing the portion of the circle within Camp

Bullis. The unit is all Karst Zone 1 except for a small portion of Karst Zone 3 in the northwest corner of the unit, which is included because removing it would increase the edge effect.

Unit 10b

Unit 10b consists of 35 ac (14 ha) of Eisenhower Park, operated on Federal land by the City of San Antonio in north-central Bexar County, east of Unit 10a and along the southern boundary of Camp Bullis in the Stone Oak KFR. The unit is mostly wooded and is entirely in Eisenhower Park. Flying Buzzworm Cave, which contains *R. infernalis,* is located on Camp Bullis. An immature blind *Cicurina* has been collected from the cave, but has not been identified to species. The cave was occupied at the time of listing. Unit 10b contains the PCEs for the species.

The unit requires special management because of human use of the park and the presence of trails and a secondary roadway in the unit. Threats include the potential for destruction of surface vegetation, contamination of the subsurface drainage area of the unit, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave entrance and removing the portion of the circle within Camp Bullis according to section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) (see Exemptions section, below). Unit 10b contains contiguous Karst Zone 1.

Unit 11e

Unit 11e consists of 89 ac (36 ha) of private land outside the eastern boundary of Camp Bullis in north-central Bexar County. Unit 11e contains a substantial amount of residential development with landscaped areas and is crossed by Blanco Road on its western edge, Cardigan Chase Road near its eastern edge, and Calico Chase Road across its central portion. Blanco Cave, located in the Blanco Road right-of-way, contains *R. exilis.* Blanco Road was included in the unit because it is so close to the cave opening (it is located in Blanco Road right of way) and because it likely crosses mesocaverns connected to the feature. The cave was not known to be occupied at the time of listing, but it is currently occupied, and likely was at the time of listing because *R. exilis* likely has inhabited the Bexar County features for thousands of years, and surveys sufficient to detect the species were not conducted before the listing. Therefore, we are considering it to be occupied at the time of listing. In addition, populations and known occurrences are so low that all need to be conserved. The area within Camp Bullis is exempt under section 4(a)(3) of the Act (see Exemptions). This unit contains both PCEs, although nutrient and moisture input have been altered by development in portions of the remainder of the unit. We believe Blanco Cave is essential for the conservation of the species.

Major threats to physical or biological features in Unit 11e include destruction of habitat from vandalism and potential future development, contamination of the subsurface drainage area of the unit, drying of karst, reduced nutrient input, and infestation of fire ants.

This unit was delineated by drawing a 100-ac (40-ha) circle around the cave and including all Karst Zone 1 outside of Camp Bullis within the resulting circle. The edge of the circle was expanded to the south and to the northeast to include undisturbed vegetation overlying Karst Zone 1. Camp Bullis was exempted according to section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) (see Exemptions section, below). The unit is all Karst Zone 1.

Unit 12

Unit 12 consists of 166 ac (67 ha) of mainly private land in north-central Bexar County, southwest of the intersection of U.S. Highway 281 and Evans Road in the Stone Oak KFR. The unit is bordered to the east by U.S. Highway 281, to the south by a quarry, and to the west by a school and some residential development. Evans Road, another major roadway, crosses the north-central part of the unit. With the exception of floodway and part of a middle school in the western part, the unit is in private ownership. Most of the unit has been developed as a single-family homes subdivision. The unit also includes some commercial development in the northeast portion. However, small amounts of undeveloped land are located in the southern, western, and extreme northern parts of the unit.

Unit 12 contains the Hairy Tooth and Ragin' Cajun Caves, which are occupied by *R. exilis.* Both caves were occupied at the time of listing. This unit contains the PCEs for the species, but sources of nutrient input are degraded through most of the unit. Houses and streets impact the cave cricket foraging areas. However, some vegetation remains over much of the unit and serves to provide a source of nutrients to the karst ecosystem. Mesocaverns likely connected to the two caves are also present in the unit. Because of the absence of KFAs for the potential to meet recovery criteria for *Rhadine exilis* in Stone Oak KFR, this low-quality unit is needed to assure long-term survival of the species.

Threats include the potential for destruction of habitat from vandalism, development, operation of a quarry, contamination of the subsurface drainage area of the unit, karst drying, reduction of nutrient input, and infestation of fire ants. The unit requires special management because of the commercial development and roadways that border and cross the unit.

This unit was delineated by drawing a 100-ac (40-ha) circle around each of the two caves and joining the edges of the two overlapping circles. A portion of the extreme southern area was removed from the unit because it contains an active quarry, which has removed some of the karst, as the karst is covered only by a thin layer of soil in Karst Zone 1. All of Unit 12 is Karst Zone 1.

Unit 13

Unit 13 consists of 100 ac (41 ha) of developed and undeveloped private land located in northeastern Bexar County in the Stone Oak KFR. The unit is located south of the intersection of Menger Road and Bulverde Road. This unit contains one cave named Black Cat Cave. The cave opening is a short distance from Bulverde Road, which crosses its cave footprint and cave cricket foraging area. The northern part of the unit includes a small amount of dense development on the northwest and borders less dense development on the northeast. Bulverde Road, a major two-lane roadway, crosses the middle of the unit from north to south. In preparation for widening the road, the City of San Antonio has modified the cave entrance. The southern part of the unit on both sides of Bulverde road is undeveloped. The cave was occupied by *R. exilis* at the time of listing, and the unit contains both PCEs.

This unit requires special management because of residential development and roadways that border and cross the unit. Threats include the potential for destruction of habitat from vandalism, potential future development, contamination of the subsurface drainage area of the unit, drying of karst from impervious cover and storm water diversion, reduced nutrient input, and infestation of fire ants.

This unit was delineated by drawing a 100-ac (40-ha) circle around the cave. We moved the circle to avoid development in the northern part of the unit. Additional undeveloped land outside the circle, but inside the area proposed, is included in the unit on the eastern and southern edge to include at least 100 ac (40 ha) of surface

vegetation, as described in the *Criteria Used To Identify Critical Habitat* section above. All of Unit 13 is Karst Zone 1. Part of the cave cricket foraging area is not included in the unit because it is either across the road or across other features that restrict cave cricket movement.

Unit 14

Unit 14 consists of 292 ac (118 ha) of private land in western Bexar County, west of the end of Louis Agusta Drive in the Culebra Anticline KFR. The unit includes several large tracts of undeveloped woodland. There is a major roadway, Stevens Parkway, in this unit, and it is in the process of being extended from the southwestern to western part of the unit. Some of the vegetation has been cleared in the past for ranching. Three caves occur in this unit: Game Pasture Cave No. 1, Stevens Ranch Trash Hole Cave, and King Toad Cave. During the comment period, we learned of two additional occupied features on the property (F2 and F4). In addition, we obtained more precise information on the locations and the surface and subsurface drainage areas of all features in this unit. All five caves and features are known to contain *R. infernalis,* and all except F2 and F4 were known to be occupied at the time of listing; however, all were likely occupied at that time. This unit contains all the PCEs of the species.

The unit requires special management because of potential future residential and commercial development and trespassing. Threats include the potential for destruction of surface vegetation and karst habitat, contamination of the subsurface drainage area of the unit, drying of karst, reduction of nutrient input, and infestation of fire ants.

This unit was delineated by drawing a 100-ac (40-ha) circle around each of the five caves and features. We were unable to include all of the edges of the overlapping circles because we added two new features to this unit and because we received additional information about the locations of the features listed for this unit in proposed critical habitat. As a result, portions of the circles in the southern, western, and northwestern portion fell outside the area proposed for critical habitat, and those portions were not therefore included inside the final unit boundaries. All of the cave cricket foraging areas are within the unit boundaries. Unit 14 is all Karst Zone 1.

Unit 15

Unit 15 consists of 217 ac (88 ha) of private land located in western Bexar County, west of Talley Road and north of Farm to Market Road 1957 in the Culebra Anticline KFR. The majority of the lands within Unit 15 are within a subdivision, and all are privately owned. Tracts in the subdivision are relatively large and still contain wooded vegetation, but roads and houses have fragmented the cave cricket foraging areas around all of the occupied caves. There is a substantial amount of the vegetation in the unit. This unit contains four caves: Braken Bat Cave, Isopit, Obvious Little Cave, and Wurzbach Bat Cave. Bracken Bat Cave is the only one that contains the Bracken Bat Cave meshweaver. All four caves are known to contain *R. infernalis,* and all were occupied at the time of listing. This unit contains all the PCEs for the species.

The unit requires special management because of the proximity of development, the potential for destruction of habitat from vandalism, and the fragmentation of the surface community of plants and animals. Threats include potential future development, contamination of the subsurface drainage area of the unit, drying of karst, reduction of nutrient input, and infestation of fire ants.

This unit was delineated by drawing a 100-ac (40-ha) circle around each of the four caves and connecting the edges of the overlapping circles. A small portion of the circle on the eastern edge in a high-density development was removed from the unit. All of Unit 15 is Karst Zone 1.

Unit 16

Unit 16 consists of 103 ac (42 ha) of private land in western Bexar County in the Culebra Anticline KFR. The unit contains several large, primarily undeveloped tracts of woodland, with Loop 1604, a major highway, to its east. With the exception of the cleared right-of–way of Loop 1604, most of the remainder of the unit is vegetated. However, some vegetation in the northern and northwestern part of the unit appears to have been cleared for livestock grazing. The area to the south of the unit is operated as a quarry. Caracol Creek Coon Cave is the only cave in this unit, and it is occupied by *R. infernalis.* The unit was occupied at the time of listing, and the unit contains all the PCEs for the species.

The unit requires special management because of the proximity of roads and potential future development. Threats include potential for destruction of habitat from vandalism, quarry operation, and potential new development; contamination of the subsurface drainage area of the unit; drying of karst; reduction of nutrient input; and infestation of fire ants.

This unit was delineated by drawing a 100-ac (40-ha) circle around the cave. The eastern part of the circle is not included in the unit because of the effects of Loop 1604 and the dense development to the east on nutrient input and mesocaverns, and we instead include undeveloped areas to the west. In addition, during the comment period, we received information that the subsurface drainage of the cave did not extend underneath Loop 1604, but inside the proposed area as previously thought. This information was credible and based on on-site studies. We expanded the unit outside the circle to the west and northwest to include at least 100 ac (40 ha) of vegetation adjacent to the cave opening. Most of Unit 16 is Karst Zone 1, except a small part of Karst Zone 2 on its western edge.

Unit 17

Unit 17 consists of 96 ac (39 ha) of private land in northwest Bexar County east of Scenic Loop Road and south of Madla Ranch Road in the Helotes KFR. About 5 ac (2 ha) within this unit's boundary are not included in this designation of critical habitat (see explanation below). The unit contains some houses and paved roads in the eastern portion and one house in the southeastern portion. The unit contains one cave, Madla's Cave, which is occupied by Madla Cave meshweaver and *R. infernalis.* The cave was occupied at the time of listing, and the unit has all the PCEs of the species.

In accordance with section 4(b)(2) of the Act, we excluded from critical habitat designation in this unit Madla's Cave and the surrounding approximately 5 ac (2 ha), which has been acquired as a preserve in accordance with the La Cantera HCP (see Exclusions section). The cave and surrounding preserve land will be managed in perpetuity for the conservation of the species.

The unit requires special management, because of the presence of residential development and potential future development within the unit. Threats include the potential for destruction of habitat from new development and vandalism, contamination of the subsurface drainage area of the unit from future development, reduction of moisture and nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave and removing areas that are not Karst Zone 1 from the northern and southwestern parts of the resulting

circle. The southern, eastern, and western portions of the circle were expanded to include 101 ac (40 ha) of undisturbed surface vegetation. However, we subtracted the 5-ac (2-ha) portion that we excluded under the La Cantera HCP in the middle of this unit to arrive at approximately 96 ac (39 ha) of designated critical habitat. A small area of Karst Zone 3 is included in the southwestern portion of the unit to reduce edge effects of drawing the boundary along Karst Zone 1.

Unit 19

Unit 19 consists of 81 ac (33 ha) of private land in north-central Bexar County north of Loop 1604 and east of Oak Road in the Stone Oak KFR. A large part of the area surrounding the cave has been developed for residential and/or commercial uses. Several other minor roadways and parking lots are scattered through the unit, and part of a golf course is in the northwestern section of the unit. Some trees are left in a neighborhood in the northern part of the unit, and a few trees are on the golf course. In addition, there is some landscaped grass surrounding Genesis Cave, the only cave in this unit. This cave is occupied by *R. infernalis* and was occupied at the time of listing. This unit contains both PCEs.

The unit requires special management, because of the high levels of residential and commercial development and the large amount of impervious cover in the unit. Threats include the potential for destruction of habitat from vandalism and future development, contamination of the subsurface drainage area of the unit, drying of karst from impervious cover and storm water diversion, reduced nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave entrance and removing areas of Karst Zone 2 from the southeastern part of the circle. Areas of Karst Zone 1 that have a large amount of impervious cover (close to 100 percent) and do not contain the PCE of sources of nutrient input were also removed from a large part of the southern portion of the circle, including part of the cave cricket foraging area. The portion of the subsurface drainage basin with high impervious cover was left in the circle because there are some entries for water and nutrients into the karst in that area. The circle was expanded to the north and west (out to the previous edge of proposed critical habitat) to include more sources of nutrients (vegetated areas); however, some of the area has a fairly high density of buildings. The unit is all Karst Zone 1.

Unit 20

Unit 20 consists of 247 ac (100 ha) of private land located in north-central San Antonio, south of Loop 410 West, and primarily along Nacogdoches Road northeast of Broadway in the Alamo Heights KFR. This unit contains one known occupied cave, Robber Baron Cave, which is the only known cave for the Cokendolpher Cave harvestman. It is also one of only two caves known to be occupied by the Robber Baron Cave meshweaver (OB3 in Unit 25 is the other cave). Robber Baron Cave was occupied at the time of listing and is the longest cave in Bexar County, consisting of approximately 0.9 mi (1.5 km) of passages (Veni 2003, p. 19). The estimated footprint of the cave now underlies numerous residential and commercial developments. Veni (1997, p. 29) reported a slow decline in moisture in the cave over time. The Texas Cave Management Association (TCMA) now owns and manages the cave and about 0.5 ac (0.2 ha) surrounding the opening. The TCMA is a nonprofit organization dedicated to the study and management of Texas cave resources. Cave gates and modifications to the cave entrance have reduced airflow into the cave and the opportunity for cave crickets to move into and out of the cave. Installation of a new cave gate, removal of trash, and revegetation of a small area surrounding the entrance was completed in 2008 by TCMA (TCMA 2011, pp 2–3) and improved these issues for a portion of the cave. This unit was occupied at the time of listing and contains both PCEs.

Surface vegetation within Unit 20 has been significantly reduced and degraded by urban development, although portions of primarily landscaped areas remain. The unit requires special management because of the high levels of residential and commercial development within the unit. Threats include the potential for destruction of habitat from vandalism, soil compaction from cave visitation, lack of a nutrient sources, contamination of the subsurface drainage area of the unit, drying of karst, and infestation of fire ants. Because of the extensive development, high levels of impervious cover, and diversion of storm water over the cave, intensive management may be needed to provide nutrients and water to the karst environment.

The unit was delineated to encompass the estimated extent of the surface and subsurface drainage and all of the contiguous Karst Zone 1. We did not use the standard procedure that we used to delineate other units because the cave footprint and contiguous Karst Zone 1 are long and narrow, and because the overall size exceeds 100 ac (40 ha).

Unit 21

Unit 21 consists of 154 ac (62 ha) of private and City of San Antonio-owned land in northeast Bexar County, northeast of the intersection of Evans Road and Stone Oak Parkway. The unit contains several large tracts of undeveloped land. Mud Creek runs through the unit, and the majority of Unit 21 is the pool area of a flood control reservoir owned by the City of San Antonio. The rest of the unit is in private ownership. Vegetation in the lower elevations of the flood pool area is modified by periodic inundation and/or mechanical control by the City of San Antonio. Unit 21 contains three caves: Hornet's Last Laugh Pit, Kick Start Cave, and Springtail Crevice. All are currently occupied by *R. exilis.* While they were not known to be occupied at the time of listing, they likely were occupied at that time. Parts of the unit contain all the PCEs for the species.

The unit requires special management because of adjacent residential development, surface contamination from runoff from urban areas in the surface watershed roadways, periodic inundation, and potential for new construction in the unit. The main threats include the potential for destruction of habitat from vandalism, potential future development, contamination of the subsurface drainage area of the unit, periodic flooding of caves and mesocaverns from stormwater retention, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around each of the three caves and joining the edges of the three overlapping circles. Some areas on the western side within the circles were removed from the designation, as they are developed. The entire unit is Karst Zone 1. One of three caves (Springtail Crevice) is located in the lower pool area of a flood control reservoir, and its surface drainage basin covers the entire watershed of Mud Creek upstream of the cave, which includes 5,675 ac (2,297 ha) of land and extends about 4.3 mi (6.9 km) upstream. We do not include the entire surface drainage area for the unit, as it is so large and extends so far from the cave and the 100 ac (40 ha) area around it. The unit designation includes about 2.7 percent of the entire surface watershed.

Unit 22

Unit 22 consists of 100 ac (40 ha) of private and City of San Antonio's Woodland Hills land located in northwestern Bexar County, northeast of Babcock Road and northwest of Heuermann Road in the UTSA KFR. There are several unpaved roads and trails, including one within the cave cricket foraging area. The unit is mostly undeveloped woodland, but some areas appear to have been cleared in the past for ranching. Unit 22 is a combination of private land and the City of San Antonio's Woodland Hills Preserve for protection of the Edwards Aquifer recharge. Breathless Cave is the only cave in this unit. Breathless Cave is occupied by Madla Cave meshweaver. The cave was not known to be occupied at the time of listing, but it is currently occupied. The cave likely was at the time of listing, but surveys sufficient to detect the species were not conducted before the listing. Therefore, we are considering it to be occupied at the time of listing. In addition, populations and known occurrences are so low that all need to be conserved. The unit contains all the PCEs for the species.

The major threat in this unit is potential future development within the unit. Threats include the potential for destruction of habitat from new development and vandalism, contamination of the subsurface drainage area of the unit from future development, reduction of moisture and nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around Breathless Cave. The resulting unit is mostly Karst Zone 1, except for a small sliver of Karst Zone 3 in its western portion, which we include because of its narrow width and the increased edge effects associated with removing this area.

Unit 23

Unit 23 consists of 100 ac (40 ha) of private land and City of San Antonio's Crownridge Canyon Natural Area in northwestern Bexar County northeast of Luskey Road and east of the end of Fiesta Grande in the UTSA KFR. A large portion of the unit is the City of San Antonio's Crownridge Canyon Natural Area, which is open to hiking, nature study, and wildlife observation. Parts of the northern and northwestern edges of the unit are privately owned. Most of Unit 23 is in native woodland vegetation. The area west and southwest of the unit has been cleared for a residential subdivision, and some houses have been constructed. The clearing extends more than halfway into the western portion of the Crownridge Canyon Cave's cave cricket foraging area. Crownridge Canyon Cave is the only cave in this unit, and it is occupied by *R. infernalis.*

The cave was not known to be occupied at the time of listing, but it is currently occupied. The cave was likely occupied at the time of listing, because surveys sufficient to detect the species had not yet been conducted by the time of listing. Therefore, we are considering it to be occupied at the time of listing. In addition, populations and known occurrences are so low that all need to be conserved. The unit contains all the PCEs for the species.

The unit is primarily threatened by adjacent residential development, roadways, and potential for new construction in the unit. Threats include the potential for destruction of habitat from vandalism and future development, contamination of the subsurface drainage area of the unit, drying of karst from impervious cover and diversion of storm water, reduced nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave. The area of the subdivision was removed from the western and southwestern parts of the circle. The remaining circle was expanded in all other directions to include 100 ac (40 ha) of vegetation. The unit is all Karst Zone 1.

Unit 25

Unit 25 consists of 100 ac (41 ha) of private land located in north central San Antonio near the intersection of Shook Avenue and East Kings Highway in the Alamo Heights KFR. This unit contains cave OB3, occupied by the Robber Baron Cave meshweaver. The cave feature was discovered during excavation in 2009, after the Robber Baron Cave meshweaver had already been listed. However, the cave was likely occupied at the time of listing because surveys to detect the species had not been conducted prior to listing. Therefore, we are considering it to be occupied at the time of listing, and we believe it is essential for the conservation of the species, because a total of only two locations are known for the species and both have impacts to the surface habitat. The surface habitat around this feature has been highly modified and is covered with residential and commercial development, including numerous streets. Unit 25 also contains landscaped lawns and residential and commercial development. The vegetation within the unit provides nutrient input into the area occupied by the species and to features and mesocaverns.

The unit is primarily threatened by high levels of residential and commercial development within the unit. Threats include the potential for destruction of habitat from vandalism and potential new development, contamination of the subsurface drainage area of the unit, drying of the karst feature, reduction of nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the feature. A small area of the south-central portion of the unit around a large church and parking lot and part of the west-central portion of the circle around an athletic field and parking lots were removed because they contain a large amount of impervious cover and do not contain sources of nutrients. Because no listed species were known from this area of the Alamo Heights KFR when Karst Zones were delineated by Veni (2003, p. 12), the entire unit is located in Karst Zone 2.

Unit 26

Unit 26 is 100 ac (40 ha) of private land in western Bexar County southwest of the extension of Stevens Ranch Parkway and south of Unit 14 in the Culebra Anticline KFR. This unit is all undeveloped land. Woody vegetation has been thinned for ranching in the eastern portion of the unit, while the western portion has been more heavily cleared. There is one cave in this unit with two entrances, Max and Roberts Cave, and it currently contains *R. infernalis.* The cave was not known to be occupied at the time of listing, but it is currently occupied, and likely was at the time of listing, because surveys to detect the species had been not conducted prior to listing. Therefore, we are considering it to be occupied at the time of listing. In addition, populations and known occurrences are so low that all need to be conserved. The unit contains both PCEs for the species. Also, we believe the cave is essential for the conservation of the species, because only a small number of locations sufficient to recover the species are known within the Culebra Anticline KFR.

The primary threats in this unit are potential future residential and commercial development and trespassing. Specific threats include the potential for destruction of surface vegetation and karst habitat from vandalism, contamination of the surface and subsurface drainage area of the unit, drying of karst habitat, reduction of

nutrient input, and infestation of fire ants.

The unit was delineated by drawing a circle with an area of 100 ac (40 ha) around the cave entrance. Areas of Karst Zone 3 on the western and southern portions of the circle outside the boundaries are not included. Also, the entire surface drainage area of the cave is not entirely included in the unit, because it could not be delineated at the time of the proposed rule. Unit 26 is primarily Karst Zone 1, but the cave cricket foraging area and part of the surface drainage basin on the western part of the unit in Karst Zone 3 are included.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for nine Bexar County invertebrates. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the nine Bexar County invertebrates. These activities include, but are not limited to:

(1) Actions that would result in removing, thinning, or destroying perennial surface vegetation. Such activities could include, but are not limited to, burning, wood cutting or other mechanical removal, grading, livestock practices that lead to excessive overgrazing, construction, road building, mining, and herbicide application. These activities could destroy or damage the native plant community and increase the number of nonnative plants and animals, including fire ants. The actions could also adversely affect cave crickets and other native animals on the surface that provide nutrients to the karst ecosystem, reduce other nutrient input (for example, leaf litter and roots), reduce water quality, reduce humidity of the cave, and change subterranean temperatures.

(2) Actions that would alter the surface topography or subsurface geology, resulting in a disruption of

ecosystem processes necessary to sustain the karst environment. Such activities could include, but are not limited to, filling cave entrances or otherwise reducing airflow in a way that limits oxygen availability; modifying cave entrances or creating new entrances that increase airflow in a way that results in drying of the karst features; altering natural drainage patterns, surface or subsurface, in a manner that alters the amount or quality or both of water entering the cave, karst feature, or mesocaverns; removing or disturbing native surface vegetation so that it alters the quality or quantity of water entering the karst environment; disturbing soil in such a way that it results in increased sedimentation in the karst environment or increased numbers of fire ants; increasing impervious cover that may decrease water quantity entering the karst environment or affect the temperature of karst below it or both within any critical habitat unit, such as paving over a vegetated area; building roads or other features that block movements of cave crickets, thereby reducing the available foraging area; and altering the entrance or opening of a cave or karst feature in a way that would disrupt movements of cave crickets or other animals that provide nutrient input or otherwise negatively altering the movement of nutrients into the cave or karst feature.

(3) Actions that would introduce pollutants to the occupied features themselves, the surface and subsurface drainage basins, or the surrounding mesocaverns. Such activities could include, but are not limited to, discharge or dumping of chemicals, silt, pollutants, household or industrial waste, pesticides or herbicides, or other harmful material into or near critical habitat units that may affect surface plant and animal communities or that may affect the subsurface karst ecosystem or degrade subsurface water quality.

(4) Activities within caves that would lead to soil compaction, changes in atmospheric conditions, or abandonment of the cave by bats or other fauna. Such activities could include, but are not limited to, excessive human traffic, destruction of cave features, enlargement of existing entrances, or creation of new entrances to karst features.

(5) Activities that would attract or increase fire ants, cockroaches, or other invasive predators, competitors, parasites, or potential vectors for diseases into caves or karst features within the critical habitat units. Such activities could include, but are not limited to, dumping of garbage in or around caves or karst features.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the critical habitat designation for *Rhadine exilis, R. infernalis,* and Madla Cave meshweaver to determine if they are exempt under section 4(a)(3) of the Act. Only these three species occur on Department of Defense lands and are included in the military's INRMP. The following areas are Department of Defense lands with completed, Service-approved INRMPs within the proposed critical habitat designation.

Approved INRMPs

Camp Bullis Military Reservation

Camp Bullis Military Reservation (Camp Bullis) has an approved INRMP in place that provides benefits to *Rhadine exilis, R. infernalis,* and Madla Cave meshweaver. Again, only these three species occur on Camp Bullis' lands. Camp Bullis is a 43.7-square-mile (mi^2) (113.3-square-kilometer (km^2)) facility under the command of Fort Sam Houston, U.S. Army, Texas. The area contains 26 caves with 1 or more of the 3 listed species. After the species were petitioned for listing, Camp Bullis began karst investigations to determine the extent of these species on their property and how best to manage them. A management plan was developed in 1999 (Veni and Associates 1999) and revised in 2002 (Veni *et al.* 2002a and 2002b) to eliminate, mitigate, and prevent harm to these and other rare species on Camp Bullis in perpetuity. The Veni *et al.* 2002a and 2002b reports became part of an INRMP in 2005. The INRMP was revised in 2007, and underwent an annual review and update in 2010.

The INRMP provides for management of all caves occupied by *Rhadine exilis, R. infernalis,* and Madla Cave meshweaver. The Madla Cave meshweaver is only found in one cave within the interior of Camp Bullis. Management actions include protecting the cave footprint, surface and subsurface drainage areas associated with the occupied cave, cave cricket foraging area, and surface plant and animal community, and controlling fire ants. The plan includes in-cave biological surveys, cave gate construction, and preservation of karst management areas (KMAs) around cave entrances. The KMAs will be preserved in perpetuity within the limits possible through the authority of Camp Bullis and its operational and mission requirements. The INRMP stipulates that should Camp Bullis ever be transferred in whole or in part, local Army officials will request that the Secretary of the Army, or other appropriate authority, review and incorporate provisions from this management plan into the property disposal procedures. Those provisions would transfer responsibility for appropriate management of any former Camp Bullis karst management areas to

all subsequent owners by deed recordation or other binding instrument.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the Camp Bullis INRMP and that conservation efforts identified in the INRMP will provide a benefit to *Rhadine exilis, R. infernalis,* and Madla Cave meshweaver occurring in habitats within or adjacent to Camp Bullis. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 4,104 ac (1,660 ha) of habitat in this final critical habitat designation because of this exemption.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide. We also consider whether the plan protects the area from all threats, particularly those with a Federal nexus and whether additional protection would be provided with critical habitat.

In the case of the nine Bexar County invertebrates, the benefits of critical habitat include public awareness of the invertebrates' presence and the importance of areas that need special management or protection for recovery of species survival, and, in cases where a Federal nexus exists, increased habitat protection for the nine Bexar County invertebrates due to the protection from adverse modification or destruction of critical habitat.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat would result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as additional public comments we received, we evaluated whether certain lands in the proposed critical habitat Units 1e, 3, 6, 8, 9, and 17 were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. We are excluding from critical habitat designation approximately 232 ac (94 ha) in portions of Units 1e, 3, 6, 8, 9, and 17 that are covered under the La Cantera HCP. Table 4 below provides approximate areas (ac, ha) of lands that meet the definition of critical habitat but are being excluded under section 4(b)(2) of the Act from the final critical habitat rule. We are excluding these areas because we believe that they are appropriate for exclusion under the ''other relevant factor'' provisions of section 4(b)(2) of the Act.

TABLE 4—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION BY CRITICAL HABITAT UNIT

Unit	Specific area	Areas meeting the definition of critical habitat, in acres (hectares)	Areas excluded from critical habitat, in acres (hectares)
1e	La Cantera HCP Canyon Ranch Preserve	64 ac (26 ha)	64 ac (26 ha).
3	La Cantera HCP Helotes Blowhole/Helotes Hilltop Preserve	25 ac (10 ha)	25 ac (10 ha).
6	La Cantera HCP John Wagner Ranch Cave Preserve	4 ac (1.6 ha)	4 ac (1.6 ha).
8	La Cantera HCP Hills and Dales Pit Preserve	52 ac (21 ha)	52 ac (21 ha).
9	Area north of Highway 1604 covered by the La Cantera HCP	82 ac (33 ha)	82 ac (33 ha).
17	La Cantera HCP Madla's Cave Preserve	5 ac (2 ha)	5 ac (2 ha).
Total		232 ac (94 ha)	232 ac (94 ha).

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (Industrial Economics 2011). The draft analysis, dated June 24, 2011, was made available for public review and comment from August 2, 2011, through September 1, 2011 (76 FR 46234). Following the close of the comment period, a final analysis (dated November 14, 2011) of the potential economic effects of the designation was developed taking into consideration the public comments and any new information (Industrial Economics 2011).

The intent of the final economic analysis (FEA) is to quantify the economic impacts of all potential conservation efforts for the nine Bexar County invertebrates; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (*e.g.,* under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 2000 (year of the species' listing) (65 FR 81419), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts of nine Bexar County invertebrates conservation efforts associated with the following categories of activity:

(1) *Development.* The potential for future residential and commercial development constitutes a primary threat to invertebrate habitat. A healthy surface community of native plants and animals and surface water free of pollutants are primary constituent elements for the species that can be adversely affected by development activity.

(2) *Transportation projects.* Road construction and improvement projects may negatively affect surface animal and plant communities and surface water quality within the habitat area.

(3) *Utility projects.* Utility projects, including pipeline, water system, and transmission line construction/maintenance, may affect critical habitat by degrading the karst forming rock where the species live.

(4) *Species/habitat management.* The invertebrates and their habitat are currently afforded some level of protection under various management plans, including the La Cantera HCP, Government Canyon State Natural Area Karst Management and Maintenance Plan, and Robber Baron Preserve Management Plan.

The FEA estimates the incremental impact of designation for two scenarios. Under Scenario 1, all development projects in Karst Zones 1 and 2 are assumed to reduce quality to low, and thus project modifications requested during consultation are considered baseline. Under Scenario 2, all development projects in Karst Zones 1 and 2 are assumed to reduce quality to medium, and thus project modifications requested during consultation are considered incremental. Impacts to development activities represent approximately 99.5 to 99.6 percent in Scenario 1, and 94 to 95 percent in Scenario 2, of the overall impacts to areas proposed for designation during the first 20 years. Between years 21 and 29, all incremental impacts are associated with development activities (as the timeframe for the analysis of impacts to other activities extends only through 20 years).

Total incremental costs for 2012 to 2031 ranged from $2,590,000 to $3,530,000 for Scenario 1, and from $43,100,000 to $55,100,000 for Scenario 2. Annualized costs during that timeframe were $244,000 to $333,000 for Scenario 1, and $4,070,000 to $5,200,000 for Scenario 2. Total estimated incremental costs for years 2032 to 2040 were $24,100 for Scenario 1, and $65,800 for Scenario 2. Estimated annualized costs were $3,700 and $10,100, respectively.

The majority of the impacts to development activities are land value losses due to restrictions on future development (91.0 to 93.4 percent of Scenario 1 development impacts and 96.5 to 97.3 percent of Scenario 2 development value impacts). The present value incremental impact to transportation activities in the areas proposed for designation range from $13,400 in Scenario 1 to $2,770,000 in Scenario 2 (assuming a 7 percent discount rate). These figures represent an annualized impact of approximately $1,270 to $262,000. No incremental impacts are expected to utility project and species and habitat management.

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation of critical habitat for the nine Bexar County invertebrates. Consequently, we have determined not to exert our discretion to exclude any areas from this designation of critical habitat based on economic impacts. A copy of the FEA with supporting documents may be obtained by contacting the Austin Ecological Services Field Office (see **ADDRESSES**) or by downloading them from the Internet at *http://www.regulations.gov.*

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this final rule, we have determined that the lands within the designation of critical habitat for the nine Bexar County invertebrates are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on

national security. Consequently, the Secretary is not exercising his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts—Habitat Conservation Plans

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships

We consider a current land management or conservation plan (HCPs as well as other types) to provide adequate management or protection if it meets the following criteria:

(1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act.

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations.

(3) The plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

We believe that portions of Units 1e, 3, 6, 8, 9, and 17 under the La Cantera Habitat Conservation Plan (HCP), which provides for the conservation of Madla Cave meshweaver and *Rhadine exilis,* fulfills the above criteria. Thus, we are excluding approximately 232 ac (94 ha) of non-Federal lands in portions of Units 1e, 3, 6, 8, 9, and 17 under this HCP.

La Cantera Habitat Conservation Plan

The goals of the La Cantera HCP are to minimize and mitigate for the potential negative effects of constructing and operating commercial, light industrial, recreational, and residential development near and adjacent to currently occupied habitat of the endangered karst invertebrates, and to contribute to conservation of the covered species and other listed and non-listed cave or karst fauna.

The La Cantera HCP authorizes take of listed species in La Cantera Cave No. 1 and La Cantera Cave No. 2 by allowing development to occur in areas surrounding these caves, which are adjacent to Unit 9. However, under the La Cantera HCP, mitigation for take within these caves was implemented by purchasing and conserving eight caves known to contain one or more of the nine Bexar County invertebrates. These mitigation caves are Canyon Ranch Pit, Fat Man's Nightmare Cave, Scenic Overlook Cave and the surrounding approximately 75 ac (30 ha) adjacent to Unit 1e; Helotes Blowhole and Helotes Hilltop Caves and the surrounding approximately 25 ac (10 ha) adjacent to Unit 3; John Wagner Ranch Cave No. 3 and the surrounding approximately 4 ac (1.6 ha) adjacent to Unit 6; Hills and Dales Pit and the surrounding approximately 70 ac (28 ha) adjacent to Unit 8; and Madla's Cave and the surrounding approximately 5 ac (2 ha) within Unit 17 (through purchase of a conservation easement). As part of their HCP, La Cantera is required to protect and manage these areas in perpetuity in accordance with the conservation needs of the species.

All of the approximately 232 ac (94 ha) of non-Federal lands under the La Cantera HCP in Units 1e, 3, 6, 8, 9, and 17 that we are excluding have either been authorized for development or preserved in perpetuity for the conservation of Madla Cave meshweaver and *Rhadine exilis.* We did include in this critical habitat designation lands surrounding these occupied caves and associated management areas, as these lands provide physical and biological features that are essential to the conservation of the species.

The Benefits of Inclusion

The principle benefit of including an area in critical habitat designation is the requirement of Federal agencies to ensure that actions that they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, which is the regulatory standard of section 7(a)(2) of the Act under which consultation is completed. Federal agencies must consult with the Service on actions that may affect a listed species, and refrain from actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some cases, the outcome of these analyses will be similar, because effects to habitat will often result in effects to the species. However, the regulatory standard is different, as the jeopardy analysis investigates the action's impact to survival and recovery of the species, while the adverse modification analysis investigates the action's effects to the designated habitat's contribution to conservation. This will, in many cases, lead to different results and different regulatory requirements. Thus, critical habitat designation may provide greater benefits to the recovery of a species than listing would alone. Therefore, critical habitat designation may provide a regulatory benefit for the Madla Cave meshweaver and *Rhadine exilis* on lands covered under the La Cantera HCP when there is a Federal nexus present for a project that might adversely modify critical habitat.

Another possible benefit of including lands in critical habitat is public education regarding the potential conservation value of an area that may help focus conservation efforts on areas of high conservation value for certain species. We consider any information about the nine Bexar County invertebrates and their habitats that reaches a wide audience, including parties engaged in conservation activities, is valuable. Designation as critical habitat of the preserve areas would provide educational benefits by informing Federal agencies and the public about presence of listed species for all units, including lands surrounding the La Cantera preserves. The process of designating critical habitat is valuable in prioritizing conservation and management of identified areas.

In summary, we believe that the benefits of inclusion of lands under the La Cantera HCP are a regulatory benefit when there is a Federal nexus present for a project that might adversely modify critical habitat and educational benefits about the listed invertebrates and their habitat.

Benefits of Exclusion

The benefits of excluding lands from critical habitat designation with properly implemented HCPs, such as the La Cantera HCP, include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed as a result of the critical habitat designation. A related benefit of exclusion is the continued ability to maintain existing and seek

new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, private landowners, and developers, which together can implement conservation actions that we would be unable to accomplish without these partners. Not only are HCPs important for listed species, but they can help conserve many species that are not State or federally listed, which might not otherwise receive protection absent the HCPs. In most HCP cases, permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. Therefore, we place great value on the partnerships that are developed with HCPs.

We believe that the exclusion of La Cantera HCP lands from critical habitat will help preserve the partnership we have developed with the La Cantera Development Company, reinforce those relationships we are building with other developers, and foster future partnerships and development of future management plans. The La Cantera HCP was developed to provide specific protection and management for the conservation of Madla Cave meshweaver and *Rhadine exilis* by purchasing and conserving eight caves known to contain one or more of the nine Bexar County invertebrates for which take was being permitted. The preserve lands under the La Cantera HCP are providing protection for the physical and biological features essential to the conservation of the species in a way that is equal to or better than designation of critical habitat would provide. Therefore, exclusion of these lands under the La Cantera HCP from critical habitat will help preserve the partnerships, and will foster future partnerships, and thus future conservation efforts.

Additionally, the La Cantera Development Company has expressed a desire to not have lands under their HCP included in our critical habitat designation. The La Cantera Development Company asked specifically for the preserve lands to be excluded, because the lands do not require additional special protection or management. We believe that exclusion of the preserve areas will help maintain a good relationship with the preserve owner. Also, excluding lands under the La Cantera HCP will show that we are committed to our partners to further the conservation for the nine Bexar County invertebrates and other endangered and threatened species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We reviewed and evaluated the benefits of inclusion and the benefits of exclusion as critical habitat those lands included in the La Cantera HCP. We acknowledge that the La Cantera HCP provides authorization of incidental take caused by development in areas around La Cantera Cave No. 1 and La Cantera Cave No. 2, but we believe that there were greater long-term conservation benefits that resulted from the implementation of this HCP, because eight cave areas were bought and are being managed in perpetuity as preserve areas for conservation of the species. Implementation of the La Cantera HCP will occur regardless of critical habitat designation. We believe that including La Cantera HCP lands in the critical habitat designation will provide little additional regulatory protection under section 7(a) of the Act when there is a Federal nexus, and educational benefits will be redundant with those already achieved through listing, the previous critical habitat designation, and areas surrounding the La Cantera HCP lands that are being designated as critical habitat by this rule. Therefore, we see very little benefit to including the La Cantera HCP lands in the critical habitat designation.

Subsequently, critical habitat may provide a regulatory benefit for the Madla Cave meshweaver and *Rhadine exilis* on lands covered under the La Cantera HCP when there is a Federal nexus present for a project that might adversely modify critical habitat. Thus, critical habitat designation could provide additional protection to the preserve areas from adverse impacts of future Federal actions (for example, condemnation by a federally funded road expansion project). Without this protection, Federal projects that would result in adverse modification could be allowed to degrade habitat in the preserves. However, the preserve areas under the La Cantera HCP are managed in perpetuity for the conservation of the Madla Cave meshweaver and *Rhadine exilis.* Also, the preserve areas are privately owned, and at this time, we do not anticipate any future projects that would involve a Federal nexus. Therefore, we believe that including the lands covered under the La Cantera HCP as critical habitat would provide very little regulatory protection.

Additionally, once an HCP is permitted, implementation of conservation measures will occur, regardless of whether critical habitat is designated within its plan boundaries, and excluding the development areas will clarify the message to Federal agencies and to the public that these impacts have already been authorized. Designation would confuse Federal agencies and the public about the value of the area without providing any meaningful benefits. Designation as critical habitat would also mislead Federal agencies and the public that the development areas are essential for conservation of the species, while providing minimal protection from a Federal project involving land condemnation.

Furthermore, we believe that the educational benefits of critical habitat designation on La Cantera HCP lands are not significant due to extensive past outreach and ongoing conservation efforts. Also, we are designating as critical habitat those lands surrounding lands covered by the La Cantera HCP, which already results in educational benefits for the listed invertebrates and their habitats without designating the La Cantera HCP lands as critical habitat. Thus, an inclusion of the La Cantera HCP lands would not provide any additional educational benefits.

In summary, we find that the benefits of excluding the La Cantera HCP lands from critical habitat outweigh the benefits of inclusion, based on the conservation values outlined in the HCP and summarized above. In consideration of the relevant impacts to our relationships with non-Federal partners to develop effective management plans that provide benefits to species, we determined that the benefits of exclusion outweigh the benefits of inclusion in critical habitat. We find that excluding lands under the La Cantera HCP will preserve our partnership and foster future habitat management and species conservation efforts with non-Federal entities. These partnership benefits are significant, because they provide protection and conservation of species on private lands that would not otherwise occur even with critical habitat designation. We believe that these partnership benefits outweigh the limited regulatory and educational benefits of including these lands in the final critical habitat designation.

Exclusion Will Not Result in Extinction of the Species

We determined that the exclusion from critical habitat designation for Madla Cave meshweaver and *Rhadine exilis* of approximately 232 ac (94 ha) of non-Federal land in Units 1e, 3, 6, 8, 9, and 17, which are covered under the La Cantera HCP, will not result in extinction of these species. Under the La Cantera HCP, eight caves containing one

or more of the nine Bexar County invertebrates has been purchased and will be managed in perpetuity for the conservation of these species. Additionally, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process due to these species' occupancy and protection provided by the La Cantera HCP provide assurances that these species will not go extinct as a result of excluding these lands from the critical habitat designation. Therefore, based on the above discussion, the Secretary is exercising his discretion to exclude approximately 232 ac (94 ha) of lands managed by the La Cantera HCP from this final critical habitat designation.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (Regulatory Planning and Review). OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the nine Bexar County invertebrates will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.,* small construction, housing builders, or subdividers). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities are affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the nine Bexar County invertebrates. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification'' Standard* section).

In our final economic analysis (FEA) of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the nine Bexar County invertebrates and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 1 through 4 and Appendix A.1 of the FEA and evaluates the potential for economic impacts related to landowners that are small developers, including: (1) New single-family housing builders, (2) new multiple housing builders, (3) new housing operative builders, and (4) land subdividers.

The FEA estimates that 20 to 149 small developers (up to 4.5 percent) may be affected by this rule. Annualized perpetuity impacts per entity range from $8,910 to $15,500. This impact is less than 0.25 percent of average annual sales of these businesses (average annual sales are $6.36 million) (Industrial Economics 2011, p. A–7).

In summary, we considered whether this designation will result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we conclude that this rule will not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for nine Bexar County invertebrates will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget (OMB) has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

As described in Chapter 4 of the FEA, critical habitat designation for the nine Bexar County invertebrates is anticipated to impact development and transportation activities. Resource extraction, energy production, and distribution are not expected to be affected. Because none of the outcomes that may constitute ''a significant adverse effect'' are relevant to this analysis, energy-related impacts within the critical habitat designation are not anticipated.

The economic analysis finds that extraction, energy production, and distribution are not expected to be affected (Industrial Economics 2011, p. A–8) and that none of the nine outcomes in OMB's guidance are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with nine Bexar County invertebrates' conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act does not apply, nor will critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because the designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the critical habitat designation will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the nine Bexar County invertebrates in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The FEA found that this designation will not affect a substantial number of small entities, but there could be costs of development restrictions in the form of reduced land values. A number of the private landowners are not small businesses. However, we found that 20 of 149 small developers may be affected by this designation, but the impact is less than 0.25 percent of average annual sales of these businesses. However, based on information contained in the FEA and described within this document, it is not likely that economic impacts to a property owner will be of a sufficient magnitude to support a takings action. We anticipate that this critical habitat designation will result in insignificant takings implications on these lands. Therefore, the takings implications assessment concludes that this designation of critical habitat for nine Bexar County invertebrates does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Texas. We received comments from the Texas State Comptroller and Texas Department of Transportation and have

addressed them in the Summary of Comments and Recommendations section of this rule. The designation of critical habitat in areas currently occupied by the nine Bexar County invertebrates imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the nine Bexar County invertebrates within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). The designation of critical habitat for the nine Bexar County invertebrates is entirely within the 5th Circuit jurisdiction; therefore, we did not prepare an environmental analysis in connection with this critical habitat designation.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that there are no Tribal lands occupied by the nine Bexar County invertebrates at the time of listing that contain the features essential for conservation of the species, and no Tribal lands unoccupied by the invertebrates that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the nine Bexar County invertebrates on Tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rulemaking are the staff members of the Austin Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entries for ''Meshweaver, Government Canyon Bat Cave'' and ''Spider, Government Canyon Bat Cave'' under ARACHNIDS in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Specific name						
*	*	*	*	*	*	*	
Arachnids							
*	*	*	*	*	*	*	
Meshweaver, Government Canyon Bat Cave.	*Cicurina vespera*	U.S.A. (TX)	NA	E	706	17.95(g)	NA.
*	*	*	*	*	*	*	
Spider, Government Canyon Bat Cave.	*Neoleptoneta microps*	U.S.A. (TX)	NA	E	706	17.95(g)	NA.
*	*	*	*	*	*	*	

■ 3. Amend § 17.95 by:
■ a. In paragraph (g), revising the critical habitat entry for the Cokendolpher Cave Harvestman (*Texella cokendolpheri*);
■ b. In paragraph (g), revising the critical habitat entry for the Braken Bat Cave Meshweaver (*Cicurina venii*);
■ c. In paragraph (g), redesignating the critical habitat entry for the Kauai Cave Wolf Spider (*Adelocosa anops*) so that it is in the order in which it appears in the table at § 17.11(h);
■ d. In paragraph (g), adding a critical habitat entry for the Government Canyon Bat Cave Meshweaver (*Cicurina vespera*) in the same alphabetical order in which the species appears in § 17.11(h);
■ e. In paragraph (g), revising the critical habitat entry for the Madla Cave Meshweaver (*Cicurina madla*);
■ f. In paragraph (g), revising the critical habitat entry for the Robber Baron Cave Meshweaver (*Cicurina baronia*);
■ g. In paragraph (g), adding a critical habitat entry for the Government Canyon Bat Cave Spider (*Neoleptoneta microps*) in the same alphabetical order in which the species appears in § 17.11(h);
■ h. In paragraph (i), revising the critical habitat entry for the Helotes Mold Beetle (*Batrisodes venyivi*);
■ i. In paragraph (i), revising the critical habitat entry for the Beetle (no common name) (*Rhadine exilis*); and
■ j. In paragraph (i), revising the critical habitat entry for the Beetle (no common name) (*Rhadine infernalis*), to read as follows.

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(g) *Arachnids.*

Cokendolpher Cave Harvestman (*Texella cokendolpheri*)

(1) Critical habitat for the Cokendolpher Cave harvestman in Bexar County, Texas, occurs in Unit 20 as described in this entry and depicted on Map 1 (index map) and Map 2 in this entry.

(2) The primary constituent elements of critical habitat for the Cokendolpher Cave harvestman are:

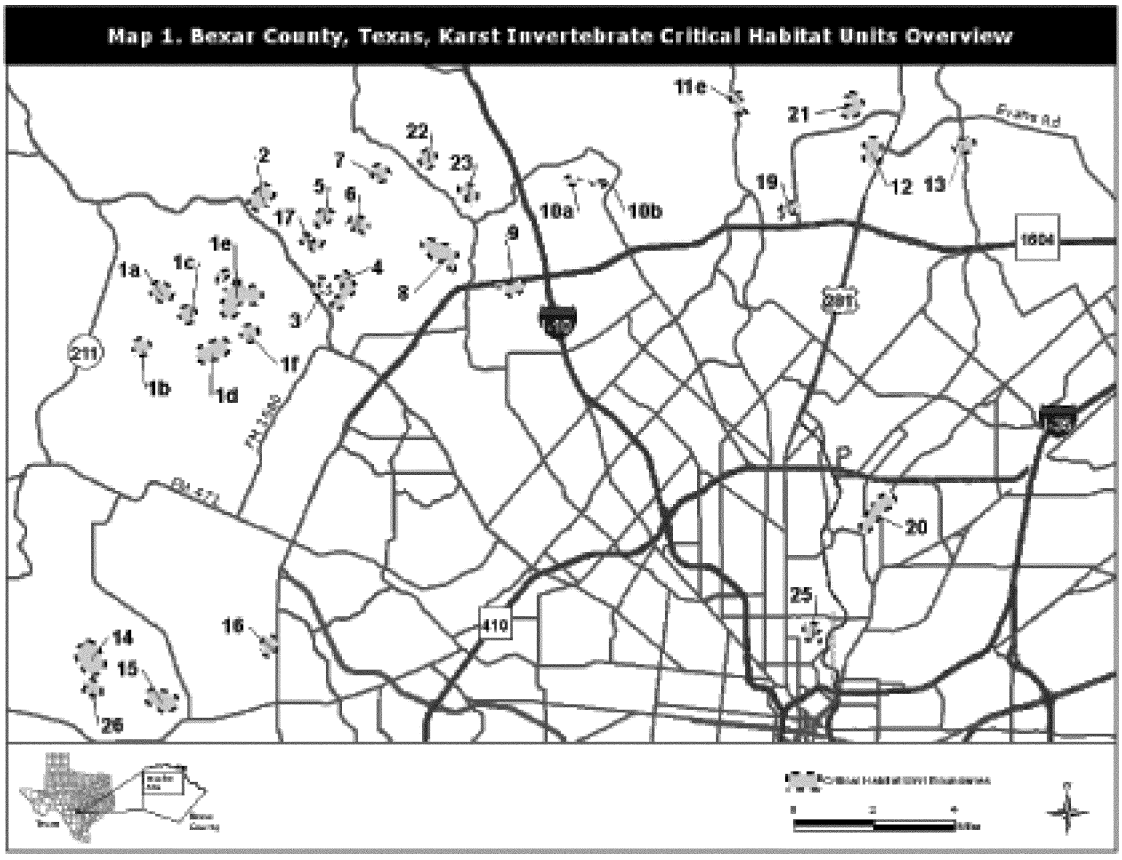
(i) Karst-forming rock containing subterranean spaces (caves and connected mesocaverns) with stable temperatures, high humidities (near saturation), and suitable substrates (for example, spaces between and underneath rocks for foraging and sheltering) that are free of contaminants; and

(ii) Surface and subsurface sources (such as plants and their roots, fruits, and leaves, and animal (e.g., cave cricket) eggs, feces, and carcasses) that provide nutrient input into the karst ecosystem.

(3) Developed lands that do not contain the subsurface primary constituent elements (see paragraph (2)(i) of this entry) and that existed on the effective date of this rule are not considered to be critical habitat.

(4) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

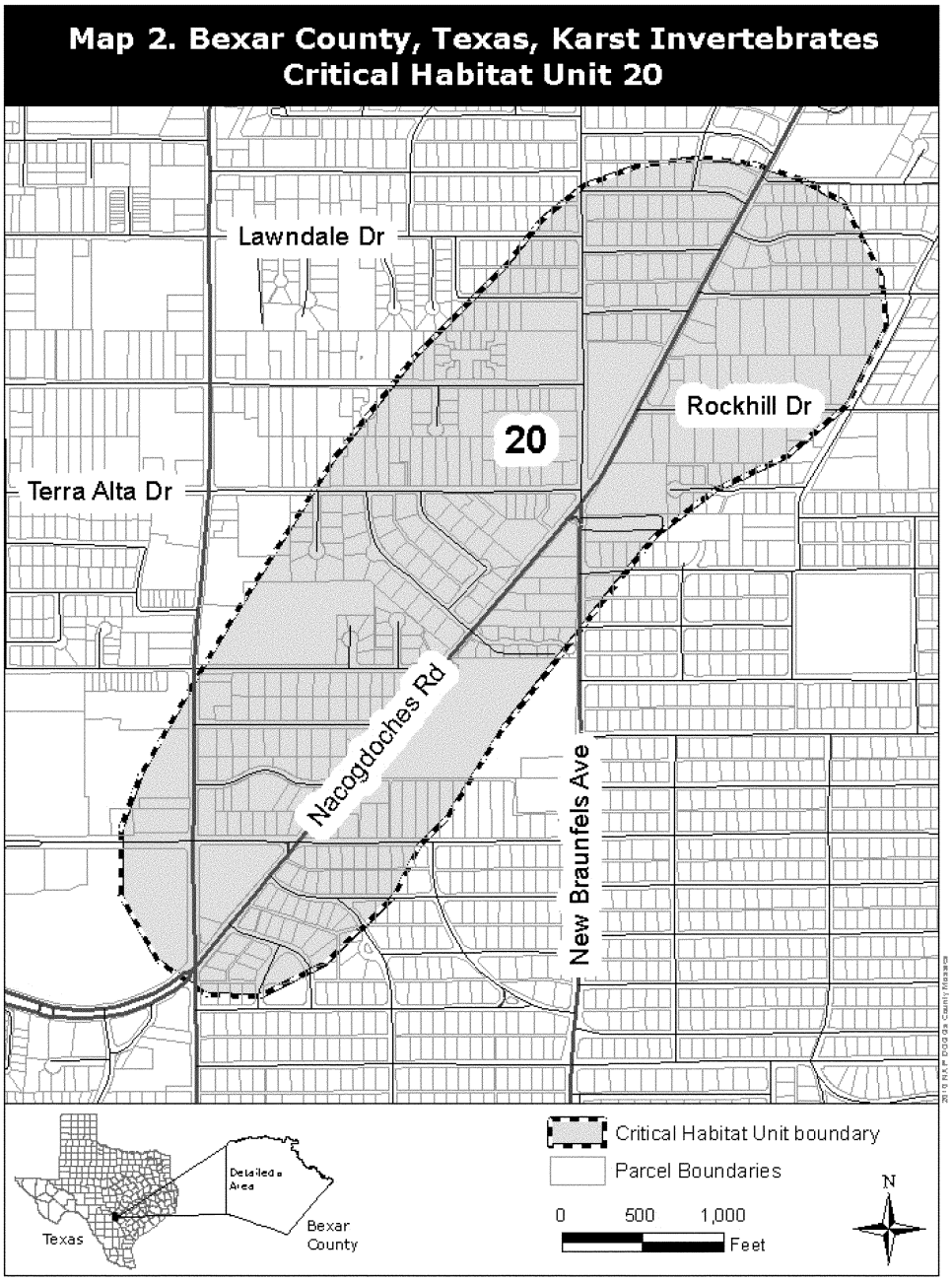
(5) Index map of Bexar County invertebrates critical habitat units, Bexar County, Texas, follows:



(6) Unit 20: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 552126, 3264361; 552287, 3264522; 552357, 3264610; 552436, 3264673; 552536, 3264710; 552654, 3264726; 552756, 3264714; 552840, 3264685; 552920, 3264644; 552991, 3264506; 553001, 3264408; 552930, 3264263; 552813, 3264165; 552683, 3264104; 552571, 3264018; 552485, 3263914; 552285, 3263659; 552175, 3263484; 552124, 3263435; 552081, 3263341; 551949, 3263214; 551826, 3263155; 551728, 3263159; 551639, 3263221; 551567, 3263343; 551569, 3263474; 551606, 3263569; 551704, 3263739; 551777, 3263863; 551969, 3264165; 552126, 3264361.

(ii) **Note:** Map 2 of Unit 20 follows:



BILLING CODE 4310–55–P

Braken Bat Cave Meshweaver (*Cicurina venii*)

(1) Critical habitat for the Braken Bat Cave meshweaver in Bexar County, Texas, occurs in Unit 15, as described in this entry and depicted on Map 2 in this entry. Unit 15 is also depicted on Map 1 (index map) provided at paragraph (5) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

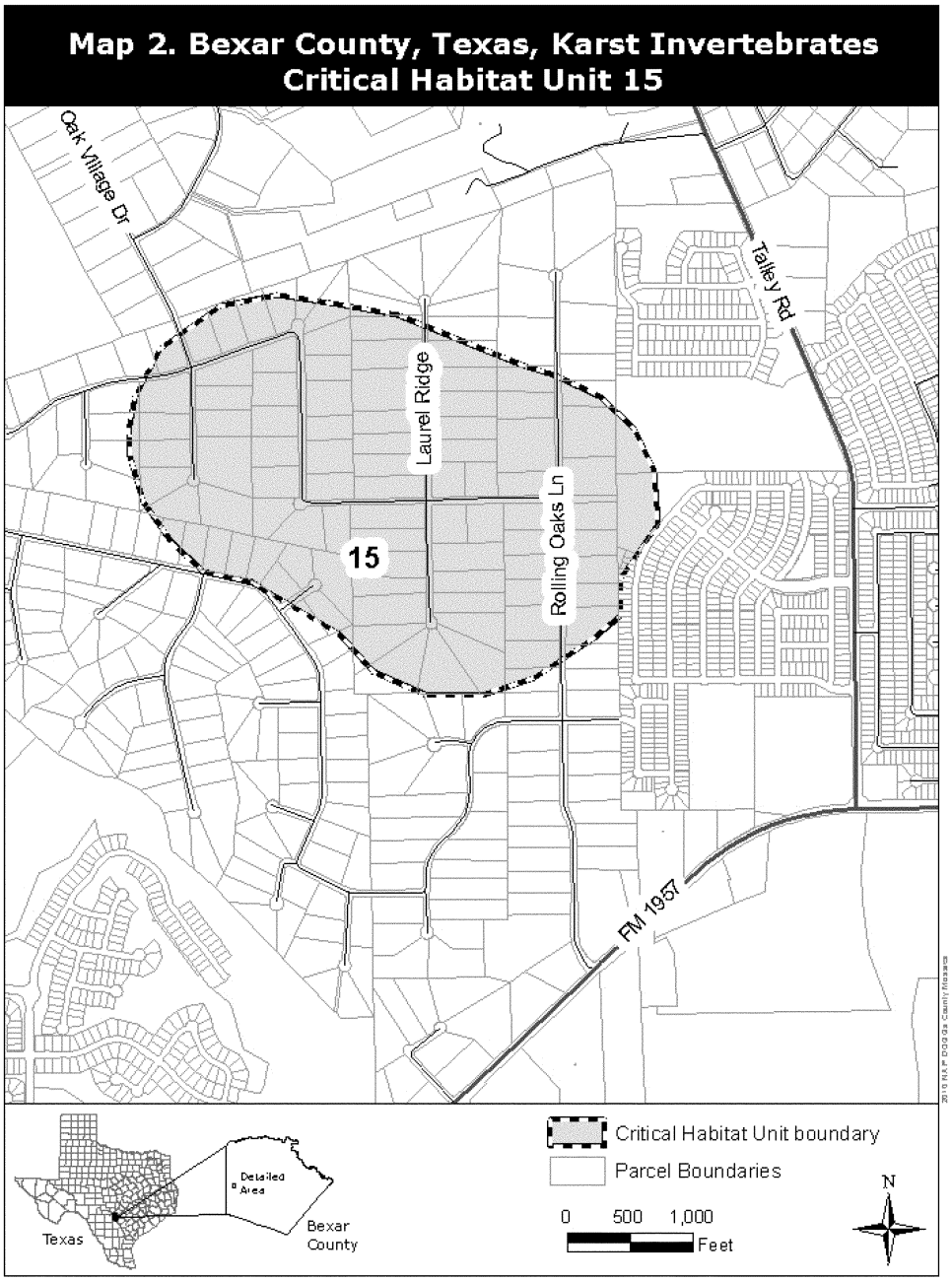
(2) The primary constituent elements of, and the statements regarding developed lands in, critical habitat for the Braken Bat Cave meshweaver are identical to those set forth at paragraphs (2) and (3) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(3) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(4) Unit 15: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522689, 3256455; 522687, 3256517; 522703, 3256601; 522765, 3256718; 522911, 3256823; 523046, 3256851; 523177, 3256830; 523344, 3256801; 523479, 3256747; 523658, 3256674; 523725, 3256656; 523834, 3256603; 523918, 3256523; 523969, 3256419; 523978, 3256293; 523885, 3256159; 523885, 3256069; 523822, 3256015; 523674, 3255915; 523547, 3255873; 523414, 3255874; 523281, 3255933; 523201, 3256024; 523017, 3256131; 522987, 3256149; 522940, 3256160; 522894, 3256168; 522869, 3256174; 522790, 3256246; 522722, 3256345; 522689, 3256455.

(ii) **Note:** Map 2 of Unit 15 follows:



Government Canyon Bat Cave Meshweaver (*Cicurina vespera*)

(1) Critical habitat for the Government Canyon Bat Cave meshweaver in Bexar County, Texas, occurs in Unit 1b, as described in this entry and depicted on Map 2 in this entry. Unit 1b is also depicted on Map 1 (index map) provided at paragraph (5) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(2) The primary constituent elements of, and the statements regarding developed lands in, critical habitat for the Government Canyon Bat Cave meshweaver are identical to those set forth at paragraphs (2) and (3) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(3) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(4) Unit 1b: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522172, 3270656; 522202, 3270794; 522259, 3270889; 522375, 3270977; 522521, 3271014; 522677, 3270988; 522793, 3270905; 522880, 3270758; 522894, 3270605; 522843, 3270457; 522724, 3270335; 522571, 3270287; 522401, 3270312; 522280, 3270382; 522186, 3270538; 522172, 3270656.

(ii) **Note:** Map 2 of Units 1a, 1b, 1c, 1d, 1e, and 1f follows:



Madla Cave Meshweaver (*Cicurina madla*)

(1) Critical habitat for the Madla Cave meshweaver in Bexar County, Texas, occurs in Units 1a, 1c, 1d, 1e, 2, 3, 5, 6, 8, 9, 17, and 22, as described in this entry and depicted on Maps 3, 4, 5, 6, 7, and 8 in this entry. Units 1a, 1c, 1d, and 1e are depicted on Map 2, which is provided at paragraph (4)(ii) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g). Units 1a, 1c, 1d, 1e, 2, 3, 5, 6, 8, 9, 17, and 22 are also depicted on Map 1 (index map) provided at paragraph (5) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(2) Eight caves and their associated karst management areas established under the La Cantera Habitat Conservation Plan section 10(a)(1)(B) permit are adjacent to or within the boundaries of Units 1e, 3, 6, 8, and 17, but are not designated as critical habitat. These caves are Canyon Ranch Pit, Fat Man's Nightmare Cave, Scenic Overlook Cave and the surrounding approximately 75 ac (30 ha) adjacent to Unit 1e; Helotes Blowhole and Helotes Hilltop Caves and the surrounding approximately 25 ac (10 ha) adjacent to Unit 3; John Wagner Cave No. 3 and the surrounding approximately 4 ac (1.6 ha) adjacent to Unit 6; Hills and Dales Pit and the surrounding approximately 70 ac (28 ha) adjacent to Unit 8; and Madla's Cave and the surrounding approximately 5 ac (2 ha) within Unit 17.

(3) The primary constituent elements of, and the statements regarding developed lands in, critical habitat for the Madla Cave meshweaver are identical to those set forth at paragraphs (2) and (3) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(4) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010

aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(5) Unit 1a: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522870, 3272900; 522872, 3273024; 522919, 3273156; 523000, 3273241; 523124, 3273312; 523284, 3273323; 523438, 3273258; 523618, 3273132; 523729, 3273041; 523797, 3272836; 523784, 3272720; 523724, 3272603; 523633, 3272522; 523515, 3272464; 523406, 3272460; 523276, 3272492; 523041, 3272654; 522939, 3272737; 522870, 3272900.

(ii) **Note:** Unit 1a is depicted on Map 2, provided at paragraph (4)(ii) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g).

(6) Unit 1c: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 524033, 3271973; 524063, 3272110; 524119, 3272206; 524235, 3272294; 524382, 3272331; 524537, 3272305; 524654, 3272222; 524740, 3272075; 524754, 3271922; 524703, 3271773; 524585, 3271652; 524431, 3271604; 524262, 3271629; 524140, 3271699; 524047, 3271855; 524033, 3271973.

(ii) **Note:** Unit 1c is depicted on Map 2, provided at paragraph (4)(ii) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g).

(7) Unit 1d: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 524739, 3270323; 524739, 3270454; 524798, 3270590; 524917, 3270699; 525091, 3270744; 525462, 3270937; 525613, 3271016; 525757, 3271026; 525893, 3270977; 526000, 3270883; 526059, 3270741; 526062, 3270603; 525980, 3270370; 525836, 3270243; 525700, 3270206; 525289, 3270072; 525153, 3270020; 525016, 3270023; 524883, 3270092; 524788, 3270191; 524739, 3270323.

(ii) **Note:** Unit 1d is depicted on Map 2, provided at paragraph (4)(ii) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g).

(8) Unit 1e: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 526403, 3273634; 526465, 3273472; 526487, 3273282; 526506, 3273157; 526879, 3273092; 527025, 3273129; 527180, 3273102; 527297, 3273019; 527383, 3272873; 527398, 3272719; 527346, 3272571; 527228, 3272449; 527075, 3272402; 526905, 3272426; 526783, 3272497; 526472, 3272434; 526435, 3272318; 526460, 3272223; 526443, 3272077; 526356, 3271945; 526158, 3271842; 525997, 3271842; 525854, 3271930; 525762, 3272044; 525703, 3272205; 525729, 3272352; 525802, 3272494; 525890, 3272776; 525876, 3272894; 525858, 3272918; 525912, 3272925; 525904, 3272945; 525903, 3272947; 525903, 3272949; 525902, 3272950; 525902, 3272952; 525901, 3272954; 525901, 3272956; 525900, 3272957; 525900, 3272959; 525899, 3272961; 525899, 3272963; 525898, 3272965; 525898, 3272966; 525898, 3272968; 525898, 3272970; 525897, 3272972; 525897, 3272974; 525897, 3272975; 525897, 3272977; 525897, 3272979; 525897, 3272981; 525897, 3272983; 525897, 3272985; 525897, 3272986; 525897, 3272988; 525897, 3272990; 525897, 3272992; 525897, 3272994; 525897, 3272996; 525897, 3272997; 525898, 3272999; 525898, 3273001; 525898, 3273003; 525899, 3273005; 525899, 3273007; 525899, 3273008; 525900, 3273010; 525900, 3273012; 525901, 3273014; 525901, 3273015; 525902, 3273017; 525902, 3273019; 525903, 3273021; 525904, 3273022; 525904, 3273024; 525905, 3273026; 525906, 3273027; 525906, 3273029; 525907, 3273031; 525908, 3273032; 525909, 3273034; 525910, 3273036; 525911, 3273037; 525912, 3273039; 525913, 3273040; 525914, 3273042; 525915, 3273044; 525916, 3273045; 525917, 3273047; 525918, 3273048; 525919, 3273049; 525920, 3273051; 525921, 3273052; 525923, 3273054; 525924, 3273055; 525925, 3273056; 525926, 3273058; 525928, 3273059; 525929, 3273060; 525930, 3273062; 525932, 3273063; 525933, 3273064; 525934, 3273065; 525936, 3273066; 525937, 3273068; 525939, 3273069; 525940, 3273070; 525942, 3273071; 525943, 3273072; 525945, 3273073; 525946, 3273074; 525948, 3273075; 525949, 3273076; 525951, 3273077; 525953, 3273078; 525954, 3273078; 525956, 3273079; 525958, 3273080; 526305, 3273293; 526303, 3273302; 526276, 3273412; 526276, 3273412; 526254, 3273499; 526202, 3273564; 526023, 3273523; 525917, 3273448; 525824, 3273382; 525786, 3273440; 525587, 3273259; 525586, 3273260; 525572, 3273363; 525594, 3273505; 525693, 3273659; 525876, 3273765; 526048, 3273798; 526253, 3273754; 526403, 3273634.

(ii) **Note:** Unit 1e is depicted on Map 2, provided at paragraph (4)(ii) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g).

(9) Unit 2: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 527508, 3276359; 527444, 3276287; 527343, 3276226; 527229, 3276204; 527117, 3276216; 527116, 3276253; 527085, 3276279; 527003, 3276270; 526933, 3276334; 526905, 3276386; 526783, 3276386; 526851, 3276555; 526850, 3276556; 526864, 3276662; 526908, 3276736; 526960, 3276801; 527010, 3276865; 527213, 3277098; 527281, 3277166; 527392, 3277230; 527536, 3277252; 527711, 3277190; 527805, 3277102; 527857, 3277003; 527869, 3276903; 527861, 3276787; 527803, 3276674; 527699, 3276578; 527644, 3276515; 527643, 3276397; 527630, 3276386; 527530, 3276384; 527508, 3276359.

(ii) **Note:** Map 3 of Unit 2 follows:



(10) Unit 3: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529906, 3272892; 529975, 3272934; 529993, 3272946; 529996, 3272945; 529998, 3272943; 530001, 3272942; 530004, 3272940; 530006, 3272938; 530007, 3272938; 530020, 3272926; 530026, 3272920; 530030, 3272917; 530032, 3272915; 530043, 3272905; 530045, 3272903; 530045, 3272902; 530046, 3272901; 530047, 3272900; 530049, 3272897; 530050, 3272895; 530050, 3272895; 530120, 3272932; 530134, 3272895; 530165, 3272898; 530159, 3272895; 530124, 3272875; 530112, 3272843; 530083, 3272805; 530081, 3272805; 530049, 3272774; 530020, 3272734; 529995, 3272714; 529909, 3272671; 529790, 3272649; 529688, 3272658; 529646, 3272723; 529589, 3272792; 529584, 3272798; 529600, 3272911; 529558, 3272947; 529514, 3272978; 529473, 3272968; 529445, 3273019; 529423, 3273086; 529449, 3273173; 529482, 3273196; 529507, 3273216; 529496, 3273253; 529504, 3273344; 529564, 3273416; 529676, 3273477; 529771, 3273499; 529870, 3273496; 529918, 3273447; 529970, 3273351; 530058, 3273320; 530110, 3273233; 530105, 3273183; 530099, 3273138; 530128, 3273120; 530096, 3273123; 530057, 3273126; 530055, 3273143; 530048, 3273180; 530057, 3273190; 530057, 3273190; 530049, 3273191; 530038, 3273192; 530002, 3273195; 529946, 3273200; 529916, 3273202; 529898, 3273204; 529897, 3273204; 529680, 3273221; 529753, 3273117; 529764, 3273100; 529836, 3272993; 529845, 3272981; 529906, 3272892.

(ii) **Note:** Map 4 of Units 3 and 4 follows:



(11) Unit 5: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529536, 3275753; 529533, 3275931; 529585, 3276056; 529741, 3276191; 529927, 3276249; 530112, 3276208; 530275, 3276093; 530350, 3275987; 530318, 3275927; 530238, 3275838; 530169, 3275776; 530109, 3275735; 529970, 3275629; 529950, 3275603; 529936, 3275565; 529781, 3275523; 529719, 3275529; 529621, 3275548; 529566, 3275611; 529536, 3275753.

(ii) **Note:** Map 5 of Units 5, 6, and 17 follows:



(12) Unit 6: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 531676, 3275515; 531639, 3275342; 531576, 3275302; 531483, 3275283; 531331, 3275337; 531242, 3275350; 531189, 3275346; 531193, 3275501; 531094, 3275501; 531094, 3275378; 531072, 3275398; 530953, 3275478; 530909, 3275521; 530851, 3275661; 530871, 3275702; 530981, 3275903; 531119, 3275970; 531335, 3275950; 531512, 3275851; 531615, 3275701; 531676, 3275515.

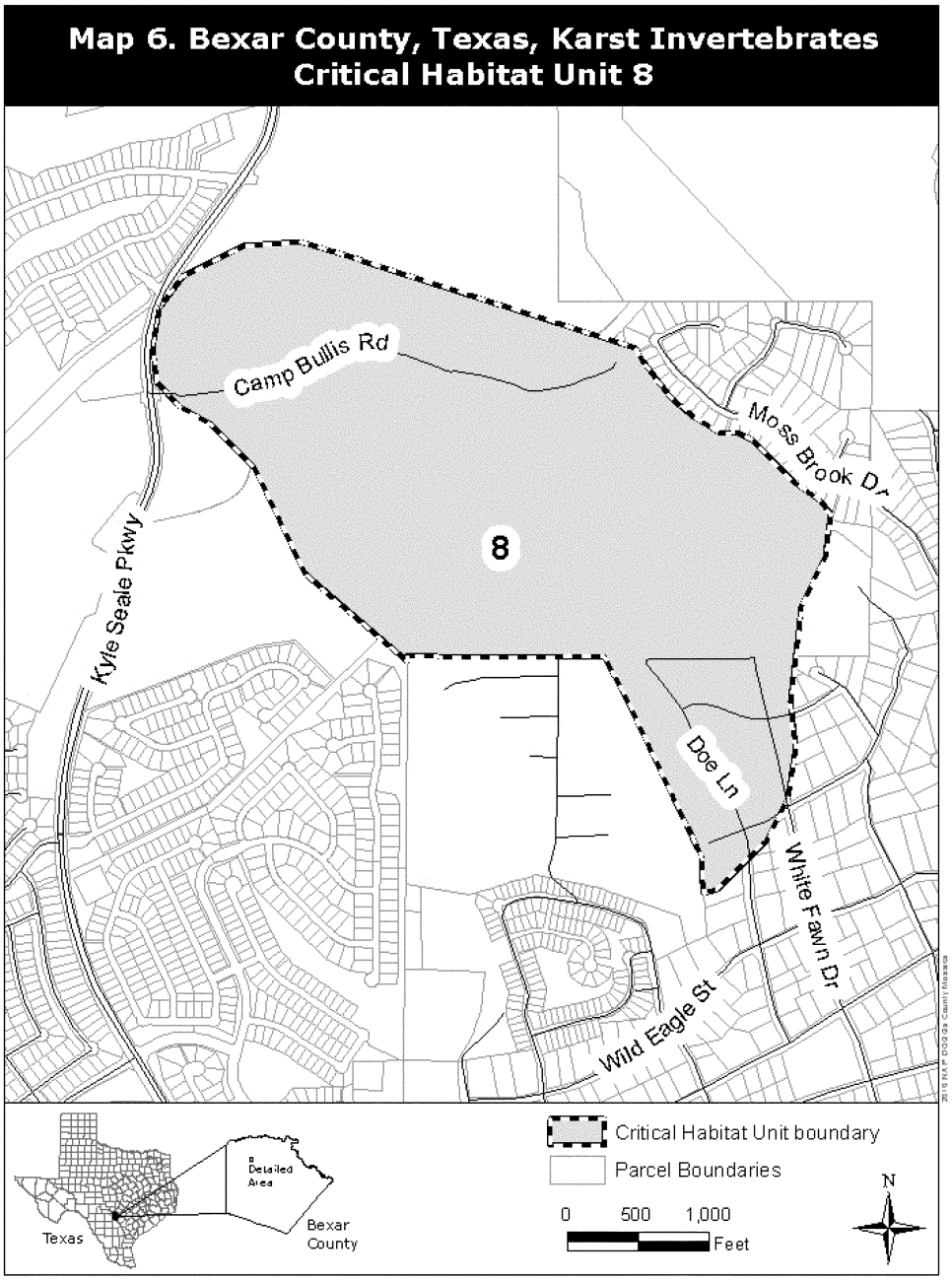
(ii) **Note:** Unit 6 is depicted on Map 5, provided at paragraph (10)(ii) of this entry.

(13) Unit 8: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 535007, 3274657; 535063, 3274624; 535096, 3274626; 535133, 3274610; 535173, 3274570; 535222, 3274516; 535282, 3274478; 535302, 3274450; 535290, 3274359; 535238, 3274250; 535215, 3274045; 535226, 3273947; 535209, 3273836; 535160, 3273741; 535056, 3273640; 535027, 3273631; 535026, 3273654; 535022, 3273714; 535018, 3273721; 535013, 3273730; 534992, 3273775; 534988, 3273784; 534962, 3273838; 534962, 3273838; 534936, 3273892; 534909, 3273947; 534909, 3273947; 534883, 3274002; 534856, 3274057; 534856, 3274057; 534813, 3274142; 534708, 3274141; 534625, 3274140; 534519, 3274140; 534389, 3274145; 534389, 3274132; 534168, 3274322; 534058, 3274551; 533966, 3274645; 533893, 3274683; 533848, 3274736; 533839, 3274809; 533853, 3274895; 533905, 3274965; 534037, 3275030; 534156, 3275037;

534290, 3274997; 534292, 3274995; 534881, 3274809; 534894, 3274782; 534931, 3274737; 534962, 3274695; 535007, 3274657.

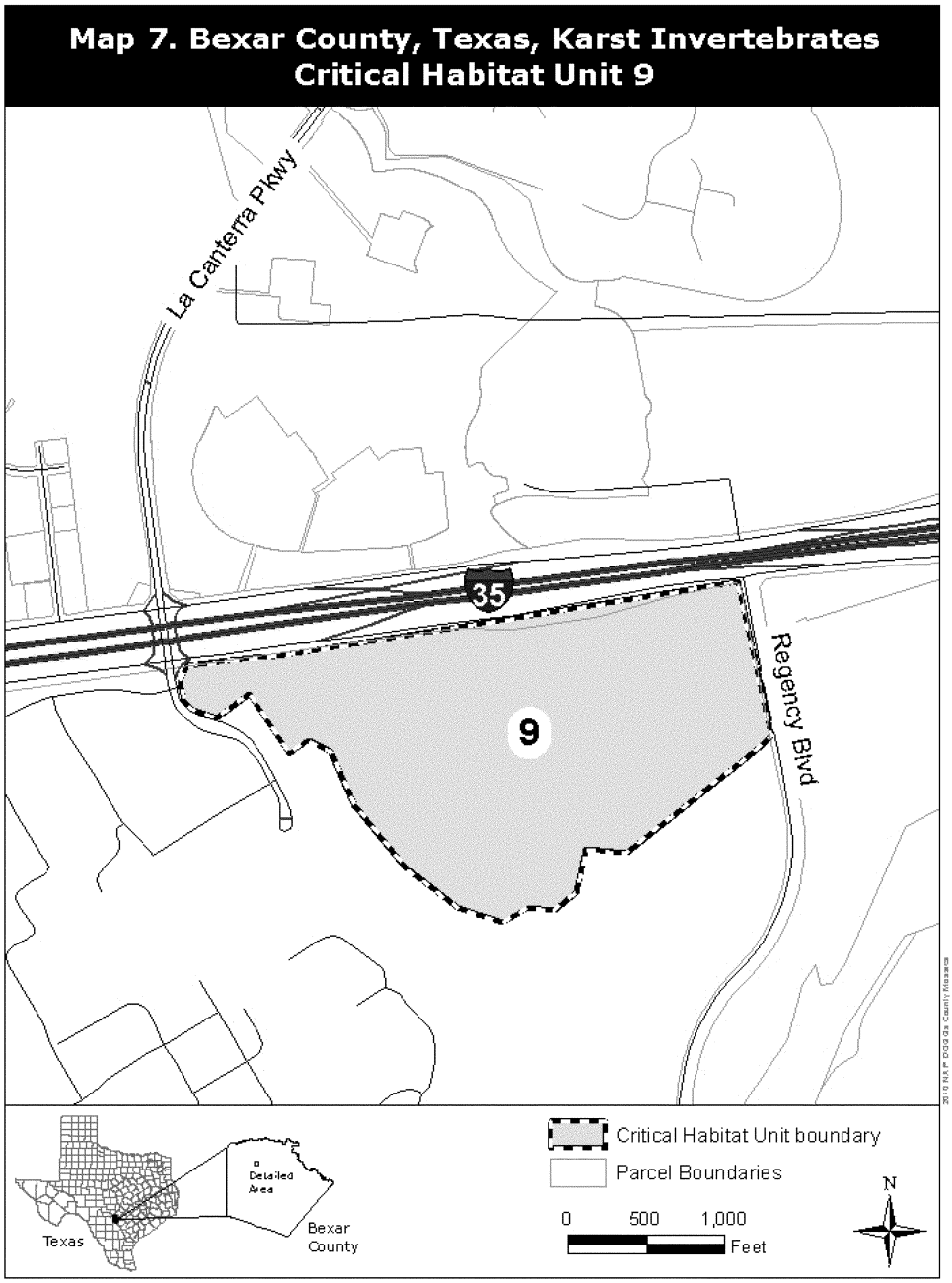
(ii) **Note:** Map 6 of Unit 8 follows:



(14) Unit 9: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 536971, 3273194; 537058, 3273204; 537958, 3273349; 538025, 3273049; 538011, 3273033; 537743, 3272819; 537663, 3272828; 537645, 3272742; 537602, 3272707; 537551, 3272712; 537500, 3272684; 537412, 3272713; 537309, 3272793; 537213, 3272912; 537167, 3273017; 537121, 3273038; 537084, 3273013; 537008, 3273129; 536943, 3273082; 536897, 3273099; 536879, 3273117; 536871, 3273154; 536887, 3273183; 536971, 3273194.

(ii) **Note:** Map 7 of Unit 9 follows:



(15) Unit 17: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 528980, 3275191; 529043, 3275247; 529120, 3275242; 529245, 3275219; 529327, 3275184; 529348, 3275167; 529492, 3275167; 529613, 3275113; 529800, 3275081; 529870, 3274953; 529819, 3274777; 529698, 3274627; 529486, 3274528; 529360, 3274615; 529335, 3274712; 529174, 3274840; 528968, 3274859; 528957, 3275049; 528980, 3275191.

(ii) Not including land within and bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529490, 3275008; 529490, 3275006; 529490, 3275005; 529490, 3275003; 529490, 3275002; 529489, 3275001; 529489, 3274999; 529489, 3274998; 529489, 3274997; 529489, 3274995; 529489, 3274994; 529488, 3274993; 529488, 3274992; 529489, 3274991; 529489, 3274986; 529489, 3274983; 529489, 3274982; 529482, 3274919; 529329, 3274930; 529337, 3274993; 529337, 3274993; 529337, 3274994; 529336, 3274995; 529337, 3274997; 529337, 3274998; 529336, 3274999; 529336, 3275001; 529336, 3275002; 529336, 3275003; 529336, 3275005; 529336, 3275006; 529336, 3275008; 529336, 3275009; 529336, 3275010; 529336, 3275012; 529336, 3275013; 529336, 3275014; 529336, 3275016; 529337, 3275017; 529337, 3275018; 529337, 3275020; 529337, 3275021; 529337, 3275022; 529338, 3275023; 529338, 3275025; 529338, 3275026; 529339, 3275027; 529339, 3275029; 529339, 3275030; 529340, 3275031; 529340, 3275033; 529341, 3275034; 529341, 3275035; 529342, 3275036; 529342, 3275038; 529343, 3275039; 529343, 3275040; 529344, 3275041; 529344, 3275042; 529345, 3275044; 529346, 3275045; 529346, 3275046; 529347, 3275047; 529348, 3275048; 529348, 3275049; 529349, 3275050; 529350, 3275052; 529351, 3275053; 529351,

3275054; 529352, 3275055; 529353, 3275056; 529354, 3275057; 529355, 3275058; 529356, 3275059; 529357, 3275060; 529358, 3275061; 529359, 3275062; 529359, 3275063; 529360, 3275064; 529361, 3275065; 529362, 3275066; 529363, 3275066; 529364, 3275067; 529366, 3275068; 529367, 3275069; 529368, 3275070; 529369, 3275070; 529370, 3275071; 529371, 3275072; 529372, 3275073; 529373, 3275073; 529374, 3275074; 529376, 3275075; 529377, 3275075; 529378, 3275076; 529379, 3275077; 529380, 3275077; 529382, 3275078; 529383, 3275078; 529384, 3275079; 529385, 3275079; 529387, 3275080; 529388, 3275080; 529389, 3275081; 529390, 3275081; 529392, 3275081; 529393, 3275082; 529394, 3275082; 529396, 3275082; 529397, 3275083; 529398, 3275083; 529399, 3275083; 529401, 3275083; 529402, 3275084; 529403, 3275084; 529405, 3275084; 529406, 3275084; 529407, 3275084; 529409, 3275084; 529410, 3275084; 529412, 3275084; 529413, 3275084; 529414, 3275084; 529416, 3275084; 529417, 3275084; 529418, 3275084; 529420, 3275084; 529421, 3275084; 529422, 3275084; 529424, 3275084; 529425, 3275083; 529426, 3275083; 529428, 3275083; 529429, 3275083; 529430, 3275082; 529431, 3275082; 529433, 3275082; 529434, 3275081; 529435, 3275081; 529437, 3275081; 529438, 3275080; 529439, 3275080; 529440, 3275079; 529442, 3275079; 529443, 3275078; 529444, 3275078; 529445, 3275077; 529447, 3275077; 529448, 3275076; 529449, 3275075; 529450, 3275075; 529451, 3275074; 529452, 3275073; 529454, 3275073; 529455, 3275072; 529456, 3275071; 529457, 3275070; 529458, 3275070; 529459, 3275069; 529460, 3275068; 529461, 3275067; 529462, 3275066; 529463, 3275066; 529464, 3275065; 529465, 3275064; 529466, 3275063; 529467, 3275062; 529468, 3275061; 529469, 3275060; 529470, 3275059; 529471, 3275058; 529472, 3275057; 529473, 3275056; 529473, 3275055; 529474, 3275054; 529475, 3275053; 529476, 3275052; 529477, 3275050; 529477, 3275049; 529478, 3275048; 529479, 3275047; 529479, 3275046; 529480, 3275045; 529481, 3275044; 529481, 3275042; 529482, 3275041; 529482, 3275040; 529483, 3275039; 529484, 3275038; 529484, 3275036; 529485, 3275035; 529485, 3275034; 529486, 3275033; 529486, 3275031; 529486, 3275030; 529487, 3275029; 529487, 3275027; 529487, 3275026; 529488, 3275025; 529488, 3275023; 529488, 3275022; 529489, 3275021; 529489, 3275020; 529489, 3275018; 529489, 3275017; 529489, 3275016; 529489, 3275014; 529490, 3275013; 529490, 3275012; 529490, 3275010; 529490, 3275009; 529490, 3275008.

(iii) **Note:** Unit 17 is depicted on Map 5, provided at paragraph (11)(ii) of this entry.

(16) Unit 22: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 533735, 3278278; 533765, 3278416; 533821, 3278511; 533938, 3278599; 534084, 3278636; 534240, 3278610; 534356, 3278527; 534443, 3278380; 534457, 3278227; 534406, 3278079; 534287, 3277957; 534134, 3277909; 533964, 3277934; 533843, 3278004; 533749, 3278160; 533735, 3278278.

(ii) **Note:** Map 8 of Unit 22 follows:



Robber Baron Cave Meshweaver (*Cicurina baronia*)

(1) Critical habitat for the Robber Baron Cave meshweaver in Bexar County, Texas, occurs in Units 20 and 25. Unit 20 is described as set forth, and depicted on Map 2 provided at paragraph (6)(ii) of the entry for the Cokendolpher Cave harvestman in this paragraph (g). Unit 25 is described in this entry and depicted on Map 3 in this entry. Units 20 and 25 are also depicted on Map 1 (index map) provided in paragraph (5) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(2) The primary constituent elements of, and the statements regarding developed lands in, critical habitat for the Robber Baron Cave meshweaver are identical to those set forth in paragraphs (2) and (3) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(3) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(4) Unit 20: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 552126, 3264361; 552287, 3264522; 552357, 3264610; 552436, 3264673; 552536, 3264710; 552654, 3264726; 552756, 3264714; 552840, 3264685; 552920, 3264644; 552991, 3264506; 553001, 3264408; 552930, 3264263; 552813, 3264165; 552683, 3264104; 552571, 3264018; 552485, 3263914; 552285, 3263659; 552175, 3263484; 552124, 3263435; 552081, 3263341; 551949, 3263214; 551826, 3263155; 551728, 3263159; 551639, 3263221; 551567, 3263343; 551569, 3263474; 551606, 3263569; 551704, 3263739;

551777, 3263863; 551969, 3264165; 552126, 3264361.

(ii) **Note:** Map 2 of Unit 20 is provided at paragraph (6)(ii) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(5) Unit 25: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 549856, 3258720; 549779, 3258722; 549776, 3258797; 549750, 3258818; 549485, 3258818; 549451, 3258796; 549450, 3258759; 549391, 3258759; 549302, 3258907; 549288, 3259025; 549281, 3259323; 549294, 3259345; 549486, 3259471; 549700, 3259499; 549933, 3259412; 549943, 3259217; 549819, 3259100; 549840, 3259045; 549869, 3259019; 549861, 3258961; 549846, 3258934; 549846, 3258909; 549891, 3258888; 549961, 3258869; 549968, 3258839; 549972, 3258752; 549856, 3258720.

(ii) **Note:** Map 3 of Unit 25 follows:



Government Canyon Bat Cave Spider (*Neoleptoneta microps*)

(1) Critical habitat for the Government Canyon Bat Cave spider in Bexar County, Texas, occurs in Unit 1b, as described at paragraph (4)(i) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g). Unit 1b is also depicted on Map 1 (index map) provided at paragraph (5) of the entry for the Cokendolpher Cave harvestman in this paragraph (g), and on Map 2 (Unit 1b) provided at paragraph (4)(ii) of the entry for the Government Canyon Bat Cave meshweaver in this paragraph (g).

(2) The primary constituent elements of, and statements regarding developed lands in, critical habitat for the Government Canyon Bat Cave spider are

identical to those set forth at paragraphs (2) and (3) of the entry for the Cokendolpher Cave harvestman in this paragraph (g).

(3) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(4) Unit 1b: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522172, 3270656; 522202, 3270794; 522259, 3270889; 522375, 3270977; 522521, 3271014; 522677, 3270988; 522793, 3270905; 522880, 3270758; 522894, 3270605; 522843, 3270457; 522724, 3270335; 522571, 3270287; 522401, 3270312; 522280, 3270382; 522186, 3270538; 522172, 3270656.

(ii) **Note:** Map 2 of Unit 1b is provided at paragraph (4)(ii) in the entry for the Government Canyon Cave meshweaver in this paragraph (g).

* * * * *

(i) *Insects.*

* * * * *

Helotes Mold Beetle (*Batrisodes venyivi*)

(1) Critical habitat for the Helotes mold beetle in Bexar County, Texas, occurs in Units 1e, 3, and 5 as described in this entry and depicted on Maps 1 (index map), 2, 4, and 5 of this entry.

(2) The primary constituent elements of critical habitat for *Batrisodes venyivi* are:

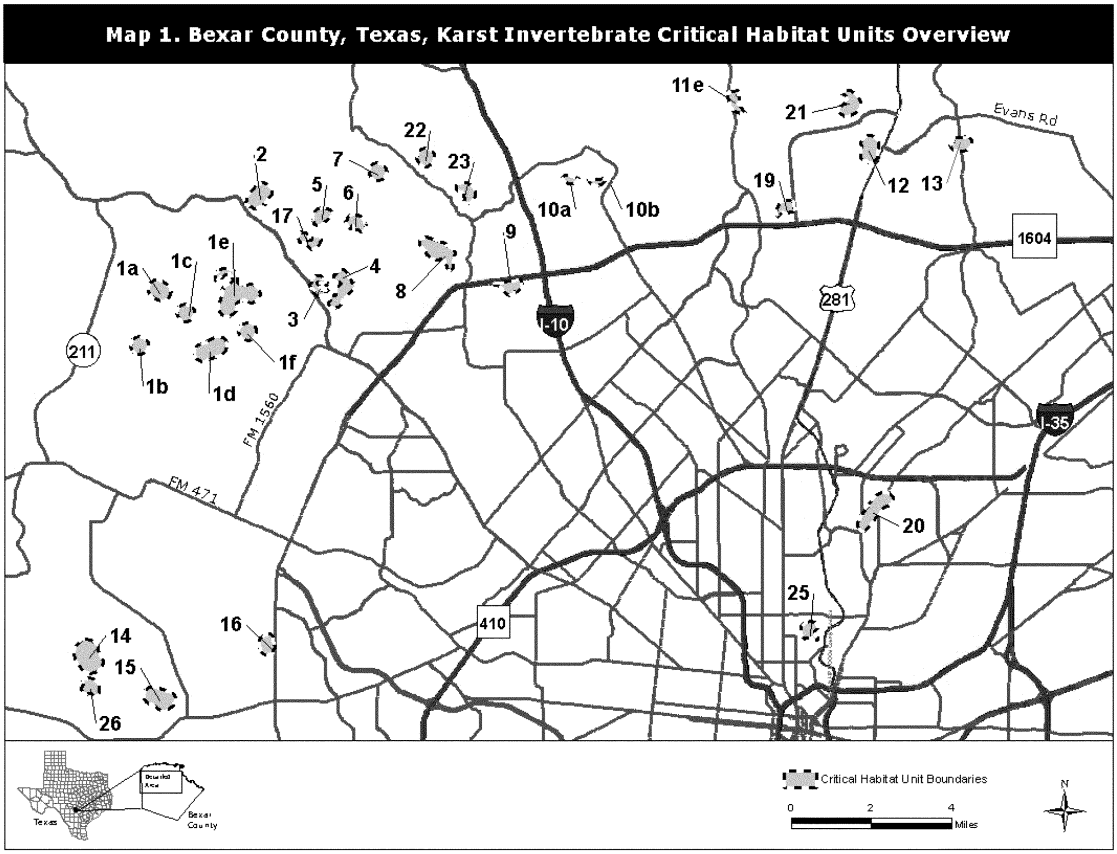
(i) Karst-forming rock containing subterranean spaces (caves and connected mesocaverns) with stable temperatures, high humidities (near saturation), and suitable substrates (for example, spaces between and underneath rocks for foraging and sheltering) that are free of contaminants; and

(ii) Surface and subsurface sources (such as plants and their roots, fruits, and leaves, and animal (e.g., cave cricket) eggs, feces, and carcasses) that provide nutrient input into the karst ecosystem.

(3) Developed lands that do not contain the subsurface primary constituent elements (see paragraph (2)(i) of this entry) and that existed on the effective date of this rule are not considered to be critical habitat.

(4) Data layers defining this map unit were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(5) Index map of Bexar County invertebrates critical habitat units, Bexar County, Texas, follows:



(6) Unit 1e: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 526403, 3273634; 526465, 3273472; 526487, 3273282; 526506, 3273157; 526879, 3273092; 527025, 3273129; 527180, 3273102; 527297, 3273019; 527383, 3272873; 527398, 3272719; 527346, 3272571; 527228, 3272449; 527075, 3272402; 526905, 3272426; 526783, 3272497; 526472, 3272434; 526435, 3272318; 526460, 3272223; 526443, 3272077; 526356, 3271945; 526158, 3271842; 525997, 3271842; 525854, 3271930; 525762, 3272044; 525703, 3272205; 525729, 3272352; 525802, 3272494; 525890, 3272776; 525876, 3272894; 525858, 3272918; 525912, 3272925; 525904, 3272945; 525903, 3272947; 525903, 3272949;

525902, 3272950; 525902, 3272952; 525901, 3272954; 525901, 3272956; 525900, 3272957; 525900, 3272959; 525899, 3272961; 525899, 3272963; 525898, 3272965; 525898, 3272966; 525898, 3272968; 525898, 3272970; 525897, 3272972; 525897, 3272974; 525897, 3272975; 525897, 3272977; 525897, 3272979; 525897, 3272981; 525897, 3272983; 525897, 3272985; 525897, 3272986; 525897, 3272988; 525897, 3272990; 525897, 3272992; 525897, 3272994; 525897, 3272996; 525897, 3272997; 525898, 3272999; 525898, 3273001; 525898, 3273003; 525899, 3273005; 525899, 3273007; 525899, 3273008; 525900, 3273010; 525900, 3273012; 525901, 3273014; 525901, 3273015; 525902, 3273017; 525902, 3273019; 525903, 3273021; 525904, 3273022; 525904, 3273024; 525905, 3273026; 525906, 3273027; 525906, 3273029; 525907, 3273031; 525908, 3273032; 525909, 3273034; 525910, 3273036; 525911, 3273037; 525912, 3273039; 525913, 3273040; 525914, 3273042; 525915, 3273044; 525916, 3273045; 525917, 3273047; 525918, 3273048; 525919, 3273049; 525920, 3273051; 525921, 3273052; 525923, 3273054; 525924, 3273055; 525925, 3273056; 525926, 3273058; 525928, 3273059; 525929, 3273060; 525930, 3273062; 525932, 3273063; 525933, 3273064; 525934, 3273065; 525936, 3273066; 525937, 3273068; 525939, 3273069; 525940, 3273070; 525942, 3273071; 525943, 3273072; 525945, 3273073; 525946, 3273074; 525948, 3273075; 525949, 3273076; 525951, 3273077; 525953, 3273078; 525954, 3273078; 525956, 3273079; 525958, 3273080; 526305, 3273293; 526303, 3273302; 526276, 3273412; 526276, 3273412; 526254, 3273499; 526202, 3273564; 526023, 3273523; 525917, 3273448; 525824, 3273382; 525786, 3273440; 525587, 3273259; 525586, 3273260; 525572, 3273363; 525594, 3273505; 525693, 3273659; 525876, 3273765; 526048, 3273798; 526253, 3273754; 526403, 3273634.

(ii) **Note:** Map 2 of Units 1a, 1b, 1c, 1d, 1e, and 1f follows:



(7) Unit 3: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529906, 3272892; 529975, 3272934; 529993, 3272946; 529996, 3272945; 529998, 3272943; 530001, 3272942; 530004, 3272940; 530006, 3272938; 530007, 3272938; 530020, 3272926; 530026, 3272920; 530030, 3272917; 530032, 3272915; 530043, 3272905; 530045, 3272903; 530045, 3272902; 530046, 3272901; 530047, 3272900; 530049, 3272897; 530050, 3272895; 530050, 3272895; 530120, 3272932; 530134, 3272895; 530165, 3272898; 530159, 3272895; 530124, 3272875; 530112, 3272843; 530083, 3272805; 530081, 3272805; 530049, 3272774; 530020, 3272734; 529995, 3272714; 529909, 3272671; 529790, 3272649; 529688, 3272658; 529646, 3272723; 529589, 3272792; 529584, 3272798; 529600, 3272911; 529558, 3272947; 529514, 3272978; 529473, 3272968; 529445, 3273019; 529423, 3273086; 529449, 3273173; 529482, 3273196; 529507, 3273216; 529496, 3273253; 529504, 3273344; 529564, 3273416; 529676, 3273477; 529771, 3273499; 529870, 3273496; 529918, 3273447; 529970, 3273351; 530058, 3273320; 530110, 3273233; 530105, 3273183; 530099, 3273138; 530128, 3273120; 530096, 3273123; 530057, 3273126; 530055, 3273143; 530048, 3273180; 530057, 3273190; 530057, 3273190; 530049, 3273191; 530038, 3273192; 530002, 3273195; 529946, 3273200; 529916, 3273202; 529898, 3273204; 529897, 3273204; 529680, 3273221; 529753, 3273117; 529764, 3273100; 529836, 3272993; 529845, 3272981; 529906, 3272892.

(ii) **Note:** Map 4 of Units 3 and 4 follows:



(8) Unit 5: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529536, 3275753; 529533, 3275931; 529585, 3276056; 529741, 3276191; 529927, 3276249; 530112, 3276208; 530275, 3276093; 530350, 3275987; 530318, 3275927; 530238, 3275838; 530169, 3275776; 530109, 3275735; 529970, 3275629; 529950, 3275603; 529936, 3275565; 529781, 3275523; 529719, 3275529; 529621, 3275548; 529566, 3275611; 529536, 3275753.

(ii) **Note:** Map 5 of Units 5, 6, and 17 follows:



Beetle (No Common Name) (*Rhadine exilis*)

(1) Critical habitat for the beetle (*Rhadine exilis*) in Bexar County, Texas, occurs in Units 1b, 1d, 1e, 2, 3, 4, 5, 6, 7, 8, 9, 11e, 12, 13, and 21, and is depicted on Maps 3, 6, 7, 8, 10, 11, 12, and 18 in this entry, and on Maps 2, 4, and 5, provided at paragraphs (6), (7), and (8) of the entry for the Helotes mold beetle in this paragraph (i). The units are also depicted on Map 1 (index map) provided in paragraph (5) of the entry for the Helotes mold beetle in this paragraph (i).

(2) Eight caves and their associated karst management areas established under the La Cantera Habitat Conservation Plan section 10(a)(1)(B) permit are adjacent to or within the boundaries of Units 1e, 3, 6, 8, and 17, but are not designated as critical habitat. These caves are Canyon Ranch Pit, Fat Man's Nightmare Cave, Scenic Overlook Cave and the surrounding approximately 75 ac (30 ha) adjacent to Unit 1e; Helotes Blowhole and Helotes Hilltop Caves and the surrounding approximately 25 ac (10 ha) adjacent to Unit 3; John Wagner Cave No. 3 and the surrounding approximately 4 ac (1.6 ha) adjacent to Unit 6; Hills and Dales Pit and the surrounding approximately 70 ac (28 ha) adjacent to Unit 8; and Madla's Cave and the surrounding approximately 5 ac (2 ha) within Unit 17.

(3) The primary constituent elements of, and the statements regarding developed lands in, critical habitat for *Rhadine exilis* are identical to those set forth at paragraphs (2) and (3) of the entry for the Helotes mold beetle in this paragraph (i).

(4) Data layers defining map units were created using a geographic information system (GIS), which included cave locations, karst zone maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5′ quadrangles. Points were placed on the GIS.

(5) Unit 1b: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522172, 3270656; 522202, 3270794; 522259, 3270889; 522375, 3270977; 522521, 3271014; 522677, 3270988; 522793, 3270905; 522880, 3270758; 522894, 3270605; 522843, 3270457; 522724, 3270335; 522571, 3270287; 522401, 3270312; 522280, 3270382; 522186, 3270538; 522172, 3270656.

(ii) **Note:** Map 2 of Unit 1b is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(6) Unit 1d: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 524739, 3270323; 524739, 3270454; 524798, 3270590; 524917, 3270699; 525091, 3270744; 525462, 3270937; 525613, 3271016; 525757, 3271026; 525893, 3270977; 526000, 3270883; 526059, 3270741; 526062, 3270603; 525980, 3270370; 525836, 3270243; 525700, 3270206; 525289, 3270072; 525153, 3270020; 525016, 3270023; 524883, 3270092; 524788, 3270191; 524739, 3270323.

(ii) **Note:** Map 2 of Unit 1d is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(7) Unit 1e: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 526403, 3273634; 526465, 3273472; 526487, 3273282; 526506, 3273157; 526879, 3273092; 527025, 3273129; 527180, 3273102; 527297, 3273019; 527383, 3272873; 527398, 3272719; 527346, 3272571; 527228, 3272449; 527075, 3272402; 526905, 3272426; 526783, 3272497; 526472, 3272434; 526435, 3272318; 526460, 3272223; 526443, 3272077; 526356, 3271945; 526158, 3271842; 525997, 3271842; 525854, 3271930; 525762, 3272044; 525703, 3272205; 525729, 3272352; 525802, 3272494; 525890, 3272776; 525876, 3272894; 525858, 3272918; 525912, 3272925; 525904, 3272945; 525903, 3272947; 525903, 3272949; 525902, 3272950; 525902, 3272952; 525901, 3272954; 525901, 3272956; 525900, 3272957; 525900, 3272959; 525899, 3272961; 525899, 3272963; 525898, 3272965; 525898, 3272966; 525898, 3272968; 525898, 3272970; 525897, 3272972; 525897, 3272974; 525897, 3272975; 525897, 3272977; 525897, 3272979; 525897, 3272981; 525897, 3272983; 525897, 3272985; 525897, 3272986; 525897, 3272988; 525897, 3272990; 525897, 3272992; 525897, 3272994; 525897, 3272996; 525897, 3272997; 525898, 3272999; 525898, 3273001; 525898, 3273003; 525899, 3273005; 525899, 3273007; 525899, 3273008; 525900, 3273010; 525900, 3273012; 525901, 3273014; 525901, 3273015; 525902, 3273017; 525902, 3273019; 525903, 3273021; 525904, 3273022; 525904, 3273024; 525905, 3273026; 525906, 3273027; 525906, 3273029; 525907, 3273031; 525908, 3273032; 525909, 3273034; 525910, 3273036; 525911, 3273037; 525912, 3273039; 525913, 3273040; 525914, 3273042; 525915, 3273044; 525916, 3273045; 525917, 3273047; 525918, 3273048; 525919, 3273049; 525920, 3273051; 525921, 3273052; 525923, 3273054; 525924, 3273055; 525925, 3273056; 525926, 3273058; 525928, 3273059; 525929, 3273060; 525930, 3273062; 525932, 3273063; 525933, 3273064; 525934, 3273065; 525936, 3273066; 525937, 3273068; 525939, 3273069; 525940, 3273070; 525942, 3273071; 525943, 3273072; 525945, 3273073; 525946, 3273074; 525948, 3273075; 525949, 3273076; 525951, 3273077; 525953, 3273078; 525954, 3273078; 525956, 3273079; 525958, 3273080; 526305, 3273293; 526303, 3273302; 526276, 3273412; 526276, 3273412; 526254, 3273499; 526202, 3273564; 526023, 3273523; 525917, 3273448; 525824, 3273382; 525786, 3273440; 525587, 3273259; 525586, 3273260; 525572, 3273363; 525594, 3273505; 525693, 3273659; 525876, 3273765; 526048, 3273798; 526253, 3273754; 526403, 3273634.

(ii) **Note:** Map 2 of Unit 1e is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(8) Unit 2: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 527508, 3276359; 527444, 3276287; 527343, 3276226; 527229, 3276204; 527117, 3276216; 527116, 3276253; 527085, 3276279; 527003, 3276270; 526933, 3276334; 526905, 3276386; 526783, 3276386; 526851, 3276555; 526850, 3276556; 526864, 3276662; 526908, 3276736; 526960, 3276801; 527010, 3276865; 527213, 3277098; 527281, 3277166; 527392, 3277230; 527536, 3277252; 527711, 3277190; 527805, 3277102; 527857, 3277003; 527869, 3276903; 527861, 3276787; 527803, 3276674; 527699, 3276578; 527644, 3276515; 527643, 3276397; 527630, 3276386; 527530, 3276384; 527508, 3276359.

(ii) **Note:** Map 3 of Unit 2 follows:



(9) Unit 3: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529583, 3272798; 529599, 3272911; 529557, 3272947; 529513, 3272978; 529473, 3272967; 529445, 3273019; 529422, 3273086; 529448, 3273172; 529481, 3273196; 529507, 3273216; 529496, 3273252; 529503, 3273343; 529563, 3273415; 529676, 3273477; 529771, 3273498; 529870, 3273496; 529917, 3273446; 529970, 3273350; 530057, 3273319; 530110, 3273232; 530104, 3273182; 530099, 3273138; 530147, 3273107; 530178, 3273102; 530182, 3273047; 530190, 3273009; 530208, 3272933; 530211, 3272920; 530159, 3272895; 530123, 3272875; 530112, 3272843; 530083, 3272804; 530081, 3272804; 530049, 3272773; 530020, 3272733; 529995, 3272713; 529909, 3272670; 529790, 3272648; 529687, 3272657; 529646, 3272722; 529588, 3272791; 529583, 3272798.

(ii) **Note:** Units 3 and 4 are depicted on Map 4, which is provided at paragraph (7)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(10) Unit 4: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 530856, 3272567; 530829, 3272537; 530779, 3272510; 530734, 3272516; 530717, 3272422; 530676, 3272341; 530620, 3272272; 530531, 3272213; 530417, 3272180; 530271, 3272194; 530240, 3272264; 530185, 3272283; 530180, 3272385; 530234, 3272501; 530209, 3272542; 530206, 3272578; 530217, 3272624; 530247, 3272658; 530294, 3272681; 530349, 3272685; 530367, 3272699; 530396, 3272702; 530448, 3272698; 530442, 3272851; 530447, 3272909; 530473, 3272992; 530595, 3273076; 530685, 3273138; 530683, 3273167; 530640, 3273210; 530578, 3273224; 530471, 3273226; 530441, 3273259; 530396, 3273326; 530369, 3273344; 530362, 3273412;

530385, 3273503; 530436, 3273540; 530493, 3273576; 530498, 3273608; 530591, 3273684; 530668, 3273720; 530738, 3273733; 530903, 3273657; 530959, 3273526; 530967, 3273452; 530973, 3273424; 531003, 3273401; 531069, 3273343; 531081, 3273277; 531099, 3273245; 531134, 3273194; 531222, 3273176; 531252, 3273111; 531282, 3273015; 531205, 3272961; 531135, 3272916; 531056, 3272822; 530975, 3272780; 530909, 3272689; 530855, 3272599; 530856, 3272567.

(ii) **Note:** Units 3 and 4 are depicted on Map 4, which is provided at paragraph (7)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(11) Unit 5: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529536, 3275753; 529533, 3275931; 529585, 3276056; 529741, 3276191; 529927, 3276249; 530112, 3276208; 530275, 3276093; 530350, 3275987; 530318, 3275927; 530238, 3275838; 530169, 3275776; 530109, 3275735; 529970, 3275629; 529950, 3275603; 529936, 3275565; 529781, 3275523; 529719, 3275529; 529621, 3275548; 529566, 3275611; 529536, 3275753.

(ii) **Note:** Units 5, 6, and 17 are depicted on Map 5, which is provided at paragraph (8)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(12) Unit 6: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 531676, 3275515; 531639, 3275342; 531576, 3275302; 531483, 3275283; 531331, 3275337; 531242, 3275350; 531189, 3275346; 531193, 3275501; 531094, 3275501; 531094, 3275378; 531072, 3275398; 530953, 3275478; 530909, 3275521; 530851, 3275661; 530871, 3275702; 530981, 3275903; 531119, 3275970; 531335, 3275950; 531512, 3275851; 531615, 3275701; 531676, 3275515.

(ii) **Note:** Units 5 and 6 are depicted on Map 5, which is provided at paragraph (8)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(13) Unit 7: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 531798, 3277694; 531828, 3277832; 531885, 3277927; 532001, 3278016; 532148, 3278053; 532303, 3278026; 532420, 3277943; 532506, 3277797; 532520, 3277643; 532469, 3277495; 532351, 3277373; 532197, 3277326; 532028, 3277350; 531906, 3277421; 531812, 3277576; 531798, 3277694.

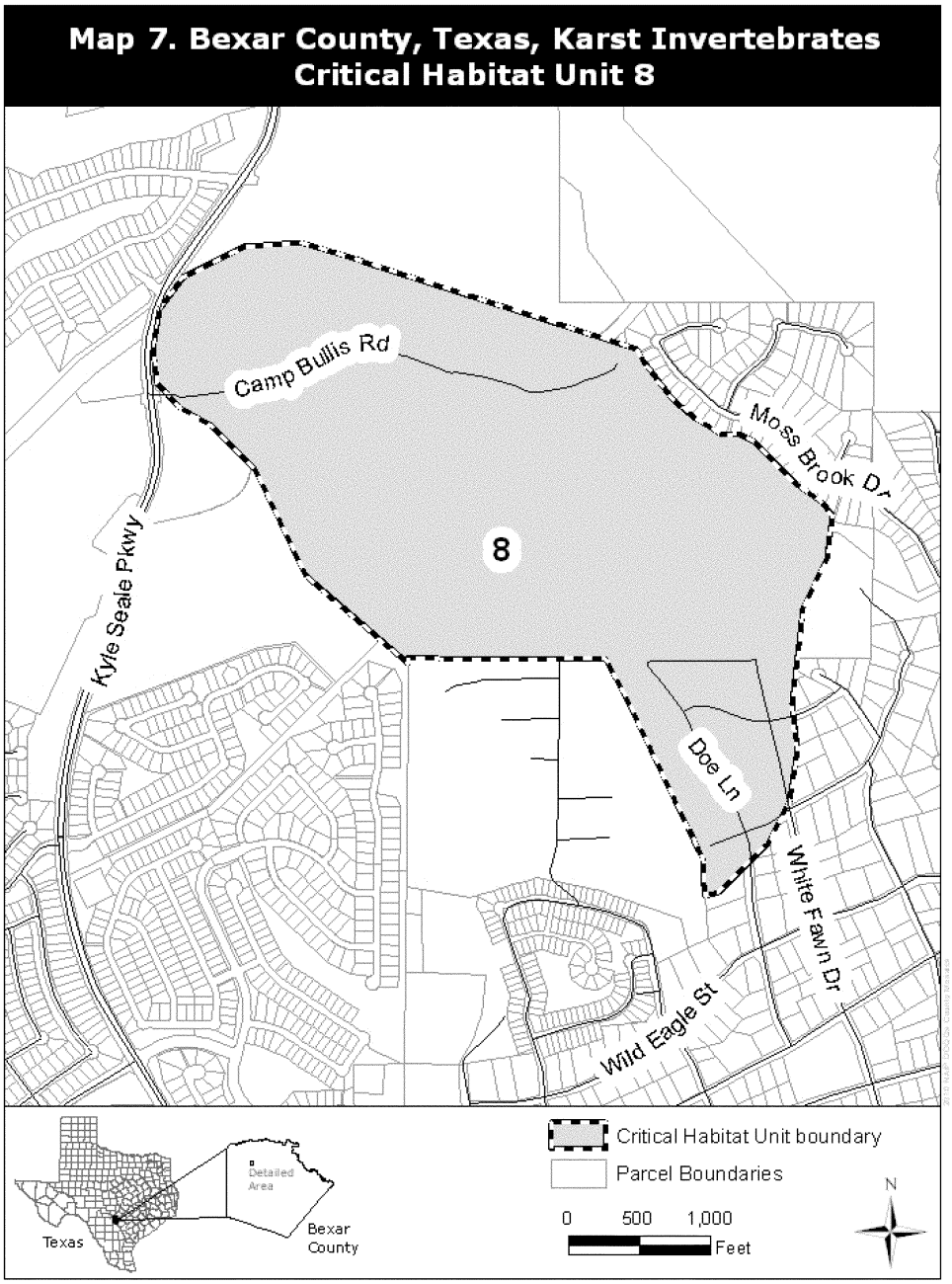
(ii) **Note:** Map 6 of Unit 7 follows:



(14) Unit 8: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 535007, 3274657; 535063, 3274624; 535096, 3274626; 535133, 3274610; 535173, 3274570; 535222, 3274516; 535282, 3274478; 535302, 3274450; 535290, 3274359; 535238, 3274250; 535215, 3274045; 535226, 3273947; 535209, 3273836; 535160, 3273741; 535056, 3273640; 535027, 3273631; 535026, 3273654; 535022, 3273714; 535018, 3273721; 535013, 3273730; 534992, 3273775; 534988, 3273784; 534962, 3273838; 534962, 3273838; 534936, 3273892; 534909, 3273947; 534909, 3273947; 534883, 3274002; 534856, 3274057; 534856, 3274057; 534813, 3274142; 534708, 3274141; 534625, 3274140; 534519, 3274140; 534389, 3274145; 534389, 3274132; 534168, 3274322; 534058, 3274551; 533966, 3274645; 533893, 3274683; 533848, 3274736; 533839, 3274809; 533853, 3274895; 533905, 3274965; 534037, 3275030; 534156, 3275037; 534290, 3274997; 534292, 3274995; 534881, 3274809; 534894, 3274782; 534931, 3274737; 534962, 3274695; 535007, 3274657.

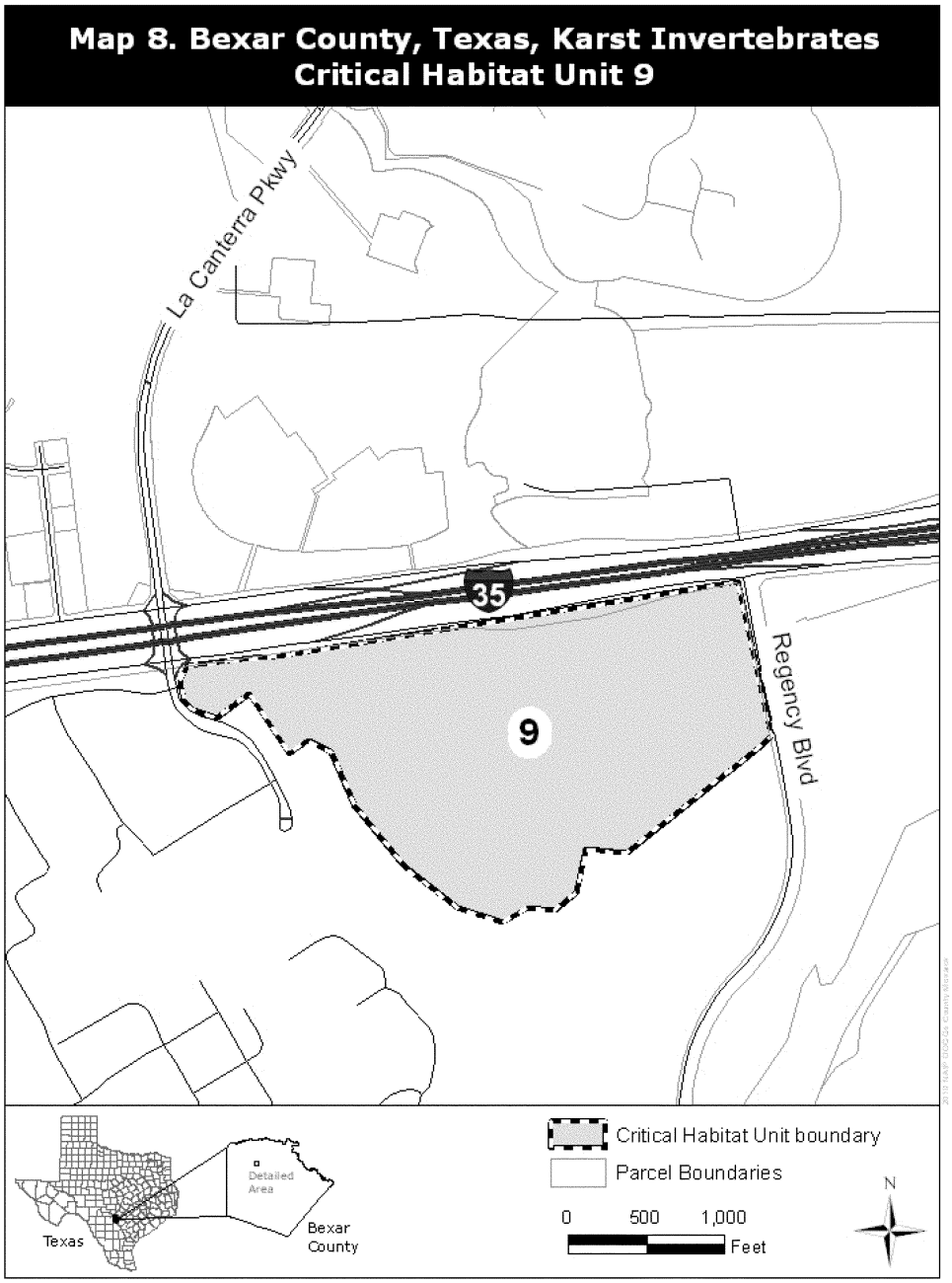
(ii) **Note:** Map 7 of Unit 8 follows:



(15) Unit 9: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 536971, 3273194; 537058, 3273204; 537958, 3273349; 538025, 3273049; 538011, 3273033; 537743, 3272819; 537663, 3272828; 537645, 3272742; 537602, 3272707; 537551, 3272712; 537500, 3272684; 537412, 3272713; 537309, 3272793; 537213, 3272912; 537167, 3273017; 537121, 3273038; 537084, 3273013; 537008, 3273129; 536943, 3273082; 536897, 3273099; 536879, 3273117; 536871, 3273154; 536887, 3273183; 536971, 3273194.

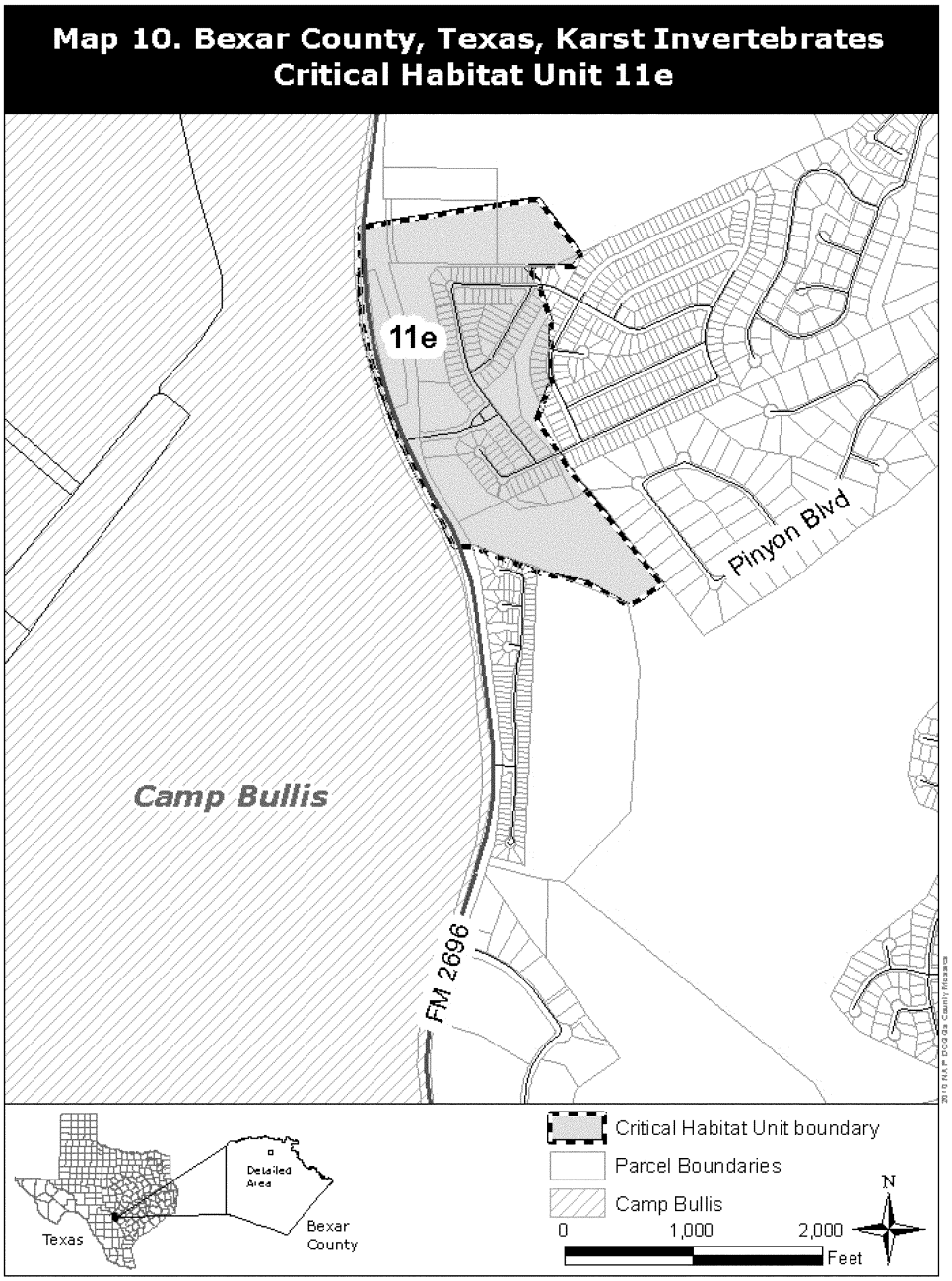
(ii) **Note:** Map 8 of Unit 9 follows:



(16) Unit 11e: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 546476, 3280267; 546413, 3280397; 546339, 3280604; 546323, 3280672; 546318, 3280792; 546318, 3280907; 546549, 3280944; 546741, 3280974; 546842, 3280841; 546822, 3280811; 546712, 3280817; 546741, 3280776; 546771, 3280674; 546768, 3280534; 546737, 3280452; 546810, 3280337; 547036, 3280060; 546957, 3280008; 546861, 3280061; 546745, 3280087; 546590, 3280148; 546541, 3280150; 546515, 3280201; 546476, 3280267.

(ii) **Note:** Map 10 of Unit 11e follows:



(17) Unit 12: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 552033, 3278053; 551928, 3278141; 551834, 3278139; 551807, 3278130; 551766, 3278160; 551687, 3278290; 551673, 3278422; 551692, 3278521; 551714, 3278718; 551702, 3278837; 551730, 3278937; 551771, 3279018; 551835, 3279091; 551959, 3279147; 552097, 3279168; 552239, 3279127; 552334, 3279050; 552409, 3278920; 552425, 3278785; 552399, 3278671; 552385, 3278483; 552385, 3278343; 552354, 3278249; 552300, 3278162; 552188, 3278085; 552105, 3278057; 552033, 3278053.

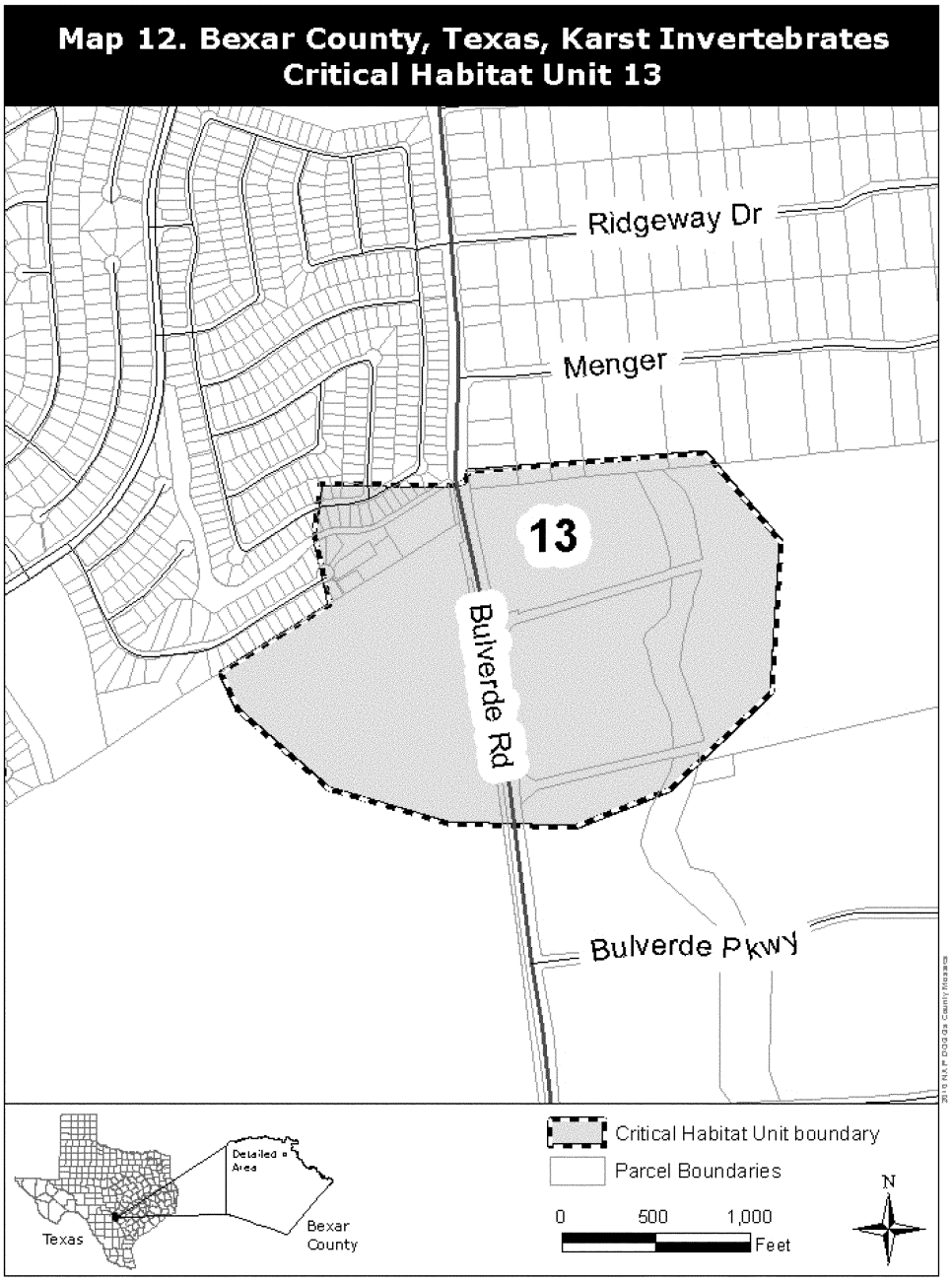
(ii) **Note:** Map 11 of Unit 12 follows:



(18) Unit 13: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 555466, 3278873; 555441, 3278986; 555451, 3279067; 555662, 3279064; 555683, 3279069; 555689, 3279087; 556071, 3279116; 556194, 3278972; 556178, 3278730; 556012, 3278573; 555860, 3278513; 555655, 3278520; 555463, 3278576; 555318, 3278702; 555289, 3278762; 555466, 3278873.

(ii) **Note:** Map 12 of Unit 13 follows:



(19) Unit 21: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 533735, 3278278; 533765, 3278416; 533821, 3278511; 533938, 3278599; 534084, 3278636; 534240, 3278610; 534356, 3278527; 534443, 3278380; 534457, 3278227; 534406, 3278079; 534287, 3277957; 534134, 3277909; 533964, 3277934; 533843, 3278004; 533749, 3278160; 533735, 3278278.

(ii) **Note:** Map 18 of Unit 21 follows:



Beetle (No Common Name) (*Rhadine infernalis*)

(1) Critical habitat for the beetle (*Rhadine infernalis*) in Bexar County, Texas, occurs in Units 1a, 1b, 1d, 1e, 1f, 2, 3, 4, 5, 6, 8, 10a, 10b, 14, 15, 16, 17, 19, 23, and 26. These units are depicted on Maps 9, 13, 14, 15, 16, 20, and 22 in this entry; on Maps 2, 4, and 5 provided at paragraphs (6)(ii), (7)(ii), and (8)(ii) of the entry for the Helotes mold beetle in this paragraph (i); and on Maps 3 and 7 provided at paragraphs (8)(ii) and (14)(ii) of the entry for the beetle (*Rhadine exilis*) in this paragraph (i). The units are also depicted on Map 1 (index map) provided in paragraph (5) of the entry for the Helotes mold beetle in this paragraph (i).

(2) Eight caves and their associated karst management areas established under the La Cantera Habitat Conservation Plan section 10(a)(1)(B) permit are adjacent to or within the boundaries of Units 1e, 3, 6, 8, and 17, but are not designated as critical habitat. These caves are Canyon Ranch Pit, Fat Man's Nightmare Cave, Scenic Overlook Cave and the surrounding approximately 75 ac (30 ha) adjacent to Unit 1e; Helotes Blowhole and Helotes Hilltop Caves and the surrounding approximately 25 ac (10 ha) adjacent to Unit 3; John Wagner Cave No. 3 and the surrounding approximately 4 ac (1.6 ha) adjacent to Unit 6; Hills and Dales Pit and the surrounding approximately 70 ac (28 ha) adjacent to Unit 8; and Madla's Cave and the surrounding approximately 5 ac (2 ha) within Unit 17.

(3) The primary constituent elements of, and the statements regarding developed lands in, critical habitat for the *Rhadine exilis* are identical to those set forth at paragraphs (2) and (3) of the entry for the Helotes mold beetle in this paragraph (i).

(4) Data layers defining map units were created using a geographic information system (GIS), which included cave locations, karst zone

maps, roads, property boundaries, 2010 aerial photography, and USGS 7.5' quadrangles. Points were placed on the GIS.

(5) Unit 1a: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522870, 3272900; 522872, 3273024; 522919, 3273156; 523000, 3273241; 523124, 3273312; 523284, 3273323; 523438, 3273258; 523618, 3273132; 523729, 3273041; 523797, 3272836; 523784, 3272720; 523724, 3272603; 523633, 3272522; 523515, 3272464; 523406, 3272460; 523276, 3272492; 523041, 3272654; 522939, 3272737; 522870, 3272900.

(ii) **Note:** Map 2 of Unit 1a is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(6) Unit 1b: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522172, 3270656; 522202, 3270794; 522259, 3270889; 522375, 3270977; 522521, 3271014; 522677, 3270988; 522793, 3270905; 522880, 3270758; 522894, 3270605; 522843, 3270457; 522724, 3270335; 522571, 3270287; 522401, 3270312; 522280, 3270382; 522186, 3270538; 522172, 3270656

(ii) **Note:** Map 2 of Unit 1b is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(7) Unit 1d: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 524739, 3270323; 524739, 3270454; 524798, 3270590; 524917, 3270699; 525091, 3270744; 525462, 3270937; 525613, 3271016; 525757, 3271026; 525893, 3270977; 526000, 3270883; 526059, 3270741; 526062, 3270603; 525980, 3270370; 525836, 3270243; 525700, 3270206; 525289, 3270072; 525153, 3270020; 525016, 3270023; 524883, 3270092; 524788, 3270191; 524739, 3270323.

(ii) **Note:** Map 2 of Unit 1d is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(8) Unit 1e: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 526878, 3273091; 527025, 3273128; 527180, 3273102; 527296, 3273019; 527383, 3272872; 527397, 3272719; 527346, 3272571; 527228, 3272449; 527074, 3272401; 526905, 3272426; 526783, 3272496; 526471, 3272434; 526435, 3272317; 526459, 3272223; 526443, 3272076; 526355, 3271944; 526157, 3271842; 525996, 3271842; 525853, 3271930; 525762, 3272043; 525703, 3272205; 525729, 3272351; 525802, 3272494; 525890, 3272776; 525875, 3272893; 525758, 3273054; 525692, 3273095; 525586, 3273259; 525571, 3273362; 525593, 3273505; 525692, 3273659; 525875, 3273765; 526047, 3273798; 526252, 3273754; 526403, 3273633; 526465, 3273472; 526487, 3273281; 526505, 3273157; 526878, 3273091.

(ii) **Note:** Map 2 of Unit 1e is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(9) Unit 1f: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 526537, 3271231; 526567, 3271369; 526624, 3271464; 526740, 3271552; 526887, 3271589; 527042, 3271563; 527159, 3271480; 527245, 3271333; 527259, 3271180; 527208, 3271032; 527090, 3270910; 526936, 3270862; 526767, 3270887; 526645, 3270958; 526552, 3271113; 526537, 3271231.

(ii) **Note:** Map 2 of Unit 1f is provided at paragraph (6)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(10) Unit 2: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 527508, 3276359; 527444, 3276287; 527343, 3276226; 527229, 3276204; 527117, 3276216; 527116, 3276253; 527085, 3276279; 527003, 3276270; 526933, 3276334; 526905, 3276386; 526783, 3276386; 526851, 3276555; 526850, 3276556; 526864, 3276662; 526908, 3276736; 526960, 3276801; 527010, 3276865; 527213, 3277098; 527281, 3277166; 527392, 3277230; 527536, 3277252; 527711, 3277190; 527805, 3277102; 527857, 3277003; 527869, 3276903; 527861, 3276787; 527803, 3276674; 527699, 3276578; 527644, 3276515; 527643, 3276397; 527630, 3276386; 527530, 3276384; 527508, 3276359.

(ii) **Note:** Map 3 of Unit 2 is provided at paragraph (8)(ii) of the entry for the beetle (*Rhadine exilis*) in this paragraph (i).

(11) Unit 3: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529583, 3272798; 529599, 3272911; 529557, 3272947; 529513, 3272978; 529473, 3272967; 529445, 3273019; 529422, 3273086; 529448, 3273172; 529481, 3273196; 529507, 3273216; 529496, 3273252; 529503, 3273343; 529563, 3273415; 529676, 3273477; 529771, 3273498; 529870, 3273496; 529917, 3273446; 529970, 3273350; 530057, 3273319; 530110, 3273232; 530104, 3273182; 530099, 3273138; 530147, 3273107; 530178, 3273102; 530182, 3273047; 530190, 3273009; 530208, 3272933; 530211, 3272920; 530159, 3272895; 530123, 3272875; 530112, 3272843; 530083, 3272804; 530081, 3272804; 530049, 3272773; 530020, 3272733; 529995, 3272713; 529909, 3272670; 529790, 3272648; 529687, 3272657; 529646, 3272722; 529588, 3272791; 529583, 3272798.

(ii) **Note:** Map 4 of Unit 3 is provided at paragraph (7)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(12) Unit 4: Bexar County, Texas

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 530856, 3272567; 530829, 3272537; 530779, 3272510; 530734, 3272516; 530717, 3272422; 530676, 3272341; 530620, 3272272; 530531, 3272213; 530417, 3272180; 530271, 3272194; 530240, 3272264; 530185, 3272283; 530180, 3272385; 530234, 3272501; 530209, 3272542; 530206, 3272578; 530217, 3272624; 530247, 3272658; 530294, 3272681; 530349, 3272685; 530367, 3272699; 530396, 3272702; 530448, 3272698; 530442, 3272851; 530447, 3272909; 530473, 3272992; 530595, 3273076; 530685, 3273138; 530683, 3273167; 530640, 3273210; 530578, 3273224; 530471, 3273226; 530441, 3273259; 530396, 3273326; 530369, 3273344; 530362, 3273412; 530385, 3273503; 530436, 3273540; 530493, 3273576; 530498, 3273608; 530591, 3273684; 530668, 3273720; 530738, 3273733; 530903, 3273657; 530959, 3273526; 530967, 3273452; 530973, 3273424; 531003, 3273401; 531069, 3273343; 531081, 3273277; 531099, 3273245; 531134, 3273194; 531222, 3273176; 531252, 3273111; 531282, 3273015; 531205, 3272961; 531135, 3272916; 531056, 3272822; 530975, 3272780; 530909, 3272689; 530855, 3272599; 530856, 3272567.

(ii) **Note:** Map 4 of Unit 4 is provided at paragraph (7)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(13) Unit 5: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529536, 3275753; 529533, 3275931; 529585, 3276056; 529741, 3276191; 529927, 3276249; 530112, 3276208; 530275, 3276093; 530350, 3275987; 530318, 3275927; 530238, 3275838; 530169, 3275776; 530109, 3275735; 529970, 3275629; 529950, 3275603; 529936, 3275565; 529781, 3275523;

529719, 3275529; 529621, 3275548; 529566, 3275611; 529536, 3275753.

(ii) **Note:** Map 5 of Unit 5 is provided at paragraph (8)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(14) Unit 6: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 531676, 3275515; 531639, 3275342; 531576, 3275302; 531483, 3275283; 531331, 3275337; 531242, 3275350; 531189, 3275346; 531193, 3275501; 531094, 3275501; 531094, 3275378; 531072, 3275398; 530953, 3275478; 530909, 3275521; 530851, 3275661; 530871, 3275702; 530981, 3275903; 531119, 3275970; 531335, 3275950; 531512, 3275851; 531615, 3275701; 531676, 3275515.

(ii) **Note:** Map 5 of Unit 6 is provided at paragraph (8)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(15) Unit 8: Bexar County, Texas.

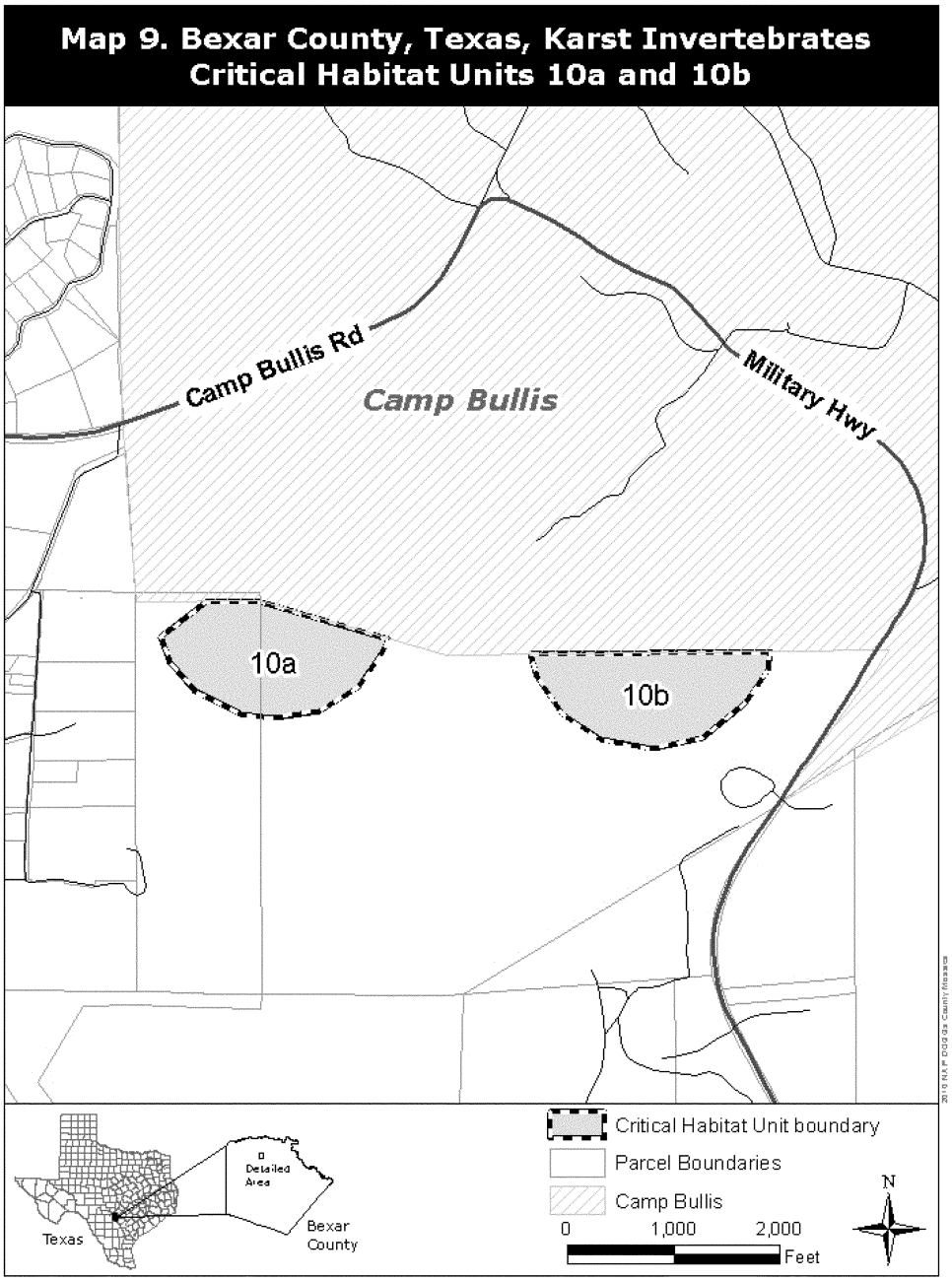
(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 535007, 3274657; 535063, 3274624; 535096, 3274626; 535133, 3274610; 535173, 3274570; 535222, 3274516; 535282, 3274478; 535302, 3274450; 535290, 3274359; 535238, 3274250; 535215, 3274045; 535226, 3273947; 535209, 3273836; 535160, 3273741; 535056, 3273640; 535027, 3273631; 535026, 3273654; 535022, 3273714; 535018, 3273721; 535013, 3273730; 534992, 3273775; 534988, 3273784; 534962, 3273838; 534962, 3273838; 534936, 3273892; 534909, 3273947; 534909, 3273947; 534883, 3274002; 534856, 3274057; 534856, 3274057; 534813, 3274142; 534708, 3274141; 534625, 3274140; 534519, 3274140; 534389, 3274145; 534389, 3274132; 534168, 3274322; 534058, 3274551; 533966, 3274645; 533893, 3274683; 533848, 3274736; 533839, 3274809; 533853, 3274895; 533905, 3274965; 534037, 3275030; 534156, 3275037; 534290, 3274997; 534292, 3274995; 534881, 3274809; 534894, 3274782; 534931, 3274737; 534962, 3274695; 535007, 3274657.

(ii) **Note:** Map 7 of Unit 8 is provided at paragraph (14)(ii) of the entry for the beetle (*Rhadine exilis*) in this paragraph (i).

(16) Unit 10a: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 540276, 3277443; 540255, 3277399; 540189, 3277302; 540076, 3277233; 539945, 3277214; 539851, 3277226; 539717, 3277295; 539645, 3277377; 539617, 3277449; 539650, 3277471; 539750, 3277551; 539905, 3277551; 540276, 3277443.

(ii) **Note:** Map 9 of Units 10a and 10b follows:



(17) Unit 10b: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 540684, 3277399; 541377, 3277406; 541368, 3277355; 541302, 3277258; 541180, 3277158; 541037, 3277126; 540890, 3277155; 540777, 3277226; 540702, 3277336; 540684, 3277399.

(ii) **Note:** Map 9 of Unit 10b is provided at paragraph (16)(ii) of this entry.

(18) Unit 14: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 520081, 3258642; 520207, 3258774; 520339, 3258764; 520542, 3258723; 520744, 3258618; 520822, 3258502; 520847, 3258327; 521047, 3257873; 521048, 3257838; 521005, 3257658; 520885, 3257494; 520710, 3257405; 520503, 3257379; 520290, 3257468; 520158, 3257609; 520006, 3257810; 519891, 3257965; 519848, 3258183; 519911, 3258441; 520081, 3258642.

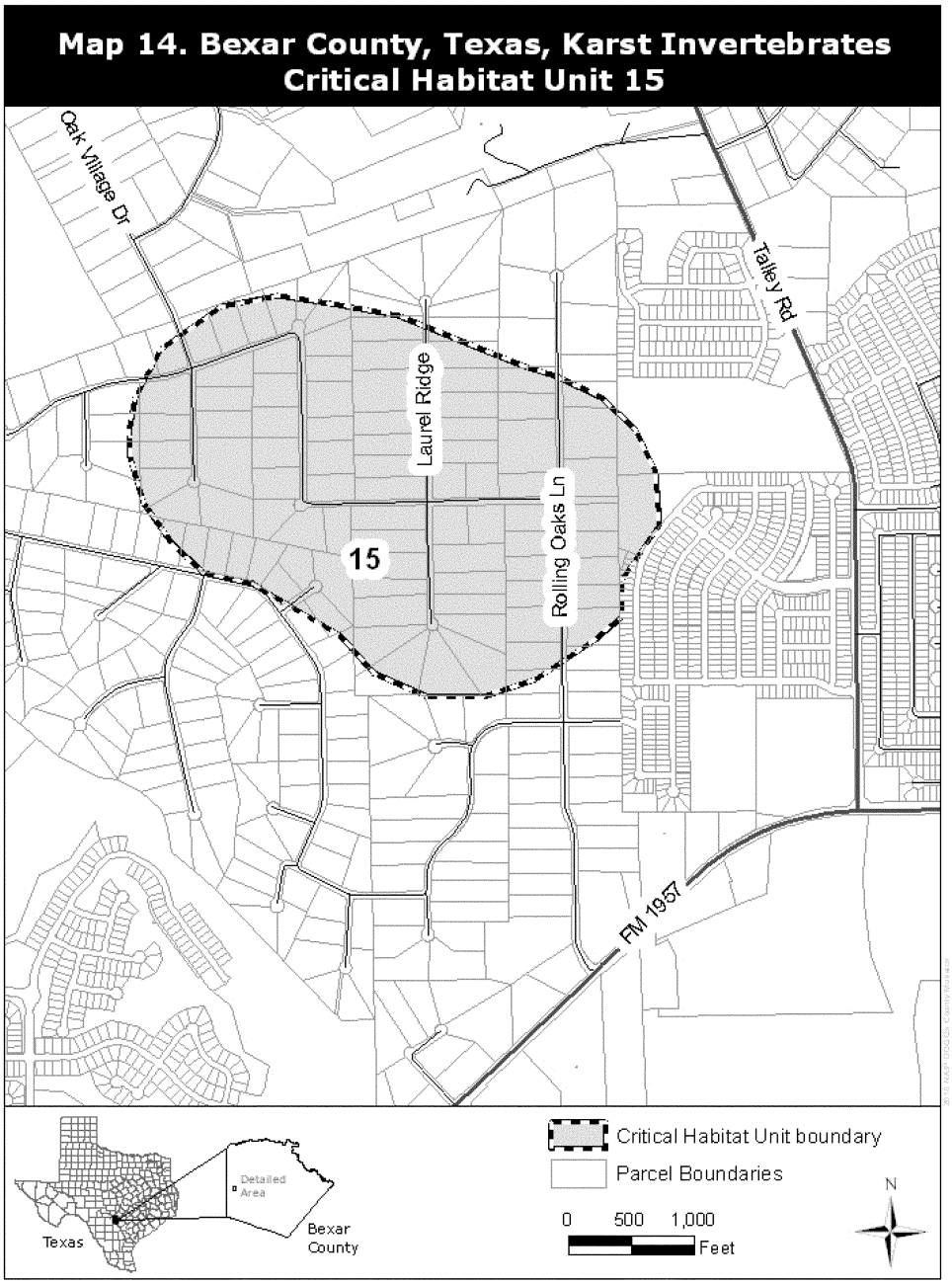
(ii) **Note:** Map 13 of Unit 14 follows:



(19) Unit 15: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 522689, 3256455; 522687, 3256517; 522703, 3256601; 522765, 3256718; 522911, 3256823; 523046, 3256851; 523177, 3256830; 523344, 3256801; 523479, 3256747; 523658, 3256674; 523725, 3256656; 523834, 3256603; 523918, 3256523; 523969, 3256419; 523978, 3256293; 523885, 3256159; 523885, 3256069; 523822, 3256015; 523674, 3255915; 523547, 3255873; 523414, 3255874; 523281, 3255933; 523201, 3256024; 523017, 3256131; 522987, 3256149; 522940, 3256160; 522894, 3256168; 522869, 3256174; 522790, 3256246; 522722, 3256345; 522689, 3256455.

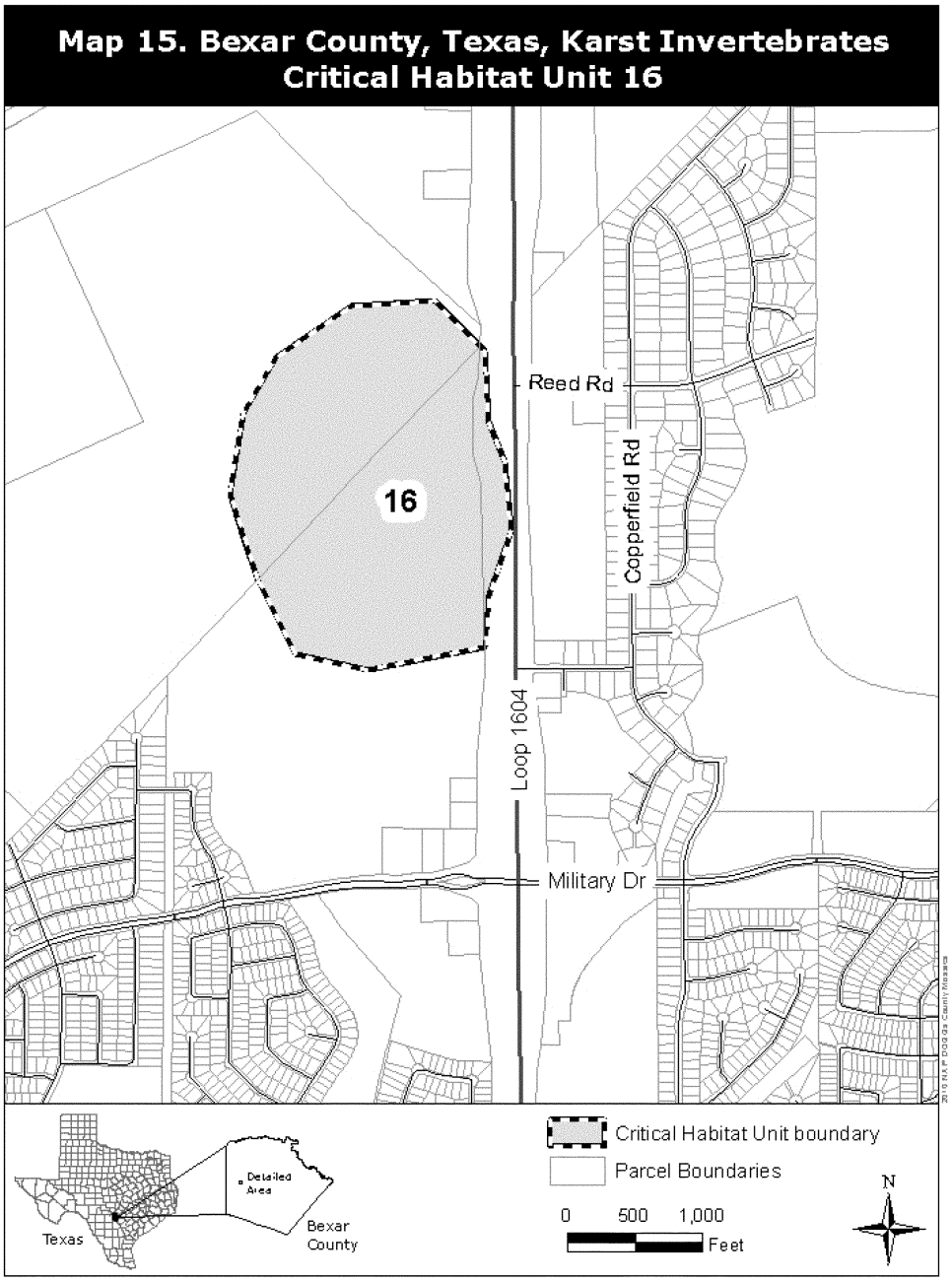
(ii) **Note:** Map 14 of Unit 15 follows:



(20) Unit 16: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 527412, 3258337; 527348, 3258534; 527379, 3258716; 527456, 3258844; 527623, 3258959; 527815, 3258972; 527925, 3258857; 527933, 3258697; 527971, 3258605; 527986, 3258452; 527934, 3258303; 527925, 3258186; 527663, 3258134; 527498, 3258173; 527412, 3258337.

(ii) **Note:** Map 15 of Unit 16 follows:



(21) Unit 17: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 528980, 3275191; 529043, 3275247; 529120, 3275242; 529245, 3275219; 529327, 3275184; 529348, 3275167; 529492, 3275167; 529613, 3275113; 529800, 3275081; 529870, 3274953; 529819, 3274777; 529698, 3274627; 529486, 3274528; 529360, 3274615; 529335, 3274712; 529174, 3274840; 528968, 3274859; 528957, 3275049; 528980, 3275191.

(ii) Not including land within and bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 529490, 3275008; 529490, 3275006; 529490, 3275005; 529490, 3275003; 529490, 3275002; 529489, 3275001; 529489, 3274999; 529489, 3274998; 529489, 3274997; 529489, 3274995; 529489, 3274994; 529488, 3274993; 529488, 3274992; 529489, 3274991; 529489, 3274986; 529489, 3274983; 529489, 3274982; 529482, 3274919; 529329, 3274930; 529337, 3274993; 529337, 3274993; 529337, 3274994; 529336, 3274995; 529337, 3274997; 529337, 3274998; 529336, 3274999; 529336, 3275001; 529336, 3275002; 529336, 3275003; 529336, 3275005; 529336, 3275006; 529336, 3275008; 529336, 3275009; 529336, 3275010; 529336, 3275012; 529336, 3275013; 529336, 3275014; 529336, 3275016; 529337, 3275017; 529337, 3275018; 529337, 3275020; 529337, 3275021; 529337, 3275022; 529338, 3275023; 529338, 3275025; 529338, 3275026; 529339, 3275027; 529339, 3275029; 529339, 3275030; 529340, 3275031; 529340, 3275033; 529341, 3275034; 529341, 3275035; 529342, 3275036; 529342, 3275038; 529343, 3275039; 529343, 3275040; 529344, 3275041; 529344, 3275042; 529345, 3275044; 529346, 3275045; 529346, 3275046; 529347, 3275047; 529348, 3275048; 529348, 3275049; 529349, 3275050; 529350, 3275052; 529351, 3275053; 529351,

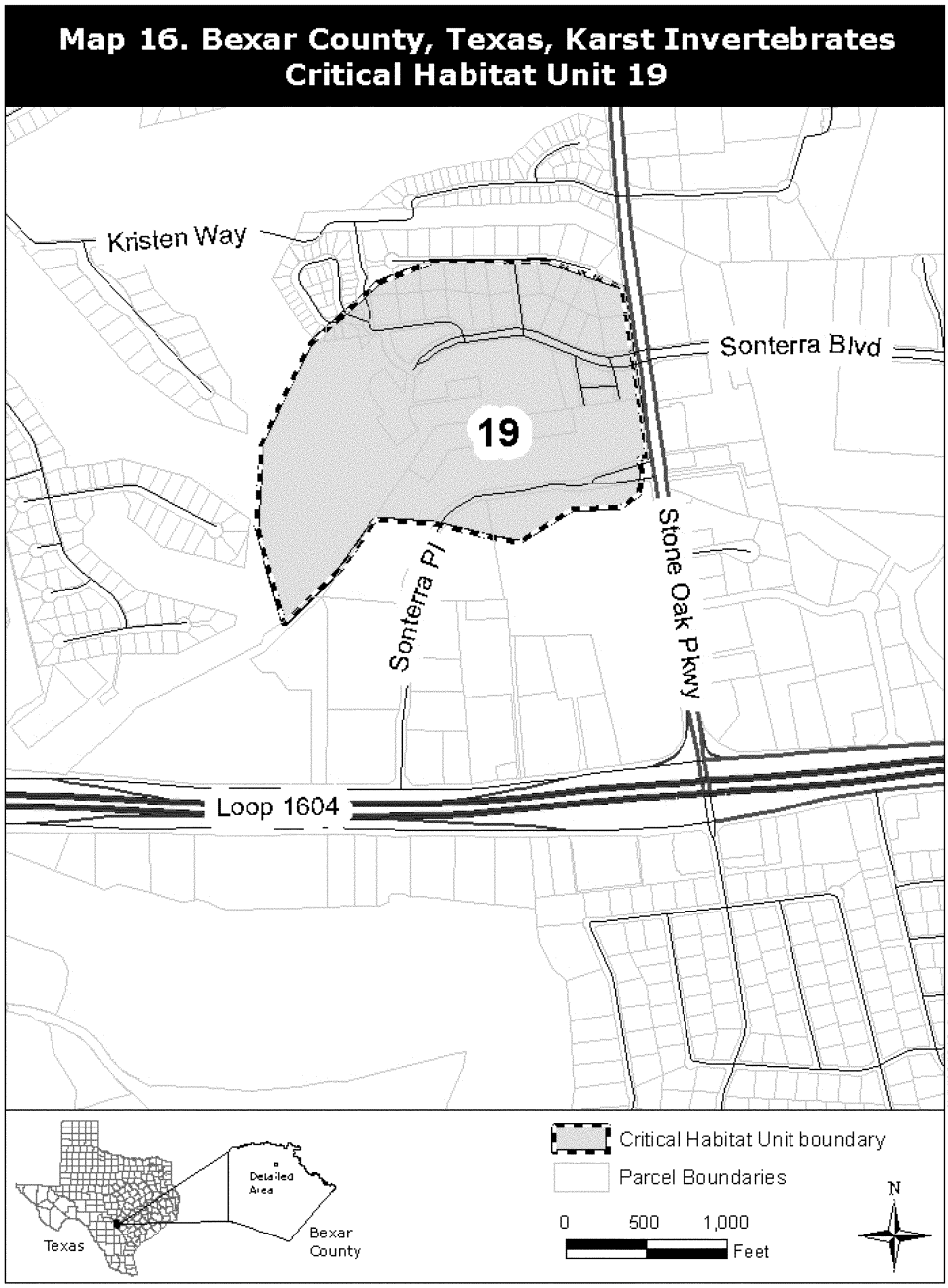
3275054; 529352, 3275055; 529353, 3275056; 529354, 3275057; 529355, 3275058; 529356, 3275059; 529357, 3275060; 529358, 3275061; 529359, 3275062; 529359, 3275063; 529360, 3275064; 529361, 3275065; 529362, 3275066; 529363, 3275066; 529364, 3275067; 529366, 3275068; 529367, 3275069; 529368, 3275070; 529369, 3275070; 529370, 3275071; 529371, 3275072; 529372, 3275073; 529373, 3275073; 529374, 3275074; 529376, 3275075; 529377, 3275075; 529378, 3275076; 529379, 3275077; 529380, 3275077; 529382, 3275078; 529383, 3275078; 529384, 3275079; 529385, 3275079; 529387, 3275080; 529388, 3275080; 529389, 3275081; 529390, 3275081; 529392, 3275081; 529393, 3275082; 529394, 3275082; 529396, 3275082; 529397, 3275083; 529398, 3275083; 529399, 3275083; 529401, 3275083; 529402, 3275084; 529403, 3275084; 529405, 3275084; 529406, 3275084; 529407, 3275084; 529409, 3275084; 529410, 3275084; 529412, 3275084; 529413, 3275084; 529414, 3275084; 529416, 3275084; 529417, 3275084; 529418, 3275084; 529420, 3275084; 529421, 3275084; 529422, 3275084; 529424, 3275084; 529425, 3275083; 529426, 3275083; 529428, 3275083; 529429, 3275083; 529430, 3275082; 529431, 3275082; 529433, 3275082; 529434, 3275081; 529435, 3275081; 529437, 3275081; 529438, 3275080; 529439, 3275080; 529440, 3275079; 529442, 3275079; 529443, 3275078; 529444, 3275078; 529445, 3275077; 529447, 3275077; 529448, 3275076; 529449, 3275075; 529450, 3275075; 529451, 3275074; 529452, 3275073; 529454, 3275073; 529455, 3275072; 529456, 3275071; 529457, 3275070; 529458, 3275070; 529459, 3275069; 529460, 3275068; 529461, 3275067; 529462, 3275066; 529463, 3275066; 529464, 3275065; 529465, 3275064; 529466, 3275063; 529467, 3275062; 529468, 3275061; 529469, 3275060; 529470, 3275059; 529471, 3275058; 529472, 3275057; 529473, 3275056; 529473, 3275055; 529474, 3275054; 529475, 3275053; 529476, 3275052; 529477, 3275050; 529477, 3275049; 529478, 3275048; 529479, 3275047; 529479, 3275046; 529480, 3275045; 529481, 3275044; 529481, 3275042; 529482, 3275041; 529482, 3275040; 529483, 3275039; 529484, 3275038; 529484, 3275036; 529485, 3275035; 529485, 3275034; 529486, 3275033; 529486, 3275031; 529486, 3275030; 529487, 3275029; 529487, 3275027; 529487, 3275026; 529488, 3275025; 529488, 3275023; 529488, 3275022; 529489, 3275021; 529489, 3275020; 529489, 3275018; 529489, 3275017; 529489, 3275016; 529489, 3275014; 529490, 3275013; 529490, 3275012; 529490, 3275010; 529490, 3275009; 529490, 3275008.

(iii) **Note:** Map 5 of Unit 17 is provided at paragraph (8)(ii) of the entry for the Helotes mold beetle in this paragraph (i).

(22) Unit 19: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 548980, 3276370; 549011, 3276172; 548992, 3276167; 549001, 3276139; 548992, 3276099; 548960, 3276076; 548867, 3276071; 548767, 3276012; 548725, 3276018; 548608, 3276046; 548499, 3276055; 548429, 3275955; 548326, 3275856; 548274, 3276042; 548285, 3276194; 548374, 3276384; 548503, 3276497; 548601, 3276538; 548815, 3276541; 548963, 3276489; 548980, 3276370.

(ii) **Note:** Map 16 of Unit 19 follows:



(23) Unit 23: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 535851, 3276414; 535640, 3276401; 535639, 3276467; 535670, 3276630; 535613, 3276734; 535616, 3276844; 535568, 3276883; 535433, 3276912; 535314, 3277003; 535342, 3277121; 535427, 3277203; 535617, 3277255; 535763, 3277242; 535884, 3277190; 536017, 3277082; 536080, 3276928; 536088, 3276708; 536003, 3276539; 535851, 3276414.

(ii) **Note:** Map 20 of Unit 23 follows:



(24) Unit 26: Bexar County, Texas.

(i) Land bounded by the following UTM Zone 14N, North American Datum of 1983 (NAD83) coordinates (E, N): 520192, 3257071; 520300, 3257163; 520493, 3257203; 520672, 3257162; 520816, 3257024; 520870, 3256906; 520901, 3256737; 520865, 3256567; 520821, 3256487; 520710, 3256440; 520638, 3256540; 520556, 3256555; 520490, 3256557; 520363, 3256547; 520290, 3256566; 520195, 3256648; 520166, 3256776; 520200, 3256878; 520268, 3256943; 520228, 3257000; 520192, 3257071.

(ii) **Note:** Map 21 of Unit 26 follows:



* * * * *

Dated: January 24, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–2195 Filed 2–13–12; 8:45 am]

BILLING CODE 4310–55–C



FEDERAL REGISTER

Vol. 77 Tuesday,
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Part IV

Department of Energy

10 CFR Parts 429 and 430
Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket Number EERE–2011–BT–STD–0048]

RIN 1904–AC07

Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental Notice of Proposed Rulemaking (SNOPR) and public meeting.

SUMMARY: The Energy Policy and Conservation Act (EPCA) prescribes energy conservation standards for various consumer products and commercial and industrial equipment. Microwave ovens are covered products under EPCA, although there are no existing microwave oven standards. EPCA requires the U.S. Department of Energy (DOE) to determine whether amended, more stringent, standards are technologically feasible and economically justified, and would save a significant amount of energy. Additionally, the Energy Independence and Security Act of 2007 (EISA 2007) amended EPCA to require any final rule adopted after July 1, 2010 establishing or revising energy conservation standards for covered products, including microwave ovens, to address standby mode and off mode energy use. On October 17, 2008, DOE issued a Notice of Proposed Rulemaking (NOPR) in which DOE proposed amendments to the energy conservation standards for several residential and commercial products, including microwave ovens. In response to the NOPR, DOE received comment expressing concern and encouraging the Department to re-examine standby mode and off mode of microwave ovens as a part of DOE's rulemaking analyses. Additionally, DOE received comment alleging certain data problems affecting DOE's rulemaking analyses. DOE's preliminary assessment suggested that the concerns might be valid, thereby necessitating additional, supplemental rulemaking analyses. In this notice, DOE responds to the comments received on the NOPR and proposes amended energy conservation standards for microwave oven standby mode and off mode. The notice also announces a public meeting to receive comment on these proposed standards and associated analyses and results.

DATES: DOE will hold a public meeting on March 14, 2012, from 9 a.m. to 4 p.m., in Washington, DC. The meeting will also be broadcast as a Webinar. See section VIII, ''Public Participation,'' for Webinar registration information, participant instructions, and information about the capabilities available to Webinar participants.

DOE will accept comments, data, and information regarding this SNOPR before and after the public meeting, but no later than April 16, 2012. See section VIII, ''Public Participation,'' for details.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue SW., Washington, DC 20585. To attend, please notify Ms. Brenda Edwards at (202) 586–2945. Please note that foreign nationals visiting DOE Headquarters are subject to advanced security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 to initiate the necessary procedures.

Any comments submitted must identify the SNOPR for Energy Conservation Standards for Microwave Oven Standby Mode and Off Mode and must provide docket number EERE–2011–BT–STD–0048 and/or regulatory information number (RIN) 1904–AC07. Comments may be submitted using any of the following methods.

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: MWO-2011-BT-STD-0048@ee.doe.gov* Include the docket number and/or RIN in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Office of Energy Efficiency and Renewable Energy through the methods listed above and by email to *Christine_J._Kymn@omb.eop.gov.*

For detailed instructions on submitting comments and additional information on the rulemaking process, see section VIII of this document (''Public Participation'').

Docket: The docket is available for review at *regulations.gov,* including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+O+SR;rpp=10;po=0;D=EERE-2011-BT–STD–0048.* This Web page will contain a link to the docket for this notice on the regulations.gov site. The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section VIII for information on how to submit comments through regulations.gov.

For further information on how to submit or review public comments or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Wes Anderson, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7335. Email: *wes.anderson@ee.doe.gov.*

Mr. Ari Altman, Esq., U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6307. Email: *Ari.Altman@hq.doe.gov.*

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I. Summary of the Proposed Rule

The Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.*; EPCA or the Act), as amended, provides that any amended energy conservation standard DOE prescribes for certain consumer products, such as microwave ovens, shall be designed to ''achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.'' (42 U.S.C. 6295(o)(2)(A)) The new or amended standard must ''result in significant conservation of energy.'' (42 U.S.C. 6295(o)(3)(B)) In accordance with these and other statutory provisions discussed in this notice, DOE proposes amended energy conservation standards for microwave oven standby mode and off mode. The proposed standards, which prescribe the maximum allowable energy use when a product is in standby mode, are shown in Table I.1.[1] These proposed standards, if adopted, would apply to all products listed in Table I.1 and manufactured in, or imported into, the United States on or after April 1, 2014.

TABLE I.1—PROPOSED ENERGY CONSERVATION STANDARDS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE

[Compliance Starting in 2014]

Product classes	Proposed energy conservation standard
Microwave-Only Ovens and Countertop Combination Microwave Ovens	Maximum Standby Power = 1.0 watt.
Built-In and Over-the-Range Combination Microwave Ovens	Maximum Standby Power = 2.2 watts.

DOE's analyses indicate that the proposed standards would save a significant amount of energy–an estimated 0.41 quads over 30 years (2014 through 2043). According to the Energy Information Administration's (EIA's) *Annual Energy Outlook 2010* (*AEO 2010*), total residential energy consumption is projected to be 21.3 quads in 2015. The amount of energy saved per year is equivalent to 0.06 percent of the projected household energy use.

The cumulative national net present value (NPV) of total consumer costs and savings of the proposed standards for products shipped in 2014–2043, in 2010$, ranges from $1.82 billion (at a 7-percent discount rate) to $3.59 billion (at a 3-percent discount rate).[2] The NPV is the estimated total value of future operating-cost savings during the analysis period, minus the estimated increased product costs, discounted to 2011. The industry net present value (INPV) is the sum of the discounted cash flows to the industry from the base

[1] DOE considered energy use in off mode for microwave ovens, but is not proposing a maximum allowable off mode power because it is unaware of any current microwave ovens that are capable of operating in such a mode.

[2] DOE uses discount rates of 7 and 3 percent based on guidance from the Office of Management and Budget (OMB Circular A–4, section E, September 17, 2003). See section IV.E for further information.

year through the end of the analysis period (2014 to 2043). Using a real discount rate of 7.2 percent, DOE estimates that INPV for manufacturers of all microwave ovens in the base case is $1.1 billion in 2010$. If DOE adopts the proposed standard, it expects manufacturers will lose 4.7 to 6.5 percent of their INPV, or approximately $52.9 million to $73.6 million. Using a 7-percent discount rate, the NPV of consumer costs and savings from today's proposed standards would amount to 25 to 34 times the total estimated industry losses. Using a 3-percent discount rate, the NPV would amount to 49 to 68 times the total estimated industry losses.

The projected economic impacts of the proposed standards on individual consumers are positive. For example, for Microwave-Only and Countertop Combination Microwave Ovens (Product Class 1), the estimated average life-cycle cost (LCC) savings in 2010$ are $13, and all consumers of these products would have positive economic impacts. For Built-In and Over-the-Range Combination Microwave Ovens (Product Class 2), the estimated average LCC savings in 2010$ are $4, and most consumers of this product would have positive economic impacts.

In addition, the proposed standards would have significant environmental benefits. The energy savings projected from the proposed standards would result in cumulative greenhouse gas emission reductions of 31.48 million metric tons (Mt) [3] of carbon dioxide (CO_2) in 2014–2043. During this period, the proposed standards would result in emissions reductions of 25.6 tons of nitrogen oxides (NO_X), and have a negligible impact on emissions of mercury (Hg).[4] DOE estimates the present monetary value of the CO_2 emissions reduction is between $139 million and $2,118 million, expressed in 2010$. DOE also estimates the present monetary value of the NO_X emissions reduction, expressed in 2010$, is between $3.82 million and $39.3 million at a 7-percent discount rate, and between $7.44 million and $76.4 million at a 3-percent discount rate.[5]

The benefits and costs of today's proposed standards can also be expressed in terms of annualized values over a 30-year period. The annualized monetary values are the sum of (1) the annualized national economic value of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, which is another way of representing consumer NPV), and (2) the monetary value of the benefits of emission reductions, including CO_2 emission reductions.[6] The value of the CO_2 reductions, otherwise known as the Social Cost of Carbon (SCC), is calculated using a range of values per metric ton of CO_2 developed by a recent interagency process. The monetary costs and benefits of cumulative emissions reductions are reported in 2010$ to permit comparisons with the other costs and benefits in the same dollar units. The derivation of the SCC values is discussed in section IV.K.

Although combining the values of operating savings and CO_2 reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic U.S. consumer monetary savings that occur as a result of market transactions, whereas the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use different time frames for analysis. The national operating cost savings is measured for the lifetime of microwave ovens shipped in 2014–2043. The SCC values, on the other hand, reflect the present value of all future climate-related impacts resulting from the emission of one ton of CO_2 in each year. These impacts continue well beyond 2100.

Table I.2 shows the annualized values for today's proposed standards, expressed in 2010$. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO_2 reductions, for which DOE used a 3-percent discount rate along with the SCC series corresponding to a value of $22.3/ton in 2010, the cost of the standards proposed in today's rule is $20.3 million per year in increased product costs, while the annualized benefits are $167 million in reduced product operating costs, $35.4 million in CO_2 reductions, and $1.74 million in reduced NO_X emissions. In this case, the net benefit amounts to $184 million per year. Using a 3-percent discount rate for all benefits and costs and the SCC series corresponding to a value of $22.3/ton in 2010, the cost of the standards proposed in today's rule is $21.6 million per year in increased product costs, while the annualized benefits are $205 million in reduced operating costs, $35.4 million in CO_2 reductions, and $2.14 million in reduced NO_X emissions. In this case, the net benefit amounts to $221 million per year.

TABLE I.2—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE FOR PRODUCTS SOLD IN 2014–2043

	Discount rate	Primary estimate *	Low benefits estimate *	High benefits estimate *
		Monetized (*million 2010$/year*)		
Benefits				
Operating Cost Savings	7%	167	150	185

[3] Results for NO_X and Hg are presented in short tons. A metric ton is equivalent to 1.1 short tons.

[4] DOE calculates emissions reductions relative to the most recent version of the *Annual Energy Outlook* (*AEO*) Reference case forecast. This forecast accounts for emissions reductions from in-place regulations, including the Clean Air Interstate Rule (CAIR, 70 FR 25162 (May 12, 2005)), but not the Clean Air Mercury Rule (CAMR, 70 FR 28606 (May 18, 2005)). Subsequent regulations, including the Cross-State Air Pollution rule issued on July 6, 2011, do not appear in the forecast at this time.

[5] DOE is aware of multiple agency efforts to determine the appropriate range of values used in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before it once again monetizes Hg in its rulemakings.

[6] DOE used a two-step calculation process to convert the time-series of costs and benefits into annualized values. First, DOE calculated a present value in the same year used for discounting the NPV of total consumer costs and savings. To calculate the present value, DOE used discount rates of 3 and 7 percent for all costs and benefits except for the value of CO_2 reductions. For the latter, DOE used a range of discount rates, as shown in Table I.2. From the present value, DOE then calculated the corresponding time-series of fixed annual payments over a 30-year period starting in the same year used for discounting the NPV of total consumer costs and savings. The fixed annual payment is the annualized value. Although DOE calculated annualized values, this does not imply that the time-series of cost and benefits from which the annualized values were determined would be a steady stream of payments.

TABLE I.2—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE FOR PRODUCTS SOLD IN 2014–2043—Continued

	3%	205	182	229
CO_2 Reduction at $4.9/t **	5%	9.02	8.49	9.55
CO_2 Reduction at $22.3/t **	3%	35.4	33.3	37.6
CO_2 Reduction at $36.5/t **	2.5%	55.9	52.5	59.3
CO_2 Reduction at $67.6/t **	3%	108.0	101.5	114.6
NO_X Reduction at $2,537/t **	7%	1.74	1.65	1.82
	3%	2.14	2.02	2.26
Total†	7% plus CO_2 range	178 to 277	160 to 253	196 to 301
	7%	204	185	224
	3%	243	217	269
	3% plus CO_2 range	216 to 315	193 to 286	241 to 346
Costs				
Incremental Product Costs	7%	20.32	23.39	20.25
	3%	21.59	25.48	21.48
Total Net Benefits				
Total†	7% plus CO_2 range	157 to 256	137 to 230	176 to 281
	7%	184	162	204
	3%	221	192	247
	3% plus CO_2 range	195 to 294	167 to 260	219 to 324

* The Primary, Benefits, and High Benefits Estimates utilize forecasts of energy prices and housing starts from the *AEO2010* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental product costs reflect a declining trend (default learning rate) for product prices in the Primary Estimate, constant prices (no learning rate) for product prices in the Low Estimate, and a declining trend (high learning rate) in the High Estimate. The derivation and application of learning rates for product prices is explained in section IV.D.1.

** The CO_2 values represent global values (in 2010$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.9, $22.3, and $36.5 per ton are the averages of SCC distributions calculated using 5-percent, 3-percent, and 2.5-percent discount rates, respectively. The value of $67.6 per ton represents the 95th percentile of the SCC distribution calculated using a 3-percent discount rate. The value for NO_X (in 2010$) is the average of the low and high values used in DOE's analysis.

† Total Benefits for both the 3-percent and 7-percent cases are derived using the SCC value calculated at a 3-percent discount rate, which is $22.3/ton in 2010 (in 2010$). In the rows labeled as ''7% plus CO_2 range'' and ''3% plus CO_2 range,'' the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

DOE has made an initial determination that the proposed standards represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, while maintaining product utility in the form of a continual clock display, and would result in the significant conservation of energy. DOE further notes that products achieving these standard levels are already commercially available for one of the product classes covered by today's proposal.[7] Based on the analyses described above, DOE found the benefits of the proposed standards to the Nation (energy savings, positive NPV of consumer benefits, consumer LCC savings, and emission reductions) outweigh the burdens (loss of INPV for manufacturers).

Based on consideration of the public comments DOE receives in response to this supplemental notice and related information collected and analyzed during the course of this rulemaking effort, DOE may adopt energy use levels presented in this notice that are either higher or lower than the proposed standards, or some combination of level(s) that incorporate the proposed standards in part. In particular, DOE is proposing TSL 3 for built-in products as the level which it has tentatively concluded meet the applicable statutory criteria (i.e., the highest level that is technologically feasible, economically justified, and would result in significant conservation of energy). Based upon public comments and any accompanying data submissions, DOE would consider finalizing other TSLs (as presented in this NOPR or at some level in between), including the option of not finalizing the standard for built-ins proposed in this rule. Accordingly, DOE is presenting a variety of issues throughout today's notice upon which it is seeking comment, which will bear upon its consideration of standards for built-ins in the final rule.

[7] Products in the Microwave-Only Ovens and Countertop Combination Microwave Ovens product class that meet the proposed standards are currently commercially available. The Built-In and Over-the-Range Combination Microwave Ovens class does not currently comprise products that meet the proposed standards, primarily because of the larger components necessary for the convection system and the more complex displays. However, DOE believes it is technologically feasible for all microwave ovens to meet the proposed standards.

II. Introduction

The following section briefly discusses the statutory authority underlying today's proposal as well as some of the relevant historical background related to the establishment of energy conservation standards for microwave oven standby mode and off mode.

A. Authority

Title III of EPCA sets forth various provisions designed to improve energy efficiency. Part B of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles.[8] EPCA covers consumer products and certain commercial equipment (referred to collectively hereafter as ''covered products''), including the microwave

[8] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

ovens that are the subject of this rulemaking. (42 U.S.C. 6292(a)(10)) [9]

Under the Act, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. The Federal Trade Commission (FTC) is primarily responsible for labeling, and DOE implements the rest of the program. Section 323 of the Act authorizes DOE, subject to certain criteria and conditions, to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6293) The National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA to establish prescriptive standards for cooking products, specifically gas cooking products. No standards were established for microwave ovens. Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA (42 U.S.C. 6295(s)) and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted under EPCA. (42 U.S.C. 6295(s)) The test procedure for microwave ovens currently appears at title 10, Code of Federal Regulations (CFR), part 430, subpart B, appendix I.

EPCA provides criteria for prescribing amended standards for covered products. As indicated above, any amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, EPCA precludes DOE from adopting any standard for certain products, including microwave ovens, if no test procedure has been established for the product. (42 U.S.C. 6295(o)(3)(A)) Moreover, DOE may not prescribe a standard: (1) If it would not result in the significant conservation of energy, or (2) if DOE determines by rule that the proposed standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(B)) The Act also provides that, in deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must do so after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

3. The total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy and water conservation; and

7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i))

EPCA also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if the Secretary finds that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. See 42 U.S.C. 6295(o)(2)(B)(iii).

Additionally, 42 U.S.C. 6295(q)(1) specifies requirements when promulgating a standard for a type or class of covered product that has two or more subcategories. DOE must specify a different standard level than that which applies generally to such type or class of products for any group of covered products which have the same function or intended use, if products within such group—(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard than applies or will apply to the other products within that type or class. Id. In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE can, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of section 327(d) of the Act. (42 U.S.C. 6297(d))

Finally, section 310(3) of the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140) amended EPCA to require that energy conservation standards address standby mode and off mode energy use. (42 U.S.C. 6295(gg)) Specifically, when DOE adopts a standard for a covered product after July 1, 2010, it must, pursuant to criteria for adoption of standards at 42 U.S.C. 6295(o), incorporate standby mode and off mode energy use into the standard, if feasible, or adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)) These provisions in EISA 2007 do not preclude DOE from considering standards for standby mode and off mode energy use in a rulemaking that does not consider standards for active

[9] DOE notes that under 42 U.S.C. 6295(m), the agency must periodically review its already established energy conservation standards for a covered product. Under this requirement, the next review that DOE would need to conduct would occur no later than 6 years from the issuance of a final rule establishing or amending a standard for a covered product.

mode energy use. In this rulemaking, DOE intends to incorporate standby mode and off mode energy use into any standard it adopts in the final rule.

It is pursuant to the authority set forth above that DOE is conducting the present SNOPR rulemaking for standby mode and off mode electricity consumption of microwave ovens.

DOE has also reviewed this regulation pursuant to Executive Order 13563. (76 FR 3281, Jan. 21, 2011). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In its guidance, the Office of Information and Regulatory Affairs (OIRA) has emphasized that such techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.'' For the reasons stated in the preamble, DOE believes that today's proposed rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized. Consistent with Executive Order 13563, and the range of impacts analyzed in this rulemaking, the energy efficiency standards proposed herein by DOE achieve maximum net benefits.

B. Background

1. Current Standards

Section 310 of EISA 2007 amends section 325 of EPCA to require DOE to regulate standby mode and off mode energy use for all covered products, including microwave ovens, as part of energy conservation standards for which a final rule is adopted after July 10, 2010. (42 U.S.C. 6295(gg)(3)(A))

Based on its ongoing analyses and comments from interested parties, DOE decided not to amend energy conservation standards for microwave oven energy factor (microwave oven operation in active mode), but instead develop a separate energy use metric for standby mode and off mode. 74 FR 16040 (Apr. 8, 2009).

2. History of Standards Rulemaking for Microwave Ovens

On March 15, 2006, DOE published on its Web site a document titled, ''Rulemaking Framework for Commercial Clothes Washers and Residential Dishwashers, Dehumidifiers, and Cooking Products'' (Framework Document).[10] 71 FR 15059. The Framework Document described the procedural and analytical approaches that DOE anticipated using to evaluate energy conservation standards for these products, and identified various issues to be resolved in conducting the rulemaking. On December 4, 2006, DOE posted on its Web site two spreadsheet tools for this rulemaking.[11] The first tool calculates life-cycle cost (LCC) and payback periods (PBPs). The second tool—the national impact analysis (NIA) spreadsheet—calculates the impacts on shipments and the national energy savings (NES) and NPV at various candidate standard levels. DOE subsequently published the advance notice of proposed rulemaking (ANOPR) for this rulemaking (72 FR 64432 (Nov. 15, 2007), the November 2007 ANOPR) and on December 13, 2007, held a public meeting to present and seek comment on the analytical methodology and results in the ANOPR (the December 2007 Public Meeting).

At the December 2007 Public Meeting, DOE invited comment in particular on the following issues concerning microwave ovens: (1) Incorporation of the International Electrotechnical Commission (IEC) test standard IEC Standard 62301 [12] into DOE's microwave oven test procedure to measure standby mode and off mode power; (2) IEC Standard 62301 test conditions; and (3) a requirement that if the measured standby mode power varies as a function of the time displayed, the standby mode power test would run for 12 hours, with an initial clock setting of 12:00.

Interested parties' comments presented during the December 2007 Public Meeting and submitted in response to the November 2007 ANOPR addressed the standby mode and off mode energy use of microwave ovens and the ability to combine that energy use into a single metric with cooking energy use. Those concerns lead DOE to thoroughly investigate standby mode, off mode, and active mode power consumption of microwave ovens.

On October 17, 2008, DOE published a NOPR (the October 2008 NOPR) for cooking products and commercial clothes washers in the **Federal Register** proposing amended energy conservation standards. 73 FR 62034. In the October 2008 NOPR, DOE tentatively concluded that a standard for microwave oven standby mode and off mode energy use would be technologically feasible and economically justified. *Id.* at 62120. Therefore, concurrent with the standards NOPR, DOE published in the **Federal Register** a test procedure NOPR for microwave ovens to incorporate a measurement of standby mode and off mode power and to consider inclusion of such power as part of the energy conservation standards rulemaking. 73 FR 62134 (Oct. 17, 2008).

In conjunction with the October 2008 NOPR, DOE posted on its Web site the associated technical support document (TSD). The TSD included the results of DOE's analyses, including: (1) The market and technology assessment, (2) screening analysis, (3) engineering analysis, (4) energy and water use determination, (5) markups analysis to determine product price, (6) LCC and PBP analyses, (7) shipments analysis, (8) NES and NIA, and (9) manufacturer impact analysis (MIA). The engineering analysis spreadsheet, the LCC spreadsheets, the national and regional impact analysis spreadsheets, and the MIA spreadsheet were all made available at *www.eere.energy.gov/buildings/appliance__standards/commercial/clothes__washers.html.*

[10] This document is available on the DOE Web site at: *www.eere.energy.gov/buildings/appliance__standards/residential/dehumidifiers.html.* (Last accessed March 18, 2011.)

[11] These spreadsheets are available on the DOE Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential_products.html.* (Last accessed March 18, 2011.)

[12] IEC standards are available for purchase at: *http://www.iec.ch/.*

In the October 2008 NOPR, DOE concluded based on its additional investigations that, ''although it may be mathematically possible to combine energy consumption into a single metric encompassing active (cooking), standby, and off modes, it is not technically feasible to do so at this time * * *.'' 73 FR 62034, 62043 (Oct. 17, 2008). The separate prescriptive standby mode and off mode energy conservation standards proposed in the October 2008 NOPR for microwave ovens were as shown in Table II.1.

TABLE II.1—OCTOBER 2008 NOPR PROPOSED ENERGY CONSERVATION STANDARDS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE

Product class	Proposed energy conservation standard
Microwave Ovens	Maximum Standby Power = 1.0 watt

In the October 2008 NOPR, DOE described and sought further comment on the analytical framework, models, and tools (*e.g.,* LCC and NIA spreadsheets) it was using to analyze the impacts of energy conservation standards for this product. DOE held a public meeting in Washington, DC, on November 13, 2008 (the November 2008 Public Meeting), to present the methodologies and results for the October 2008 NOPR analyses.

Multiple interested parties commented in response to the October 2008 NOPR that insufficient data and information were available to complete this rulemaking, and requested that it be postponed to allow DOE to gather such inputs on which to base its analysis. Whirlpool Corporation (Whirlpool) commented that DOE should work with industry to gather comprehensive data. Whirlpool stated that DOE and industry must ensure the product is useful to the consumer at the standards adopted, which could mean delaying standards until the next round of rulemaking. (Whirlpool, No. 50 at p. 2; Whirlpool, Public Meeting Transcript, No. 40.5 at p. 63) [13] GE Consumer & Industrial (GE) stated that DOE's approach could have important implications for how standby power is approached for other covered products, and thus it is essential that DOE take the time to address these issues. GE commented that DOE should postpone the microwave oven standby mode and off mode energy conservation standards rulemaking to allow standby power issues for covered products to be addressed either through negotiation or through a rulemaking that considers how the definition of standby power would affect all appliances, not just microwave ovens. GE further commented that if the microwave oven standby mode and off mode energy conservation standards rulemaking was not postponed, DOE should issue a ''no standard'' standard for microwave oven standby power. (GE, No. 48, at pp. 2, 4)

DOE agreed with these commenters that additional information would improve its analysis and, in April 2009, it concluded that it should defer a decision regarding amended energy conservation standards for standby mode and off mode energy use for microwave ovens pending further rulemaking. FR 16040, 16042 (Apr. 8, 2009). In the interim, DOE proceeded with consideration of energy conservation standards for microwave oven active mode energy use based on its proposals in the October 2008 NOPR, and its analysis determined that no new standards for microwave oven active mode (as to cooking efficiency) were technologically feasible and economically justified. Therefore, in a final rule published on April 8, 2009, DOE maintained the ''no standard'' standard for microwave oven active mode energy use. *Id.* at 16087. The final rule is available on DOE's Web site at: *www1.eere.energy.gov/buildings/appliance__standards/residential/pdfs/74fr16040.pdf.*

After continuing its analysis of microwave oven standby mode and off mode through additional testing, research, and consideration of an updated version of IEC Standard 62301, DOE developed this SNOPR to enable interested parties to comment on the revised standby power levels proposed for microwave oven standby mode and off mode energy use.

The effective date of any new energy conservation standards for this product would be 3 years after the final rule is published in the **Federal Register**.

III. General Discussion

A. Test Procedures

The test procedures for cooking products including microwave ovens initially appeared at 10 CFR part 430, subpart B, appendix I. Those test procedures were part of a May 10, 1978 final rule that first established test procedures for conventional ranges, cooktops, and ovens (including microwave ovens). 43 FR 20108. DOE later revised its test procedures for cooking products to measure their efficiency and energy use more accurately, publishing a final rule on October 3, 1997. 62 FR 51976. The 1997 rule incorporated parts of IEC Standard 705–1998 and Amendment 2–1993, ''Methods for Measuring the Performance of Microwave Ovens for Households and Similar Purposes.'' It measured microwave oven cooking efficiency, but did not address energy use in the standby mode or off mode.

Section 310 of EISA 2007 amended EPCA to require DOE to amend the test procedures for covered products to address energy consumption of standby mode and off mode. If technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure. (42 U.S.C. 6295(gg)(2)(A))

As discussed previously, DOE published a notice of proposed rulemaking in October 2008 to amend the microwave oven test procedure to provide for measuring standby mode and off mode power consumption, (73 FR 62134 (Oct. 17, 2008)) and held a public meeting on the proposed rulemaking on November 14, 2008. DOE received comments from interested parties both in written responses to the October 2008 NOPR and at the November 2008 Public Meeting.

[13] A notation in the form ''Whirlpool, No. 50 at p. 2'' identifies a written comment that DOE has received and has included in the docket of the standards rulemaking for microwave ovens (Docket No. EE–2006–STD–0127). This particular notation refers to a comment (1) submitted by Whirlpool, (2) recorded in document number 50 in the docket of this rulemaking, and (3) which appears on page 2 of document number 50. A notation in the form ''Whirlpool, Public Meeting Transcript, No. 40.5 at p. 63'' identifies an oral comment that DOE received during the November 13, 2008 NOPR public meeting and which was recorded in the public meeting transcript in the docket for this rulemaking (Docket No. EE–2006–STD–0127), available on *www.regulations.gov.* This particular notation refers to a comment (1) made by Whirlpool during the public meeting, (2) recorded in document number 40.5, which is the public meeting transcript that is filed in the docket of this rulemaking, and (3) which appears on page 63 of document number 40.5.

After considering stakeholder comments and additional information, DOE issued an SNOPR for the test procedure for measuring microwave oven standby mode and off mode power consumption. 75 FR 42612 (July 22, 2010). In that SNOPR, DOE proposed adopting definitions of modes based on relevant provisions from IEC Standard 62301 Second Edition, Committee Draft for Vote (IEC Standard 62301 CDV), as well as language to clarify application of those provisions for measuring microwave oven standby mode and off mode power consumption. *Id.* Also on July 22, 2010, DOE issued a repeal final rule (the July 2010 TP Final Rule) eliminating the active mode cooking efficiency provisions in the microwave oven test procedure after it determined that those provisions did not produce accurate and repeatable results. 75 FR 42579. DOE held a public meeting on September 16, 2010, and accepted comments, data, and information regarding the test procedure SNOPR no later than October 4, 2010. DOE also invited inputs on microwave active mode test procedures for a potential new test procedure rulemaking. After consideration of these comments, an interim final rule for a microwave oven test procedure addressing standby mode and off mode power was published in the **Federal Register** on March 9, 2011 (the March 2011 TP Interim Final Rule). 76 FR 12825. DOE provided a 180-day comment period on the March 2011 TP Interim Final Rule, during which it received several comments on potential improvements to the microwave oven test procedure recently adopted. DOE is currently considering these comments, but does not believe that any of the suggested amendments would impact the analysis in today's notice.

B. Technological Feasibility

1. General

DOE considers a design option to be technologically feasible if it is in use by the associated industry or if research has progressed to development of a working prototype. In each standards rulemaking, therefore, DOE conducts a screening analysis, based on information it has gathered regarding existing technology options and prototype designs. In consultation with manufacturers, design engineers, and other stakeholders, DOE develops a list of design options for consideration in the rulemaking. After DOE determines that particular design options are technologically feasible, the first of the screening criteria, it evaluates each option in light of the following three additional criteria: (a) Practicability to manufacture, install, and service; (b) adverse impacts on product utility or availability; and (c) adverse impacts on health or safety. 10 CFR part 430, subpart C, appendix A, section 4(a)(3) and (4). All technologically feasible design options that pass the three additional screening criteria are candidates for further assessment in the engineering and subsequent analyses in the NOPR stage. DOE may amend the list of retained design options in SNOPR analyses based on comments received on the NOPR and on further research.

DOE published a list of evaluated microwave oven technologies in the November 2007 ANOPR. 72 FR 64432 (Nov. 15, 2007). DOE identified lower-power display technologies, improved power supplies and controllers, and alternative cooking sensor technologies as options to reduce standby power. DOE conducted this research when it became aware of the likelihood of EISA 2007 being signed, which DOE understood was to contain provisions pertaining to standby mode and off mode energy use. Therefore, DOE presented details of each design option to stakeholders at the December 2007 Public Meeting even though the results were not available in time for publication in the November 2007 ANOPR. DOE believes all of these options are technologically feasible, and in the ANOPR invited comment on technology options that reduce standby power in microwave ovens. 72 FR 64432, 64513 (Nov. 15, 2007). For more details of these technology options and stakeholder comments, see section IV.B of this notice.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt, or to decline to adopt, an amended or new standard for a type (or class) of product such as microwave ovens, it must ''determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible'' for such a product. (42 U.S.C. 6295(p)(1)) Using the design parameters that lead to creation of the highest available product efficiencies, in the engineering analysis DOE determined the maximum technologically feasible (''max-tech'') standby power levels [14] for microwave ovens, as shown in Table III.1. (See chapter 3 in the SNOPR TSD.) The max-tech microwave oven standby power level corresponds to a unit equipped with a default automatic power-down function that shuts off certain power-consuming components after a specified period of user inactivity. The max-tech microwave oven standby power level was determined in the October 2008 NOPR to be 0.02 watts (W). 73 FR 62052 (Oct. 17, 2008). Based upon additional analyses for today's SNOPR, DOE is proposing that this max-tech level applies to the product class of microwave-only ovens and countertop combination microwave ovens. For built-in and over-the-range combination microwave ovens, DOE proposes, based on its analysis, a max-tech standby power level of 0.04 W. For more details of the max-tech levels and stakeholder comments, see section IV.C of this notice.

TABLE III.1—PROPOSED MAX-TECH MICROWAVE OVEN STANDBY POWER LEVELS

Product class	Max-Tech standby power level
Microwave-Only Ovens and Countertop Combination Microwave Ovens	0.02 watts
Built-In and Over-the-Range Combination Microwave Ovens	0.04 watts

C. Energy Savings

1. Determination of Energy Savings

DOE used its NIA spreadsheet tool to estimate energy savings from amended standards for standby mode and off mode energy use for microwave ovens. (Section IV.E of today's supplemental notice and chapter 10 of the SNOPR TSD describe the NIA spreadsheet model.) DOE forecasted energy savings throughout the period of analysis (beginning in 2014, the year that amended standards would go into effect, and ending in 2043) for each TSL,

[14] As noted previously, DOE is unaware of any microwave ovens currently available that can operate in off mode. Therefore, efficiency levels for the purposes of evaluating standby mode and off mode energy use in microwave ovens are defined on the basis of standby power only.

relative to the base case, which represents the forecast of energy consumption in the absence of amended energy conservation standards. DOE quantified the energy savings attributable to amended energy conservation standards as the difference in energy consumption between each standards case and the base case. The base case incorporates market demand for more efficient products.

The NIA spreadsheet tool calculates the electricity savings in ''site energy'' expressed in kilowatt-hours (kWh). Site energy is the energy consumed directly on location by an individual product. DOE reports national energy savings on an annual basis in terms of the aggregated source energy savings, which is the savings in energy used to generate and transmit the energy consumed at the site. To convert site energy to source energy, DOE derived conversion factors, which change with time, from the *AEO 2010.* (See SNOPR TSD chapter 10 for further details.)

2. Significance of Savings

EPCA, as amended, prohibits DOE from adopting a standard for a product if that standard would not result in ''significant'' energy savings. (42 U.S.C. 6295(o)(3)(B)) Although EPCA does not define the term ''significant,'' the U.S. Court of Appeals for the District of Columbia Circuit, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (DC Cir. 1985), indicated that Congress intended ''significant'' energy savings in this context to be savings that were not ''genuinely trivial.'' The energy savings for energy conservation standards at the TSL considered in this rulemaking are nontrivial, and, therefore, DOE considers them ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

D. Economic Justification

1. Specific Criteria

As noted earlier, EPCA provides seven factors to be evaluated in determining whether an energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)) The following sections describe how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impacts on Manufacturers and Consumers

In determining the impacts of an amended standard on manufacturers, DOE first determines the quantitative impacts using an annual cash-flow approach. This step includes both a short-term assessment—based on the cost and capital requirements during the period between the issuance of a regulation and when entities must comply with the regulation—and a long-term assessment over a 30-year analysis period. The industry-wide impacts analyzed include INPV (which values the industry on the basis of expected future cash flows), cash flows by year, changes in revenue and income, and other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, paying particular attention to impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of different DOE regulations and other regulatory requirements on manufacturers. For more details on the MIA, see section IV.G and chapter 12 of the SNOPR TSD.

For consumers, measures of economic impact include the changes in life-cycle cost (LCC) and payback period for the product at each TSL. Under EPCA, the LCC is one of seven factors to be considered in determining economic justification. (42 U.S.C. 6295(o)(2)(B)(i)(II)) It is discussed in detail in the following section.

b. Life-Cycle Cost

The LCC is the sum of the purchase price of product (including any installation) and the operating expense (including energy and maintenance expenditures), discounted over the lifetime of the product.

In this rulemaking, DOE calculated both LCC and LCC savings for various power consumption levels in standby and off modes. DOE established the variability and uncertainty in energy use by defining the uncertainty and variability in the standby and off modes (hours per day) of the product. The variability in energy prices was characterized by use of regional energy prices. To account for uncertainty and variability in other inputs, such as product lifetime and discount rate, DOE used a distribution of values with probabilities attached to each value. For each consumer with a microwave oven, DOE sampled the values of those inputs from the probability distributions.

DOE's analysis produced a range of LCCs. In addition to providing the average LCC savings or average payback for a standard, this approach enables DOE to identify the percentage of consumers achieving LCC savings or attaining certain payback values due to an energy conservation standard. DOE presents the LCC savings as a distribution, with a mean value and a range. In the analysis prepared for the October 2008 NOPR, DOE assumed that consumers will purchase the product in 2012. For today's SNOPR, that assumption has been changed to 2014, as this is the expected first year of compliance. See section IV.D for more details on the LCC and PBP analysis.

c. Energy Savings

Significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard. Additionally, EPCA requires DOE, in determining the economic justification of a proposed standard, to consider the total energy savings that are projected to result directly from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As noted in the October 2008 NOPR, DOE used the NIA spreadsheet to estimate total energy savings attributable to the considered standard levels. 73 FR 62034, 62046 (Oct. 17, 2008). See section IV.E and chapter 10 of the SNOPR TSD for more details on this analysis.

d. Lessening of Utility or Performance of Product

In preparing the NOPR, DOE considered whether the evaluated design options likely would lessen the utility or performance of the standby mode and off mode of microwave ovens. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) In the October 2008 NOPR, DOE determined that none of the considered TSLs would reduce the utility or performance of microwave ovens; all consumer utility features that affect standby power, such as a clock display and a cooking sensor, would be retained. 73 FR 62034, 62047 (Oct. 17, 2008).

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider any lessening of competition likely to result from standards. It directs the Attorney General of the United States (Attorney General) to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii)). DOE received the Attorney General's determination, dated December 16, 2008, on standards proposed in the October 2008 NOPR. The Attorney General's determination for October 2008 NOPR did not mention microwave oven standards. (DOJ, No. 53 at pp. 1–

2). DOE has transmitted a copy of today's proposed rule to the Attorney General and has requested that the Department of Justice provide its determination on this issue.

f. Need of the Nation To Conserve Energy

The non-monetary benefits of proposed standards are likely to be reflected in improvements to the reliability of the Nation's energy system—namely, reductions in the demand for energy will result in reduced costs for maintaining reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may impact the Nation's needed power generation capacity. This analysis captures the effects of efficiency improvements on electricity consumption by the product that is the subject of this rulemaking.

Proposed standards also likely result in improvements to the environment. In quantifying those improvements, DOE has calculated emission reductions based on the estimated level of power generation displaced by each TSL for microwave oven standby power. DOE reports the environmental effects from the proposed standards in an environmental assessment in chapter 15 of the SNOPR TSD. (42. U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a)) See section IV.J for more details on this analysis.

g. Other Factors

The Secretary, in determining whether a standard is economically justified, may consider other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) In considering amended standards for today's supplemental notice of proposed rulemaking, the Secretary found no relevant factors other than those identified elsewhere in today's SNOPR.

2. Rebuttable Presumption

As set forth under 42 U.S.C. 6295(o)(2)(B)(iii), there is a rebuttable presumption that an energy conservation standard is economically justified if the increased installed cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. DOE's LCC and PBP analyses generate values that calculate the payback period for consumers of products that meet potential energy conservation standards. Included is the 3-year payback period contemplated under the rebuttable presumption test. DOE routinely conducts a full economic analysis that considers the full range of impacts, however, including those to the consumer, manufacturer, Nation, and environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). Section V.B.1.c of today's supplemental notice and chapter 8 of the SNOPR TSD address the calculation of rebuttable-presumption payback.

IV. Methodology and Revisions to the Analyses Employed in the October 2008 Proposed Rule

In weighing the benefits and burdens of amended standards for microwave oven standby mode and off mode energy use, DOE used economic models to estimate the impacts of each TSL. The life-cycle cost (LCC) spreadsheet calculates the LCC impacts and payback periods for potential amended energy conservation standards. DOE used the engineering spreadsheet to develop the relationship between cost and efficiency and to calculate the simple payback period for purposes of addressing the rebuttable presumption that a standard with a payback period of less than 3 years is economically justified. The NIA spreadsheet provides shipments forecasts and then calculates NES and NPV impacts of potential amended energy conservation standards. DOE also assessed manufacturer impacts, largely through use of the Government Regulatory Impact Model (GRIM).

Additionally, DOE estimated the impacts of potential amended energy conservation standards on utilities and the environment. DOE used a version of the EIA's National Energy Modeling System (NEMS) for the utility and environmental analyses. The EIA has developed the NEMS model, which simulates the energy economy of the United States, over several years primarily for the purpose of preparing the *AEO.* The NEMS produces forecasts for the United States energy situation that are available in the public domain. The version of NEMS used for appliance standards analysis is called NEMS–BT.[15] The NEMS–BT offers a sophisticated picture of the effect of standards, because it accounts for the interactions among the various energy supply and demand sectors and the economy as a whole.

A. Product Classes

In general, when evaluating and establishing energy conservation standards, DOE divides covered products into classes by the type of energy used, capacity, or other performance-related features that affect consumer utility and efficiency. (42 U.S.C. 6295(q); 6316(a)) Different energy conservation standards may apply to different product classes. *Id.*

At the time of the October 2008 NOPR, DOE's regulations codified at 10 CFR 430.2 defined a microwave oven as a class of kitchen ranges and ovens which is a household cooking appliance consisting of a compartment designed to cook or heat food by means of microwave energy. In the October 2008 NOPR, DOE proposed a single product class for microwave ovens that would encompass microwave ovens with and without browning (thermal) elements, but would not include microwave ovens that incorporate convection systems. 73 FR 62034, 62048 (Oct. 17, 2008).

Whirlpool commented that DOE's proposed definition of covered products creates a new product definition without proper engagement of interested parties by covering microwave ovens with or without thermal elements designed for surface browning of food. Whirlpool also commented that DOE stated combination microwave ovens, which were previously undefined, are not products covered by the microwave oven test procedure or standard. Whirlpool stated that DOE's proposed definition of covered products is inconsistent with the regulatory definition of a microwave oven provided in 10 CFR part 430 because there is no mention of thermal elements designed for browning food, and furthermore is not clear and should be clarified. (Whirlpool, No. 50 at pp. 1–2; Whirlpool, Public Meeting Transcript, No. 40.5 at p. 29) GE also commented that DOE should clarify what products are considered covered products. GE stated that DOE should review data for different product types, and exclude those for which there is insufficient data to support DOE's analysis. (GE, No. 48 at pp. 2–3)

As part of its microwave oven test procedure rulemaking, DOE reassessed what products would be considered microwave ovens under the regulatory definition, and whether multiple product classes would be appropriate. As discussed in the March 2011 TP

[15] The EIA approves the use of the name NEMS to describe only an *AEO* version of the model without any modification to code or data. Because the present analysis entails some minor code modifications and runs the model under various policy scenarios that deviate from *AEO* assumptions, the model used here has been named NEMS–BT. (''BT'' stands for DOE's Building Technologies Program.) For more information on NEMS, refer to *The National Energy Modeling System: An Overview,* DOE/EIA–0581 (98) (Feb. 1998) (available at: *http://tonto.eia.doe.gov/FTPROOT/forecasting/058198.pdf*). (Last accessed March 18, 2011.)

Interim Final Rule, DOE amended the definition of microwave oven in 10 CFR 430.2 to clarify that it includes microwave ovens with or without thermal elements designed for surface browning of food and combination ovens. DOE also discussed its determination that all ovens equipped with microwave capability would be considered a covered product, regardless of which cooking mode (*i.e.,* radiant heating or microwave energy) is primary. Based on its preliminary analysis, DOE concluded that the general standby mode and off mode operation for microwave ovens that incorporate other means of cooking food does not differ from that of microwave-only units. As a result, DOE amended the microwave oven test procedure to require that the same standby mode and off mode testing methods be used for all microwave ovens. 76 FR 12825, 12828–30 (Mar. 9, 2011).

In order to determine whether specific types of microwave ovens should be separated into different product classes, DOE investigated whether there are any performance related features that would justify the establishment of a separate energy conservation standard. As discussed in the October 2008 NOPR, DOE tested a sample of 32 countertop microwave-only units and measured standby mode power ranging from 1.2 W to 5.8 W. 73 FR 62034, 62042 (Oct. 17, 2008). None of these units was capable of operation in off mode, nor, as noted previously, is DOE aware of any other current microwave ovens capable of such operation. As discussed below in section IV.B, DOE noted that standby power consumption for microwave-only units largely depended on the presence of a cooking sensor, the display technology, the power supply and control board, and implementation of a power-down feature. With regards to display technologies, DOE noted that microwave-only units incorporated Light Emitting Diode (LED) displays, Liquid Crystal Displays (LCDs), and Vacuum Fluorescent Displays (VFDs).

Based on comments received in response to the October 2008 NOPR (Association of Home Appliance Manufacturers (AHAM), No. 47 at p. 6; Whirlpool, No. 50 at p. 1), DOE conducted a survey of over-the-range microwave-only units available on the U.S. market. DOE determined that the display technologies used are similar to those used in countertop microwave-only units (*i.e.,* LED displays, LCDs, and VFDs). DOE also conducted in-store standby mode testing on a limited sample of over-the-range microwave-only units which showed similar standby power consumption as countertop microwave-only units. For these reasons, DOE tentatively concludes that over-the-range microwave-only units would not warrant a separate product class. DOE understands that over-the-range microwave-only units may have additional components that are energized during active mode operation (*i.e.,* exhaust fan motors). However, DOE's testing showed that the presence of such features did not increase the standby power consumption to warrant establishing a separate product class.

DOE also conducted standby power testing on a sample of 13 representative combination microwave ovens, including 5 countertop combination microwave ovens, 6 over-the-range combination microwave ovens, and 2 built-in combination microwave ovens. DOE's testing showed that the countertop combination microwave ovens use similar display technologies as countertop microwave-only units (*i.e.,* LED displays, LCDs, and VFDs), and had standby power consumption ranging from 1.2 W to 4.7 W, which is similar to the standby power consumption for countertop microwave-only units. As a result, DOE tentatively concludes that countertop combination microwave ovens would not warrant a product class separate from microwave-only ovens.

DOE's testing of built-in and over-the-range combination microwave ovens showed that the standby power consumption for these products ranged from 4.1 W to 8.8 W, which is higher than the standby power consumption for other microwave oven product types (*i.e.,* countertop microwave-only, over-the-range microwave-only, and countertop combination microwave ovens). DOE's reverse-engineering analysis suggests that the additional features in built-in and over-the-range combination microwave ovens required to handle the thermal loads associated with their installation and to provide consumer utility, such as additional exhaust fan motors, convection fan motors and heaters, and additional lights, require a significant number of additional relays on the control board, and thus require a larger power supply for the control of such relays. While the relays themselves do not consume power in standby mode, they increase the total power supply requirements of the control board and thus increase the standby losses of the power supply. As a result, DOE believes that a separate product class should be established for built-in and over-the-range combination microwave ovens. DOE recognizes that built-in and over-the-range microwave-only units may similarly require some additional relays for exhaust fans and lights, and that countertop combination microwave ovens would require some additional relays for convection fans and heaters. However, DOE's product testing and reverse-engineering analyses indicated that these product types use similar-sized power supplies as those found in countertop microwave-only units, and as a result would not warrant a separate product class from countertop microwave-only units. Details of standby power testing for the determination of product classes is presented in chapter 5 of the SNOPR TSD.

In summary, DOE proposes to establish the following two product classes for microwave ovens:

TABLE IV.1—MICROWAVE OVEN PRODUCT CLASSES

Product class
1. Microwave-Only Ovens and Countertop Combination Microwave Ovens.
2. Built-in and Over-the-Range Combination Microwave Ovens.

DOE determined that separate product classes for the purposes of setting energy conservation standards addressing standby mode and off mode energy use are warranted on the basis of different standby power performance. DOE did not evaluate whether the same product class distinction would also be appropriate for any active mode energy use standards because DOE eliminated the regulatory provisions establishing the cooking efficiency test procedure for microwave ovens in the July 2010 TP Final Rule. 75 FR 42579 (July 22, 2010). If DOE adopts amendments to the microwave oven test procedure to include provisions for measuring active mode cooking efficiency, DOE may reevaluate these product classes as part of a future microwave oven energy conservation standards rulemaking. At that time, DOE may consider dividing countertop combination microwave ovens and over-the-range/built-in microwave-only units into separate product classes to account for the energy performance of heating components other than the microwave portion.

B. Technology Assessment

Product teardowns performed by DOE for this and past rulemakings gave DOE an insight into the strategies a manufacturer could adopt to achieve higher energy conservation standards. In the October 2008 NOPR, DOE asked stakeholders to provide data and information that would help DOE

evaluate the utility provided by specific features that contribute to microwave oven standby power. In addition, DOE conducted additional research on several microwave oven technologies that significantly affect standby power, including cooking sensors, display technologies, and control strategies and associated control boards. In the October 2008 NOPR, DOE determined that control strategies are available that enable manufacturers to make design tradeoffs between incorporating features that consumer standby power (such as displays or cooking sensors) and including a function to turn power off to those components during standby mode. 73 FR 62034, 62052 (Oct. 17, 2008).

As discussed above, DOE believes that the standby power characteristics for countertop combination microwave ovens and over-the-range microwave-only units are similar to that of countertop microwave-only units, and therefore, the same technology options would apply to these products. Additional testing on over-the range combination microwave ovens conducted by DOE also showed that standby power in these products depends largely on the same factors. The following sections discuss each of these technology options.

1. Cooking Sensors

In the October 2008 NOPR, DOE reported that its teardown analysis had revealed one cooking sensor technology with no standby power consumption used in microwave ovens on the U.S. market: A piezoelectric steam sensor. DOE also found that infrared and weight sensors, which require little to no warm-up time or standby power, had been applied successfully in Japanese-market microwave ovens. Furthermore, DOE identified relative humidity sensors with no standby power consumption as a feasible microwave oven cooking sensor technology, but found no microwave ovens using these sensors at the time. Finally, DOE learned that a major microwave oven supplier to the U.S. market was preparing to introduce microwave ovens using a new type of absolute humidity sensor with no standby power requirement and no cost premium over that of a conventional absolute humidity sensor. 73 FR 62034, 62051 (Oct. 17, 2008). DOE requested input and data on the utility provided by specific microwave oven features, including in relevant part cooking sensors that do not require standby power. *Id.* at 62133.

AHAM agreed with DOE that some manufacturers in certain areas of the world have already started to incorporate some of the cooking sensor design options into microwave ovens. (AHAM, Public Meeting Transcript, No. 40.5 at pp. 78–79) AHAM expressed two concerns about these sensors: That reliability and accuracy of the sensors have not been fully proved through testing, and that there is limited availability of those sensors to microwave oven manufacturers due to intellectual property protections. (AHAM, Public Meeting Transcript, No. 40.5 at pp. 69–70) AHAM further requested that DOE provide data on the availability, reliability, and functionality of the cooking sensors that consume no standby power. AHAM stated that data collection for such sensors provides an additional rationale for postponing the rulemaking or not adopting a standby power standard for microwave ovens. (AHAM, No. 47 at p. 5)

Whirlpool agreed with DOE that cooking sensors with no standby power consumption are becoming available, though experience with them is limited. According to Whirlpool, there is a lack of necessary data regarding reliability, accuracy and intellectual property status. (Whirlpool, No. 50 at p. 7)

GE similarly commented that cooking sensors with no standby power consumption, while in limited use at that time, had not been fully tested and evaluated as appropriate alternatives. GE also requested that DOE provide data on the availability, reliability, and functionality of the sensors discussed in the October 2008 NOPR, relative to sensors currently in use. (GE, No. 48 at p. 3) GE also commented that absolute humidity sensors with standby power consumption offer greater resolution than relative humidity sensors with no standby power consumption and therefore offer consumer utility. (GE, Public Meeting Transcript, No. 40.5 at pp. 74–75) Furthermore, GE suggested that some of the sensor technologies described in the October 2008 NOPR, such as infrared and weight sensors, are not feasible alternatives to the absolute humidity sensors used today. For instance, infrared sensors are easily fouled by contaminants and condensation. GE commented that DOE should provide further information about absolute humidity sensors with no standby power consumption and no cost premium over that of a conventional absolute humidity sensor. GE stated that it needed to review performance parameters and any associated intellectual property issues associated with these sensors. (GE, No. 48, pp. 3–4)

DOE requested comment on whether any intellectual property or patent infringement issues are associated with the cooking sensor technologies discussed above; however, DOE did not receive any such data. In addition, DOE is not currently aware of any intellectual property or patent infringement issues for infrared sensors, weight sensors, piezoelectric sensors, or relative humidity sensors. With respect to the accuracy and reliability of low- and zero-standby power cooking sensors, DOE notes that a significant number of microwave oven models using the alternate cooking sensor technologies discussed above are available on the international market, and have been available for a number of years. As discussed above, DOE is also aware of one zero-standby power cooking sensor technology used in microwave ovens on the U.S. market. DOE is not aware of any data indicating that the reliability and accuracy associated with these low- and zero-standby power cooking sensors significantly differs from that of the absolute humidity sensors currently employed in microwave ovens on the U.S. market. DOE is also unaware of data showing that fouling of infrared cooking sensors, as commented by GE, would significantly differ from that of absolute humidity sensors, or data on the decreased accuracy due to fouling as compared to the fouling of absolute humidity sensors. DOE recognizes GE's concern regarding the use of relative humidity sensors in microwave ovens. Because DOE is not aware of any relative humidity cooking sensors used in microwave ovens currently on the market, DOE is not aware of any data regarding the accuracy of these sensors for detecting the state of the cooking load to adjust the cooking time. However, DOE notes that multiple other cooking sensor technology options exist that have been employed in microwave ovens in place of an absolute humidity cooking sensor. For these reasons, DOE tentatively concludes that the low- and zero-standby-power cooking sensor technologies discussed above are viable design options, and has analyzed them for this SNOPR. DOE requests data and information on the accuracy and reliability of low- and zero-standby power cooking sensors as compared to absolute humidity cooking sensors currently used in microwave ovens on the U.S. market, and whether these technologies would affect how consumers use their microwave ovens or their satisfaction in using them due to any lessening of the utility or the performance of microwaves imposed by the standard. DOE also seeks information on the current commercial availability of this technology, the

likelihood of future adoption, and the potential impact on the lessening of competition amongst manufacturers. DOE also continues to request comment on whether any intellectual property or patent infringement issues are associated with the cooking sensor technologies discussed above.

With respect to GE's comment that DOE should provide further information on absolute humidity sensors with no standby power consumption and no cost premium over that of a conventional absolute humidity sensor, because DOE was made aware of this information during interviews with microwave oven manufacturers, DOE is unable to provide further information regarding this absolute humidity cooking sensor.

Edison Electric Institute (EEI) stated that due to the reduction in cooking time and thus energy consumption made possible by use of a cooking sensor, it is important to retain this feature in microwave ovens. (EEI, Public Meeting Transcript, No 40.5 at pp. 71–72) Also, EEI expressed concern about the recovery time of a cooking sensor after a full microwave oven power-down and the impacts on consumer utility of a slow recovery time. (EEI, Public Meeting Transcript, No. 40.5 at pp. 77–78) As discussed in the October 2008 NOPR, low- and zero-standby-power cooking sensor technologies require little to no warm-up time. 73 FR 62034, 62050–51 (Oct. 17, 2008). As a result, DOE believes that low- and zero-standby-power cooking sensor technologies can be used in microwave ovens without impacting consumer utility.

2. Display Technologies

DOE stated in the October 2008 NOPR that it would consider three display technologies for reducing microwave oven standby power consumption: LED displays, LCDs with and without backlighting, and VFDs. DOE stated that LED displays and LCDs consume less power than VFDs. DOE also stated that each identified display technology provides acceptable consumer utility, including brightness, viewing angle, and ability to display complex characters. 73 FR 62034, 62051 (Oct. 17, 2008). DOE requested input and data on the utility provided by specific microwave oven features, including, in relevant part, display technologies. *Id.* at 62133.

EEI commented that consumer utility is associated with an electronic display and timer rather than a mechanical timer. (EEI, Public Meeting Transcript, No. 40.5 at pp. 63–64). As discussed in the October 2008 NOPR, DOE was not aware of any microwave ovens currently available on the U.S. market using electromechanical controls (73 FR 62034, 62051 (Oct. 17, 2008)), and thus has considered only electronic controls (including displays) in determining standby power levels. In addition, DOE is not considering electromechanical controls as a design option to reduce standby power consumption.

AHAM, GE, and Whirlpool suggested that not all microwave oven display technologies considered by DOE will maintain consumer utility in all applications. Whirlpool stated that limiting the information displayed and/or reducing the size of the clock reduces standby power consumption at the expense of consumer utility. AHAM and Whirlpool expressed concerns about the reliability of LED displays, particularly in over-the-range microwave oven applications. According to AHAM, GE, and Whirlpool, for over-the-range microwave oven applications, VFDs are generally preferred over other display technologies such as backlit LCDs or LED displays, as VFDs: (1) Have greater reliability when exposed to the higher heat encountered above a cooking surface; (2) allow a wider viewing angle and have greater visibility; and (3) are available in more sizes and colors as demanded by the consumers of higher-end products, also allowing a manufacturer to provide a ''family look'' to product suites. (AHAM, No. 47 at p. 5; AHAM, Public Meeting Transcript, No. 40.5 at pp. 70–71; GE, No. 48 at p. 3; GE, Public Meeting Transcript, No 40.5, p. 75; Whirlpool, No. 50 at pp. 6–7).

As discussed above, DOE's research suggests that multiple over-the-range microwave ovens with low power displays, including the LED and LCD types, are currently available on the U.S. market. DOE has also found that manufacturer temperature ratings for the three types of displays are comparable. Furthermore, DOE has found that LED displays and LCDs in both countertop and over-the-range microwave ovens offer acceptable consumer utility features, including brightness, viewing angle, and ability to display complex characters. DOE found no microwave oven display technologies with intermittent backlighting or other features that impair consumer utility. As a result, DOE believes that LED displays and LCDs can be integrated into any countertop or over-the-range microwave oven, with proper heat shielding and without significant loss of consumer utility.

3. Power Supply and Control Boards

In the October 2008 NOPR, DOE found several technologies available to increase power supply and control board efficiency that would reduce microwave oven standby power consumption. DOE found some microwave ovens on the U.S. market using switching power supplies with up to 75-percent conversion efficiencies and 0.2 W or less no-load standby losses, though these models came with a higher cost, higher part count, and greater complexity. DOE stated that switching power supplies are as yet unproven in long-term microwave oven applications, and the greater complexity of these power supplies may also lower overall reliability. DOE was also aware of high efficiency power supply and control board components that could be used to reduce standby power consumption, but these were not found on commercially available microwave ovens at the time. 73 FR 62034, 62051 (Oct. 17, 2008). DOE requested comments on the ability of switching or similar modern power supplies to operate successfully inside a microwave oven and on the impacts of the efficiency of such power supplies on microwave oven standby power. *Id.* at 62133.

AHAM commented that switching power supplies can operate successfully in microwave ovens, but that associated reliability is still relatively unknown. (AHAM, No. 47 at p. 6) Whirlpool cited limited data suggesting that the costs and potential reliability issues associated with switching power supplies do not support their economic viability. (Whirlpool, No. 50 at p. 8) Nevertheless, Whirlpool stated that it sells products with switching power supplies outside of the U.S. (Whirlpool, Public Meeting Transcript, No. 40.5 at pp. 81–82) DOE observes that switching power supplies are found in products such as computers, battery chargers, clothes washers, and clothes dryers, suggesting that the reliability and durability of switching power supplies has been proven in residential appliance applications. DOE notes that microwave ovens incorporating switching power supplies have been available for multiple years and are still used, as evidenced by such power supplies being observed in DOE's most recent test sample of combination microwave ovens. DOE is also unaware of data indicating that the reliability of switching power supplies is significantly worse than conventional linear power supplies over the lifetime of the product.

Whirlpool suggested that switching power supplies are modestly more efficient than conventional power supplies. (Whirlpool, No. 50 at p. 8) Pacific Gas and Electric (PG&E) commented that switching power

supplies can have efficiency exceeding 90 percent and those in computers are routinely exceeding 95 percent. (PG&E, Public Meeting Transcript, No. 40.5 at p. 81) DOE believes that the application of power supplies is very different for computers and microwave ovens, and DOE research indicates that switching power supplies for appliance applications in sizes similar to those utilized in microwave ovens achieve no greater than 75-percent efficiency.[16] Furthermore, DOE notes that the most efficient power supplies available for consumer computer use typically do not exceed 92-percent efficiency.[17]

AHAM expressed concern that electromechanical controls may be necessary in order to meet standby power requirements. (AHAM, Public Meeting Transcript, No. 40.5 at p. 58) As discussed above, DOE is not aware of any microwave ovens currently on the market with electromechanical controls. As a result, DOE has considered only microwave ovens with electronic controls in determining standby power levels. DOE does not believe that electromechanical controls would be required to achieve any of the standby power levels presented in section IV.D.

4. Power-Down Options

In the October 2008 NOPR, DOE determined that control strategies are available that allowed microwave oven manufacturers to make design tradeoffs between incorporating power-consuming features such as displays or cooking sensors and including a function to cut power to those components during standby. DOE found that a large number of microwave ovens incorporating this automatic power-down feature were available in other markets such as Japan. 73 FR 62034, 62051–52 (Oct. 17, 2008). DOE requested input and data on these control strategies as well as comments on the viability and cost of microwave oven control board circuitry that could accommodate transistors to switch off cooking sensors and displays. *Id.* at 62133.

AHAM commented that the industry lacks data on control board circuitry to allow for a function to cut off power during standby mode. According to AHAM, such features must be reliable in high-temperature environments. AHAM noted that DOE has allowed no time for manufacturers to evaluate the viability or feasibility of the proposed technologies. (AHAM, No. 47 at pp. 3, 6) DOE research has not identified any technical barrier that would prevent microwave oven manufacturers from successfully integrating such control board circuitry with proper heat shielding and other design elements. DOE is also aware of similar automatic power-down control technologies incorporated in products such as clothes washers and clothes dryers, which utilize an additional transformerless power supply to provide just enough power to maintain the microcontroller chip while the unit is powered down, resulting in very low standby power levels. Therefore, DOE continues to believe that an automatic power-down feature is technically feasible in microwave applications.

AHAM commented that it is concerned with a reduction in consumer utility and how the consumer interfaces with the unit. AHAM added that evaluating the impacts on consumer utility will require substantial consumer research. (AHAM, No. 47 at p. 6) AHAM suggested that an indicator light may be desirable in a microwave oven with the automatic power-down feature to communicate the product's status to the user. (AHAM, Public Meeting Transcript, No. 40.5 at p. 59) Whirlpool stated that an automatic power-down feature in microwave ovens may cause consumer confusion and complaints and could require significant consumer education efforts. (Whirlpool, Public Meeting Transcript, No. 40.5 at pp. 65–66) Whirlpool commented that control technologies are available to dim or turn off a display after a period of inactivity has elapsed but that Whirlpool does not currently incorporate such a technology into its products. (Whirlpool, No. 50 at p. 7) Whirlpool and ASAP both commented that there could be a variety of ways to implement a power-down feature, including consumer-activated or fuzzy logic-based power response. (ASAP, Public Meeting Transcript, No. 40.5 at p. 79; Whirlpool, Public Meeting Transcript, No. 40.5 at p. 80) DOE has considered consumer utility issues in the determination of the proposed standby mode and off mode energy conservation standards. (See section V.C of today's supplemental notice and chapter 5 of the SNOPR TSD for additional discussion of this topic.) DOE welcomes further comments regarding consumer utility issues associated with each of the technology options, and in particular the low- and zero-standby power cooking sensors and display technologies, considered in this analysis.

The comment filed jointly (hereafter, the Joint Comment) by ASAP, American Council for an Energy-Efficient Economy, American Rivers, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Northwest Power and Conservation Council, Southern California Gas Company, San Diego Gas and Electric Company, Southern California Edison, and Earthjustice (EJ), stated that DOE should analyze user-activated controls to turn the display on and off, in addition to automatic power-down features. According to these commenters, a microwave oven equipped with such controls would meet the EPCA definition of operating in standby or off mode, and would give consumers the ability to reduce energy use below the proposed standby power standard level. The Joint Comment asserted that this type of switch is similar to power switches found on many computers, copiers, printers, televisions, and other products sold outside of the U.S. (Joint Comment, No. 44 at p. 10)

ASAP requested clarification whether an on/off switch, particularly a consumer-activated one, would be considered as a design option. (ASAP, Public Meeting Transcript, No. 40.5 at pp. 66, 73–74) GE questioned whether a microwave oven would be in standby mode or off mode if the display is turned off. (GE, Public Meeting Transcript, No. 40.5 at p. 73)

Under the mode definitions adopted by the amended microwave oven test procedure (76 FR 12825, 12834–37 (Mar. 9, 2011)), a product for which an on/off switch has turned off the display would be considered to be in off mode, unless other energy consuming features associated with standby mode remain energized (*i.e.,* features to facilitate the activation of other modes by remote switch, internal sensor, or timer; or continuous functions, including other information or status displays or sensor-based features). In the latter case, the microwave oven would remain in standby mode even with the display turned off.

DOE is not aware of any products incorporating a user-activated control to turn the display on or off. Further, DOE does not have information to evaluate how often consumers might make use of this feature. Therefore, at this time DOE is unable to analyze such a control as a design option. DOE agrees that such a feature, if provided, could result in decreased energy usage in standby mode or off mode, and remains open to consideration of such a design option in future rulemakings. DOE also notes that manufacturers would not be precluded

[16] Information on the design and efficiency of switch mode power supplies can be found at *http://www.powerint.com/en/applications/major-appliances.*

[17] Information can be found at *http://www.plugloadsolutions.com/80PlusPowerSupplies.aspx.*

from incorporating such a feature in their products under the proposed standards.

C. Engineering Analysis

The purpose of the engineering analysis is to characterize the relationship between the energy use and the cost of standby mode features of microwave ovens. DOE used this standby power/cost relationship as input to the payback period, LCC, and NIA analyses. The engineering analysis provides data that can be used to establish the manufacturer selling price of more efficient products. Those data include manufacturing costs and manufacturer markups.

DOE has identified three basic methods for generating manufacturing costs: (1) The design-option approach, which provides the incremental costs of adding to a baseline model design options that will improve its efficiency (*i.e.,* lower its energy use in standby mode and off mode); (2) the efficiency-level approach, which provides the incremental costs of moving to higher energy efficiency levels (*in this case,* levels of reduced standby power), without regard to the particular design option(s) used to achieve such increases; and (3) the cost-assessment (or reverse engineering) approach, which provides ''bottom-up'' manufacturing cost assessments for achieving various levels of increased efficiency, based on detailed data on costs for parts and material, labor, shipping/packaging, and investment for models that operate at particular efficiency levels. DOE conducted the engineering analysis for this rulemaking using the efficiency-level approach. For this analysis, DOE relied on laboratory testing of representative microwave ovens. DOE supplemented the standby power data with data gained through reverse-engineering analysis and primary and secondary research, as appropriate. To identify microwave oven design options, DOE performed a reverse engineering analysis on a representative sample of microwave ovens. Details of the engineering analysis are in chapter 5 of the SNOPR TSD.

1. Energy Use Metric

In the October 2008 NOPR, DOE explored whether it would be technically feasible to combine the existing measure of energy efficiency during the cooking cycle per use with standby mode and off mode energy use over time to form a single metric, as required by EISA 2007. (42 U.S.C. 6295(gg)(2)(A)) DOE tentatively concluded that, although it may be mathematically possible to combine energy consumption into a single metric encompassing active, standby, and off modes, it is not technically feasible to do so due to the high variability in the cooking efficiency measurement based on the microwave oven test procedure at that time and because of the significant contribution of standby power to overall microwave oven energy use. Therefore, DOE proposed a separate metric to measure standby power as provided by EISA 2007. 73 FR 62034, 62042–43 (Oct. 17, 2008).

ASAP, EEI, the Joint Comment, and Whirlpool agree with DOE's determination that it is not technically feasible to integrate standby and off mode energy use into a single efficiency metric for microwave ovens. (ASAP, Public Meeting Transcript, No. 40.5 at pp. 53; EEI, Public Meeting Transcript, No. 40.5 at p. 55; Joint Comment, No. 44 at p. 10; Whirlpool, No. 50 at p. 4; Whirlpool, Public Meeting Transcript, No. 40.5 at p. 29) AHAM stated that an integrated energy descriptor, while technically feasible, is not practical. (AHAM, No. 47 at p. 4; AHAM, Public Meeting Transcript, No. 40.5 at pp. 27, 54–55) ASAP questioned whether there was any legal prohibition on a prescriptive standard for microwave oven standby power, especially since DOE was at that time proposing a prescriptive standard for standing pilots in gas cooking products. (ASAP, Public Meeting Transcript, No. 40.5 at pp. 64–65)

As noted previously, DOE eliminated the active mode cooking efficiency provisions in the July 2010 TP Final Rule after it determined that those provisions did not produce accurate and repeatable results. 75 FR 42579 (July 22, 2010). Therefore, the absence of active mode provisions results in a *de facto* separate energy use descriptor for microwave oven standby mode and off mode energy use.

2. Standby Power Levels

DOE is considering standby mode and off mode standards based on a maximum average standby power, in W, for microwave ovens. For the reasons noted previously, the standards do not include off mode power. For the October 2008 NOPR, DOE's analysis estimated the incremental manufacturing cost for microwave ovens having standby power consumption less than the baseline level of 4 W. For the purposes of that analysis, a baseline microwave oven was considered to incorporate an absolute humidity cooking sensor. To analyze the cost-energy use relationship for microwave oven standby power, DOE defined standby power levels expressed as a maximum average standby power in W. To analyze the impacts of standards, DOE defined the following four standby power levels for analysis: (1) The Federal Energy Management Program (FEMP) procurement efficiency recommendation; (2) the International Energy Agency's (IEA's) 1-Watt Plan; (3) a standby power level as a gap-fill between the FEMP Procurement Efficiency Recommendation and IEA 1-Watt Plan; and (4) the current maximum microwave oven standby technology (max-tech; *i.e.,* lowest standby power) that DOE believes is or could be commercially available when the energy conservation standards become effective, based on a review of microwave ovens currently on the market worldwide. Table IV.2 provides the microwave oven standby power levels and the reference source for each level that DOE analyzed for the October 2008 NOPR. For more details on the determination of standby power levels, see chapter 5 of the SNOPR TSD.

TABLE IV.2—OCTOBER 2008 NOPR PROPOSED MICROWAVE OVEN STANDBY POWER LEVELS

Standby power level (TSL)	Source	Standby power (*W*)
Baseline	Baseline	4.0
1	FEMP Procurement Efficiency Recommendation	2.0
2	Gap Fill	1.5
3	IEA 1-Watt Program	1.0
4	Max Tech	0.02

In the October 2008 NOPR, DOE requested comments and views of interested parties concerning the selection of microwave oven standby power levels for the engineering analysis. 73 FR 62034, 62133 (Oct. 17, 2008). As discussed in section V.A, due to the definition of only four standby power levels, a TSL was defined for each standby power level and thus standby power levels may also be referred to as TSLs.

AHAM commented that the microwave oven standby power TSLs are appropriate. In particular, AHAM asserted that much of the worldwide industry is moving towards the IEA 1-Watt Program, which corresponds to one of the TSLs. However, AHAM stated that DOE's engineering analysis based on these TSLs is incomplete and inaccurate. For example, none of the 32 units tested by DOE were over-the-range units, whereas six of the 21 units in the AHAM sample were over-the-range units. According to AHAM, it is important to include over-the-range microwave ovens in the analysis because most of these units likely include a VFD, which is the most reliable display type in high temperature conditions. (AHAM, No. 47 at p. 3; AHAM, Public Meeting Transcript, No. 40.5 at p. 83)

As previously discussed, DOE research found that multiple over-the-range microwave ovens are currently available on the market that incorporate low-power display technologies, including LEDs and LCDs. DOE has also found that manufacturer temperature ratings for the three types of displays are comparable, and that LED displays and LCDs in both countertop and over-the-range microwave ovens offer acceptable consumer utility features, including brightness, viewing angle, and ability to display complex characters. Due to these findings, DOE believes that the TSLs and the associated analyses are still valid.

Additionally, AHAM stated that each microwave oven standby power TSL should be set in a way that allows manufacturers a variety of pathways to reduce standby power consumption to that level. While some manufacturers are already starting to incorporate some of the standby power consumption-reducing design options identified by DOE, little or no data is available on some of the design trade-offs and reliability. (AHAM, Public Meeting Transcript, No. 40.5 at pp. 78–79) DOE believes that multiple pathways exist, based on the selection of the (1) display technology, (2) power supply/control boards, (3) cooking sensors, and (4) the possible incorporation of algorithms to automatically reduce standby power after a period of inactivity, as stated in the October 2008 NOPR.

Whirlpool commented that it is unaware of technologies that would allow microwave ovens equipped with VFDs to meet the 1-W standby power consumption limit of TSL 3 while keeping the display energized during standby mode. (Whirlpool, No. 50 at p. 7) GE stated that it has significant concerns about retaining all features associated with VFDs that impact consumer utility while reducing microwave oven standby power consumption to TSL 3. As a result, GE believes TSL 3 would reduce the utility or performance of microwave ovens. (GE, Public Meeting Transcript, No. 40.5 at p. 89) DOE has determined that microwave oven manufacturers can meet TSL 3 in microwave ovens with VFDs by incorporating an automatic power-down feature. In addition, DOE research suggests that LED displays and LCDs in both countertop and over-the-range microwave ovens offer acceptable consumer utility features, including brightness, viewing angle, and ability to display complex characters. Additional issues related to consumer utility are addressed in section V.C, which discusses the TSLs considered for proposed standby mode and off mode standards.

AHAM requested additional information about the functionality associated with the microwave oven max-tech level, including response time from power-down. (AHAM, Public Meeting Transcript, No. 40.5 at p. 84) EEI also requested information about the max-tech level, such as whether it has as many display features and includes all the features of the baseline model. (EEI, Public Meeting Transcript, No. 40.5 at p. 84)

As discussed in the October 2008 NOPR, the max-tech microwave oven standby power level of 0.02 W corresponds to a unit equipped with a default automatic power-down function that shuts off certain power-consuming components after a specified period of user inactivity. The standby power at max-tech was obtained from a microwave oven currently on the market in Korea which incorporates such a feature. 73 FR 62034, 62045 (Oct. 17, 2008). Although DOE does not have operational information on this specific model, DOE has analyzed the components necessary to achieve an automatic power-down function, and does not believe such a feature would limit the selection of display technologies or other features that provide consumer utility. DOE analysis suggests that response times for startup will be short enough (less than 1 second) to be acceptable to consumers.

For the reasons discussed above in section IV.A, DOE also analyzed a separate product class for over-the-range combination microwave ovens. DOE's analysis estimates the incremental manufacturing cost for built-in and over-the-range combination microwave ovens having standby power consumption less than the baseline value of 4.5 W. To determine that baseline level, DOE measured the standby power consumption of a representative sample of built-in and over-the-range combination microwave ovens currently on the market. For the purpose of this standby power analysis, a baseline built-in/over-the-range combination microwave oven is considered to incorporate an absolute humidity cooking sensor. In order to analyze the cost-energy use relationship for this product class, DOE defined each standby power level as a maximum average standby power in watts.

To determine the maximum average standby power at each level, DOE reverse-engineered a representative sample of built-in and over-the-range combination microwave ovens to analyze the various components that contribute to the standby power consumption of the unit. DOE also measured the standby power consumed by these components individually. In its analysis, DOE observed that the absolute humidity cooking sensor used in these combination microwave ovens on average consume 0.9 W of standby power. For Standby Power Level (SL) 1, DOE believes that standby power can be reduced by incorporating a zero-standby cooking sensor. For SL 2, DOE analyzed potential improvements to the power supply design. DOE noted that microwave ovens at the baseline standby energy use incorporate a linear power supply. DOE measured the standby power consumption of the power supply and found that the transformer used to step down the line input voltage contributes most significantly to the standby power consumption. DOE then performed a power budget analysis to determine the size of the transformer needed to operate a microwave at full load, and the results suggest that replacing the conventional linear power supply with a more efficient switch mode power supply will eliminate the need for a large transformer and effectively reduce the standby power associated with the power supply. DOE thus estimated the standby power for SL 2 based on the improvement associated with changing from a conventional linear power supply with an efficiency of 55 percent

to a switch mode power supply with an efficiency of 75 percent. DOE developed this estimate for the efficiency of a switch mode power supply based on research of such power supply designs for appliance applications.[18] For SL 3, DOE analyzed the impact relays have in determining the size of a power supply. DOE compared the power budget of a control board with electromechanical relays to that with solid state relays, and observed that the power requirement of a control board, with similar input and load, is lower with solid state relays than with electromechanical relays. Therefore, DOE estimated the standby power at SL 3 based on design improvements associated with using more efficient components in a switch mode power supply that incorporates solid state relays. For SL 4, DOE analyzed an automatic function that turns off power to standby power consuming components after a certain period of inactivity and that uses a transformerless power supply to maintain the microcontroller chip while the microwave oven is not powered on. DOE estimated the standby power at SL 4 based on the standby power requirements of the controller microcontroller chip.

Table IV.3 provides the proposed standby power levels for the two product classes considered for today's SNOPR. Details of the engineering analysis are in chapter 5 of the SNOPR TSD.

TABLE IV.3—PROPOSED MICROWAVE OVEN STANDBY POWER LEVELS

Standby power level	Standby power (*W*)	
	Microwave-only and countertop combination	Built-in and over-the-range combination
Baseline	4.0	4.5
1	2.0	3.7
2	1.5	2.7
3	1.0	2.2
4	0.02	0.04

3. Manufacturing Costs

In this rulemaking DOE estimates a manufacturing cost for microwave ovens at each standby power level. The manufacturing costs are the basis of inputs for other analyses, including the LCC, national impact, and GRIM analyses.

For microwave oven standby mode and off mode energy use, DOE estimated a cost-energy use relationship (or ''curve'') in the form of the incremental manufacturing costs associated with incremental reductions in baseline standby power. In the October 2008 NOPR, DOE determined that microwave oven standby power depends on, among other factors, the display technology used, the associated power supplies and controllers, and the presence or lack of a cooking sensor. From testing and reverse engineering, DOE observed correlations between (1) specific components and technologies, or combinations thereof, and (2) measured standby power. DOE obtained preliminary incremental manufacturing costs associated with standby power levels by considering combinations of those components as well as other technology options identified to reduce standby power. In the October 2008 NOPR, DOE presented manufacturing cost estimates based on quotes obtained from suppliers, interviews with manufacturers, interviews with subject matter experts, research and literature review, and numerical modeling. 73 FR 62034, 62055 (Oct. 17, 2008). They are shown in Table IV.4.

TABLE IV.4—OCTOBER 2008 NOPR PROPOSED MICROWAVE OVEN STANDBY POWER INCREMENTAL MANUFACTURING COSTS

Standby power level	Standby power (*W*)	Incremental cost 2007$)
Baseline	4.0	NA
1	2.0	0.30
2	1.5	0.67
3	1.0	1.47
4	0.02	5.13

Based on DOE's research, interviews with subject matter experts, and discussions with manufacturers, DOE believes that all consumer utility (display, cooking sensor, etc.) could be maintained by standby power consumption down to SL 3 (1.0 W). At the max-tech level, DOE would expect implementation of an automatic power-down feature that would, among other things, shut off the display after a period of inactivity, potentially impacting consumer utility.

DOE observed several different cooking sensor technologies. Follow-on testing after the December 2007 public meeting showed that some sensors are zero-standby (relative humidity) cooking sensors. During the MIA interview for the NOPR, one manufacturer indicated that its supplier of cooking sensors had developed zero-standby absolute humidity cooking sensors that would have the same manufacturing cost as the higher-standby power devices they would replace. Based on the number of available approaches to zero-standby cooking sensors from which manufacturers can choose, DOE believes that all manufacturers can and likely will implement zero-standby cooking sensors by the effective date of standby mode and off mode energy conservation standards, and maintain the consumer utility of a cooking sensor without affecting unit cost. DOE believes that a standard at standby power levels of 1 or 2 W would not affect consumer utility, because all display types could continue to be used. At SL 3 for VFDs and SL 4 for all display technologies, DOE analysis suggests the need for a separate controller (automatic power-down) that automatically turns off all other power-consuming components during standby mode. Such a feature would affect the consumer utility of having a clock display only if the consumer could not opt out of auto power-down.

DOE requested input and data from interested parties on the estimated incremental manufacturing costs, as well as the assumed approaches, to achieve each microwave oven standby power level. DOE also requested comment on whether any intellectual property or patent infringement issues are associated with the design options

[18] Information on the design and efficiency of switch mode power supplies can be found at *http://www.powerint.com/en/applications/major-appliances.*

presented in the NOPR TSD to achieve each standby power level. 73 FR 62034, 62133 (Oct. 17, 2008).

AHAM questioned the source of the incremental cost data associated with each standby power level presented by DOE, since some microwave oven manufacturers cannot recall providing this information to DOE. AHAM commented on the need for incremental manufacturing costs to reflect both a one-time cost as well as the possibility of multiple paths to achieve each TSL. (AHAM, Public Meeting Transcript, No. 40.5 at p. 87) GE commented that the cost associated with upgrading power supplies to reach TSL 3 is a question. (GE, Public Meeting Transcript, No. 40.5 at pp. 75–76)

As described in chapter 5 of the TSD published with the October 2008 NOPR, DOE developed incremental cost estimates for each standby power level using the design-option approach. (One-time costs are evaluated as part of the MIA.) DOE estimated costs for each of the components and technologies based on quotes from component suppliers, interviews with manufacturers, interviews with subject matter experts, research and literature review, and numerical modeling. The incremental manufacturing costs for each standby power level were determined by considering different combinations of these components as well as other technology options identified to reduce standby power.

DOE is aware that manufacturers may employ a number of strategies to achieve the different standby power levels. The estimated manufacturing costs for each standby power level represent the approach DOE believes manufacturers would most likely use to achieve the standby power at each level. For each level, DOE assumed manufacturers would implement design options with the lowest associated manufacturing cost. If DOE determined there were multiple paths with similar costs to reach a certain level, it assumed manufacturers would be equally likely to choose either strategy.

Whirlpool commented that its market research suggests high costs associated with consumer education on proper operation of microwave ovens with automatic power-down features. Whirlpool clarified that the marketing costs it submitted for the ANOPR did not include these costs, estimated at $10 million, including retailer training, point-of-purchase material, product tags, telephone support, and possibly more. (Whirlpool, No. 50 at p. 7) AHAM also commented that DOE did not complete a rigorous analysis on manufacturing costs. According to AHAM, DOE obtained component costs, but did not account for the cost implications on appliance manufacturers. AHAM stated that this includes variables such as component reliability and/or utility, both of which will impact manufacturer cost. (AHAM, No. 47 at p. 6)

DOE considered any conversion costs associated with changes to consumer utility and reliability in the manufacturer impact analysis, discussed in section IV.G. However, as previously discussed, DOE found no reliability or consumer utility concerns with switching from VFD to LCD or LED displays. Through discussions with manufacturers and OEMs, DOE believes that zero-standby cooking sensors could be implemented with no effect on consumer utility or reliability. DOE is aware that an automatic power-down feature required at SL 3 for VFDs and at SL 4 for all display types could affect consumer utility, and considered these impacts in the selection of the proposed standards.

For the reasons described above, DOE believes the standby power levels and corresponding incremental manufacturing costs presented in the October 2008 NOPR remain fundamentally valid for the microwave-only and countertop combination microwave oven product class. DOE is unaware of any technologies that have become available since the publishing of the October 2008 NOPR that would alter the incremental cost for any standby power level. However, the costs presented in the October 2008 NOPR are in 2008 dollars. DOE scaled these costs to 2010 dollars using the producer price index (PPI) to reflect more current values.[19] The relevant PPI for microwave ovens is a subset of the household cooking appliance manufacturing industry, specifically for electric (including microwave) household ranges, ovens, surface cooking units, and equipment. Table IV.5 shows the revised incremental costs for each standby power level for Product Class 1, scaled to 2010 dollars.

TABLE IV.5—MICROWAVE OVEN PRODUCT CLASS 1 STANDBY POWER INCREMENTAL MANUFACTURING COSTS

Standby power level	Standby power (*W*)	Incremental cost (*2010$*)
Baseline	4.0	NA
1	2.0	$0.27
2	1.5	0.60
3	1.0	1.31
4	0.02	4.58

[19] Information on the PPI databases can be found at *http://www.bls.gov/ppi/data.htm.* (Last accessed March 18, 2011.)

As discussed in section IV.A, for today's SNOPR, DOE is proposing two product classes for microwave ovens. While the analysis presented in the October 2008 NOPR remains relevant for the microwave-only and countertop combination microwave oven product class, DOE conducted analyses on a test sample of 13 combination microwave ovens for this SNOPR to evaluate the built-in and over-the-range combination microwave oven product class. DOE again used the design-option approach to determine the incremental manufacturing costs of combination microwave ovens for each standby power level.

DOE estimated the incremental cost associated with reductions in baseline standby power of built-in and over-the-range combination microwave ovens. DOE performed engineering teardowns and control board cost analyses to determine the cost of the baseline control board used in these units. DOE estimated the cost associated with each standby power level by using quotes from various component suppliers to determine the cost of the components used in each design option.

For SL 1, DOE estimated that the manufacturing cost of a zero-standby cooking sensor would be the same as that of the cooking sensor with high standby power. To estimate the manufacturing cost for SL 2, DOE used reverse engineering to determine the cost of the components used in a design of a switch mode power supply capable of delivering the same output power as the baseline conventional linear power supply. In its analysis for the manufacturing cost of SL 3, DOE determined the cost of the components used to design a control board with a switch mode power supply and solid state relays capable of driving the same loads as the electromechanical relays. DOE estimated the manufacturing cost for SL 4 based on the cost of the components needed to design an automatic power-down function that uses a transformerless power supply.

The results of these new analyses are summarized in Table IV.6. For the detailed cost-energy use analysis, including descriptions of design options and design changes to meet standby

power levels, see chapter 5 of the SNOPR TSD.

TABLE IV.6—MICROWAVE OVEN PRODUCT CLASS 2 STANDBY POWER INCREMENTAL MANUFACTURING COSTS

Standby power level	Standby power (*W*)	Incremental cost (*2010$*)
Baseline	4.5	NA
1	3.7	$0
2	2.7	2.29
3	2.2	9.44
4	0.04	5.18

D. Life-Cycle Cost and Payback Period Analysis

In response to the requirements of section 325(o)(2)(B)(i) of the Act, DOE conducted LCC and PBP analyses to evaluate the economic impacts of possible amended energy conservation standards for consumers of microwave ovens having standby mode and off mode features. (42 U.S.C. 6295(o)(2)(B)(i)) DOE conducted the analyses using a spreadsheet model developed in Microsoft (MS) Excel for Windows 2007. (See chapter 8 of the SNOPR TSD.)

The LCC represents the total consumer expense over the life of a product, including purchase and installation expense and operating costs (energy expenditures, repair costs, and maintenance costs). The PBP is the number of years it would take for the consumer to recover the increased costs of a higher-efficiency product through energy savings. To calculate the LCC, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product. DOE forecasts the change in LCC and the change in PBP associated with a given efficiency level relative to the base-case product efficiency. The base-case forecast reflects the market in the absence of amended mandatory energy conservation standards. As part of the LCC and PBP analyses, DOE develops data that it uses to establish product prices, annual energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates.

DOE developed a consumer sample for microwave ovens having standby mode and off mode features from EIA's 2005 Residential Energy Consumption Survey (RECS). It used this sample to establish the variability and uncertainty in microwave oven electricity use. The variability in electricity pricing was characterized by incorporating regional energy prices. DOE calculated the LCC associated with a baseline microwave oven having standby mode and off mode features. To calculate the LCC savings and PBP associated with products that could meet potential amended energy conservation standards, DOE substituted the baseline unit with more efficient designs.

Table IV.7 summarizes the approaches and data DOE used to derive the inputs to the LCC and PBP calculations for the October 2008 NOPR, and the changes it made for today's SNOPR. DOE did not introduce changes to the LCC and PBP analysis methodology described in the October 2008 NOPR. As the following sections discuss in more detail, however, DOE revised some of the inputs to the analysis. Chapter 8 of the SNOPR TSD contains a detailed discussion of the methodology utilized for the LCC and PBP analysis as well as the inputs developed for the analysis.

TABLE IV.7—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN LCC AND PBP ANALYSES

Inputs	October 2008 NOPR	Changes for the SNOPR
Affecting Installed Costs		
Product Cost	Derived by multiplying manufacturer cost by manufacturer, distributor markups and sales tax.	Used experience curve fits to forecast a price scaling index to forecast product costs.
Affecting Operating Costs		
Annual Energy Use	Annual energy use determined from the annual usage (average daily use cycles).	No change.
Energy Prices	Electricity: Updated using EIA's 2006 Form 861 data. Variability: Regional energy prices determined for 13 regions.	Electricity: Updated using EIA's 2009 Form 861 data. Variability: No change.
Energy Price Trends	Energy: Forecasts updated with EIA's *Annual Energy Outlook 2008* (*AEO 2008*).	Reference Case, High Growth, and Low Growth forecasts updated with EIA's *AEO 2010* May Release.
Repair and Maintenance Costs	Assumed no repair or maintenance costs	No change.
Affecting Present Value of Annual Operating Cost Savings		
Product Lifetime	Estimated using survey results from RECS (1990, 1993, 1997, 2001, 2005) and the U.S. Census American Housing Survey (2005, 2007), along with historic data on appliance shipments.	No change.
Discount Rates	Variability: Characterized using Weibull probability distributions.	No change.
Affecting Installed and Operating Costs		
Effective Date of New Standard	2012	2014.

1. Product Costs

To calculate the product costs paid by microwave oven purchasers, DOE multiplied the manufacturing selling prices developed from the engineering analysis by the supply chain markups it developed (along with sales taxes). DOE used the same supply chain markups for today's SNOPR that were developed for the October 2008 NOPR. See chapter 6 of the SNOPR TSD for additional information. For the October 2008 NOPR, DOE analyzed only countertop models of microwave ovens and considered installation costs to be zero. For today's SNOPR, DOE analyzed both countertop and over-the-range microwave ovens and considered installation costs to be zero.

On February 22, 2011, DOE published a Notice of Data Availability (NODA, 76 FR 9696) stating that DOE may consider improving regulatory analysis by addressing equipment price trends. Consistent with the NODA, DOE examined historical producer price indices (PPI) for electric cooking equipment generally and microwave ovens specifically and found a consistent, long-term declining real price trend. Consistent with the method proposed in the NODA, DOE used experience curve fits to develop a price scaling index to forecast product costs for this rulemaking.

DOE also considered the public comments that were received in response to the NODA and refined its experience curve trend forecasting estimates. Many commenters were supportive of DOE moving from an assumption-based equipment price trend forecasting method to a data-driven methodology for forecasting price trends. Other commenters were skeptical that DOE could accurately forecast price trends given the many variables and factors that can complicate both the estimation and the interpretation of the numerical price trend results and the relationship between price and cost. DOE evaluated these concerns and determined that retaining the assumption-based approach of a constant real price trend was not consistent with the historical data for the products covered in this rule (though this scenario does represent a reasonable upper bound on the future equipment price trend). DOE also performed an initial evaluation of the possibility of other factors complicating the estimation of the long-term price trend, and developed a range of potential price trend values that was consistent with the available data and justified by the amount of data that was available to DOE at this time. DOE recognizes that its price trend forecasting methods are likely to be modified as more data and information becomes available to enhance the statistical certainty of the trend estimate and the completeness of the model. Additional data should enable an improved evaluation of the potential impacts of more of the factors that can influence equipment price trends over time.

To evaluate the impact of the uncertainty of the price trend estimates, DOE performed price trend sensitivity calculations in the national impact analysis to examine the dependence of the analysis results on different analytical assumptions. DOE also included a constant real price trend assumption as a sensitivity scenario representing an upper bound on the forecast price trend.

A more detailed discussion of DOE's price trend modeling and calculations is provided in appendix 8–E of the SNOPR TSD.

2. Annual Energy Consumption

DOE determined the annual energy consumption of the standby mode and off mode of microwave ovens by estimating the number of hours of operation throughout the year and assuming that the unit would be in standby mode or off mode the rest of the time. DOE estimated the number of operating hours relative to the baseline of 71 hours calculated in the NOPR. DOE subtracted the number of calculated operating hours from the total number of hours in a year and multiplied by the standby mode and off mode power usage to determine yearly standby mode and off mode energy consumption.

3. Energy Prices

DOE derived average electricity prices for 13 geographic areas consisting of the nine U.S. Census divisions, with four large States (New York, Florida, Texas, and California) treated separately. DOE estimated residential electricity prices for each of the 13 geographic areas based on data from EIA Form 861, ''Annual Electric Power Industry Report.'' DOE calculated an average residential electricity price by first estimating an average residential price for each utility, and then calculating a regional average price by weighting each utility having customers in a region by the number of residential customers served in that region. The calculations for today's SNOPR used the most recent available data (2009).

To estimate trends in electricity prices for the October 2008 NOPR, DOE used the price forecasts in EIA's *AEO 2008.* To arrive at prices in future years, DOE multiplied the average prices described above by the forecast of annual average price changes in *AEO 2008.* For today's supplemental notice, DOE updated its energy price forecasts using those in the *AEO 2010* May Release. Because the *AEO* forecasts prices only to 2035, DOE followed past guidelines that EIA provided to the Federal Energy Management Program and used the average rate of change during 2020–2035 to estimate price trends beyond 2035.

The spreadsheet tools used to conduct the LCC and PBP analysis allow users to select energy price forecasts for either the *AEO*'s High economic growth case or Low economic growth case to estimate the sensitivity of the LCC and PBP to different energy price forecasts.

DOE received comment regarding the inputs to the energy price forecasts. The Joint Comment recommended that DOE conduct a sensitivity analysis using a basket of other forecasts besides the *AEO.* (Joint Comment, No. 44 at p. 11) As mentioned above, DOE considered price forecasts from the *AEO's* High and Low economic growth cases to estimate the sensitivity of the LCC and PBP results to different energy price forecasts. The alternative forecasts from the *AEO* provide a suitable range to examine the sensitivity of LCC and PBP results to different energy price forecasts.

The Joint Comment also stated that to realistically depict energy prices in the future, DOE must consider the impact of carbon control legislation, because such legislation is likely. It also noted that there are regional cap-and-trade programs in effect in the Northeast (Regional Greenhouse Gas Initiative [RGGI]) and the West (Western Climate Initiative [WCI]) that will affect the price of electricity, which was not yet reflected in the *AEO* energy price forecasts. (Joint Comment, No. 44 at p. 12) EJ stated that caps likely will be in place by the time new standards become effective, so DOE should increase its electricity prices to reflect the cost of complying with emission caps. (EJ, Public Meeting Transcript, No. 40.5 at pp. 105–106)

In response, DOE believes that the shape of Federal carbon control legislation, and the ensuing cost to electricity generators of carbon mitigation, is too uncertain to incorporate into the energy price forecasts that DOE uses. The costs to electricity generators of carbon mitigation resulting from the regional programs are also uncertain over the forecast period for this rulemaking. That being said, EIA included the effect of

the RGGI in its energy price forecasts for the *AEO 2010* May Release. (WCI did not provide sufficient detail to EIA in order for them to model WCI's impact on energy price forecasts.) Therefore, the energy price forecasts used in today's supplemental notice include the impact of one of the two regional cap-and-trade programs in the United States.

4. Repair and Maintenance Costs

Repair costs are those associated with repairing or replacing components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. For the October 2008 NOPR, DOE did not include repair or maintenance costs in its analyses. DOE maintained the same approach for this SNOPR.

5. Product Lifetime

For the October 2008 NOPR and today's SNOPR, DOE used a variety of sources to establish low, average, and high estimates for product lifetime. The average microwave oven lifetime used was 9.3 years. DOE used a Weibull probability distribution to characterize microwave oven lifetime.

6. Discount Rates

In the calculation of LCC, DOE applies discount rates to estimate the present value of future operating costs. DOE estimated a distribution of residential discount rates for microwave ovens. See chapter 8 in the SNOPR TSD for further details on the development of consumer discount rates.

To establish residential discount rates for the LCC analysis in the October 2008 NOPR and today's SNOPR, DOE identified all debt or asset classes that consumers might use to purchase household appliances, including household assets that might be affected indirectly. It estimated average percentage shares of the various debt or asset classes for the average U.S. household using data from the Federal Reserve Board's ''Survey of Consumer Finances'' (SCF) for 1989, 1992, 1995, 1998, 2001, 2004, and 2007. Using the SCF and other sources, DOE then developed a distribution of rates for each type of debt and asset to represent the rates that may apply in the year in which new standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity, weighted by the shares of each class, is 5.1 percent. DOE used the same approach for today's supplemental notice.

7. Effective Date of New Standards

The effective date is the future date when parties subject to the requirements of a new energy conservation standard must begin compliance. For the NOPR, DOE assumed that any new standards adopted in this rulemaking would become effective in March 2012, 3 years after the month when it expected the final rule would be published in the **Federal Register**. For today's SNOPR, DOE expects that the final rule will be published in 2011, with new standards requiring compliance three years later. Thus, DOE calculated the LCC for appliance consumers as if they would purchase new products in 2014.

8. Product Energy Efficiency in the Base Case

For the LCC and PBP analysis, DOE analyzes higher efficiency levels relative to a base case (*i.e.,* the case without new energy conservation standards). However, some consumers may already purchase products having efficiencies greater than the baseline product levels. Thus, to accurately estimate the percentage of consumers that would be affected by a particular standard level, DOE estimates the distribution of product efficiencies that consumers are expected to purchase under the base case. DOE refers to this distribution of product energy efficiencies as a base-case efficiency distribution. For the October 2008 NOPR and today's SNOPR, DOE used the current shares of available models at specific standby power levels to establish the base-case efficiency distributions. Table IV.8 presents the market shares of the standby power levels in the base case for standby mode and off mode energy use of microwave ovens.

TABLE IV.8—MICROWAVE OVENS: BASE-CASE MARKET SHARES

Level	Product Class 1		Product Class 2	
	Standby power (*W*)	2005 Share (%)	Standby power (*W*)	2005 Share (%)
Baseline	4.00	46.2	4.50	100.0
TSL1 *	2.00	34.6	3.70	0.0
TSL 2	1.50	19.2	2.70	0.0
TSL 3	1.00	0.0	2.20	0.0
TSL 4	0.02	0.0	0.04	0.0

* TSL = Trial Standard Level.

9. Inputs to Payback Period Analysis

The PBP is the amount of time (expressed in years) it takes the consumer to recover the additional installed cost of a more efficient product through operating cost savings, compared to the baseline product. The simple payback period does not account for changes in operating expenses over time or the time value of money. The inputs to the PBP calculation are the total installed cost of the product to the consumer for each efficiency level and the annual (first-year) operating expenditures for each efficiency level. For the October 2008 NOPR and today's SNOPR, the PBP calculation uses the same inputs as the LCC analysis, except that energy price trends and discount rates are not needed.

10. Rebuttable-Presumption Payback Period

As noted above, EPCA, as amended (42 U.S.C. 6295(o)(2)(B)(iii)) establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that ''the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard,'' as calculated under the test procedure in place for that standard. For each TSL, DOE determined the value of the first year's energy savings by calculating the quantity of those savings in accordance with DOE's test procedure, and multiplying that amount by the average energy price forecast for the year in which a new standard first would be effective—in this case, 2014.

DOE received comments addressing the topic of using a rebuttable-presumption payback period to establish the economic justification of an energy conservation standard. The Joint Comment and EJ stated that DOE's view that it is necessary to consider a full range of impacts because the rebuttable presumption criterion is insufficient for determining economic justification does not reflect the extent to which the rebuttable-presumption analysis constrains DOE's authority to reject standards based on economic impacts. (Joint Comment, No. 44 at appendix B, p. 1; EJ, Public Meeting Transcript, No. 40.5 at p. 130) The Joint Comment stated that in 42 U.S.C. 6295(o)(2)(B)(iii), Congress erected a significant barrier to DOE's rejection, on the basis of economic justifiability, of standard levels to which the rebuttable presumption applies. Further, EJ and the Joint Comment stated DOE's preference to proceed under the seven-factor test contained in 42 U.S.C. 6295(o)(2)(B)(i) is not pertinent. The Joint Comment agreed with DOE that analysis under the seven-factor test is necessary and typically has supported standards having paybacks longer than 3 years. However, the Joint Comment stated that DOE's decision making must reflect the expressed intent of Congress that the highest standard level resulting in cost recovery within 3 years constitutes the presumptive lowest standard level that DOE must adopt. (Joint Comment, No. 44 at appendix B, pp. 1–2)

In response, when examining potential standard levels DOE considers both the rebuttable-presumption payback criteria, as well as a full analysis that includes all seven relevant statutory criteria under 42 U.S.C. 6295(o)(2)(B)(i). DOE believes, however, that the commenters are misinterpreting the statutory provision in question. The Joint Comment and EJ state that DOE need not look beyond the results of the rebuttable-presumption analysis, but DOE believes that the statute contains no such restriction, and following this approach would potentially force the agency to ignore other relevant information that would bear on the selection of the most stringent standard level that meets all applicable statutory criteria. Similarly, DOE believes that the Joint Comment misreads the statute in calling for a level that meets the rebuttable-presumption test to serve as a minimum level when setting the final energy conservation standard. To do so would not only eliminate the ''rebuttable'' aspect of the presumption but also would lock in place a level that may not be economically justified based on a full review of statutory criteria. EPCA already obligates DOE to select the most stringent standard level that meets the applicable statutory criteria.

E. National Impact Analysis—National Energy Savings and Net Present Value Analysis

1. General

DOE's NIA assesses the national energy savings, as well as the national NPV, of total consumer costs and savings expected to result from new or amended standards at specific efficiency levels. DOE applied the NIA spreadsheet to calculate energy savings and NPV, using the annual energy consumption and total installed cost data from the LCC analysis. DOE forecasted the energy savings, energy cost savings, product costs, and NPV for the two product classes from 2014 to 2043. The forecasts provide annual and cumulative values for all four parameters. In addition, DOE incorporated into its NIA spreadsheet the capability to analyze sensitivity of the results to forecasted energy prices and product efficiency trends. Table IV.9 summarizes the approach and data DOE used to derive the inputs to the NES and NPV analyses for the October 2008 NOPR and the changes made in the analyses for today's SNOPR. A discussion of the 2008 inputs and the changes follows. (See chapter 10 of the SNOPR TSD for further details.)

TABLE IV.9—APPROACH AND DATA USED TO DERIVE INPUTS TO THE NATIONAL ENERGY SAVINGS AND NPV ANALYSES

Inputs	2008 NOPR Description	Changes for the SNOPR
Shipments	Annual shipments from shipments model	See Table IV.10.
Compliance Date of Standard	2012	2014.
Base-Case Forecasted Efficiencies	Shipment-weighted efficiency (SWEF) determined in 2005. SWEF held constant over forecast period.	No change.
Standards-Case Forecasted Efficiencies	Analyzed as one product class. Roll-up scenario used for determining SWEF in the year that standards become effective for each standards case. SWEF held constant over forecast period.	Analyzed as two product classes. Roll-up scenario used for determining SWEF in the year that standards become effective for each standards case. SWEF held constant over forecast period
Annual Energy Consumption per Unit	Annual weighted-average values as a function of SWEF.	No change.
Total Installed Cost per Unit	Annual weighted-average values as a function of SWEF.	Incorporated learning rate to forecast product prices.
Energy Cost per Unit	Annual weighted-average values as a function of the annual energy consumption per unit and energy (and water) prices.	No change.
Repair Cost and Maintenance Cost per Unit	Incorporated changes in repair costs as a function of standby power.	No change.
Escalation of Energy Prices	*AEO 2008* forecasts (to 2030); extrapolated to 2042.	Updated to *AEO 2010* May release forecasts (to 2035); extrapolated to 2043.
Energy Site-to-Source Conversion	Conversion varies yearly and is generated by DOE/EIA's NEMS program (a time-series conversion factor; includes electric generation, transmission, and distribution losses).	No change.
Discount Rate	3 and 7 percent real	No change.
Present Year	Future expenses discounted to 2007	Future expenses discounted to 2011.

2. Shipments

The shipments portion of the NIA spreadsheet is a model that uses historical data as a basis for projecting future shipments of the products that are the subject of this rulemaking. In projecting microwave oven shipments, DOE accounted for two market segments: (1) New construction; and (2) replacement of failed products. Because shipments for new construction and replacements were not enough to account for all product shipments, DOE developed another market segment to calibrate its shipments model. In addition to normal replacements, DOE's shipments model also assumed that a small fraction of the stock would be replaced early. It also considered retired units not replaced. DOE used the non-replacement market segment to calibrate the shipments model to historical shipments data.

To estimate the impacts of prospective standards on product shipments (*i.e.,* to forecast standards-case shipments), DOE considered the combined effects of changes in purchase price, annual operating cost, and household income on the magnitude of shipments.

Table IV.10 summarizes the approach and data DOE used to derive the inputs to the shipments analysis for the October 2008 NOPR, and the changes it made for today's SNOPR. The general approach for forecasting microwave shipments for today's SNOPR remains unchanged from the NOPR.

TABLE IV.10—APPROACH AND DATA USED TO DERIVE INPUTS TO THE SHIPMENTS ANALYSIS

Inputs	2008 NOPR description	Changes for the SNOPR
Number of Product Classes	One product class. Market share data provided by AHAM.	Two product classes: (1) All microwave oven-only and countertop microwave oven-combination; (2) over-the-range microwave oven-combination. Market share data provided by AHAM; 99% product class #1 and 1% product class #2. Product class market shares held constant over forecast period.
New Construction Shipments	Housing forecasts updated with EIA *AEO 2009* April release forecasts for the Reference case, High growth case, and Low growth case.	No change in approach. Housing forecasts updated with EIA *AEO 2010* forecasts for the Reference case, High growth case, and Low growth case.
Replacements	Determined by tracking total product stock by vintage and establishing the failure of the stock using retirement functions from the LCC and PBP analysis. Retirement functions revised to be based on Weibull lifetime distributions.	No change.
Retired Units not Replaced (*i.e.,* non-replacements).	Used to calibrate shipments model to historical shipments data.	No change.
Historical Shipments	Data sources include AHAM data submittal and *Appliance* magazine.	No change.
Purchase Price, Operating Cost, and Household Income Impacts due to Efficiency Standards.	Developed ''relative price'' elasticity, which accounts for the purchase price and the present value of operating cost savings divided by household income. Used purchase price and efficiency data specific to residential refrigerators, clothes washers, and dishwashers between 1980 and 2002 to determine a ''relative price'' elasticity of demand of −0.34.	No change.
Fuel Switching	Not applicable	No change.

a. New Construction Shipments

To estimate shipments for new construction, DOE used forecasts of housing starts coupled with microwave oven saturation data. In other words, to forecast the shipments for new construction in any given year, DOE multiplied the housing forecast by the forecasted saturation of microwave ovens for new housing.

New housing comprises single- and multi-family units (also referred to as ''new housing completions'') and mobile home placements. DOE forecasted new housing based on EIA's *AEO 2010* for 2005–2035. *AEO 2010* provides three sets of forecasts: the Reference case, the High economic growth case, and the Low economic growth case. DOE used the forecasts from the Reference case for the NIA results reported in this notice. For the Reference case, the forecast shows a decline in housing completions from 2.2 million in 2005 to 1.7 million by 2030. For 2035–2043, DOE froze completions at the level in 2035.

b. Replacements and Non-Replacements

To determine shipments for the replacement market, DOE used an accounting method that tracks the total stock of units by vintage. DOE estimated a stock of microwave ovens by vintage by integrating historical shipments starting from 1972. Over time, some units are retired and removed from the stock, triggering the shipment of a replacement unit. Depending on the vintage, a certain percentage of each type of unit will fail and need to be replaced. To determine when a microwave oven fails, DOE used data from RECS and AHS to estimate a product survival function. This function was modeled as a Weibull distribution. Based on this method, the average calculated microwave oven lifetime is 9.3 years. For a more complete discussion of microwave lifetimes, refer to section 8.2.3 of chapter 8 of the SNOPR TSD.

3. Purchase Price, Operating Cost, and Income Impacts

To estimate the combined effects of increases in product purchase price and decreases in product operating costs on microwave oven shipments, for the October 2008 NOPR DOE used a

literature review and a statistical analysis on a limited set of appliance price, efficiency, and shipments data. DOE used purchase price and efficiency data specific to microwave ovens between 1980 and 2002 to conduct regression analyses. DOE's analysis suggested that the relative short-run price elasticity of demand is −0.34.

Because DOE's forecast of shipments and national impacts attributable to standards spans more than 30 years, DOE also considered how the relative price elasticity is affected once a new standard takes effect. After the purchase price changes, price elasticity becomes more inelastic over the years until it reaches a terminal value. For the October 2008 NOPR and today's SNOPR, DOE incorporated a relative price elasticity change that resulted in a terminal value of approximately one-third of the short-run elasticity. In other words, DOE determined that consumer purchase decisions, in time, become less sensitive to the initial change in the product's relative price.

4. Other Inputs

a. Forecasted Efficiencies

A key input to the calculations of NES and NPV are the energy efficiencies that DOE forecasts for the base case (without new standards). The forecasted efficiencies represent the annual shipment-weighted energy efficiency (SWEF) of the product under consideration during the forecast period (*i.e.,* from the estimated effective date of a new standard to 30 years after that date). Because DOE had no data to reasonably estimate how microwave oven standby power levels might change during the next 30 years, it assumed that forecasted efficiencies will stay at the 2014 standby power levels until the end of the forecast period.

For its determination of the cases under alternative standard levels (''standards cases''), DOE used a ''roll-up'' scenario in the October 2008 NOPR to establish the SWEF for 2012. For today's SNOPR, DOE established the SWEF for 2014 and assumed that product efficiencies in the base case that do not meet the standard level under consideration would roll-up to meet the new standard level. DOE assumed that all product efficiencies in the base case that were above the standard level under consideration would not be affected by the standard.

DOE made the same assumption regarding forecasted standards-case efficiencies as for the base case; namely, that efficiencies will remain at the 2014 standby power level until the end of the forecast period. By maintaining the same rate of increase for forecasted efficiencies in the standards case as in the base case (*i.e.,* no change), DOE retained a constant efficiency difference between the two cases throughout the forecast period. Although the no-change trends may not reflect what would happen to base-case and standards-case product efficiencies in the future, DOE believes that maintaining a constant efficiency difference between the base case and each standards case provides a reasonable estimate of the impact that standards would have on product efficiency. It is more important to accurately estimate the efficiency difference between the standards case and base case than to accurately estimate the actual product efficiencies in the standards and base cases. DOE retained the approach used in the October 2008 NOPR for today's SNOPR. Because the effective date of the standard is now assumed to be 2014, DOE applied the ''roll-up'' scenario in the year 2014 to establish the SWEF for each standards case.

b. Annual Energy Consumption

The annual energy consumption per unit depends directly on product efficiency. For the October 2008 NOPR and today's SNOPR, DOE used the SWEFs associated with the base case and each standards case, in combination with the annual energy use data, to estimate the shipment-weighted average annual per-unit energy consumption under the base case and standards cases. The national energy consumption is the product of the annual energy consumption per unit and the number of units of each vintage, which depends on shipments.

As noted above, DOE used a relative price elasticity to estimate standards-case shipments for microwave ovens. To avoid the inclusion of energy savings from any reduction in shipments attributable to a standard, DOE used the standards-case shipments projection and the standards-case stock to calculate the annual energy consumption in the base case. For microwave ovens, DOE assumed that any drop in shipments caused by standards would result in the purchase of used machines. DOE retained the use of the base-case shipments to determine the annual energy consumption in the base case for today's SNOPR.

c. Site-to-Source Energy Conversion

To estimate the national energy savings expected from appliance standards, DOE uses a multiplicative factor to convert site energy consumption (energy use at the location where the appliance is operated) into primary or source energy consumption (the energy required to deliver the site energy). For the October 2008 NOPR, DOE used annual site-to-source conversion factors based on the version of NEMS that corresponds to *AEO 2008*. For today's SNOPR, DOE used *AEO 2010*. For electricity, the conversion factors vary over time because of projected changes in generation sources (*i.e.,* the types of power plants projected to provide electricity to the country). Because the *AEO* does not provide energy forecasts beyond 2035, DOE used conversion factors that remain constant at the 2035 values throughout the rest of the forecast.

d. Total Installed Costs and Operating Costs

The increase in total annual installed cost is equal to the difference in the per-unit total installed cost between the base case and standards case, multiplied by the shipments forecasted in the standards case.

In the NOPR analysis, DOE assumed that the manufacturer costs and retail prices of products meeting various efficiency levels remain fixed, in real terms, throughout the period of the analysis. As discussed in section IV.F.1, examination of historical price data for certain appliances that have been subject to energy conservation standards indicates that the assumption of constant real prices and costs may, in many cases, over-estimate long-term appliance price trends.

For the SNOPR, DOE applied a learning rate of 28.9 percent to forecast the prices of microwave ovens sold in each year in the forecast period (2014–2043). The learning rate expresses the change in price associated with a doubling in cumulative production. The price in each year is a function of the learning rate and the cumulative production of microwave ovens forecast in each year. DOE applied the same values to forecast prices for each product class at each considered efficiency level. Learning curve analysis characterizes the reduction in production cost mainly associated with labor-based performance improvement and higher investment in new capital equipment at the microeconomic level. Experience curve analysis tends to focus more on entire industries and aggregates over various casual factors at the macroeconomic level: ''Experience curve'' and ''progress function'' typically represent generalizations of the learning concept to encompass behavior of all inputs to production and cost (*i.e.,* labor, capital, and materials).'' The economic literature often uses these two terms interchangeably. The term

''learning'' is used here to broadly cover these general macroeconomic concepts. The ''experience'' curve developed for microwave ovens is based solely on shipments and PPI data specific to the United States. Because all microwave ovens are manufactured outside of the country, the changes observed in the PPI data are a result of efficiency gains realized in production outside of the country. In other words, ''experience'' is currently a dynamic of global production and distribution and is the cause for the changes observed in the PPI data.

To evaluate the impact of the uncertainty of the price trend estimates, DOE performed price trend sensitivity calculations to examine the dependence of the analysis results on different analytical assumptions. DOE considered four learning rate sensitivities: (1) A ''high learning'' rate (34.7 percent); (2) a ''low learning'' rate (21.3 percent); (3) a ''no learning'' rate (constant real prices); and (4) a ''microwave oven only'' rate. The ''microwave oven only'' is based on a limited set of historical price data specifically for microwave ovens, and the learning rate is 39.6 percent.

The annual operating cost savings per unit include changes in energy, repair, and maintenance costs. DOE forecasted energy prices for the October 2008 NOPR based on *AEO 2008;* it updated the forecasts for the SNOPR using data from *AEO 2010*. For the October 2008 NOPR and today's SNOPR, DOE assumed no increases in repair and maintenance costs for more efficient standby mode and off mode features of microwave ovens.

e. Discount Rates

DOE multiplies monetary values in future years by a discount factor to determine their present value. DOE estimated national impacts using both a 3-percent and a 7-percent real discount rate, in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis (OMB Circular A–4 (Sept.17, 2003), section E, ''Identifying and Measuring Benefits and Costs''). The Joint Comment stated that DOE should use a 2-percent to 3-percent real discount rate for national impact analyses. (Joint Comment, No. 44 at p. 11) It noted that societal discount rates are the subject of extensive academic research, and the weight of academic opinion is that the appropriate societal discount rate is 3 percent or less. It urged DOE to give primary weight to results based on the lower of the discount rates recommended by OMB.

In response, DOE notes that OMB Circular A–4 references an earlier Circular A–94, which states that a real discount rate of 7 percent should be used as a base case for regulatory analysis. The 7-percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. It approximates the opportunity cost of capital, and, according to Circular A–94, it is the appropriate discount rate whenever the primary effect of a regulation is to displace or alter the use of capital in the private sector. OMB later found that the average rate of return to capital remains near the 7-percent rate estimated in 1992. Circular A–4 also states that when regulation primarily and directly affects private consumption, a lower discount rate is appropriate. ''The alternative most often used is sometimes called the social rate of time preference * * * the rate at which 'society' discounts future consumption flows to their present value.'' It suggests that the real rate of return on long-term government debt may provide a fair approximation of the social rate of time preference, and states that during the past 30 years, this rate has averaged around 3 percent in real terms on a pre-tax basis. It concludes that ''for regulatory analysis, [agencies] should provide estimates of net benefits using both 3 percent and 7 percent.'' In accordance with the guidance from OMB Circular A–4, DOE did not give primary weight to results derived using a 3-percent discount rate.

5. Effects of Standards on Energy Prices

The Joint Comment stated that the proposed standard's mitigation effects on electricity prices should be documented and the value of reduced electricity bills to all consumers quantified as a benefit. (Joint Comment, No. 44 at p. 11) For the October 2008 NOPR, DOE examined the impact of reduced energy demand associated with possible cooking products standards on prices of electricity. DOE found that reductions in electricity demand resulting from possible standards for cooking products would produce no detectable change on the average user price of electricity in the United States. DOE concluded that microwave oven standby mode and off mode standards will not provide additional economic benefits resulting from lower energy prices. Thus, for today's SNOPR DOE has made no change to its assumptions about the effects of microwave oven standards on energy prices.

F. Consumer Subgroup Analysis

In the October 2008 NOPR, DOE analyzed the potential effects of microwave oven standby mode and off mode standards on two subgroups: (1) Low-income consumers, and (2) consumers living in senior-only households. DOE used the same approach for today's SNOPR.

G. Manufacturer Impact Analysis

DOE performed an MIA to estimate the financial impact of standby mode and off mode energy conservation standards on microwave oven manufacturers, and to calculate the impact of such standards on domestic employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA primarily relies on the GRIM—an industry-cash-flow model customized for this rulemaking. The GRIM inputs are data characterizing the industry cost structure, shipments, and revenues. The key output is the industry net present value. Different sets of assumptions (scenarios) will produce different results. The qualitative part of the MIA addresses factors such as product characteristics, characteristics of particular firms, and market and product trends, and it also includes an assessment of the impacts of standards on subgroups of manufacturers. DOE outlined its methodology for the MIA in the October 2008 NOPR. 73 FR 62034, 62075–81 (Oct. 17, 2008). The complete MIA is presented in chapter 12 of the SNOPR TSD.

For today's SNOPR, DOE updated the MIA results based on several changes to other analyses that impact the MIA. DOE revised the analysis to account for the impacts on manufacturers resulting from standby mode and off mode standards for Product Class 1 (Microwave-Only Ovens and Countertop Combination Microwave Ovens) and Product Class 2 (Built-In and Over-the-Range Combination Microwave Ovens). As discussed in section IV.C.3, based on the engineering analysis, DOE included updated manufacturer production costs (MPCs) for Product Class 1 and new MPCs for Product Class 2. For the SNOPR DOE updated its engineering analysis to 2010$ using the PPI. DOE also incorporated price trends into the analysis. Incorporating prices trends rather than assuming prices remain fixed in real terms throughout the analysis also impacts the MIA results. DOE used the default prices trends in the NIA starting in the base year of the analysis (2011) and continuing through the end of the analysis period (2043). DOE also assumed that MPCs and MSPs were similarly impacted by price trends in both the base case and standards cases. See section IV.D.1 for a

description of how DOE implemented prices trends into the analysis.

The total shipments and efficiency distributions were updated using the new estimates outlined in the SNOPR NIA. The MIA also uses the new analysis period in the NIA (2013–2043) and has updated the base year to 2011. See section IV.E for a description of the changes to the NIA.

To segment total product and capital conversion costs between Product Class 1 and Product Class 2, DOE used the same split between these two product classes as used in the NIA. DOE used the same per-platform costs at each standby power level for both product classes, but converted these product and capital conversion costs to 2010$ using the PPI. As described below, DOE also updated the product conversion costs in response to comments from interested parties.

As noted in section IV.C.2, Whirlpool commented that its market research suggests high costs associated with consumer education on proper operation of microwave ovens with automatic power-down features. Whirlpool clarified that the marketing costs it submitted for the ANOPR did not include these costs, estimated at $10 million, including retailer training, point-of-purchase material, product tags, telephone support, and possibly more. (Whirlpool, No. 50 at p. 7) AHAM also commented that DOE did not account for the all cost implications on appliance manufacturers, including variables such as component reliability and/or utility, both of which will impact manufacturer cost. (AHAM, No. 47 at p. 6)

As part of the MIA conducted for the October 2008 NOPR, DOE considered product and capital conversion costs associated with the analyzed TSLs. Product conversion costs are one-time investments in research, development, testing, and marketing, focused on making product designs comply with new energy conservation standards. DOE investigated available product information to estimate the number of product platforms that would need to be updated at each TSL to determine conversion costs for the entire industry. DOE also used manufacturer interviews to verify the estimates used to determine product conversion costs. For each TSL, DOE assumed that most of the product conversion costs would be used for product development expenses. To account for the majority of the cost to upgrade the designs of product platforms that did not meet the standby power requirements at each TSL, DOE estimated a per-platform cost for engineering time, reliability testing, and product development that varied depending on the complexity of the design options. In response to Whirlpool's comment, DOE notes that the normal product cycle of microwave ovens is less the 3-year period between the announcement and the compliance date of the final rule, and some of these marketing costs for rolling-out new products would have been incurred without standards. However, to conservatively account for any of these extraordinary marketing costs in that period, DOE also estimated for the SNOPR a per-platform cost where it analyzed a power-down design option to achieve the required standby power level. The marketing cost equaled half the estimated engineering expense per platform. Chapter 12 of the SNOPR TSD contains more detailed information on the product conversion costs for microwave oven manufacturers.

DOE also received a comment about the MIA results during the October 2008 NOPR public meeting. In response to a discussion about different possible design paths that might be taken by manufacturers to reach higher efficiencies, LG questioned why the range of impacts on INPV was great if DOE had trouble contacting some overseas manufacturers. (LG, Public Meeting Transcript, No. 40.5 at p. 167–169).

Additional information and interviewing a greater number of manufacturers would not affect the range of INPV impacts shown in the NOPR. Rather, the range of potential impacts on microwave oven manufacturers in the NOPR MIA analysis depended on two factors: The magnitude of the conversion costs and the ability of manufacturers to pass through the additional production costs to consumers at higher TSLs. The production cost at the max-tech standby power level (TSL 4) in the NOPR added $5.13 to the baseline MPC. If manufacturers could fully pass through these additional production costs to consumers for lower standby power, the additional cash flow from operations in the NOPR MIA analysis would still not be enough to overcome the substantial product and capital conversion costs, resulting in a loss of $35 million in INPV. If manufacturers could only pass through a portion of the increased production costs, the lower per-unit profit lowered cash flow from operations and resulted in a loss of $172 million in INPV. 73 FR 62034, 62096–99 (Oct. 17, 2008). Hence, feedback from manufacturers was valuable to determine the standby power conversion costs and to determine which scenarios were appropriate to calculate the potential impacts on INPV.

H. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts include direct and indirect impacts. Direct employment impacts are changes in the number of employees for manufacturers of the products subject to standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts from standards consist of the jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, due to: (1) Reduced spending on energy by end users, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the purchase of new products, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects such shifts in economic activity may have on the demand for labor is to compare sectoral employment statistics developed by the Bureau of Labor Statistics (BLS). BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by that same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than do expenditures in other sectors of the economy.[20] There are many reasons for the differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than many other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of energy conservation standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and manufacturing sectors). Thus, based on the BLS data alone, DOE believes net national employment will increase due to shifts in economic activity resulting from new standby mode and off mode standards for microwave ovens.

In developing the October 2008 NOPR and today's SNOPR, DOE estimated

[20] See Bureau of Economic Analysis, ''*Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II),*'' Washington, DC, U.S. Department of Commerce, 1992.

indirect national employment impacts using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 3.1.1 (ImSET). ImSET is a special-purpose version of the U.S. Benchmark National Input-Output (I–O) model designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients to characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and understands the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis.[4] Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this rule. Because ImSET predicts small job impacts resulting from this rule, regardless of these uncertainties, the actual job impacts are likely to be negligible in the overall economy. DOE may consider the use of other modeling approaches for examining long run employment impacts. DOE also notes that the employment impacts estimated with ImSET for the entire economy differ from the employment impacts in the microwaves manufacturing sector estimated using the Government Regulatory Impact Model (GRIM) in chapter 12 of the TSD. The methodologies used and the sectors analyzed in the ImSET and GRIM models are different. Please see chapter 13 of the TSD for additional details on the range of results generated from the ImSET model.

EJ and the Joint Comment stated that DOE must consider its own projections that an increase in employment will result from the adoption of standards in weighing the economic costs and benefits of more stringent energy conservation standards. (EJ Comment, Public Meeting Transcript, No. 40.5 at p. 186; Joint Comment, No. 44 at p. 13) As described above, when evaluating alternative standard levels DOE considers the indirect employment impacts estimated using ImSet. Direct employment impacts on the manufacturers that produce microwave ovens are analyzed in the MIA, as discussed in section IV.G. For today's SNOPR, DOE made no change to its method for estimating employment impacts. EEI requested clarification on the methodology used to estimate the national employment impacts when the majority of microwave ovens are manufactured overseas. (EEI, Public Meeting Transcript at p. 185) The employment impacts analysis considers only the indirect employment impacts expected to result from appliance standards. The employment impacts in the affected appliance manufacturing industry are assessed in the MIA. For the purposes of the employment impacts analysis described in this section, the location of the manufacturing facilities is not relevant. For further details, see chapter 13 of the SNOPR TSD.

I. Utility Impact Analysis

The utility impact analysis estimates the change in the forecasted power generation capacity for the Nation that would be expected to result from adoption of new or amended standards. The analysis determines the changes to electricity supply as a result of electricity consumption savings due to standards. For the October 2008 NOPR and today's SNOPR, DOE used the NEMS–BT computer model to calculate these changes. The analysis output provides a forecast for the needed generation capacities at each TSL. The estimated net benefit of a standard is the difference between the generation capacities forecasted by NEMS–BT and the *AEO* Reference case. DOE obtained the energy savings inputs from the NIA. Those inputs reflect the effects of standby mode and off mode energy use reduction on electricity consumption of microwave ovens. Chapter 14 of the SNOPR TSD presents results of the utility impact analysis.

J. Emissions Analysis

In the emissions analysis, DOE estimated the reduction in power sector emissions of CO_2, NO_X, and Hg from energy conservation standards for microwave oven standby mode and off mode energy use. DOE used the NEMS–BT computer model, which is run similarly to the *AEO* NEMS, except that microwave oven standby mode and off mode energy use is reduced by the amount of energy saved at each TSL. The inputs of national energy savings come from the NIA spreadsheet model, while the output is the forecasted physical emissions. The net benefit of each TSL in today's proposed rule is the difference between the forecasted emissions estimated by NEMS–BT at each TSL and the *AEO 2010* Reference case. NEMS–BT tracks CO_2 emissions using a detailed module that provides results with broad coverage of all sectors and inclusion of interactive effects. For today's SNOPR, DOE used *AEO 2010.* For the final rule, DOE intends to revise the emissions analysis using the most current version of NEMS.

SO_2 emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap and trading programs, and DOE has preliminarily determined that these programs create uncertainty about the standards' impact on SO_2 emissions. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in all 50 States and the District of Columbia (DC). SO_2 emissions from 28 eastern States and DC are also limited under the Clean Air Interstate Rule (CAIR, 70 FR 25162 (May 12, 2005)), which created an allowance-based trading program that would gradually replace the Title IV program in those States and DC. Although CAIR was remanded to EPA by the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit), see *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. 2008), it remained in effect temporarily, consistent with the DC Circuit's earlier opinion in *North Carolina* v. *EPA,* 531 F.3d 896 (DC Cir. 2008). On July 6, 2010, EPA issued the Transport Rule proposal, a replacement for CAIR (75 FR 45210 (Aug. 2, 2010)); and on July 6, 2011 EPA issued the final Transport Rule, entitled the Cross-State Air Pollution Rule. 76 FR 48208 (Aug. 8, 2011). On December 30, 2011, however, the DC Circuit stayed the new rules while a panel of judges reviews them, and told EPA to continue enforcing CAIR (see *EME Homer City Generation* v. *EPA,* No. 11–1302, Order at *2 (DC Cir. Dec. 30, 2011)). The *AEO 2011* NEMS–BT used for today's NOPR assumes the implementation of CAIR.

The attainment of emissions caps typically is flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the imposition of an energy conservation standard could be used to permit offsetting increases in SO_2 emissions by any regulated EGU. However, if the standard resulted in a permanent increase in the quantity of unused emissions allowances, there would be an overall reduction in SO_2 emissions from the standards. While there remains some uncertainty about the ultimate effects of energy conservation standards on SO_2 emissions covered by the existing cap-and-trade system, the NEMS–BT modeling system that DOE uses to forecast emissions reductions currently indicates that no physical reductions in power sector emissions would occur for SO_2.

As discussed above, the version of NEMS–BT used for today's SNOPR assumes the implementation of CAIR, which established a cap on NO_X emissions in 28 eastern States and the District of Columbia. With CAIR in effect, the energy conservation standards for microwave oven standby mode and off mode energy use are expected to have little or no physical effect on these emissions in those States covered by CAIR, for the same reasons that they may have little effect on SO_2 emissions. However, the standards would be expected to reduce NO_X emissions in those 22 States not affected by the CAIR. For these 22 States, DOE used NEMS–BT to estimate NO_X emission reductions from the standards that are considered in today's SNOPR.

On December 21, 2011, EPA announced national emissions standards for hazardous air pollutants (NESHAPs) for mercury and certain other pollutants emitted from coal and oil-fired EGUs. (See *http://epa.gov/mats/pdfs/20111216MATSfinal.pdf.*) The NESHAPs do not include a trading program and, as such, DOE's energy conservation standards would likely reduce Hg emissions. For the emissions analysis for this rulemaking, DOE estimated mercury emissions reductions using NEMS–BT based on *AEO2010,* which does not incorporate the NESHAPs. DOE expects that future versions of the NEMS–BT model will reflect the implementation of the NESHAPs.

K. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this proposed rule, DOE considered the estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that are expected to result from each of the TSLs considered. In order to make this calculation similar to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the forecast period for each TSL. This section summarizes the basis for the monetary values used for each of these emissions and presents the values considered in this rulemaking.

For today's SNOPR, DOE is relying on a set of values for the SCC that was developed by an interagency process. A summary of the basis for those values is provided below, and a more detailed description of the methodologies used is provided as an appendix to chapter 16 of the SNOPR TSD.

1. Social Cost of Carbon

Under section 1(b)(6) of Executive Order 12866, 58 FR 51735 (Oct. 4, 1993), agencies must, to the extent permitted by law, ''assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' The purpose of the SCC estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory actions that have small, or ''marginal,'' impacts on cumulative global emissions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed the SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

a. Monetizing Carbon Dioxide Emissions

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SCC are provided in dollars per metric ton of carbon dioxide.

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Research Council [21] points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

Despite the serious limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. Consistent with the directive quoted above, the purpose of the SCC estimates presented here is to make it possible for agencies to incorporate the social benefits from reducing carbon dioxide emissions into cost-benefit analyses of regulatory actions that have small, or ''marginal,'' impacts on cumulative global emissions. Most Federal regulatory actions can be expected to have marginal impacts on global emissions.

For such policies, the agency can estimate the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years. This approach assumes that the marginal damages from increased emissions are constant for small departures from the baseline emissions path, an approximation that is reasonable for policies that have effects on emissions that are small relative to cumulative global carbon dioxide emissions. For policies that have a large (non-marginal) impact on global cumulative emissions, there is a separate question of whether the SCC is an appropriate tool for calculating the benefits of reduced emissions. This concern is not applicable to this notice, and DOE does not attempt to answer that question here.

At the time of the preparation of this supplemental notice, the most recent interagency estimates of the potential global benefits resulting from reduced CO_2 emissions in 2010, expressed in 2010$, were $4.9, $22.3, $36.5, and $67.6 per metric ton avoided. For emissions reductions that occur in later years, these values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to

[21] National Research Council. ''Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use.'' National Academies Press: Washington, DC 2009.

calculate domestic effects,[22] although preference is given to consideration of the global benefits of reducing CO_2 emissions.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. Specifically, the interagency group has set a preliminary goal of revisiting the SCC values within 2 years or at such time as substantially updated models become available, and to continue to support research in this area. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

b. Social Cost of Carbon Values Used in Past Regulatory Analyses

To date, economic analyses for Federal regulations have used a wide range of values to estimate the benefits associated with reducing carbon dioxide emissions. In the model year 2011 CAFE final rule, the Department of Transportation (DOT) used both a ''domestic'' SCC value of $2 per ton of CO_2 and a ''global'' SCC value of $33 per ton of CO_2 for 2007 emission reductions (in 2007$), increasing both values at 2.4 percent per year. It also included a sensitivity analysis at $80 per ton of CO_2. See *Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011,* 74 FR 14196 (March 30, 2009) (Final Rule); Final Environmental Impact Statement Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015 at 3–90 (Oct. 2008) (Available at: *http://www.nhtsa.gov/fuel-economy*). A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

A 2008 regulation proposed by DOT assumed a domestic SCC value of $7 per ton of CO_2 (in 2006$) for 2011 emission reductions (with a range of $0 to $14 for sensitivity analysis), also increasing at 2.4 percent per year. See *Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015,* 73 FR 24352 (May 2, 2008) (Proposed Rule); Draft Environmental Impact Statement Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015 at 3–58 (June 2008) (Available at: *http://www.nhtsa.gov/fuel-economy*). A regulation for packaged terminal air conditioners and packaged terminal heat pumps finalized by DOE in October of 2008 used a domestic SCC range of $0 to $20 per ton CO_2 for 2007 emission reductions (in 2007$). 73 FR 58772, 58814 (Oct. 7, 2008). In addition, EPA's 2008 Advance Notice of Proposed Rulemaking on Regulating Greenhouse Gas Emissions Under the Clean Air Act identified what it described as ''very preliminary'' SCC estimates subject to revision. 73 FR 44354 (July 30, 2008). EPA's global mean values were $68 and $40 per ton CO_2 for discount rates of approximately 2 percent and 3 percent, respectively (in 2006$ for 2007 emissions).

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim values: Global SCC estimates for 2007 (in 2006$) of $55, $33, $19, $10, and $5 per ton of CO_2. These interim values represent the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules and were offered for public comment in connection with proposed rules, including the joint EPA–DOT fuel economy and CO_2 tailpipe emission proposed rules.

c. Current Approach and Key Assumptions

Since the release of the interim values, the interagency group reconvened on a regular basis to generate improved SCC estimates, which were considered for this proposed rule. Specifically, the group considered public comments and further explored the technical literature in relevant fields. The interagency group relied on three integrated assessment models (IAMs) commonly used to estimate the SCC: The FUND, DICE, and PAGE models.[23] These models are frequently cited in the peer-reviewed literature and were used in the last assessment of the Intergovernmental Panel on Climate Change. Each model was given equal weight in the SCC values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models while respecting the different approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for climate sensitivity was specified as an input into all three models. In addition, the interagency group used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

The interagency group selected four SCC values for use in regulatory analyses. Three values are based on the average SCC from three integrated assessment models, at discount rates of 2.5 percent, 3 percent, and 5 percent. The fourth value, which represents the 95th percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. For emissions (or emission reductions) that occur in later years, these values grow in real terms over time, as depicted in Table IV.11.

[22] It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no *a priori* reason why domestic benefits should be a constant fraction of net global damages over time.

[23] The models are described in appendix 15–A of the SNOPR TSD.

TABLE IV.11—SOCIAL COST OF CO_2, 2010–2050

[In 2007 dollars per metric ton]

Year	Discount Rate %			
	5	3	2.5	3
	Average	Average	Average	95th Percentile
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report mentioned above points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of concerns and problems that should be addressed by the research community, including research programs housed in many of the agencies participating in the interagency process to estimate the SCC.

DOE recognizes the uncertainties embedded in the estimates of the SCC used for cost-benefit analyses. As such, DOE and others in the U.S. Government intend to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling. In this context, statements recognizing the limitations of the analysis and calling for further research take on exceptional significance.

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the most recent values identified by the interagency process, adjusted to 2010$ using the GDP price deflator. For each of the four cases specified, the values used for emissions in 2010 were $4.9, $22.3, $36.5, and $67.6 per metric ton avoided (values expressed in 2010$).[24] To monetize the CO_2 emissions reductions expected to result from amended standards for microwave ovens, DOE used the values identified in Table A1 of the ''Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,'' which is reprinted in appendix 16–A of the SNOPR TSD, appropriately escalated to 2010$. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SCC values in each case.

Several parties provided comments regarding the economic valuation of CO_2 for the October 2008 NOPR. Whirlpool does not support an attempt to value those emissions as part of this rulemaking. (Whirlpool, No. 50 at p. 8) DOE believes that, in keeping with Executive Order 12866, placing an economic value on avoided CO_2 emissions is necessary for a proper assessment of the costs and benefits of energy efficiency standards. For this SNOPR, DOE has updated its valuation of emission reductions based on the most recent recommendations from the interagency group. DOE has considered a wide range of values per ton of avoided CO_2. As stated previously, the estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

2. Valuation of Other Emissions Reductions

DOE investigated the potential monetary benefit of reduced NO_X emissions from the TSLs it considered. As noted above, new or amended energy conservation standards would reduce NO_X emissions in those 22 States that are not affected by the CAIR. DOE estimated the monetized value of NO_X emissions reductions resulting from each of the TSLs considered for today's SNOPR based on environmental damage estimates found in the relevant scientific literature. Available estimates suggest a very wide range of monetary values, ranging from $370 per ton to $3,800 per ton of NO_X from stationary sources, measured in 2001$ (equivalent to a range of $450 to $4,623 per ton in 2010$).[25] In accordance with OMB guidance, DOE conducted two calculations of the monetary benefits derived using each of the economic values used for NO_X, one using a real discount rate of 3 percent and the other using a real discount rate of 7 percent.[26]

DOE is aware of multiple agency efforts to determine the appropriate range of values used in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before it once again monetizes Hg in its rulemakings.

L. Discussion of Other Comments

1. Off Mode Power Consumption

In the October 2008 NOPR, DOE determined that a microwave oven would be considered to be in off mode if it is plugged in to a main power source, is not being used for an active function such as cooking or defrosting, and is not consuming power for any standby mode function. 73 FR 62034, 62042 (Oct. 17, 2008). Hypothetically, a microwave with mechanical controls and no display or cooking sensor but that consumes power for components such as a power supply when the unit

[24] Table A1 presents SCC values through 2050. For DOE's calculation, it derived values after 2050 using the 3-percent per year escalation rate used by the interagency group.

[25] For additional information, refer to U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Washington, DC

[26] OMB, Circular A–4: Regulatory Analysis (Sept. 17, 2003).

is not activated would be considered to be in off mode. DOE believed no such microwave ovens were available on the market, and was unaware of any microwave ovens available that could operate in off mode. Therefore, DOE proposed no off-mode power consumption energy conservation standard. DOE requested input and data regarding off mode power for microwave ovens.

Despite DOE's test results indicating that no current microwave oven can operate in off mode, AHAM recommended that some level of power should be allowed in off mode for the following reasons:

(1) Harmonization, particularly with Europe, which is implementing a 0.5 W standard on off mode in 2013;

(2) Consistency in standby mode and off mode definitions among all NAECA-covered products;

(3) Off mode and standby mode are linked, in that standby power requirements may result in previously unused features, such as a small LED indicating that power is running to the unit, but the unit is in standby mode; and

(4) Power use and conversion concerns (*i.e.,* harmonics [27]) may necessitate some protective capability, which falls into the definition of off mode.

AHAM urged DOE to consider adopting AHAM's proposed clarifications and examples for off mode power included in Exhibit 1. These guidelines allow for a single definition to be used for all products. (AHAM, No. 47 at p. 5)

Whirlpool commented that the addition of off mode to the proposed rule is very important to assure that all power consumption is properly accounted for. (Whirlpool, No. 50 at p. 4)

DOE generally agrees with the topics addressed in these comments. Consistency between covered products and international harmonization are important issues to be considered in energy conservation standards rulemakings, as is properly accounting for all power consumption. However, DOE received no comments indicating that any microwave ovens with off mode capability are currently available or expected to become available on the market. In the concurrent microwave oven test procedure rulemaking, DOE investigated the potential for microwave ovens with an on/off switch to operate in off mode. DOE determined that microwave ovens with such a configuration would be capable of operating in off mode, but that operation in off mode due to the activation of an on/off switch would be associated with zero energy consumption. Therefore, DOE continues to propose no standard for off mode power in microwave ovens because it believes there would be no benefit associated with such a standard.

2. Proposed Standards for Microwave Oven Standby Mode and Off Mode Energy Use

For the October 2008 NOPR, DOE made the preliminary determination that a maximum standby power standard of 1.0 W for microwave ovens is technologically feasible and economically justified. 73 FR 62034, 62120 (Oct. 17, 2008). DOE requested comments and views of interested parties on the proposed standards for microwave ovens. *Id.* at 62133.

EEI stated that the proposed standard of 1.0 W is too aggressive because typical microwave ovens have standby power consumption of 2 to 4 W. This power is used for functions that consumers find useful (such as clocks and cooking sensors). EEI noted that DOE should work with AHAM to set a different standard that does not compromise functionality. EEI suggested a standard of 2.0 to 3.0 W, which should provide more flexibility to manufacturers and provide national energy savings. (EEI, No. 56 at p. 2)

As discussed in the October 2008 NOPR and this SNOPR, DOE is aware of various strategies manufacturers could employ to reduce standby power consumption while maintaining consumer utility. DOE's analysis in today's SNOPR indicates that a 1–W standard for microwave-only ovens and countertop combination microwave ovens would be technically feasible and economically justified. DOE is not proposing a 1–W standard for built-in and over-the-range combination microwave ovens because such a level was not found to be technically feasible while maintaining consumer utility (*i.e.,* automatic power-down would be necessary to meet that standby power level).

The Joint Comment and ASAP support the proposed standard. According to the Joint Comment, the proposal is in keeping with national and international efforts to limit product standby power. (Joint Comment, No. 44 at p. 10; ASAP, Public Meeting Transcript, No. 40.5 at p. 32)

AHAM stated that it believes all the TSLs are appropriate, including the TSL on which the proposed standard is based. AHAM stated that much of the world is moving towards the IEA 1–Watt Program. (AHAM, Public Meeting Transcript, No. 40.5 at p. 83) Nevertheless, AHAM stated its opposition to the proposed standard, due in part to the lack of sufficient time for manufacturers to evaluate the viability or feasibility of the proposed technologies. AHAM proposed that DOE issue a ''no standard'' standard on microwave ovens or postpone the current rulemaking on microwave oven standby power until a robust test procedure is published and data are collected using the clarified test procedure to define potential standby power requirements. If the ''no standard'' standard is issued, standby power may be addressed during the next cooking products rulemaking or through negotiation. (AHAM, No. 47 at pp. 3–4) AHAM also commented that the proposed standard's effective date of 2012 is inconsistent with the timing in the rest of the world. (AHAM, Public Meeting Transcript, No. 40.5 at p. 27) GE recommended that DOE should postpone the microwave oven standby power rulemaking until a robust test procedure is published or, in the alternative, issue a ''no standard'' standard on microwave ovens. GE further stated that it believes there are critical gaps in the engineering analysis used to justify the proposed standard. (GE, No. 48 at p. 2) GE commented that if the microwave oven standby and off mode rulemaking is not postponed, DOE should issue a ''no standard'' standard on microwave ovens. (GE, No. 48 at p. 2)

Whirlpool commented that it does not support the proposed standard. (Whirlpool, No. 50 at p. 1) Further, Whirlpool stated that DOE's rulemaking timeline should take into account international changes in microwave oven standards. According to Whirlpool, any changes in U.S. policy that coincided with changes in policy around the world would be significantly advantageous to manufacturers. (Whirlpool, Public Meeting Transcript, No. 40.5 at p. 29)

Since the publication of the October 2008 NOPR, DOE has amended the microwave oven test procedure for microwave ovens to measure standby mode and off mode power consumption. These amendments appear in the March 2011 TP Interim Final Rule. 76 FR 12825 (Mar. 9, 2011). The amendments incorporate by reference certain provisions of IEC Standard 62301 First Edition, 2005–06, which is an international test procedure addressing standby mode and off mode power measurement. In addition, in order to

[27] Harmonics are waveforms of voltage or current that are multiples of the fundamental main power frequency. Harmonics can cause disruption to equipment connected to the main power and lead to component failures.

ensure that the amended test procedure adequately addresses the EISA 2007 requirement to consider the most recent version of IEC Standard 62301 (42 U.S.C. 6295(gg)(2)(A)), and recognizing that the IEC was expected to issue IEC Standard 62301 (Second Edition) in the same timeframe as DOE was planning to publish the amended test procedure, DOE issued the microwave oven test procedure on an interim final basis. The March 2011 TP Interim Final Rule offered a 180-day comment period, and to the extent necessary, DOE is considering appropriate adjustments based on comments received. Also since the publication of the October 2008 NOPR, DOE conducted further analyses in support of this energy conservation standards rulemaking, including the evaluation of combination microwave ovens.

In considering standards for today's SNOPR, DOE is proposing two product classes for microwave ovens: (1) Microwave-only ovens and countertop combination microwave ovens; and (2) built-in and over-the-range combination microwave ovens. DOE believes the analyses conducted for microwave ovens in the October 2008 NOPR remains valid for the microwave-only oven and countertop combination microwave oven product class. However, these analyses have been updated to reflect more current results, where applicable. DOE conducted additional analyses for the built-in and over-the-range combination microwave oven product class. The approach and results for proposed standard levels for today's SNOPR are discussed in section IV.

3. Manufacturer Tax Credits Impact on Market Adoption of More Efficient Products

Whirlpool commented that the analysis cites dated studies which suggest that the consumer sees little economic benefit of manufacturer tax credits. Not covered in this analysis is that the tax credits provide manufacturers some of the cash flow necessary to invest in the development of ever more efficient products. Thus, the consumer sees significant benefit in the form of increasingly energy and water efficient products in the marketplace. (Whirlpool, No. 50 at p. 9)

As described in chapter 17 of the SNOPR TSD on the Regulatory Impact Analysis (RIA), DOE analyzed non-regulatory alternatives to minimum energy conservation standards, including manufacturer tax credits. The RIA assesses the national energy savings and economic impacts (*i.e.,* NPV) of the non-regulatory alternatives relative to the national impacts from minimum energy conservation standards. In the case of manufacturer tax credits, DOE agrees that they provide manufacturers the financial means to develop and sell more efficient products and that the resulting consumer purchase price would be partially mitigated by the tax credits. However, DOE estimated that tax credits would be paid for by consumers in another form (such as additional taxes), and therefore did not include them as a consumer benefit for the purposes of calculating the national NPV. DOE did estimate that manufacturer tax credits will lead to an increase in the sales of more energy-efficient products. DOE determined, however, that the rate of adoption of more efficient products due to manufacturer tax credits is not as great as that from mandatory minimum energy conservation standards. For more details on DOE's analysis of manufacturer tax credits and all non-regulatory alternatives, refer to chapter 17 of the SNOPR TSD.

V. Analytical Results

A. Trial Standard Levels

DOE analyzed the benefits and burdens of a number of TSLs for the microwave oven standby mode and off mode energy use that are the subject of today's proposed rule. For the October 2008 NOPR, DOE based the TSLs on standby power levels explored in the November 2007 ANOPR, and selected the TSLs on consideration of economic factors and current market conditions. As discussed previously in section IV, given the small number of standby power levels analyzed, DOE maintained all four of the standby power levels to consider as TSLs.

Table V.1 shows the TSLs for microwave oven standby mode and off mode energy use. In all, DOE has considered four TSLs. TSL 1 corresponds to the first candidate standard level from each product class and represents the standby power level for each class with the least significant design change. TSL 4 corresponds to the max-tech efficiency levels. TSLs 2 and 3 are intermediate levels between TSL 1 and TSL 4.

TABLE V.1—TRIAL STANDARD LEVELS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE ENERGY USE

Trial standard level	Standby power (*W*)	
	Product Class 1: Microwave-only and countertop combination	Product Class 2: Built-in and over-the-range combination
TSL 1	2.00	3.70
TSL 2	1.50	2.70
TSL 3	1.00	2.20
TSL 4	0.02	0.04

B. Economic Justification and Energy Savings

1. Economic Impacts on Consumers

a. Life-Cycle Cost and Payback Period

To evaluate the net economic impact of standards on consumers, DOE conducted LCC and PBP analyses for each TSL. In general, a higher-efficiency product would affect consumers in two ways: (1) Annual operating expense would decrease; and (2) purchase price would increase. Section IV.D of this notice discusses the inputs DOE used for calculating the LCC and PBP.

The key outputs of the LCC analysis are a mean LCC savings relative to the baseline product design, as well as a probability distribution or likelihood of LCC reduction or increase, for each TSL and product class. The LCC analysis also estimates the fraction of consumers for which the LCC will decrease (net benefit), increase (net cost), or exhibit no change (no impact) relative to the base-case product forecast. No impacts occur when the product efficiencies of the base-case forecast already equal or exceed the efficiency at a given TSL.

Table V.2 and Table V.3 show the LCC and PBP results for both microwave oven product classes. Note that for built-in and over-the-range combination

microwave ovens, 100 percent of consumers of such products in 2014 are assumed to be using a combination microwave oven in the base case. Any decrease in standby power would affect 100 percent of the market.

TABLE V.2—MICROWAVE-ONLY OVENS AND COUNTERTOP COMBINATION MICROWAVE OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	Standby power (*W*	Life-cycle cost (*$*)			Life-cycle cost savings				Payback period (*years*) Median
		Average installed price	Average operating cost	Average LCC	Average savings *$*	% Households with			
						Net cost	No impact	Net benefit	
Baseline	4.00	$223	$31	$254	NA	0	100	0	NA
1	2.00	224	15	239	7	0	54	46	0.2
2	1.50	224	12	236	10	0	19	81	0.4
3	1.00	225	8	233	13	0	0	100	1.1
4	0.02	230	0	230	15	0	0	100	2.4

TABLE V.3—BUILT-IN AND OVER-THE-RANGE COMBINATION MICROWAVE OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	Standby power (*W*)	Life-cycle cost (*$*)			Life-cycle cost savings				Payback period (*years*) median
		Average installed price	Average operating cost	Average LCC	Average Savings	% Households with			
						Net cost	No impact	Net benefit	
Baseline	4.50	$482	$35	$517	NA	0	100	0	NA
1	3.70	482	29	511	$6	0	0	100	0.0
2	2.70	486	21	506	11	0	0	100	1.9
3	2.20	496	17	513	4	21	0	79	6.3
4	0.04	490	0	490	27	0	0	100	1.8

b. Consumer Subgroup Analysis

Using the LCC spreadsheet model, DOE determined the impact of the standards on the following microwave oven consumer subgroups: senior-only households and low-income households. Table V.4 and Table V.5 compare the average LCC savings for senior-only households and low-income households with those for all households. The LCC impacts for senior-only and low-income households are essentially the same as they are for the general population.

TABLE V.4—MICROWAVE-ONLY OVENS AND COUNTERTOP COMBINATION MICROWAVE OVENS: COMPARISON OF AVERAGE LCC SAVINGS FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS

TSL	Standby power *(W)*	Senior-only households	Low-income households	All households
1	2.00	$7	$7	$7
2	1.50	10	10	10
3	1.00	12	12	13
4	0.02	15	15	15

TABLE V.5—BUILT-IN AND OVER-THE-RANGE COMBINATION MICROWAVE OVENS: COMPARISON OF AVERAGE LCC SAVINGS FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS

TSL	Standby power *(W)*	Senior-only households	Low-income households	All households
1	3.70	$6	$6	$6
2	2.70	10	10	11
3	2.20	4	4	4
4	0.04	27	27	27

c. Rebuttable-Presumption Payback

As discussed above, EPCA establishes a rebuttable presumption that, in essence, an energy conservation standard is economically justified if the increased purchase cost for product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. (42 U.S.C. 6295(o)(2)(B)(iii)) DOE calculated a rebuttable-presumption payback period for each TSL to determine whether DOE could presume that a standard at that level is economically justified. Table V.6 shows the rebuttable-presumption payback periods for the microwave oven standby mode and off mode TSLs. Because only a single, average value is necessary for establishing the rebuttable-presumption payback period, rather than using distributions for input values, DOE used discrete values. As required by EPCA, DOE based the calculation on the assumptions in the DOE test procedures for microwave ovens. (42 U.S.C. 6295(o)(2)(B)(iii)) As a result, DOE

calculated a single rebuttable-presumption payback value, and not a distribution of payback periods, for each TSL.

TABLE V.6—REBUTTABLE-PRESUMPTION PAYBACK PERIODS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE

TSL	Payback period (*years*)	
	Microwave-only ovens and countertop combination ovens	Built-in and over-the-range combination microwave ovens
1	0.2	0.0
2	0.3	1.8
3	0.6	5.6
4	1.6	1.6

With the exception of TSL 3 for built-in and over-the-range combination microwave ovens, all the TSLs in the above tables have rebuttable-presumption payback periods of less than 3 years. DOE believes that the rebuttable-presumption payback period criterion (*i.e.,* a limited payback period) is not sufficient for determining economic justification. Therefore, DOE has considered a full range of impacts, including those to consumers, manufacturers, the Nation, and the environment. Section IV.D provides a complete discussion of how DOE considered the range of impacts to select its proposed standards.

2. Economic Impacts on Manufacturers

For the October 2008 NOPR, DOE used INPV to compare the financial impacts of different TSLs on microwave oven manufacturers. 73 FR 62034, 62096–99 (Oct. 17, 2008). The INPV is the sum of all net cash flows discounted by the industry's cost of capital (discount rate). DOE used the GRIM to compare the INPV of the base case (no new energy conservation standards) to that of each TSL for the microwave oven industry. To evaluate the range of cash-flow impacts on the microwave oven industry, DOE constructed different scenarios using different markups that correspond to the range of anticipated market responses. Each scenario results in a unique set of cash flows and corresponding industry value at each TSL. These steps allowed DOE to compare the potential impacts on the industry as a function of TSLs in the GRIM. The difference in INPV between the base case and the standards case is an estimate of the economic impacts that implementing that standard level would have on the entire industry. For today's supplemental notice, DOE continues to use the above methodology and presents the results in the subsequent sections. See chapter 12 for additional information on MIA methodology and results.

a. Industry Cash-Flow Analysis Results

To assess the lower end of the range of potential impacts for the microwave oven industry, DOE considered the scenario reflecting the preservation of gross margin percentage. As production cost increases with efficiency, this scenario implies manufacturers will be able to maintain gross margins as a percentage of revenues. To assess the higher end of the range of potential impacts for the microwave oven industry, DOE considered the scenario reflecting preservation of gross margin in absolute dollars. Under this scenario, DOE assumed that the industry can maintain its gross margin in absolute dollars after the compliance date of the energy conservation standard. The industry would do so by lowering their gross margin as a percentage of revenue so that the gross margin in absolute dollars does not increase above the base-case gross margin. Table V.7 through Table V.12 show MIA results for standby mode and off mode energy conservation standards using both markup scenarios described above for microwave oven manufacturers.

TABLE V.7—PRODUCT CLASS 1 MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
Change in INPV	*2010$ millions*	1,103.4	1,076.6	1,058.6	1,050.6	1,013.9
Change in INPV	*2010$ millions*	–	(26.8)	(44.9)	(52.8)	(89.6)
	%	–	(2.4)	(4.1)	(4.8)	(8.1)
Product Conversion Costs	*2010$ millions*	–	39.2	70.5	89.1	172.3
Capital Conversion Costs	*2010$ millions*	–	3.9	4.3	4.7	7.8
Total Investment Required	*2010$ millions*	–	43.1	74.8	93.8	180.1

Parentheses indicate negative (–) values.

TABLE V.8—PRODUCT CLASS 1 MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN IN ABSOLUTE DOLLARS MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
Change in INPV	*2010$ millions*	1,103.4	1,074.4	1,051.8	1,031.6	939.5
Change in INPV	*2010$ millions*	–	(29.0)	(51.7)	(71.9)	(163.9)
	%	–	(2.6)	(4.7)	(6.5)	(14.9)
Product Conversion Costs	*2010$ millions*	–	39.2	70.5	89.1	172.3
Capital Conversion Costs	*2010$ millions*	–	3.9	4.3	4.7	7.8
Total Investment Required	*2010$ millions*	–	43.1	74.8	93.8	180.1

Parentheses indicate negative (–) values.

TABLE V.9—PRODUCT CLASS 2 MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
Change in INPV	*2010$ millions*	24.0	23.8	23.7	23.9	23.2
Change in INPV	*2010$ millions*	–	(0.3)	(0.4)	(0.1)	(0.9)
	%	–	(1.2)	(1.5)	(0.3)	(3.6)
Product Conversion Costs	*2010$ millions*	–	0.4	0.7	0.9	1.7
Capital Conversion Costs	*2010$ millions*	–	0.0	0.0	0.0	0.1
Total Investment Required*	*2010$ millions*	–	0.4	0.8	0.9	1.8

Parentheses indicate negative (–) values.
*The total values may differ from the sum of the product conversion costs and capital conversion costs due to the rounding to one decimal place.

TABLE V.10—PRODUCT CLASS 2 MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN IN ABSOLUTE DOLLARS MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
Change in INPV	*2010$ millions*	24.0	23.8	23.3	22.3	22.3
Change in INPV	*2010$ millions*	–	(0.3)	(0.8)	(1.7)	(1.8)
	%	–	(1.2)	(3.1)	(7.1)	(7.3)
Product Conversion Costs	*2010$ millions*	–	0.4	0.7	0.9	1.7
Capital Conversion Costs	*2010$ millions*	–	0.0	0.0	0.0	0.1
Total Investment Required*	*2010$ millions*	–	0.4	0.8	0.9	1.8

Parentheses indicate negative (–) values.
*The total values may differ from the sum of the product conversion costs and capital conversion costs due to the rounding to one decimal place.

TABLE V.11—MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO FOR PRODUCT CLASS 1 AND 2 COMBINED

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
Change in INPV	*2010$ millions*	1,127.5	1,100.4	1,082.2	1,074.5	1,037.0
Change in INPV	*2010$ millions*	–	(27.1)	(45.2)	(52.9)	(90.4)
	%	–	(2.4)	(4.0)	(4.7)	(8.0)
Product Conversion Costs	*2010$ millions*	–	39.6	71.2	90.0	174.0
Capital Conversion Costs	*2010$ millions*	–	4.0	4.4	4.7	7.9
Total Investment Required*	*2010$ millions*	–	43.5	75.5	94.7	181.9

Parentheses indicate negative (–) values.
*The total values may differ from the sum of the product conversion costs and capital conversion costs due to the rounding to one decimal place.

TABLE V.12—MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN IN ABSOLUTE DOLLARS MARKUP SCENARIO FOR PRODUCT CLASS 1 AND 2 COMBINED

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
Change in INPV	*2010$ millions*	1,127.5	1,098.2	1,075.0	1,053.9	961.8
Change in INPV	*2010$ millions*	–	(29.3)	(52.4)	(73.6)	(165.7)
	%	–	(2.6)	(4.6)	(6.5)	(14.7)
Product Conversion Costs	*2010$ millions*	–	39.6	71.2	90.0	174.0
Capital Conversion Costs	*2010$ millions*	–	4.0	4.4	4.7	7.9
Total Investment Required*	*2010$ millions*	–	43.5	75.5	94.7	181.9

Parentheses indicate negative (–) values.

* The total values may differ from the sum of the product conversion costs and capital conversion costs due to the rounding to one decimal place.

TSL 1 represents an improvement in standby power from the baseline level of 4.0 W to 2.0 W for Product Class 1 and an improvement in standby power from the baseline level of 4.5 W to 3.7 W for Product Class 2. At TSL 1, the impact on INPV and cash flow varies depending on the manufacturers' ability to pass on increases in MPCs to their customers. DOE estimated the impacts in INPV at TSL 1 to range −$27.1 million to −$29.3 million, or a change in INPV of −2.4 percent to −2.6 percent. At this level, the industry cash flow decreases by approximately 14.0 percent, to $72.3 million, compared to the base-case value of $84.2 million in the year leading up to the standards.

TSL 2 represents an improvement in standby power from the baseline level of 4.0 W to 1.5 W for Product Class 1 and an improvement in standby power from the baseline level of 4.5 W to 2.7 W for Product Class 2. At TSL 2, the impact on INPV and cash flow would be similar to TSL 1 and depend on whether manufacturers can fully recover the increases in MPCs from their customers. DOE estimated the impacts in INPV at TSL 2 to range from −$45.2 million to −$52.4 million, or a change in INPV of −4.0 percent to −4.6 percent. At this level, the industry cash flow decreases by approximately 24.0 percent, to $64.0 million, compared to the base-case value of $84.2 million in the year leading up to the standards.

TSL 3 represents an improvement in standby power from the baseline level of 4.0 W to 1.0 W for Product Class 1 and an improvement in standby power from the baseline level of 4.5 W to 2.2 W for Product Class 2. At TSL 3, the impact on INPV and cash flow continues to vary depending on the manufacturers and their ability to pass on increases in MPCs to their customers. DOE estimated the impacts in INPV at TSL 3 to range from approximately −$52.9 million to −73.6 million, or a change in INPV of −4.7 percent to −6.5 percent. At this level, the industry cash flow decreases by approximately 29.9 percent, to $59.0 million, compared to the base-case value of $84.2 million in the year leading up to the standards.

TSL 4 represents an improvement in standby power from the baseline level of 4.0 W to 0.02 W for Product Class 1 and an improvement in standby power from the baseline level of 4.5 W to 0.04 W for Product Class 2. At TSL 4, DOE estimated the impacts in INPV to range from approximately −$90.4 million to −$165.7 million, or a change in INPV of −8.0 percent to −14.7 percent. At this level, the industry cash flow decreases by approximately 57.3 percent, to $35.9 million, compared to the base-case value of $84.2 million in the year leading up to the standards. At higher TSLs, manufacturers have a harder time fully passing on larger increases in MPCs to their customers. At TSL 4, the conversion costs are higher than the other TSLs because the design of all microwave platforms must be more significantly altered.

For new standby mode and off mode energy conservation standards, conversion costs increase at higher TSLs as the complexity of further lowering standby power increases, substantially driving up engineering time and also increasing the testing and product development time. If the increased production costs are fully passed on to consumers (the preservation of gross margin percentage scenario), the operating revenue from higher prices is still not enough to overcome the negative impacts from the substantial conversion costs. The incremental costs are small for each TSL, meaning the positive impact on cash flows is small compared to the conversion costs required to achieve these efficiencies. As a result of the small incremental costs and large conversion expenses, INPV is negative for all TSLs under the preservation of gross margin percentage scenario. If the incremental costs are not fully passed along to customers (the preservation of gross margin (absolute dollars) scenario), the negative impacts on INPV are amplified at each TSL.

b. Employment Impacts

DOE discussed the domestic employment impacts on the microwave oven industry in the October NOPR. DOE concluded that since more than 95 percent of microwave ovens are already imported and the employment impacts in the GRIM are small, the actual impacts on domestic employment would depend on whether any U.S. manufacturer decided to shift remaining U.S. production to lower-cost countries. 73 FR 62034, 62101–02 (Oct. 17, 2008).

c. Impacts on Manufacturing Capacity

As stated in the NOPR, minor tooling changes would be necessary at all TSLs for standby mode and off mode standards. For all standby power levels, the most significant conversion costs are the research and development, testing, and certification of products with more-efficient components, which does not affect production line capacity. Thus, DOE believes manufacturers will be able to maintain manufacturing capacity levels and continue to meet market demand under new energy conservation standards. 73 FR 62034, 62103 (Oct. 17, 2008).

d. Impacts on Subgroups of Manufacturers

DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics. However, DOE did not identify any manufacturer subgroups for microwave ovens that would justify a separate manufacturer subgroup.

e. Cumulative Regulatory Burden

During previous stages of this rulemaking DOE identified a number of requirements with which manufacturers of these microwave ovens must comply and which take effect within 3 years of the anticipated compliance date of the proposed new standards. DOE discusses these and other requirements, and includes the full details of the cumulative regulatory burden, in chapter 12 of the SNOPR TSD.

3. National Impact Analysis

a. Significance of Energy Savings

To estimate the energy savings through 2043 attributable to potential standards for microwave oven standby mode and off mode, DOE compared the energy consumption of those products under the base case to their energy consumption under each TSL. Table V.13 presents the forecasted NES for each TSL for microwave oven standby mode and off mode. The savings were calculated using the approach described in section IV.E.

TABLE V.13—CUMULATIVE NATIONAL ENERGY SAVINGS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE POWER IN 2014–2043

TSL	Microwave-only ovens and countertop combination ovens (*quads*)	Built-in and over-the-range combination microwave ovens (*quads*)	Total* (*quads*)
.			
1	0.21	0.00	0.21
2	0.30	0.00	0.30
3	0.41*	0.01*	0.41
4	0.62	0.01	0.63

* The total values may differ from the sum of the product class sub-totals due to the rounding to two decimal places.

Chapter 10 of the SNOPR TSD provides additional details on the NES values reported in Table V.13, and also presents tables that show the magnitude of the energy savings discounted at rates of 3 percent and 7 percent. Discounted energy savings represent a policy perspective in which energy savings realized farther in the future are less significant than energy savings realized in the nearer term.

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV to the Nation of the total costs and savings for consumers that would result from particular standard levels for microwave oven standby mode and off mode. In accordance with the OMB's guidelines on regulatory analysis,[28] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. The 7-percent rate is an estimate of the average before-tax rate of return on private capital in the U.S. economy, and reflects the returns on real estate and small business capital as well as corporate capital. DOE used this discount rate to approximate the opportunity cost of capital in the private sector, because recent OMB analysis has found the average rate of return on capital to be near this rate. DOE used the 3-percent rate to capture the potential effects of standards on private consumption (*e.g.,* through higher prices for products and reduced purchases of energy). This rate represents the rate at which society discounts future consumption flows to their present value. This rate can be approximated by the real rate of return on long-term government debt (*i.e.,* yield on Treasury notes minus annual rate of change in the Consumer Price Index), which has averaged about 3 percent on a pre-tax basis for the past 30 years.

Table V.14 shows the consumer NPV results for each TSL DOE considered for both product classes of microwave ovens, using both a 7-percent and a 3-percent discount rate. In each case, the impacts, i.e., discounted operating cost savings and discounted incremental equipment costs, cover the lifetime of products purchased in 2014–2043. For Product Class 1 (microwave-only and countertop combination microwave ovens), the benefit-to-cost ratio is greater than or equal to nine for TSLs 1, 2, and 3 and greater than three for TSL 4, irrespective of discount rate. For Product Class 2 (built-in and over-the-range combination microwave ovens), TSLs 2 and 4 have benefit-to-cost ratios of approximately five, irrespective of discount rate, while TSL 1, which incurs no additional cost relative to the baseline, has a limitless benefit-to-cost ratio. At TSL3, the benefits are 30 percent and 50 percent greater than the costs at discount rates of 7-percent and 3-percent, respectively. See chapter 10 of the SNOPR TSD for more detailed NPV results.

TABLE V.14—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE FOR UNITS SOLD 2014–2043

TSL	Net present value (*billion 2010$*)					
	Microwave-only ovens and countertop combination microwave ovens		Built-in and over-the-range combination microwave ovens		Total*	
	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate
1	1.01	1.97	0.01	0.02	1.02	1.98
2	1.41	2.75	0.02	0.03	1.42	2.78
3	1.81	3.58	0.01	0.02	1.82	3.59
4	2.21	4.53	0.04	0.08	2.25	4.60

* The total values may differ from the sum of the product class sub-totals due to the rounding to two decimal places.

The NPV results presented in Table V.14 are based on a learning rate of 28.9 percent, which is referred to as the ''default'' learning rate. DOE investigated the impact of different learning rates for product prices for the TSLs considered for microwave oven standby mode and off mode. DOE considered four learning rate sensitivities: (1) A ''high learning'' rate (37.0 percent); (2) a ''low learning'' rate (19.2 percent); (3) a ''no learning'' rate

[28] OMB Circular A–4, section E (Sept. 17, 2003). Available at: *http://www.whitehouse.gov/omb/circulars_a004_a-4.* (Last accessed March 18, 2011.)

(constant real prices); and (4) a ''microwave oven only'' rate. The ''microwave oven only'' is based on limited set of historical price data specifically for microwave ovens. DOE also analyzed a sensitivity based on the ''chained price index—other consumer durable goods except ophthalmic'' that was forecasted for use in *AEO2010.* This index is the most disaggregated category that includes appliances. Refer to appendix 8–E of the SNOPR TSD for details on the development of the above learning sensitivities.

Table V.15 provides the annualized NPV of consumer benefits at a 3-percent discount rate, combined with the annualized present value of monetized benefits from CO_2 and NO_X emissions reductions, for each of the TSLs for the ''default'' learning rate and the sensitivity cases. Table V.16 provides the annualized NPVs using a 7-percent discount rate for consumer NPV. Section V.B.6 provides a complete description and summary of the monetized benefits from CO_2 and NO_X emissions reductions. For most of the TSLs, the difference between the default results and the sensitivities is insignificant.

TABLE V.15—MICROWAVE OVEN STANDBY MODE AND OFF MODE: ANNUALIZED NET PRESENT VALUE OF CONSUMER BENEFITS (3 PERCENT DISCOUNT RATE) AND ANNUALIZED PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS FOR PRODUCTS SHIPPED IN 2014–2043*

Trial standard level	Default LR =28.9%	Low learning LR =19.2%	High learning LR =37.0%	No learning LR = 0% (constant real prices)	Microwave ovens only LR = 39.6%	AEO2010 chained price index forecast
	Billion 2010$					
1	0.12	0.12	0.12	0.12	0.12	0.12
2	0.17	0.17	0.17	0.17	0.17	0.17
3	0.22	0.22	0.22	0.22	0.22	0.22
4	0.29	0.29	0.30	0.27	0.30	0.30

*The economic benefits from reduced CO_2 emissions were calculated using a SCC value of $22.3/metric ton in 2010 (in 2010$) for CO_2, increasing at 3% per year, and a discount rate of 3%. The economic benefits from reduced NO_X emissions were calculated using a value of $2,537/ton (in 2010$), which is the average of the low and high values used in DOE's analysis, and a 3-percent discount rate. Because the discounted equipment cost increases at each TSL are very small relative to the discounted operating cost savings and the discounted monetized benefits of the emission reductions, the NPV as a function of learning rate does not change appreciably. In fact, the learning rate has a significant effect only on the NPV for TSL 4 where discounted equipment cost increases are relatively more significant.

TABLE V.16—MICROWAVE OVEN STANDBY MODE AND OFF MODE: ANNUALIZED NET PRESENT VALUE OF CONSUMER BENEFITS (7 PERCENT DISCOUNT RATE) AND ANNUALIZED PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS FOR PRODUCTS SHIPPED IN 2014–2043*

Trial standard level	Default LR =28.9%	Low learning LR =19.2%	High learning LR =37.0%	No learning LR = 0% (constant real prices)	Sensitivity (microwave ovens only) LR = 39.6%	AEO2010 chained price index forecast
	Billion 2010$					
1	0.10	0.10	0.10	0.10	0.10	0.10
2	0.14	0.14	0.14	0.14	0.14	0.14
3	0.18	0.18	0.18	0.18	0.19	0.18
4	0.24	0.23	0.24	0.22	0.25	0.24

*The economic benefits from reduced CO_2 emissions were calculated using a SCC value of $22.3/metric ton in 2010 (in 2010$) for CO_2, increasing at 3% per year, and a discount rate of 3%. The economic benefits from reduced NO_X emissions were calculated using a value of $2,537/ton (in 2010$), which is the average of the low and high values used in DOE's analysis, and a 7-percent discount rate. Because the discounted equipment cost increases at each TSL are very small relative to the discounted operating cost savings and the discounted monetized benefits of the emission reductions, the NPV as a function of learning rate does not change appreciably. In fact, the learning rate has a significant effect only on the NPV for TSL 4 where discounted equipment cost increases are relatively more significant.

c. Indirect Impacts on Employment

DOE develops estimates of the indirect employment impacts of proposed standards on the economy in general. As discussed above, DOE expects energy conservation standards for microwave ovens to reduce energy bills for consumers of those products, and the resulting net savings to be redirected to other forms of economic activity. Those shifts in spending and economic activity could affect the demand for labor. As described in section IV.H, to estimate those effects, DOE used an input/output model of the U.S. economy. DOE estimated the indirect employment impacts for the TSLs for both product classes of microwave ovens that DOE considered in this rulemaking. DOE understands that there are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for intermediate timeframes, such as 2015, where these uncertainties are reduced.

The results suggest the proposed standards are likely to have negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 13 of the SNOPR TSD presents the detailed results.

4. Impact on Utility or Performance of Product

For the reasons stated in section III.D.1.d, DOE believes that for purposes of 42 U.S.C. 6295(o)(2)(B)(i)(IV), the standby power level considered in this supplemental notice does not reduce the utility or performance of the microwave oven products under consideration in this rulemaking.

5. Impact of Any Lessening of Competition

In weighing the promulgation of any proposed standards, DOE is required to consider any lessening of competition that is likely to result from the adoption of those standards. The determination of the likely competitive impacts stemming from a proposed standard is made by the Attorney General, who transmits this determination, along with an analysis of the nature and extent of the impact, to the Secretary of Energy. (42 U.S.C. 6295(o)(2)(B)(i)(VI) and (B)(ii))

The Attorney General's determination for the October 2008 NOPR included cooking products but did not mention microwave oven standards. (DOJ, No. 53 at pp. 1–2). To assist the Attorney General in making such a determination for the proposed standby mode and off mode standards, DOE has provided the Attorney General with copies of this notice and the TSD for review. DOE will consider the Attorney General's opinion on the proposed rule in preparing the final rule.

6. Need of the Nation To Conserve Energy

Improving the energy consumption of microwave oven standby mode and off mode, where economically justified, would likely improve the security of the Nation's energy system by reducing overall demand for energy. Reduced electricity demand may also improve the reliability of the electricity system. As a measure of this reduced demand, Table V.17 presents the estimated reduction in national generating capacity for the TSLs that DOE considered in this rulemaking.

TABLE V.1717—REDUCTION IN NATIONAL INSTALLED ELECTRICITY GENERATION CAPACITY UNDER MICROWAVE OVEN STANDBY MODE AND OFF MODE TRIAL STANDARD LEVELS

TSL	*Gigawatts*	
	2030	2043
1	0.190	0.196
2	0.274	0.284
3	0.377	0.390
4	0.581	0.601

Energy savings from more stringent microwave oven standby mode and off mode standards would also produce environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with electricity production. Table V.18 provides DOE's estimate of cumulative CO_2 and NO_X emissions reductions that would result from the TSLs considered in this rulemaking. (Hg emission impacts are negligible and therefore not reported here.) In the environmental assessment (chapter 15 of the SNOPR TSD), DOE reports estimated annual changes in CO_2, NO_X, and Hg emissions attributable to each TSL.

TABLE V.18—CUMULATIVE EMISSIONS REDUCTIONS UNDER MICROWAVE OVEN STANDBY MODE AND OFF MODE TRIAL STANDARD LEVELS IN 2014–2043

	TSL			
	1	2	3	4
.				
CO_2 (*Mt*)	15.84	22.88	31.48	48.46
NO_X (*1,000 tons*)	12.88	18.61	25.60	39.42

Mt = million metric tons. Values for NO_X emissions reductions refer to short tons.

As discussed in section IV.J of this supplemental notice, DOE has not reported SO_2 emissions reductions from power plants because there is uncertainty about the effect of energy conservation standards on the overall level of SO_2 emissions in the United States due to SO_2 emissions caps. DOE also did not include NO_X emissions reduction from power plants in States subject to CAIR because an energy conservation standard would not affect the overall level of NO_X emissions in those States due to the emissions caps mandated by CAIR.

DOE also estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that DOE estimated for each of the TSLs considered for microwave oven standby mode and off mode. In order to make this calculation similar to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in 2014–2043. Thus, the emissions reductions extend past 2043.

As discussed in section IV.K, DOE used values for the SCC developed by an interagency process. The four values for CO_2 emissions reductions resulting from that process (expressed in 2010$) are $4.9/ton (the average value from a distribution that uses a 5-percent discount rate), $22.3/ton (the average value from a distribution that uses a 3-percent discount rate), $36.5/ton (the average value from a distribution that uses a 2.5-percent discount rate), and $67.6/ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). These values correspond to the value of emission reductions in 2010; the values for later years are higher due to increasing damages as the magnitude of climate change increases. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. Table V.19 presents the global values of CO_2 emissions reductions at each TSL. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values, and these results are presented in chapter 16 of the SNOPR TSD.

TABLE V.19—ESTIMATES OF PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS UNDER MICROWAVE OVEN STANDBY MODE AND OFF MODE TRIAL STANDARD LEVELS FOR PRODUCTS SOLD IN 2014–2043

TSL	*Million 2010$*			
	5% discount rate, average*	3% discount rate, average*	2.5% discount rate, average*	3% discount rate, 95th percentile*
1	$70	$349	$589	$1,066
2	101	505	851	1,539
3	139	694	1,170	2,118
4	213	1,069	1,801	3,259

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution.

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed in this rulemaking on reducing CO_2 emissions is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this proposed rule the most recent values resulting from the ongoing interagency review process.

DOE also estimated a range for the cumulative monetary value of the economic benefits associated with NO_X emissions reductions anticipated to result from new standby mode and off mode standards for microwave ovens. The dollar-per-ton values that DOE used are discussed in section IV.K. Table V.20 presents the cumulative present values for each TSL calculated using 7-percent and 3-percent discount rates.

TABLE V.20—ESTIMATES OF PRESENT VALUE OF NO_X EMISSIONS REDUCTIONS UNDER MICROWAVE OVEN STANDBY MODE AND OFF MODE TRIAL STANDARD LEVELS FOR PRODUCTS SOLD IN 2014–2043

TSL	3% discount rate *Million 2010$*	7% discount rate *Million 2010$*
1	3.74 to 38.46 ...	1.92 to 19.76
2	5.41 to 55.56 ...	2.78 to 28.55
3	7.44 to 76.44 ...	3.82 to 39.28
4	11.45 to 117.7	5.89 to 60.5

The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Table V.21 and Table V.22 presents the NPV values that result from adding the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL considered in this rulemaking, at both a 7-percent and 3-percent discount rate. The CO_2 values used in the columns of each table correspond to the four scenarios for the valuation of CO_2 emission reductions presented in section IV.K.

TABLE V.21—RESULTS OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 7-PERCENT DISCOUNT RATE) TO NET PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE

TSL	Consumer NPV at 7% discount rate added with:			
	SCC Value of $4.9/metric ton CO_2* and low value for NO_X** *billion 2010$*	SCC Value of $22.3/metric ton CO_2* and medium value for NO_X** *billion 2010$*	SCC Value of $36.5/metric ton CO_2* and medium value for NO_X** *billion 2010$*	SCC Value of $67.6/metric ton CO_2* and high value for NO_X** *billion 2010$*
1	1.09	1.38	1.62	2.10
2	1.52	1.94	2.29	2.99
3	1.96	2.53	3.01	3.98
4	2.47	3.35	4.08	5.57

* These label values represent the global SCC in 2010, in 2010$. The present values have been calculated with scenario-consistent discount rates.

** Low value corresponds to $450 per ton of NO_X emissions. Medium value corresponds to $2,537 per ton of NO_X emissions. High Value corresponds to $4,623 per ton of NO_X emissions.

TABLE V.22—RESULTS OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 3-PERCENT DISCOUNT RATE) TO NET PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE

TSL	Consumer NPV at 7% discount rate added with:			
	SCC Value of $4.9/metric ton CO_2* and low value for NO_X** *billion 2010$*	SCC Value of $22.3/metric ton CO_2* and medium value for NO_X** *billion 2010$*	SCC Value of $36.5/metric ton CO_2* and medium value for NO_X** *billion 2010$*	SCC Value of $67.6/metric ton CO_2* and high value for NO_X** *billion 2010$*
1	2.06	2.35	2.59	3.09
2	2.89	3.31	3.66	4.37
3	3.74	4.33	4.81	5.79
4	4.83	5.74	6.47	7.98

* These label values represent the global SCC in 2010, in 2010$. The present values have been calculated with scenario-consistent discount rates.

** Low value corresponds to $450 per ton of NO_X emissions. Medium value corresponds to $2,537 per ton of NO_X emissions. High Value corresponds to $4,623 per ton of NO_X emissions.

Although adding the value of consumer savings to the values of emission reductions provides a valuable perspective, two issues should be considered. First, the national operating cost savings are domestic U.S. consumer monetary savings that occur as a result of market transactions, while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and the SCC are performed with different methods that use quite different time frames for analysis. The national operating cost savings is measured for the lifetime of products shipped in 2014–2043. The SCC values, on the other hand, reflect the present value of future climate-related impacts resulting from the emission of one ton of CO_2 in each year. These impacts continue well beyond 2100.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VI))) DOE has not considered other factors in development of the proposed standards in this SNOPR.

C. Proposed Standard

When considering proposed standards, the new or amended energy conservation standard that DOE adopts for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, in light of the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also ''result in significant conservation of energy.'' (42 U.S.C. 6295(o)(3)(B))

For today's SNOPR, DOE considered the impacts of standards at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader in understanding the benefits and/or burdens of each TSL, Table V.24 summarizes the quantitative analytical results for each TSL, based on the assumptions and methodology discussed herein. In addition to the quantitative results presented in the table, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers, such as low-income households and seniors, who may be disproportionately affected by a national standard. Section V.B.1 presents the estimated impacts of each TSL for these subgroups.

In addition to the quantitative results, DOE also considered harmonization of microwave oven standby mode and off mode standards with international standby power programs such as Korea's e-standby program,[29] Australia's standby program,[30] and Japan's Top Runner Program.[31] Those programs seek to establish standby power ratings through the International Energy Agency's (IEA) 1-Watt Program, which seeks to lower standby power below 1 W for microwave ovens.[32] Korea published a mandatory standby power standard of 1 W that became effective in 2010 and Australia will publish mandatory standby power standards of 1 W by 2012. In accordance with Japan's Top Runner Program, Japanese appliance manufacturers made a voluntary declaration to reduce standby power of microwave ovens that lack a timer to as close to zero as possible and that of microwave ovens that have a timer to 1 W or lower.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. This undervaluation suggests that regulation that promotes energy efficiency can produce significant net private gains (as well as producing social gains by, for example, reducing pollution). There is evidence that consumers undervalue future

[29] Refer to: *http://www.kemco.or.kr/new_eng/pg02/pg02100300.asp.* (Last accessed March 18, 2011.)

[30] Refer to: *http://www.energyrating.gov.au/standby.html.* (Last accessed March 18, 2011.)

[31] Refer to: *http://www.eccj.or.jp/top_runner/index.html.* (Last accessed March 18, 2011.)

[32] IEA Energy Information Centre. Standby Power Use and the IEA ''1-Watt Plan.'' Available at: *http://www.iea.org/subjectqueries/standby.asp.* (Last accessed March 18, 2011.)

energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases (for example, an inefficient ventilation fan in a new building or the delayed replacement of a water pump); (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (that is, renter versus owner; builder vs. purchaser). Other literature indicates that with less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings.

In its current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways: (1) If consumers forego a purchase of a product in the standards case, this decreases sales for product manufacturers and the cost to manufacturers is included in the MIA, and (2) DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a regulatory option decreases the number of products used by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides detailed estimates of shipments and changes in the volume of product purchases in chapter 9 of the SNOPR TSD.

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE seeks comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for Microwave Ovens

Table V.23 summarizes the quantitative impacts estimated for each TSL for microwave ovens. The efficiency levels contained in each TSL are described in section V.A.

TABLE V.23—SUMMARY OF RESULTS FOR TRIAL STANDARD LEVELS FOR MICROWAVE OVEN STANDBY MODE AND OFF MODE ENERGY USE

Category	TSL 1	TSL 2	TSL 3	TSL 4
National Energy Savings (*quads*)	0.21	0.30	0.41	0.63
NPV of Consumer Benefits (*2010$ billion*)				
7% discount rate	1.02	1.42	1.82	2.25
3% discount rate	1.98	2.78	3.59	4.60
Manufacturer Impacts				
Industry NPV (*2010$ million*)	(27.1) to (29.3)	(45.2) to (52.4)	(52.9) to (73.6)	(90.4) to (165.7)
Industry NPV (*% change*)	(2.4) to (2.6)	(4.0) to (4.6)	(4.7) to (6.5)	(8.0) to (14.7)
Cumulative Emissions Reduction				
CO_2 (*Mt*)	15.84	22.88	31.48	48.46
NO_X (*thousand tons*)	12.88	18.61	25.60	39.42
Value of Emissions Reductions				
CO_2 (*2010$ million*)*	70 to 1,066	101 to 1,539	139 to 2,118	213 to 3,259
NO_X—3% discount rate (*2010$ million*)	3.74 to 38.5	5.41 to 55.6	7.44 to 76.4	11.5 to 118
NO_X—7% discount rate (*2010$ million*)	1.92 to 19.8	2.78 to 28.6	3.82 to 39.3	5.89 to 60.5
Consumer Mean LCC Savings (*2010$*)				
Product Class 1	7	10	13	15
Product Class 2	6	11	4	27
Consumer Median PBP (*years*)				
Product Class 1	0.2	0.4	1.1	2.4
Product Class 2	0.0	1.9	6.3	1.8
Distribution of Consumer LCC Impacts				
Product Class 1				
Net Cost (%)	0	0	0	0
No Impact (%)	54	19	0	0
Net Benefit (%)	46	81	100	100
Product Class 2				
Net Cost (%)	0	0	21	0
No Impact (%)	0	0	0	0
Net Benefit (%)	100	100	79	100
Reduction in Generation Capacity in 2043 (*GW*)	0.196	0.284	0.390	0.601

Parentheses indicate negative (−) values. For NPVs, a negative value means a decrease in NPV.
* Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.

First, DOE considered TSL 4, the max-tech level for microwave oven standby mode and off mode energy use. TSL 4 likely would save 0.63 quads of energy through 2043, an amount DOE considers significant. Under TSL 4, the estimated NPV of consumer benefit is $2.25 billion, using a discount rate of 7 percent, and $4.60 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 48.46 Mt of CO_2 and 39.42 thousand tons of NO_X, with a negligible impact on Hg emissions. The estimated monetary value of the CO_2 emissions reductions at TSL 4 ranges from $213 million to $3,259 million. Total generating capacity in 2043 is estimated to decrease by 0.601 GW.

DOE projects that at TSL 4 for microwave-only ovens and countertop combination microwave ovens (Product Class 1), the average microwave oven consumer would experience a decrease in LCC of $15. DOE also estimates that all consumers who purchase these

microwave ovens would realize some LCC savings. The median payback period at TSL 4 is projected to be 2.4 years, substantially shorter than the lifetime of the product. DOE projects that at TSL 4 for built-in and over-the-range combination microwave ovens (Product Class 2), the average microwave oven consumer would experience a decrease in LCC of $27, and all consumers who purchase these microwave ovens would realize some LCC savings. The median payback period at TSL 4 is projected to be 1.8 years, substantially shorter than the lifetime of the product.

Although DOE estimates that all microwave oven consumers would benefit economically from TSL 4, the reduction in standby power consumption at TSL 4 would result in the loss of certain functions that provide utility to consumers, specifically the continuous clock display. Because it is uncertain how greatly consumers value this function, DOE is concerned that TSL 4 may result in significant loss of consumer utility.

For manufacturers of microwave ovens, DOE estimated a decrease in INPV that ranges from $90.4 million to $165.7 million. DOE recognizes that TSL 4 poses the risk of large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached, as DOE expects, TSL 4 could result in a net loss of 14.7 percent in INPV to microwave oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 4, the Secretary has reached the following initial conclusion: At TSL 4, the benefits of energy savings, NPV of consumer benefit, positive consumer LCC impacts, and emissions reductions would be outweighed by the potential burden on consumers from loss of product utility and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

DOE then considered TSL 3. Primary energy savings are estimated to be 0.41 quads of energy through 2043, which DOE considers significant. Under TSL 3, the estimated NPV of consumer benefit is $1.82 billion, using a discount rate of 7 percent, and $3.59 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 31.48 Mt of CO_2 and 25.60 thousand tons of NO_X, with a negligible impact on Hg emissions. The estimated monetary value of the CO_2 emissions reductions at TSL 3 ranges from $139 million to $2,118 million. Total generating capacity in 2043 under TSL 3 is estimated to decrease by 0.390 GW.

For microwave-only ovens and countertop combination microwave ovens, DOE projects that at TSL 3 the average consumer would experience a decrease in LCC of $13, and all consumers who purchase these microwave ovens would realize some LCC savings. At TSL 3 the median payback period is projected to be 1.1 years, substantially shorter than the lifetime of the product. In addition, DOE estimates that the reduction in standby power consumption under TSL 3 (to no greater than 1.0 W) would not impact consumer utility. The continuous clock display that would be lost under TSL 4 would be retained at TSL 3.

For built-in and combination microwave ovens, DOE projects that at TSL 3 the average consumer would experience a decrease in LCC of $4, and 79 percent of consumers who purchase these microwave ovens would realize some LCC savings. At TSL 3 the median payback period is projected to be 6.3 years, shorter than the lifetime of the product.

For manufacturers of microwave ovens, DOE estimated that the projected decrease in INPV under TSL 3 would range from $52.9 million to $73.6 million. DOE recognizes the risk of large negative impacts at TSL 3 if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached, as DOE expects, TSL 3 could result in a net loss of 6.5 percent in INPV to microwave oven manufacturers.

After considering the analysis and weighing the benefits and the burdens, DOE has tentatively concluded that the benefits of energy savings, NPV of consumer benefit, positive consumer LCC impacts, and emissions reductions would outweigh the capital conversion costs that could result in a reduction in INPV for manufacturers. In particular, the Secretary has concluded that TSL 3 would save a significant amount of energy and is technologically feasible and economically justified. Therefore, DOE today proposes to adopt the energy conservation standards for microwave oven standby mode and off mode at TSL 3. Table V.23 presents the proposed standby mode and off mode energy conservation standards for microwave ovens.

TABLE V.23—PROPOSED ENERGY CONSERVATION STANDARDS FOR MICROWAVE OVEN STANDBY AND OFF MODE

Product classes	Proposed energy conservation standard
Microwave-Only Ovens and Countertop Combination Microwave Ovens	Maximum Standby Power = 1.0 watt.
Built-In and Over-the-Range Combination Microwave Ovens	Maximum Standby Power = 2.2 watts.

2. Summary of Benefits and Costs (Annualized) of the Proposed Standards

The benefits and costs of today's proposed standards can also be expressed in terms of annualized values. The annualized monetary values are the sum of (1) the annualized national economic value, expressed in 2010$, of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase costs, which is another way of representing consumer NPV), and (2) the monetary value of the benefits of emission reductions, including CO_2 emission reductions.[33] The value of the CO_2 reductions is calculated using a range of values per metric ton of CO_2 developed by a recent interagency process. The monetary costs and benefits of cumulative emissions reductions are reported in 2010$ to permit comparisons with the other costs and benefits in the same dollar units.

Although combining the values of operating savings and CO_2 reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic

[33] DOE used a two-step calculation process to convert the time-series of costs and benefits into annualized values. First, DOE calculated a present value in 2011, the year used for discounting the NPV of total consumer costs and savings, for the time-series of costs and benefits using discount rates of 3 and 7 percent for all costs and benefits except for the value of CO_2 reductions. For the latter, DOE used a range of discount rates, as shown in Table V.26. From the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in 2011, that yields the same present value. The fixed annual payment is the annualized value. Although DOE calculated annualized values, this does not imply that the time-series of cost and benefits from which the annualized values were determined would be a steady stream of payments.

U.S. consumer monetary savings that occur as a result of market transactions while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and SCC are performed with different methods that use different time frames for analysis. The national operating cost savings is measured for the lifetime of products shipped in 2014–2043. The SCC values, on the other hand, reflect the present value of future climate-related impacts resulting from the emission of one ton of CO_2 in each year. These impacts continue well beyond 2100.

Table V.24 shows the annualized values for the proposed standards for microwave oven standby mode and off mode energy use. The results for the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO_2 reductions, for which DOE used a 3-percent discount rate along with the SCC series corresponding to a value of $22.3/ton in 2010, the cost of the standards proposed in today's rule is $20.3 million per year in increased product costs, while the annualized benefits are $167 million in reduced product operating costs, $35.4 million in CO_2 reductions, and $1.74 million in reduced NO_X emissions. In this case, the net benefit amounts to $184 million per year. Using a 3-percent discount rate for all benefits and costs and the SCC series corresponding to a value of $22.3/ton in 2010, the cost of the standards proposed in today's rule is $21.6 million per year in increased product costs, while the annualized benefits are $205 million in reduced operating costs, $35.4 million in CO_2 reductions, and $2.14 million in reduced NO_X emissions. In this case, the net benefit amounts to $221 million per year.

TABLE V.24—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS (TSL 3) FOR MICROWAVE OVENS SOLD IN 2014–2043

Benefits	Discount rate	Monetized (*million 2010$/year*)		
		Primary estimate*	Low benefits estimate*	High benefits estimate*
Operating Cost Savings	7%	167	150	185
	3%	205	182	229
CO_2 Reduction at $4.9/t**	5%	9.02	8.49	9.55
CO_2 Reduction at $22.3/t**	3%	35.4	33.3	37.6
CO_2 Reduction at $36.5/t**	2.5%	55.9	52.5	59.3
CO_2 Reduction at $67.6/t**	3%	108.0	101.5	114.6
NO_X Reduction at $2,537/t**	7%	1.74	1.65	1.82
	3%	2.14	2.02	2.26
Total†	7% plus CO_2 range	178 to 277	160 to 253	196 to 301
	7%	204	185	224
	3%	243	217	269
	3% plus CO_2 range	216 to 315	193 to 286	241 to 346
Costs				
Incremental Product Costs	7%	20.32	23.39	20.25
	3%	21.59	25.48	21.48
Total Net Benefits				
Total†	7% plus CO_2 range	157 to 256	137 to 230	176 to 281
	7%	184	162	204
	3%	221	192	247
	3% plus CO_2 range	195 to 294	167 to 260	219 to 324

* The Primary, Benefits, and High Benefits Estimates utilize forecasts of energy prices and housing starts from the *AEO 2010* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, the Low estimate uses incremental product costs that reflects constant prices (no learning rate) for product prices, and the High estimate uses incremental product costs that reflects a declining trend (high learning rate) for product prices.

** The CO_2 values represent global values (in 2010$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.9, $22.3, and $36.5 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $67.6 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The value for NO_X (in 2010$) is the average of the low and high values used in DOE's analysis.

† Total Benefits for both the 3% and 7% cases are derived using the SCC value calculated at a 3% discount rate, which is $22.3/ton in 2010 (in 2010$). In the rows labeled as ''7% plus CO_2 range'' and ''3% plus CO_2 range,'' the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

VI. Additional Technical Corrections to 10 CFR 430.32

In today's SNOPR, DOE is also proposing the following technical corrections to the language contained in 10 CFR 430.32. DOE notes that the title of 10 CFR 430.32, ''Energy and water conservation standards and their effective dates'' contains dates required for compliance with energy and water conservation standards rather than the effective dates of such standards. As a result, DOE is proposing to revise the title of 10 CFR 430.32 to read ''Energy and water conservation standards and their compliance dates.'' DOE also notes that the current energy conservation standards for cooking products found at 10 CFR 430.32(j)(1)–(2) should be revised to more accurately reflect the date required for compliance with energy conservation standards. DOE is proposing to revise the language in 10 CFR 430.32(j)(1)–(2) to state that products manufactured on or after the compliance date must meet the required energy conservation standard.

VII. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866 and 13563

Section 1(b)(1) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that today's proposed standards address are as follows:

(1) There is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the home appliance market.

(2) There is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services).

(3) There are external benefits resulting from improved energy efficiency of microwave ovens that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases.

In addition, DOE has determined that today's regulatory action is an ''economically significant regulatory action'' under section 3(f)(1) of Executive Order 12866. Accordingly, section 6(a)(3) of the Executive Order requires that DOE prepare a regulatory impact analysis (RIA) on today's rule and that OIRA review this rule. DOE presented to OIRA for review the draft rule and other documents prepared for this rulemaking, including the RIA, and has included these documents in the rulemaking record. The assessments prepared pursuant to Executive Order 12866 can be found in the TSD for this rulemaking, available at *www1.eere.energy.gov/buildings/appliance_standards/residential/cooking_products.html*.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281, Jan. 21, 2011). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In its guidance, OIRA has emphasized that such techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.'' For the reasons stated in the preamble, DOE believes that today's SNOPR is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990 DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*www.gc.doe.gov*).

For manufacturers of microwave ovens, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30850 (May 15, 2000), as amended at 65 FR 53533, 53545 (Sept. 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/content/table-small-business-size-standards*. DOE used the size standards the SBA published on November 5, 2010, as amended, to determine whether any small entities would be required to comply with the rule. Microwave oven manufacturing is classified under NAICS 335221, ''Manufacturers of Household Cooking Appliances.'' The SBA sets a threshold of 750 employees or less for an entity to be considered as a small business for this category.

The microwave oven industry consists of seven manufacturers that have a market share greater than 3 percent. Most are large, foreign companies that import microwave ovens into the United States. There are U.S. facilities that partly assemble microwave ovens. However, no domestic facilities are small businesses. Furthermore none of the microwave oven manufacturers are small business manufacturers. Thus, DOE did not conduct an initial regulatory flexibility analysis.

C. Review Under the Paperwork Reduction Act

Manufacturers of microwave ovens must certify to DOE that their product complies with any applicable energy conservation standard. In certifying compliance, manufacturers must test their product according to the DOE test procedure for microwave ovens, including any amendments adopted for that test procedure. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including microwave ovens. 75 FR 56796 (Sept. 16, 2010). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per

response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*), DOE has determined that the proposed rule fits within the category of actions included in Categorical Exclusion (CX) B5.1 and otherwise meets the requirements for application of a CX. (See 10 CFR 1021.410(b) and Appendix B to Subpart D) The proposed rule fits within this category of actions because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, and for which none of the exceptions identified in CX B5.1(b) apply. Therefore, DOE has made a CX determination for this rulemaking, and DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for this proposed rule. DOE's CX determination for this proposed rule is available at *http://cxnepa.energy.gov*.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999) imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://www.gc.doe.gov.*

Although today's proposed rule does not contain a Federal intergovernmental mandate, it may require expenditures of $100 million or more on the private sector. Specifically, the proposed rule will likely result in a final rule that could require expenditures of $100 million or more. Such expenditures may include (1) investment in research and development and in capital expenditures by microwave oven manufacturers in the years between the final rule and the compliance date for the new standard, and (2) incremental additional expenditures by consumers to purchase higher-efficiency microwave ovens, starting in 2014.

Section 202 of UMRA authorizes an agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. 2 U.S.C. 1532(c). The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of this supplemental notice of proposed rulemaking and the ''Regulatory Impact Analysis,'' chapter 17 of the TSD for this supplemental proposed rule, respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. 2 U.S.C. 1535(a). DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(h) and (o), today's proposed rule would establish energy conservation standards for microwave

oven standby mode and off mode that are designed to achieve the maximum improvement in energy use that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for today's supplemental proposed rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

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

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's SNOPR under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that today's regulatory action, which sets forth energy conservation standards for microwave oven standby mode and off mode, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the proposed rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin and as more fully set forth in the October 2008 NOPR, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report'' dated February 2007 has been disseminated and is available at the following Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

VIII. Public Participation

A. Attendance at Public Meeting

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or *Brenda.Edwards@ee.doe.gov.* As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures.

In addition, you can attend the public meeting via Webinar. Webinar registration information, participant instructions, and information about the capabilities available to Webinar participants will be published on the following Web site *https://www1.gotomeeting.com/register/507099585.* Participants are responsible for ensuring their systems are compatible with the Webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this notice. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA

(42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this notice. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov, the regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. Email submissions are preferred. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except

information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. Input and data regarding off mode power for microwave ovens;

2. Input and data on the utility provided by specific features that contribute to microwave oven standby power. In particular, DOE seeks information on any lessening of the utility or the performance of microwave display technologies and low- and zero-standby power cooking sensors as compared to absolute humidity cooking sensors currently used in microwave ovens on the U.S. market.

3. Input and data on control strategies available to enable manufacturers to make design tradeoffs between incorporating standby-power-consuming features such as displays or cooking sensors and including a function to turn power off to these components during standby mode. DOE also seeks comment on the viability and cost of microwave oven control board circuitry that could accommodate transistors to switch off cooking sensors and displays;

4. Whether switching or similar modern power supplies can operate successfully inside a microwave oven and the associated efficiency impacts on standby power;

5. Input and data on the estimated incremental manufacturing costs, as well as the assumed approaches to achieve TSL 3 for microwave oven standby mode and off mode. DOE also seeks comment on whether any intellectual property or patent infringement issues are associated with the design options presented in the SNOPR TSD to achieve TSL 3. In particular, DOE seeks comment on any lessening of competition due to intellectual property or patent infringement issues associated with low- and zero-standby power cooking sensors;

6. Input and data on the estimated market share of microwave ovens at the standby power consumption stipulated by TSL 3.

7. Information on any utility or performance impacts to built-ins at the standard level proposed by DOE.

IX. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements, and Small businesses.

Issued in Washington, DC, on January 31, 2012.

Henry Kelly,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 430, of title 10 of the Code of Federal Regulations, as set forth below.

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

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

Authority: 42 U.S.C. 6291–6317.

2. In § 429.23 revise paragraph (b)(2) to read as follows:

§ 429.23 Conventional cooking tops, conventional ovens, microwave ovens.

* * * * *

(b) * * *

(2) Pursuant to § 429.12(b)(13), a certification report shall include the following public product-specific information: For conventional cooking tops and conventional ovens: the type of pilot light and a declaration that the manufacturer has incorporated the applicable design requirements. For microwave ovens, the average standby power in watts.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. In § 430.23 revise paragraph (i)(3) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(i) * * *

(3) The standby power for microwave ovens shall be determined according to 3.2.4 of appendix I to this subpart. The standby power shall be rounded off to the nearest 0.1 watt.

* * * * *

3. In § 430.32 revise the heading and paragraph (j) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(j) *Cooking Products* (1) Gas cooking products with an electrical supply cord manufactured on or after January 1, 1990, shall not be equipped with a constant burning pilot light.

(2) Gas cooking products without an electrical supply cord manufactured on or after April 9, 2012, shall not be equipped with a constant burning pilot light.

(3) Microwave-only ovens and countertop combination microwave ovens manufactured on or after [date 3 years after final rule **Federal Register** publication] shall have an average standby power not more than 1.0 watt. Built-in and over-the-range combination microwave ovens manufactured on or after [date 3 years after final rule **Federal Register** publication] shall have an average standby power not more than 2.2 watts.

* * * * *

[FR Doc. 2012–2784 Filed 2–13–12; 8:45 am]

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Part V

Environmental Protection Agency

40 CFR Part 63
National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2010–0544; FRL–9628–8]

RIN 2060–AQ40

National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing amendments to the national emissions standards for hazardous air pollutants for Secondary Aluminum Production to address the results of the residual risk and technology review that the EPA is required to conduct by the Clean Air Act. In addition, the EPA is proposing amendments to correct and clarify rule requirements and provisions. These proposed amendments would require emission sources to comply with the emission limits at all times including periods of startup and shutdown; add a definition of affirmative defense; add a requirement to report performance testing through the Electronic Reporting Tool (ERT); add rule provisions allowing owners and operators to change furnace classifications; add rule requirements regarding testing of uncontrolled furnaces; add compliance provisions for hydrogen fluoride (HF) for uncontrolled group 1 furnaces; add operating requirements such as monitoring of lime injection rates; and make technical corrections and clarifications to the applicability, definitions, operating, monitoring, and performance testing requirements.

DATES: Comments must be received on or before March 30, 2012. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before March 15, 2012.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing by February 24, 2012, a public hearing will be held on February 29, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–HQ–OAR–2010–0544, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov,* Attention Docket ID Number EPA–HQ–OAR–2010–0544.
- *Fax:* (202) 566–9744, Attention Docket ID Number EPA–HQ–OAR–2010–0544.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center, EPA West (Air Docket), Attention Docket ID Number EPA–HQ–OAR–2010–0544, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004, Attention Docket ID Number EPA–HQ–OAR–2010–0544. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID Number EPA–HQ–OAR–2010–0544. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket. The EPA has established a docket for this rulemaking under Docket ID Number EPA–HQ–OAR–2010–0544. The proposed rulemaking also used material from Docket ID Number EPA–HQ–OAR–2010–0469 in the development of this rule. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Public Hearing. If a public hearing is held, it will begin at 10 a.m. on February 29, 2012 and will be held at the EPA's campus in Research Triangle Park, North Carolina, or at an alternate facility nearby. Persons interested in presenting oral testimony or inquiring as to whether a public hearing is to be held should contact Ms. Virginia Hunt, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, (D243–02), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0832.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Rochelle Boyd, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–1390; fax number: (919) 541–3207; and email address: *boyd.rochelle@epa.gov.* For specific information regarding the risk modeling methodology, contact Dr. Michael Stewart, Office of Air Quality Planning and Standards, Health and Environmental Impacts Division, Air Toxics Assessment Group (C504–06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711;

telephone number: (919) 541–7524; fax number: (919) 541–0840; and email address: *stewart.michael@epa.gov.* For information about the applicability of the national emission standards for hazardous air pollutants (NESHAP) to a particular entity, contact the appropriate person listed in Table 1 of this preamble.

TABLE 1—LIST OF EPA CONTACTS FOR THE NESHAP ADDRESSED IN THIS PROPOSED ACTION

NESHAP for:	OECA Contact[1]	OAQPS Contact[2]
Secondary Aluminum Production	Scott Throwe, (202) 564–7013 *throwe.scott@epa.gov*.	Rochelle Boyd, (919) 541–1390, *boyd.rochelle@epa.gov*

[1] EPA Office of Enforcement and Compliance Assurance.
[2] EPA Office of Air Quality Planning and Standards.

SUPPLEMENTARY INFORMATION:

Preamble Acronyms and Abbreviations

Several acronyms and terms used to describe industrial processes, data inventories, and risk modeling are included in this preamble. While this may not be an exhaustive list, for ease of reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

ACGIH American Conference of Government Industrial Hygienists
ADAF age-dependent adjustment factors
AEGL acute exposure guideline levels
AERMOD air dispersion model used by the HEM–3 model
APCD air pollution control devices
AMOS ample margin of safety
ANPRM advance notice of proposed rulemaking
ATSDR Agency for Toxic Substances and Disease Registry
BACT best available control technology
CAA Clean Air Act
CBI confidential business information
CFR Code of Federal Regulations
D/F dioxins and furans
EJ environmental justice
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
ERT Electronic Reporting Tool
HAP hazardous air pollutants
HCl hydrogen chloride
HEM–3 Human Exposure Model, Version 3
HF hydrogen fluoride
HHRAP human health risk assessment protocols
HI hazard index
HQ hazard quotient
ICR information collection request
IRIS Integrated Risk Information System
km kilometer
LAER lowest achievable emissions rate
lb/yr pounds per year
MACT maximum achievable control technology
MACT Code code within the NEI used to identify processes included in a source category
MDL method detection level
mg/acm milligrams per actual cubic meter
mg/dscm milligrams per dry standard cubic meter
mg/m^3 milligrams per cubic meter
MIR maximum individual risk
MRL minimum risk level
NAC/AEGL Committee National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances
NAICS North American Industry Classification System
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NEI National Emissions Inventory
NESHAP National Emissions Standards for Hazardous Air Pollutants
NOAEL no observed adverse effects level
NRC National Research Council
NTTAA National Technology Transfer and Advancement Act
O&M operation and maintenance
OAQPS Office of Air Quality Planning and Standards
OECA Office of Enforcement and Compliance Assurance
OHEA Office of Health and Environmental Assessment
OMB Office of Management and Budget
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PM particulate matter
ppmv parts per million by volume
RACT reasonably available control technology
RBLC RACT/BACT/LAER Clearinghouse
REL reference exposure level
RFA Regulatory Flexibility Act
RfC reference concentration
RfD reference dose
RIA regulatory impact analysis
RTR residual risk and technology review
SAB Science Advisory Board
SBA Small Business Administration
SCC source classification codes
SF3 2000 Census of Population and Housing Summary
SIP state implementation plan
SOP standard operating procedures
SSM startup, shutdown, and malfunction
TEF toxic equivalency factors
TEQ toxic equivalency quotient
THC total hydrocarbons
TOSHI target organ-specific hazard index
tpy tons per year
TRIM Total Risk Integrated Modeling System
TTN Technology Transfer Network
UBC used beverage containers
UF uncertainty factor
$\mu g/m^3$ microgram per cubic meter
UMRA Unfunded Mandates Reform Act
UPL upper predictive limit
URE unit risk estimate
VOC volatile organic compounds
VOHAP volatile organic hazardous air pollutants
WHO World Health Organization
WWW worldwide web

Organization of this Document. The information in this preamble is organized as follows:

I. General Information
A. What is the statutory authority for this action?
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II. Background
A. What is this source category and how did the MACT standard regulate its HAP emissions?
B. What data collection activities were conducted to support this action?
III. Analyses Performed
A. How did we estimate risks posed by the source category?
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IV. Analytical Results and Proposed Decisions
A. What are the results of the risk assessments?
B. What are our proposed decisions regarding risk acceptability and ample margin of safety?
C. What are the results and proposed decisions based on our technology review?
D. What other actions are we proposing?
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V. Summary of Cost, Environmental, and Economic Impacts
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E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. What is the statutory authority for this action?

Section 112 of the CAA establishes a two-stage regulatory process to address emissions of hazardous air pollutants (HAP) from stationary sources. In the first stage, after the EPA has identified categories of sources emitting one or more of the HAP listed in section 112(b) of the CAA, section 112(d) of the CAA calls for us to promulgate national emission standards for hazardous air pollutants (NESHAP) for those sources. ''Major sources'' are those that emit or have the potential to emit (PTE) 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. For major sources, these technology-based standards must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements and non-air quality health and environmental impacts) and are commonly referred to as maximum achievable control technology (MACT) standards.

MACT standards must require the maximum degree of emissions reduction achievable through the application of measures, processes, methods, systems or techniques including, but not limited to, measures which (1) reduce the volume of or eliminate emissions of pollutants through process changes, substitution of materials or other modifications, (2) enclose systems or processes to eliminate emissions, (3) capture or treat pollutants when released from a process, stack, storage or fugitive emissions point, (4) are design, equipment, work practice or operational standards (including requirements for operator training or certification) or (5) are a combination of the above. CAA section 112(d)(2)(A)–(E). The MACT standard may take the form of a design, equipment, work practice or operational standard where the EPA first determines that either (1) a pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutant or that any requirement for, or use of, such a conveyance would be inconsistent with law, or (2) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. CAA sections 112(h)(1)–(2).

The MACT ''floor'' is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT floors for existing sources can be less stringent than floors for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, we must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on consideration of the cost of achieving the emissions reductions and any non-air quality health and environmental impacts and energy requirements.

Under CAA section 112(d)(6), the EPA is then required to review these technology-based standards and to revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less frequently than every 8 years. In conducting this review, the EPA is not obliged to completely recalculate the prior MACT determination. *NRDC* v. *EPA,* 529 F.3d 1077, 1084 (DC Cir. 2008).

The second stage in standard-setting focuses on reducing any remaining ''residual'' risk according to CAA section 112(f). This provision requires, first, that the EPA prepare a *Report to Congress* discussing (among other things) methods of calculating risk posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks, and the EPA's recommendations as to legislation regarding such remaining risk. The EPA prepared and submitted this report (*Residual Risk Report to Congress,* EPA–453/R–99–001) in March 1999. Congress did not act in response to the report, thereby triggering the EPA's obligation under CAA section 112(f)(2) to analyze and address residual risk.

CAA section 112(f)(2) requires us to determine, for source categories subject to certain MACT standards, whether the emissions standards provide an ample margin of safety to protect public health. If the MACT standards for HAP ''classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million,'' the EPA must promulgate residual risk standards for the source category (or subcategory), as necessary, to provide an ample margin of safety to protect public health. In doing so, the EPA may adopt standards equal to existing MACT standards if the EPA determines that the existing standards are sufficiently protective. *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (DC Cir. 2008). (''If EPA determines that the existing technology-based standards provide an 'ample margin of safety,' then the agency is free to readopt those standards during the residual risk rulemaking.'') The EPA must also adopt more stringent standards, if necessary, to prevent an adverse environmental effect [1] but must consider cost, energy, safety and other relevant factors in doing so.

Section 112(f)(2) of the CAA expressly preserves our use of a two-step process for developing standards to address any residual risk and our interpretation of ''ample margin of safety'' developed in the *National Emission Standards for Hazardous Air Pollutants: Benzene Emissions From Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP)* (54 FR 38044, September 14, 1989). The first step in this process is the determination of acceptable risk. The second step provides for an ample margin of safety to protect public health, which is the level at which the standards are set (unless a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect).

The terms ''individual most exposed,'' ''acceptable level,'' and ''ample margin of safety'' are not specifically defined in the CAA. However, CAA section 112(f)(2)(B) preserves the EPA's interpretation set out in the Benzene NESHAP, and the United States Court of Appeals for the District of Columbia

[1] ''Adverse environmental effect'' is defined in CAA section 112(a)(7) as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas.

Circuit in *NRDC* v. *EPA* concluded that the EPA's interpretation of subsection 112(f)(2) is a reasonable one. See *NRDC* v. *EPA,* 529 F.3d 1077 1083 (DC Cir. 2008) (''[S]ubsection 112(f)(2)(B) expressly incorporates the EPA's interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the **Federal Register**''); see also *A Legislative History of the Clean Air Act Amendments of 1990,* volume 1, p. 877 (Senate debate on Conference Report). We notified Congress in the *Residual Risk Report to Congress* that we intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11).

In the Benzene NESHAP, 54 FR at 38044–38045, we stated as an overall objective:

> In protecting public health with an ample margin of safety under section 112, EPA strives to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1 in 1 million; and (2) limiting to no higher than approximately 1 in 10 thousand [i.e., 100 in 1 million] the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The agency stated that ''[t]he EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risk to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population.'' 54 FR at 38045. The agency went on to conclude that ''estimated incidence would be weighed along with other health risk information in judging acceptability.'' 54 FR at 38046. As explained more fully in our *Residual Risk Report to Congress,* the EPA does not define ''rigid line[s] of acceptability,'' but considers rather broad objectives to be weighed with a series of other health measures and factors (EPA–453/R–99–001, p. ES–11). The determination of what represents an ''acceptable'' risk is based on a judgment of ''what risks are acceptable in the world in which we live'' (*Residual Risk Report to Congress,* p. 178, quoting the *Vinyl Chloride* decision at 824 F.2d 1165) recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that ''EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately 1 in 10 thousand, that risk level is considered acceptable.'' 54 FR at 38045. We discussed the maximum individual lifetime cancer risk (or maximum individual risk (MIR)) as being ''the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.'' *Id.* We explained that this measure of risk ''is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years.'' *Id.* We acknowledge that maximum individual lifetime cancer risk ''does not necessarily reflect the true risk, but displays a conservative risk level which is an upper bound that is unlikely to be exceeded.'' *Id.*

Understanding that there are both benefits and limitations to using maximum individual lifetime cancer risk as a metric for determining acceptability, we acknowledged in the 1989 Benzene NESHAP that ''consideration of maximum individual risk * * * must take into account the strengths and weaknesses of this measure of risk.'' *Id.* Consequently, the presumptive risk level of 100 in 1 million (1 in 10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination.

The agency also explained in the 1989 Benzene NESHAP: ''[i]n establishing a presumption for MIR, rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50 km [kilometer] exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants.'' *Id.*

In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone. As explained in the Benzene NESHAP, ''[e]ven though the risks judged 'acceptable' by the EPA in the first step of the *Vinyl Chloride* inquiry are already low, the second step of the inquiry, determining an 'ample margin of safety,' again includes consideration of all of the health factors, and whether to reduce the risks even further * * *.'' Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties and any other relevant factors. Considering all of these factors, the Agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112.'' 54 FR at 38046.

As discussed above, we apply a two-step process for developing standards to address residual risk. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [2] of approximately 1 in 10 thousand [i.e., 100 in 1 million].'' 54 FR at 38045. In the second step of the process, the EPA sets the standard at a level that provides an ample margin of safety ''in consideration of all health information, including the number of persons at risk levels higher than approximately 1 in 1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.*

In past residual risk determinations, the EPA presented a number of human health risk metrics associated with emissions from the category under review, including: The MIR; the numbers of persons in various risk ranges; cancer incidence; the maximum noncancer hazard index (HI); and the maximum acute noncancer hazard. In estimating risks, the EPA considered source categories under review that are located near each other and that affect the same population. The EPA estimates risk based on the actual emissions from the source category under review as well as based on the emissions allowed pursuant to the source category MACT standard. The EPA also discussed and considered risk estimation uncertainties. The EPA is providing this same type of information in support of these actions.

The agency acknowledges that the Benzene NESHAP provides flexibility

[2] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual to be exposed to the maximum level of a pollutant for a lifetime.

regarding what factors the EPA might consider in making our determinations and how they might be weighed for each source category. In responding to comment on our policy under the Benzene NESHAP, the EPA explained that: ''[t]he policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of noncancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health.' '' 54 FR at 38057.

For example, the level of the MIR is only one factor to be weighed in determining acceptability of risks. The Benzene NESHAP explains ''an MIR of approximately 1 in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' 54 FR at 38045. Similarly, with regard to the ample margin of safety analysis, the Benzene NESHAP states that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' 54 FR at 38061.

B. Does this action apply to me?

The regulated industrial source category that is the subject of this proposal is listed in Table 2 of this preamble. Table 2 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding the entities likely to be affected by this proposed action. These standards, once finalized, will be directly applicable to affected sources. Federal, State, local, and tribal government entities are not affected by this proposed action. The EPA defined the Secondary Aluminum source category in 1992 as any establishment using clean charge, aluminum scrap, or dross from aluminum production, as the raw material and performing one or more of the following processes: Scrap shredding, scrap drying/delacquering/decoating, thermal chip drying, furnace operations (i.e., melting, holding, sweating, refining, fluxing, or alloying), recovery of aluminum from dross, in-line fluxing, or dross cooling.

TABLE 2—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NESHAP	NAICS code [1]	MACT code [2]
Secondary Aluminum Production	Secondary Aluminum Production	331314	0044
Primary aluminum production facilities		331312	
Aluminum sheet, plate, and foil manufacturing facilities		331315	
Aluminum extruded product manufacturing facilities		331316	
Other aluminum rolling and drawing facilities		331319	
Aluminum die casting facilities		331521	
Aluminum foundry facilities		331524	

[1] North American Industry Classification System.
[2] Maximum Achievable Control Technology.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web (WWW) through the EPA's Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* The TTN provides information and technology exchange in various areas of air pollution control including the residual risk and technology review (RTR) and includes source category descriptions and detailed emissions estimates and other data that were used as inputs to the risk assessments.

D. What should I consider as I prepare my comments for the EPA?

Submitting CBI. Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a CD ROM or disk that does not contain CBI, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID Number EPA–HQ–OAR–2010–0544.

II. Background

A. What is this source category and how did the MACT standard regulate its HAP emissions?

The Secondary Aluminum Production source category includes facilities that produce aluminum from scrap aluminum material and consists of the following operations: (1) Preprocessing of scrap aluminum, including size reduction and removal of oils, coatings, and other contaminants; (2) Furnace operations including melting, in-furnace refining, fluxing, and tapping; (3) Additional refining, by means of in-line fluxing; and (4) Cooling of dross. The following sections include descriptions of the affected sources in the secondary aluminum production source category, the origin of HAP emissions from these affected sources, and factors affecting the emissions.

Scrap aluminum is often preprocessed prior to melting. Preprocessing steps may include shredding to reduce the size of aluminum scrap; drying of oily scrap such as machine turnings and borings; and/or heating in a scrap dryer, delacquering kiln or decoating kiln to remove coatings or other contaminants that may be present on the scrap. Heating of high iron content scrap in a sweat furnace to reclaim the aluminum content is also a preprocessing operation.

Crushing, shredding and grinding operations are used to reduce the size of scrap aluminum. Particulate matter (PM) and HAP metals emissions are generated as dust from coatings and other contaminants contained in the scrap aluminum as they are processed.

A chip dryer is used to evaporate oil and/or moisture from uncoated aluminum chips and borings. Chip dryers typically operate at temperatures ranging between 150 °C to 400 °C (300 °F to 750 °F). An uncontrolled chip dryer may emit dioxins and furans (D/F) and total hydrocarbons (THC), of which some fraction is organic HAP.

Painted and/or coated materials are processed in a scrap dryer/delacquering kiln/decoating kiln to remove coatings and other contaminants that may be present in the scrap prior to melting. Coatings, oils, grease, and lubricants represent up to 20 percent of the total weight of these materials. Organic HAP, D/F, and inorganic HAPs including particulate metal HAP are emitted during the drying/delacquering/decoating process.

Used beverage containers (UBC) comprise a major portion of the recycled aluminum scrap used as feedstock by the industry. In scrap drying/delacquering/decoating operations, UBC and other post-consumer, coated products (e.g., aluminum siding) are heated to an exit temperature of up to 540 °C (1,000 °F) to volatilize and remove various organic contaminants such as paints, oils, lacquers, rubber, and plastic laminates prior to melting. An uncontrolled scrap dryer/delacquering kiln/decoating kiln emits PM (of which some fraction is particulate metal HAP), HCl, THC (of which some fraction is organic HAP), and D/F.

A sweat furnace is typically used to reclaim (or ''sweat'') the aluminum from scrap with high levels of iron. These furnaces operate in batch mode at a temperature that is high enough to melt the aluminum but not high enough to melt the iron. The aluminum melts and flows out of the furnace while the iron remains in the furnace in solid form. The molten aluminum can be cast into sows, ingots, or T-bars that are used as feedstock for aluminum melting and refining furnaces. Alternately, molten aluminum can be fed directly to a melting or refining furnace. An uncontrolled sweat furnace may emit D/F.

Process (i.e. melting, holding or refining) furnaces are refractory-lined metal vessels heated by an oil or gas burner to achieve a metal temperature of about 760 °C (1,400 °F). The melting process begins with the charging of scrap into the furnace. A gaseous (typically, chlorine) or salt flux may be added to remove impurities and reduce aluminum oxidation. Once molten, the chemistry of the bath is adjusted by adding selected scrap or alloying agents, such as silicon. Salt and other fluxes contain chloride and fluoride compounds that may be released when introduced to the bath. HCl may also be released when chlorine-containing contaminants (such as polyvinyl chloride coatings) present in some types of scrap are introduced to the bath. Argon and nitrogen fluxes are not reactive and do not produce HAPs. In a sidewell melting furnace, fluxing is performed in the sidewell and fluxing emissions from the sidewell are controlled. In this type of furnace, fluxing is not typically done in the hearth and hearth emissions (which include products of combustion from the oil and gas fired furnaces) are typically uncontrolled.

Process furnaces may process contaminated scrap which can result in HAP emissions. In addition, fluxing agents may contain HAPs, some fraction of which is emitted from the furnace. Process furnaces are significant sources of HAP emissions in the secondary aluminum industry. An uncontrolled melting furnace which processes contaminated scrap and uses reactive fluxes emits PM (of which some fraction is particulate metal HAP), HCl, and D/F.

Process furnaces are divided into group 1 and group 2 furnaces. Group 1 furnaces are unrestricted in the type of scrap they process and the type of fluxes they can use. Group 2 furnaces process only clean charge and conduct no reactive fluxing.

Dross-only furnaces are furnaces dedicated to reclamation of aluminum from drosses formed during the melting/holding/alloying operations carried out in other furnaces. Exposure to the atmosphere causes the molten aluminum to oxidize, and the flotation of the impurities to the surface along with any salt flux creates ''dross.'' Prior to tapping, the dross is periodically skimmed from the surface of the aluminum bath and cooled. Dross-only furnaces are typically rotary barrel furnaces (also known as salt furnaces). A dross-only furnace without controls emits PM (of which some fraction is particulate metal HAP).

Rotary dross coolers are devices used to cool dross in a rotating, water-cooled drum. A rotary dross cooler without controls emits PM (of which some fraction is particulate metal HAP).

In-line fluxers are devices used for aluminum refining, including degassing, outside the furnace. The process involves the injection of chlorine, argon, nitrogen or other gases to achieve the desired metal purity. Argon and nitrogen are not reactive and do not produce HAPs. In-line fluxers are found primarily at facilities that manufacture very high quality aluminum or in facilities with no other means of degassing. An in-line fluxer operating without emission controls emits HCl and PM.

The Secondary Aluminum Production NESHAP was promulgated on March 23, 2000, (65 FR 15690) and codified as 40 CFR part 63, subpart RRR. The rule was amended at 67 FR 79808, December 30, 2002; 69 FR 53980, September 3, 2004; 70 FR 57513, October 3, 2005 and 70 FR 75320, December 19, 2005. The existing subpart RRR NESHAP regulates HAP emissions from secondary aluminum production facilities that are major sources of HAP that operate aluminum scrap shredders, thermal chip dryers, scrap dryers/delacquering kilns/decoating kilns, group 1 furnaces, group 2 furnaces, sweat furnaces, dross only furnaces, rotary dross coolers, and secondary aluminum processing units (SAPUs). The SAPUs include group 1 furnaces and in-line fluxers. The subpart RRR NESHAP regulates HAP

emissions from secondary aluminum production facilities that are area sources of HAP only with respect to emissions of dioxins/furans (D/F) from thermal chip dryers, scrap dryers/delacquering kilns/decoating kilns, group 1 furnaces, sweat furnaces, and SAPUs.

The secondary aluminum industry consists of approximately 161 secondary aluminum production facilities, of which the EPA estimates 53 to be major sources of HAP. Several of the secondary aluminum facilities are co-located with primary aluminum, coil coating, and possibly other source category facilities. Natural gas boilers or process heaters may also be co-located at a few secondary aluminum facilities.

The HAP emitted by these facilities are metals, organic HAP, D/F, hydrogen chloride (HCl), and hydrogen fluoride (HF).

The standards promulgated in 2000 established emission limits for particulate matter (PM) as a surrogate for metal HAP, total hydrocarbons (THC) as a surrogate for organic HAP other than D/F, D/F expressed as toxicity equivalents, and HCl as a surrogate for acid gases including HF, chlorine and fluorine. HAP are emitted from the following affected sources: aluminum scrap shredders (subject to PM standards), thermal chip dryers (subject to standards for THC and D/F), scrap dryers/delacquering kilns/decoating kilns (subject to standards for PM, D/F, HCl and THC), sweat furnaces (subject to D/F standards), dross-only furnaces (subject to PM standards), rotary dross coolers (subject to PM standards), group 1 furnaces (subject to standards for PM, HCl and D/F), and in-line fluxers (subject to standards for PM and HCl). Group 2 furnaces and certain in-line fluxers are subject to work practice standards. Table 3 provides a summary of the current MACT emissions limits for existing and new sources under the 2000 NESAHP and the 2005 amendments.

Table 3. Emission Standards for New and Existing Affected Sources for the Secondary Aluminum Source Category

Affected source/ Emission unit	Pollutant	Limit	Units
All new and existing affected sources and emission units that are controlled with a PM add-on control device and that choose to monitor with a Continuous Opacity Monitor (COM) and all new and existing aluminum scrap shredders that choose to monitor with a COM or to monitor visible emissions	Opacity	10	Percent
New and existing aluminum scrap shredder	PM	0.01	gr/dscf
New and existing thermal chip dryer	THC D/F[a]	0.80 2.50	lb/ton of feed µg TEQ/Mg of feed
New and existing scrap dryer/delacquering kiln/decoating kiln	PM HCl THC D/F[a]	0.08 0.80 0.06 0.25	lb/ton of feed lb/ton of feed lb/ton of feed µg TEQ/Mg of feed
Or			
Alternative limits if afterburner has a design residence time of at least 1 second and operates at a temperature of at least 1400 °F	PM HCl THC D/F[a]	0.30 1.50 0.20 5.0	lb/ton of feed lb/ton of feed lb/ton of feed µg TEQ/Mg of feed
New and existing sweat furnace	D/F[a]	0.80	ng TEQ/dscm @ 11% O_2[b]
New and existing dross-only furnace	PM	0.30	lb/ton of feed
New and existing in-line fluxer[c]	HCl PM	0.04 0.01	lb/ton of feed lb/ton of feed
New and existing in-line fluxer with no reactive fluxing		No limit	Work practice: no reactive fluxing
New and existing rotary dross cooler	PM	0.04	gr/dscf
New and existing clean furnace (Group 2)		No limit	Work practices: clean charge only and no reactive fluxing

New and existing group 1 melting/holding furnace (processing only clean charge)[c]	PM	0.80	lb/ton of feed
	HCl	0.40 or 10	lb/ton of feed percent of the HCl upstream of an add-on control device
New and existing group 1 furnace[c]	PM	0.40	lb/ton of feed
	HCl	0.40 or 10	lb/ton of feed percent of the HCl upstream of an add-on control device
	D/F[a]	15.0	µg TEQ/Mg of feed
New and existing group 1 furnace[c] with clean charge only	PM	0.40	lb/ton of feed
	HCl	0.40 or 10	lb/ton of feed percent of the HCl upstream of an add-on control device
	D/F[a]	No Limit	Clean charge only
New and existing secondary aluminum processing unit[a,d] (consists of all existing group 1 furnaces and existing in-line flux boxes at the facility, or all simultaneously constructed new group 1 furnaces and new in-line fluxers)	PM[e]	$L_{t_{PM}} = \frac{\sum_{i=1}^{n} \left(L_{i_{PM}} \times T_i\right)}{\sum_{i=1}^{n} \left(T_i\right)}$	
	HCl[f]	$L_{t_{HCl}} = \frac{\sum_{i=1}^{n} \left(L_{i_{HCl}} \times T_i\right)}{\sum_{i=1}^{n} \left(T_i\right)}$	
	D/F[g]	$L_{t_{D/F}} = \frac{\sum_{i=1}^{n} \left(L_{i_{D/F}} \times T_i\right)}{\sum_{i=1}^{n} \left(T_i\right)}$	

[a] D/F limit applies to a unit at a major or area source.

[b] Sweat furnaces equipped with afterburners meeting the specifications of §63.1505(f)(1) are not required to conduct a performance test.

[c] These limits are also used to calculate the limits applicable to secondary aluminum processing units.

[d] Equation definitions: L_{iPM} = the PM emission limit for individual emission unit i in the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; T_i = the feed rate for individual emission unit i in the secondary aluminum processing unit; L_{tPM} = the overall PM emission limit for the secondary aluminum processing unit [kg/Mg (lb-ton) of feed]; L_{iHCl} = the HCl emission limit for individual emission unit i in the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; L_{tHCl} = the overall HCl emission limit for the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; $L_{iD/F}$ = the D/F emission limit for individual emission unit i [µg TEQ/Mg (gr TEQ/ton) of feed]; $L_{tD/F}$ = the overall D/F emission limit for the secondary aluminum processing unit [µg TEQ/Mg (gr TEQ/ton) of feed]; n = the number of units in the secondary aluminum processing unit.

[e] In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the PM limit.

[f] In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the HCl limit.

[g] Clean charge furnaces cannot be included in this calculation since they are not subject to the D/F limit.

Control devices currently in use to reduce emissions from affected sources subject to the subpart RRR NESHAP include fabric filters for control of PM from aluminum scrap shredders; afterburners for control of THC and D/F from thermal chip dryers; afterburners plus lime-injected fabric filters for control of PM, HCl, THC, and D/F from scrap dryers/delacquering kilns/decoating kilns; afterburners for control of D/F from sweat furnaces; fabric filters for control of PM from dross-only furnaces and rotary dross coolers; lime-injected fabric filters for control of PM and HCl from in-line fluxers; and lime-injected fabric filters for control of PM, HCl and D/F from group 1 furnaces. All affected sources with add-on controls are also subject to design requirements and operating limits to limit fugitive emissions.

Compliance with the emission limits in the current rule is demonstrated by an initial performance test for each affected source. Repeat performance tests are required every 5 years. Area sources are only subject to one-time performance tests for D/F. After the compliance tests, facilities are required to monitor various control parameters or conduct other types of monitoring to ensure continuous compliance with the MACT standards. Owners or operators of sweat furnaces that operate an afterburner that meets temperature and residence time requirements are not required to conduct performance tests.

B. What data collection activities were conducted to support this action?

For the Secondary Aluminum Production source category, we compiled a dataset from two primary sources: (1) An all-company information collection request (ICR) sent to companies in February 2011, and (2) a nine-company testing ICR, sent in May 2010.

Responses to the all-company ICR contained data on stack release characteristics such as height, volumetric flow rate, temperature, and location (latitude/longitude) coordinates. Responses to the all-company ICR also contained data on maximum production capacity and actual production in tpy and testing results for pollutants regulated under subpart RRR.

As mentioned above, the pollutants regulated under subpart RRR are PM, HCl, THC and D/F. PM is a surrogate for metal HAP and THC is a surrogate for organic HAP. Since subpart RRR compliance testing is performed for the surrogates PM and THC, there are limited test data available for speciated metal HAP and organic HAP emissions. Therefore, responses to the nine-company testing ICR were used to extrapolate the PM and THC testing results reported in the all-company ICR to specific metal and organic HAP emissions. In the nine-company testing ICR, companies were asked to provide speciated metal HAP concentrations (e.g. arsenic, cadmium, cobalt, lead, nickel, etc.) in the particulate collected by fabric filters. For more information on the selection of these facilities, see the Draft *Technical Support Document for the Secondary Aluminum Production Source Category* located in the docket. These data were then used to estimate speciated metal HAP emissions, based on the PM emissions reported in the all-company ICR. For example, if a response to the all-company ICR indicated a particular piece of equipment at a specific secondary aluminum facility had 10 tpy of PM emissions, and based on an analysis of the results of the nine-company testing ICR the EPA determined that the cobalt concentration in the fabric filter particulate matter catch was 20 parts-per-million (ppm), the estimated emissions of cobalt would be 0.0002 tpy. In the nine-company testing ICR, companies were also required to conduct speciated organic HAP and THC emission testing for the two types of equipment that have THC limits under subpart RRR, scrap dryer/delacquering/decoating kilns and thermal chip dryers. The speciated organic HAPs for which data were provided included volatile HAPs (e.g., benzene, chloroprene, toluene, etc.) and semi-volatile HAPs (anthracene, chrysene, naphthalene, etc.).

Using the reported amount of charge or production for the most recent year and the reported test results (in lb per ton of charge) from the all-company ICR, emissions were calculated. Where test results from the all-company ICR responses were expressed in terms of PM and THC surrogates, emissions were

converted to speciated metal and organic HAP emissions using the nine-company test results, as described above. Allowable and actual emissions were calculated for each piece of equipment. The derivation of allowable emissions estimates is described in Section III of this preamble.

The emissions data, calculations and risk assessment inputs for the Secondary Aluminum Production source category are described further in the memorandum *Draft Development of the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category* which is available in the docket for this proposed rulemaking.

III. Analyses Performed

In this section we describe the analyses performed to support the proposed decisions for the RTR for this source category.

A. How did we estimate risks posed by the source category?

The EPA conducted risk assessments that provide estimates of the MIR posed by the HAP emissions for each source in the category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects. The assessments also provided estimates of the distribution of cancer risks within the exposed populations, cancer incidence and an evaluation of the potential for adverse environmental effects for the source category. The risk assessments consisted of seven primary steps, as discussed below. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Draft Residual Risk Assessment for the Secondary Aluminum Production Source Category*. The methods used to assess risks (as described in the six primary steps below) are consistent with those peer-reviewed by a panel of the EPA's Science Advisory Board (SAB) in 2009 and described in their peer review report issued in 2010;[3] they are also consistent with the key recommendations contained in that report.

[3] U.S. EPA SAB. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* May 2010.

1. Establishing the Nature and Magnitude of Actual Emissions and Identifying the Emissions Release Characteristics

As discussed in Section II.B. of this preamble, we used a dataset based on the estimated actual and allowable emissions as the basis for the risk assessment. This dataset was based on responses to an Information Collection Request (ICR) sent to approximately 425 facilities potentially subject to the subpart RRR NESHAP. Approximately 161 sources subject to the NESHAP responded, approximately 166 facilities confirmed that they were not subject to the NESHAP and no responses were received to approximately 51 ICRs. In addition to these responses, as described in section II.B, an earlier ICR was sent to 9 companies requiring them to provide speciated metal and organic HAP concentrations for purposes of calculating speciated HAP emissions based on reported emissions of the surrogate pollutants, THC and PM. As part of our quality assurance (QA) process, we checked the coordinates of every facility in the dataset using tools such as Google Earth. We corrected coordinates that were found to be incorrect. We also performed QA of the emissions data and release characteristics to identify outliers and then confirmed or corrected the data.

2. Establishing the Relationship Between Actual Emissions and MACT-Allowable Emissions Levels

The available emissions data in the MACT dataset include estimates of the mass of HAP actually emitted during the specified annual time period. These ''actual'' emission levels are often lower than the emission levels that a facility might be allowed to emit and still comply with the MACT standards. The emissions level allowed to be emitted by the MACT standards is referred to as the ''MACT-allowable'' emissions level. This represents the highest emissions level that could be emitted by the facility without violating the MACT standards.

We discussed the use of both MACT-allowable and actual emissions in the final Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP residual risk rules (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those previous actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable since these risks reflect the maximum level sources could emit and still comply with national emission standards. But we also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP. (54 FR 38044, September 14, 1989.)

As discussed above, allowable and actual emissions were calculated for each piece of equipment. The estimates of actual emissions are described in Section II of this preamble.

Allowable emissions for this source category were calculated by assuming emissions were at the maximum level allowed by the MACT standard (i.e., we assume emissions would be emitted at a level equal to the MACT emission limit). Nevertheless, we note that these are conservative estimates of allowable emissions. It is unlikely that emissions would be at the maximum limit at all times because sources cannot emit HAP at a level that is exactly equal to the limit at all times and remain in compliance with the standard due to day-to-day variability in process operations and emissions. On average, facilities must emit at some level below the MACT limit to ensure that they are always in compliance.

The derivation of actual and allowable emissions estimates are discussed in more detail in the document *Draft Development of the RTR Emissions Dataset for the Secondary Aluminum Production Source Category* which is available in the docket for this proposed rulemaking.

3. Conducting Dispersion Modeling, Determining Inhalation Exposures and Estimating Individual and Population Inhalation Risks

Both long-term and short-term inhalation exposure concentrations and health risks from each facility in the source category were estimated using the Human Exposure Model (HEM) (Community and Sector HEM–3 version 1.1.0). The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 km of the modeled sources and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The dispersion model used by HEM–3 is AERMOD, which is one of the EPA's preferred models for assessing pollutant concentrations from industrial

facilities.[4] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (1991) of hourly surface and upper air observations for more than 158 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[5] internal point locations and populations provides the basis of human exposure calculations (Census, 2000). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by the EPA for HAP and other toxic air pollutants. These values are available at *http://www.epa.gov/ttn/atw/toxsource/summary.html* and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentration of each of the HAP emitted by each source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. We calculated the MIR for each facility as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, and 52 weeks per year for a 70-year period) exposure to the maximum concentration at the centroid of an inhabited census block. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter) by its unit risk estimate (URE), which is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use URE values from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without the EPA IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) URE values, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with the EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate.

Incremental individual lifetime cancer risks associated with emissions from the source category were estimated as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans and suggestive evidence of carcinogenic potential[6]) emitted by the modeled source. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of any source were also estimated for the source category as part of these assessments by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

To assess risk of noncancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or target organ-specific HI, TOSHI). The HQ for chronic exposures is the estimated chronic exposure divided by the chronic reference level, which is either the EPA reference concentration (RfC), defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime,'' or, in cases where an RfC from the EPA's IRIS database is not available, a value from the following prioritized sources: (1) The agency for Toxic Substances and Disease Registry Minimum Risk Level, which is defined as ''an estimate of daily human exposure to a substance that is likely to be without an appreciable risk of adverse effects (other than cancer) over a specified duration of exposure''; (2) the CalEPA Chronic Reference Exposure Level (REL), which is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration;'' or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA, in place of or in concert with other values.

Screening estimates of acute exposures and risks were also evaluated for each of the HAP at the point of highest off-site exposure for each facility (i.e., not just the census block centroids), assuming that a person is located at this spot at a time when both the peak (hourly) emission rates from each emission point at the facility and worst-case dispersion conditions occur. The acute HQ is the estimated acute exposure divided by the acute dose-response value. In each case, acute HQ values were calculated using best available, short-term dose-response values. These acute dose-response values, which are described below, include the acute REL, acute exposure guideline levels (AEGL) and emergency response planning guidelines (ERPG) for 1-hour exposure durations. As discussed below, we used conservative assumptions for emission rates, meteorology and exposure location for our acute analysis.

As described in the CalEPA's *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* an acute REL value (*http://www.oehha.ca.gov/air/pdf/acuterel.pdf*) is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' Acute REL values are based on the most sensitive, relevant, adverse health effect reported in the medical and toxicological literature. Acute REL values are designed to protect the most sensitive sub-populations (e.g., asthmatics) by the inclusion of margins of safety. Since margins of safety are incorporated to address data gaps and uncertainties, exceeding the acute REL does not automatically indicate an adverse health impact.

[4] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[5] A census block is generally the smallest geographic area for which census statistics are tabulated.

[6] These classifications also coincide with the terms ''known carcinogen, probable carcinogen and possible carcinogen,'' respectively, which are the terms advocated in the EPA's previous *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA's SAB in their 2002 peer review of EPA's NATA entitled, *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

AEGL values were derived in response to recommendations from the National Research Council (NRC). As described in *Standing Operating Procedures (SOP) of the National Advisory Committee on Acute Exposure Guideline Levels for Hazardous Substances* (*http://www.epa.gov/opptintr/aegl/pubs/sop.pdf*),[7] ''the NRC's previous name for acute exposure levels—community emergency exposure levels—was replaced by the term AEGL to reflect the broad application of these values to planning, response, and prevention in the community, the workplace, transportation, the military, and the remediation of Superfund sites.'' This document also states that AEGL values ''represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to eight hours.'' The document lays out the purpose and objectives of AEGL by stating (page 21) that ''the primary purpose of the AEGL program and the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances is to develop guideline levels for once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' In detailing the intended application of AEGL values, the document states (page 31) that ''[i]t is anticipated that the AEGL values will be used for regulatory and nonregulatory purposes by U.S. Federal and state agencies and possibly the international community in conjunction with chemical emergency response, planning, and prevention programs. More specifically, the AEGL values will be used for conducting various risk assessments to aid in the development of emergency preparedness and prevention plans, as well as real-time emergency response actions, for accidental chemical releases at fixed facilities and from transport carriers.''

The AEGL–1 value is then specifically defined as ''the airborne concentration of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes (page 3) that, ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' Similarly, the document defines AEGL–2 values as ''the airborne concentration (expressed as ppm or mg/m^3) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.''

ERPG values are derived for use in emergency response, as described in the American Industrial Hygiene Association's document entitled, *Emergency Response Planning Guidelines (ERPG) Procedures and Responsibilities* (*http://www.aiha.org/1documents/committees/ERPSOPs2006.pdf*) which states that, ''Emergency Response Planning Guidelines were developed for emergency planning and are intended as health based guideline concentrations for single exposures to chemicals.'' [8] The ERPG–1 value is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' Similarly, the ERPG–2 value is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.''

As can be seen from the definitions above, the AEGL and ERPG values include the similarly defined severity levels 1 and 2. For many chemicals, a severity level 1 value AEGL or ERPG has not been developed; in these instances, higher severity level AEGL–2 or ERPG–2 values are compared to our modeled exposure levels to assess potential for acute concerns.

Acute REL values for 1-hour exposure durations are typically lower than their corresponding AEGL–1 and ERPG–1 values. Even though their definitions are slightly different, AEGL–1 values are often similar to the corresponding ERPG–1 values, and AEGL–2 values are often similar to ERPG–2 values. Maximum HQ values from our acute screening risk assessments typically result when basing them on the acute REL value for a particular pollutant. In cases where our maximum acute HQ value exceeds 1, we also report the HQ value based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1 value).

To develop screening estimates of acute exposures, we developed estimates of maximum hourly emission rates by multiplying the average actual annual hourly emission rates by a factor to cover routinely variable emissions. We chose the factor to use based on process knowledge and engineering judgment and with awareness of a Texas study of short-term emissions variability, which showed that most peak emissions events, in a heavily-industrialized 4-county area (Harris, Galveston, Chambers, and Brazoria Counties, Texas) were less than twice the annual average hourly emissions rate. The highest peak emissions event was 74 times the annual average hourly emissions rate, and the 99th percentile ratio of peak hourly emissions rate to the annual average hourly emissions rate was 9.[9] This analysis is provided in Appendix 4 of the *Draft Residual Risk Assessment for Secondary Aluminum Production* which is available in the docket for this action. Considering this analysis, unless specific process knowledge or data are available to provide an alternate value, to account for more than 99 percent of the peak hourly emissions, we generally apply the assumption to most source categories that the maximum one-hour emissions rate from any source other than those resulting in fugitive dust emissions are 10 times the average annual hourly emissions rate for that source. We use a factor other than 10 in some cases if we have information that indicates that a different factor is appropriate for a particular source category. For this source category however, there was no such information available and the default factor of 10 was used in the acute screening process.

When worst-case HQ values from the initial acute screen step were less than 1, acute impacts were deemed negligible and no further analysis was performed. In the cases where any worst-case acute HQ from the screening step was greater than 1, additional site-specific data were considered to develop a more refined estimate of the potential for acute impacts of concern. However, for this source category no acute values were greater than 1 and therefore, further refinement was not performed.

Ideally, we would prefer to have continuous measurements over time to

[7] NAS, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2.

[8] *ERP Committee Procedures and Responsibilities.* November 1, 2006. American Industrial Hygiene Association.

[9] See *http://www.tceq.state.tx.us/compliance/field_ops/eer/index.html* or docket to access the source of these data.

see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emission rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this screening analysis. However, we recognize that having this level of data is rare, hence our use of the multiplier approach.

To better characterize the potential health risks associated with estimated acute exposures to HAP, and in response to a key recommendation from the SAB's peer review of the EPA's RTR risk assessment methodologies,[10] we generally examine a wider range of available acute health metrics than we do for our chronic risk assessments. This is in response to the SAB's acknowledgement that there are generally more data gaps and inconsistencies in acute reference values than there are in chronic reference values.

Comparisons of the estimated maximum off-site 1-hour exposure levels are not typically made to occupational levels for the purpose of characterizing public health risks in RTR assessments. This is because they are developed for working age adults and are not generally considered protective for the general public. We note that occupational ceiling values are, for most chemicals, set at levels higher than a 1-hour AEGL–1.

4. Conducting Multipathway Exposure and Risk Screening

The potential for significant human health risks due to exposures via routes other than inhalation (i.e., multipathway exposures) and the potential for adverse environmental impacts were evaluated in a two-step process. In the first step, we determined whether any facilities emitted any HAP known to be persistent and bio-accumulative in the environment (PB–HAP). There are 14 PB–HAP compounds or compound classes identified for this screening in EPA's *Air Toxics Risk Assessment Library* (available at *http://www.epa.gov/ttn/fera/risk_atra_vol1.html*). They are cadmium compounds, chlordane, chlorinated dibenzodioxins and furans, dichlorodiphenyldichloroethylene, heptachlor, hexachlorobenzene, hexachlorocyclohexane, lead compounds, mercury compounds, methoxychlor, polychlorinated biphenyls, POM, toxaphene, and trifluralin. Since three of these PB–HAP (cadmium compounds, POM and chlorinated D/F) are emitted by at least one facility in this source category, we proceeded to the second step of the evaluation. In this step, we determined whether the facility-specific emission rates of each of the emitted PB–HAP were large enough to create the potential for significant non-inhalation human or environmental risks under, worst-case conditions. To facilitate this step, we developed emission rate thresholds for each PB–HAP using a hypothetical worst-case screening exposure scenario developed for use in conjunction with the EPA's TRIM.FaTE model. The hypothetical screening scenario was subjected to a sensitivity analysis to ensure that its key design parameters were established such that environmental media concentrations were not underestimated (i.e., to minimize the occurrence of false negatives or results that suggest that risks might be acceptable when, in fact, actual risks are high) and to also minimize the occurrence of false positives for human health endpoints. We call this application of the TRIM.FaTE model TRIM–Screen. The facility-specific emission rates of each of the PB–HAP were compared to the TRIM–Screen emission threshold values for each of the PB–HAP identified in the source category datasets to assess the potential for significant human health risks or environmental risks via non-inhalation pathways. See Section IV for results of this screening analysis.

5. Conducting Other Risk-Related Analyses: Facilitywide Assessments

To put the source category risks in context, for our residual risk reviews, we also typically examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In these facilitywide assessments we examine the HAP emissions not only from the source category of interest, but also emissions of HAP from all other emissions sources at the facility. For the secondary aluminum source category, a facilitywide assessment was performed for all major sources.

A facilitywide assessment was not conducted for area sources. By definition, no major sources of HAP (e.g., primary aluminum production or coil coating operations) are collocated with any of the secondary aluminum area sources. Further, at many area sources, equipment subject to the Secondary Aluminum NESHAP is the only HAP-emitting equipment. Therefore, the most significant HAP emissions from area sources were already being considered under the area source risk assessment, and low levels of HAP emissions from equipment not subject to the Secondary Aluminum NESHAP at these facilities would not contribute appreciably to the risk profile. The results of the facilitywide assessment for major sources are provided in Section IV.

6. Considering Uncertainties in Risk Assessment

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for the Secondary Aluminum source category addressed in this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health-protective. A brief discussion of the uncertainties in the emissions datasets, dispersion modeling, inhalation exposure estimates and dose-response relationships follows below. A more thorough discussion of these uncertainties is included in the risk assessment documentation (referenced earlier) available in the docket for this action.

a. Uncertainties in the Emissions Datasets

Although the development of the MACT dataset involved QA/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in estimating emissions values and other factors. The emission estimates considered in this analysis were generally developed from one-time or periodic performance tests that do not reflect short-term fluctuations during the course of a year or variations from year to year.

The estimates of peak hourly emission rates for the acute effects screening assessment were based on a default factor of 10 applied to the average annual hourly emission rate, which is intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

While the analysis employed the EPA's recommended regulatory dispersion model, AERMOD, we recognize that there is uncertainty in ambient concentration estimates

[10] The SAB peer review of RTR Risk Assessment Methodologies is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA–SAB–10–007-unsigned.pdf.*

associated with any model, including AERMOD. In circumstances where we had to choose between various model options, where possible, model options (e.g., rural/urban, plume depletion, chemistry) were selected to provide an overestimate of ambient air concentrations of the HAP rather than underestimates. However, because of practicality and data limitation reasons, some factors (e.g., meteorology, building downwash) have the potential in some situations to overestimate or underestimate ambient impacts. For example, meteorological data were taken from a single year (1991), and facility locations can be a significant distance from the sites where these data were taken. Despite these uncertainties, we believe that at off-site locations and census block centroids, the approach considered in the dispersion modeling analysis should generally yield overestimates of ambient HAP concentrations.

c. Uncertainties in Inhalation Exposure

The effects of human mobility on exposures were not included in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling domain were not considered.[11] The assumption of not considering short or long-term population mobility does not bias the estimate of the theoretical MIR, nor does it affect the estimate of cancer incidence since the total population number remains the same. It does, however, affect the shape of the distribution of individual risks across the affected population, shifting it toward higher estimated individual risks at the upper end and reducing the number of people estimated to be at lower risks, thereby increasing the estimated number of people at specific risk levels.

In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live further from the facility, and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact, but it is an unbiased estimate of average risk and incidence.

The assessments evaluate the cancer inhalation risks associated with continuous pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emissions sources at facilities actually operate (i.e., more or less than 70 years) and the domestic growth or decline of the modeled industry (i.e., the increase or decrease in the number or size of United States facilities) will influence the risks posed by a given source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in rare cases, where a facility maintains or increases its emission levels beyond 70 years, residents live beyond 70 years at the same location, and the residents spend most of their days at that location, then the risks could potentially be underestimated. Annual cancer incidence estimates from exposures to emissions from these sources would not be affected by uncertainty in the length of time emissions sources operate.

The exposure estimates used in these analyses assume chronic exposures to ambient levels of pollutants. Because most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAP, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, these levels are typically lower. This factor has the potential to result in an overstatement of 25 to 30 percent of exposures.[12]

In addition to the uncertainties highlighted above, there are several other factors specific to the acute exposure assessment. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and human activity patterns. In this assessment, we assume that individuals remain for 1 hour at the point of maximum ambient concentration as determined by the co-occurrence of peak emissions and worst-case meteorological conditions. These assumptions would tend to overestimate actual exposures since it is unlikely that a person would be located at the point of maximum exposure during the time of worst-case impact.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in the *EPA 2005 Cancer Guidelines;* namely, that ''the primary goal of the EPA actions is protection of human health; accordingly, as an agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective.'' (*EPA 2005 Cancer Guidelines,* pages 1–7.) This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variability in dose-response relationships is given in the residual risk documentation, which is available in the docket for this action.

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit).[13] In some circumstances, the true risk could be as low as zero; however, in other circumstances, the risk could also be greater.[14] When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health-protection, the EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have limitations for other uses (e.g., priority-setting or expected benefits analysis).

Chronic noncancer reference (RfC and reference dose (RfD)) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an

[11] Short-term mobility is movement from one micro-environment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

[12] U.S. EPA. *National-Scale Air Toxics Assessment for 1996.* (EPA 453/R–01–003; January 2001; page 85.)

[13] IRIS glossary (*http://www.epa.gov/NCEA/iris/help_gloss.htm*).

[14] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible and which is based on maximum likelihood estimates.

estimate (with uncertainty spanning perhaps an order of magnitude) of daily oral exposure (RfD) or of a continuous inhalation exposure (RfC) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach (U.S. EPA, 1993, 1994) which includes consideration of both uncertainty and variability. When there are gaps in the available information, UF are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UF are commonly default values,[15] e.g., factors of 10 or 3, used in the absence of compound-specific data; where data are available, UF may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UF are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (i.e., less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated. While collectively termed ''uncertainty factor,'' these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UF are intended to account for: (1) Variation in susceptibility among the members of the human population (i.e., inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (i.e., interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (i.e., extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies. Many of the UF used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but more often they use individual UF values that may be less than 10. UF are applied based on chemical-specific or health effect-specific information (e.g., simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (see the following paragraph). The UF applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (e.g., 4 hours) to derive an acute reference value at another exposure duration (e.g., 1 hour).

Not all acute reference values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Although every effort is made to identify peer-reviewed reference values for cancer and noncancer effects for all pollutants emitted by the sources included in this assessment, some HAP continue to have no reference values for cancer or chronic noncancer or acute effects (see table 3.1–1 of the risk assessment document available in the docket for this proposed rulemaking). Since exposures to these pollutants cannot be included in a quantitative risk estimate, an understatement of risk for these pollutants at environmental exposure levels is possible. For a group of compounds that are either unspeciated or do not have reference values for every individual compound (e.g., POM), we conservatively use the most protective reference value to estimate risk from individual compounds in the group of compounds.

Additionally, chronic reference values for several of the compounds included in this assessment are currently under the EPA IRIS review, and revised assessments may determine that these pollutants are more or less potent than the current value. We may re-evaluate residual risks for the final rulemaking if these reviews are completed prior to our taking final action for this source category and a dose-response metric changes enough to indicate that the risk assessment supporting this notice may significantly understate human health risk. More information regarding the dose-response values used in this assessment is provided in the Draft Residual Risk Assessment for the Secondary Aluminum Production Source Category, which is available in the docket.

e. Uncertainties in the Multipathway and Environmental Effects Screening Assessment

We generally assume that when exposure levels are not anticipated to adversely affect human health, they also are not anticipated to adversely affect the environment. For each source category, we generally rely on the site-specific levels of PB–HAP emissions to determine whether a full assessment of the multipathway and environmental effects is necessary. Our screening methods use worst-case scenarios to determine whether multipathway impacts might be important. The results of such a process are biased high for the purpose of screening out potential impacts. Thus, when individual pollutants or facilities screen out, we are confident that the potential for multipathway impacts is negligible. On the other hand, when individual pollutants or facilities do not screen out, it does not mean that multipollutant impacts are significant, only that we cannot rule out that possibility. For this source category, we only performed a worst-case multipathway screening assessment for PB–HAP. Thus, it is important to note that potential PB–HAP multipathway risks are biased high.

B. How did we consider the risk results in making decisions for this proposal?

In evaluating and developing standards under section 112(f)(2), as discussed in Section I.A of this preamble, we apply a two-step process to address residual risk. In the first step, the EPA determines whether risks are acceptable. This determination

[15] According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) ''[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain.'' The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process,* defined default option as ''the option chosen on the basis of risk assessment policy that appears to be the best choice in the absence of data to the contrary'' (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the Agency; rather, the Agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with EPA's goal of protecting public health and the environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See EPA, 2004, *An Examination of EPA Risk Assessment Principles and Practices,* EPA/100/B–04/001 available at: *http://www.epa.gov/osa/pdfs/ratf-final.pdf.*

''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [16] of approximately 1 in 10 thousand [i.e., 100 in 1 million]'' (54 FR at 38045). In the second step of the process, the EPA sets the standard at a level that provides an ample margin of safety ''in consideration of all health information, including the number of persons at risk levels higher than approximately one in one million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision'' *Id.*

In past residual risk actions, the EPA has presented and considered a number of human health risk metrics associated with emissions from the category under review, including: the MIR; the numbers of persons in various risk ranges; cancer incidence; the maximum non-cancer hazard index (HI); and the maximum acute non-cancer hazard (72 FR 25138, May 3, 2007; 71 FR 42724, July 27, 2006). In more recent proposals the EPA also presented and considered additional measures of health information, such as estimates of the risks associated with the maximum level of emissions which might be allowed by the current MACT standards (see, e.g., 76 FR 72770, November 25, 2011, 76 FR 72508, November 23, 2011, 75 FR 65068, October 21, 2010, and 75 FR 80220, December 21, 2010). The EPA also discussed and considered risk estimation uncertainties. The EPA is providing this same type of information in support of the proposed determinations described in this **Federal Register** notice.

The agency is considering all available health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). Specifically, as explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and thus ''[t]he Administrator believes that the acceptability of risk under [previous] section 112 is best judged on the basis of a broad set of health risk measures and information'' (54 FR at 38046). Similarly, with regard to making the ample margin of safety determination, as stated in the Benzene NESHAP ''[in the ample margin decision, the agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The agency acknowledges that the Benzene NESHAP provides flexibility regarding what factors the EPA might consider in making determinations and how these factors might be weighed for each source category. In responding to comment on our policy under the Benzene NESHAP, the EPA explained that: ''The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and, thereby, implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health' '' (54 FR at 38057).

For example, the level of the MIR is only one factor to be weighed in determining acceptability of risks. The Benzene NESHAP explained that ''an MIR of approximately 1-in-10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors'' (54 FR at 38045). Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''the EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category'' (54 FR at 38061).

The EPA wishes to point out that certain health information has not been considered to date in making residual risk determinations. In assessing risks to populations in the vicinity of the facilities in each category, we present estimates of risk associated with HAP emissions from the source category alone (source category risk estimates) and HAP emissions from the entire facility at which the covered source category is located (facilitywide risk estimates). We do not attempt to characterize the risks associated with all HAP emissions impacting the populations living near the sources in these categories. That is, at this time, we do not attempt to quantify those HAP risks that may be associated with emissions from other facilities that do not include the source category in question, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in these categories.

The agency understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. This is particularly important when assessing non-cancer risks, where pollutant-specific exposure health reference levels (*e.g.,* Reference Concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the agency recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse non-cancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in increased risk of adverse non-cancer health effects. In May 2010, the Science Advisory Board (SAB) advised us ''* * * that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.'' [17]

[16] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual exposed to the maximum level of a pollutant for a lifetime.

[17] The EPA's responses to this and all other key recommendations of the SAB's advisory on RTR risk assessment methodologies (which is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/*

While we are interested in placing source category and facilitywide HAP risks in the context of total HAP risks from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. At this point, we believe that such estimates of total HAP risks will have significantly greater associated uncertainties than for the source category or facilitywide estimates hence compounding the uncertainty in any such comparison. This is because we have not conducted a detailed technical review of HAP emissions data for source categories and facilities that have not previously undergone an RTR review or are not currently undergoing such review. We are requesting comment on whether and how best to estimate and evaluate total HAP exposure in our assessments and, in particular, on whether and how it might be appropriate to use information from EPA's National Air Toxics Assessment (NATA) to support such estimates. We are also seeking comment on how best to consider various types and scales of risk estimates when making our acceptability and ample margin of safety determinations under CAA section 112(f).

C. How did we perform the technology review?

Our technology review focused on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the Secondary Aluminum Production NESHAP was promulgated. In cases where the technology review identified such developments, we conducted an analysis of the technical feasibility of applying these developments, along with the estimated impacts (costs, emissions reductions, risk reductions, etc.) of applying these developments. We then made decisions on whether it is appropriate or necessary to propose amendments to the 2000 NESHAP to require any of the identified developments.

Based on our analyses of the data and information collected from industry and the trade organization representing facilities subject to the NESHAP, our general understanding of the industry, and other available information in the literature on potential controls for this industry, we identified several new developments in practices, processes, and control technologies. For the purpose of this exercise, we considered any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the 2000 Secondary Aluminum Production NESHAP.
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the 2000 Secondary Aluminum Production NESHAP) that could result in significant additional emissions reduction.
- Any work practice or operational procedure that was not identified or considered during development of the 2000 Secondary Aluminum Production NESHAP.
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the 2000 Secondary Aluminum Production NESHAP.

In addition to reviewing the practices, processes, or control technologies that were not considered at the time we developed the 2000 NESHAP, we reviewed a variety of data sources in our evaluation of whether there were additional practices, processes, or controls to consider for the Secondary Aluminum Production industry. Among the data sources we reviewed were the NESHAP for various industries that were promulgated after the 2000 NESHAP. We reviewed the regulatory requirements and/or technical analyses associated with these regulatory actions to identify any practices, processes, and control technologies considered in these efforts that could possibly be applied to emissions sources in the Secondary Aluminum Production source category, as well as the costs, non-air impacts, and energy implications associated with the use of these technologies.

Additionally, we requested information from facilities regarding developments in practices, processes, or control technology. Finally, we reviewed other information sources, such as State or local permitting agency databases and industry-supported databases. In particular, we consulted the EPA's RACT/BACT/LAER Clearinghouse (RBLC) to identify potential technology advances. Control technologies classified as RACT (Reasonably Available Control Technology), BACT (Best Available Control Technology), or LAER (Lowest Achievable Emissions Rate) apply to stationary sources depending on whether the sources are existing or new and on the size, age, and location of the facility. BACT and LAER (and sometimes RACT) are determined on a case-by-case basis, usually by State or local permitting agencies. The EPA established the RBLC to provide a central database of air pollution technology information (including technologies required in source-specific permits) to promote the sharing of information among permitting agencies and to aid in identifying future possible control technology options that might apply broadly to numerous sources within a category or apply only on a source-by-source basis. The RBLC contains over 5,000 air pollution control permit determinations that can help identify appropriate technologies to mitigate many air pollutant emissions streams. We searched this database to determine whether it contained any practices, processes or control technologies for the types of processes covered by the Secondary Aluminum Production NESHAP. No such practices, processes or control technologies were identified in this database.

D. What other issues are we addressing in this proposal?

In addition to the analyses described above, we also reviewed other aspects of the MACT standards for possible revision as appropriate and necessary. Based on this review we have identified aspects of the MACT standards that we believe need revision.

This includes proposing revisions to the startup, shutdown and malfunction (SSM) provisions of the MACT rule in order to ensure that they are consistent with the court decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008).

We are also proposing changes to the rule related to affirmative defense for violation of an emission limit during a malfunction. We are proposing other changes to address HF emissions, fugitive emissions during testing and numerous clarifications and corrections related to the existing provisions in the rule. Descriptions of each issue and the proposed revision to address the issue are presented in Section IV of this preamble.

IV. Analytical Results and Proposed Decisions

This section of the preamble provides the results of our RTR for the Secondary Aluminum Production source category and our proposed decisions concerning changes to the Secondary Aluminum Production NESHAP.

A. What are the results of the risk assessments?

For major sources in the Secondary Aluminum source category, we

4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf) are outlined in a memo to this rulemaking docket from David Guinnup, UESPA/OAQPS entitled, *EPA's Actions in Response to the Key Recommendations of the SAB Review of RTR Risk Assessment Methodologies.*

conducted an inhalation risk assessment for all HAP emitted. In addition, we performed a facilitywide risk assessment for the major sources in the secondary aluminum source category. For area sources, we conducted an inhalation risk assessment for D/F since this is the only HAP covered by the subpart RRR MACT standards at area sources. For all sources, we conducted multipathway screening analyses for PB–HAP emitted (e.g., D/F). Although there are 53 major sources and 108 area sources covered by the subpart RRR MACT standards, 52 major sources and 103 area sources were modeled due to the other sources' lack of equipment subject to the applicable emission standards. Results of the risk assessment are presented briefly below and in more detail in the residual risk documentation referenced in Section III of this preamble, which is available in the docket for this action.

Table 4 of this preamble provides an overall summary of the results of the inhalation risk assessment.

TABLE 4—SECONDARY ALUMINUM PRODUCTION INHALATION RISK ASSESSMENT RESULTS

Category & number of facilities modeled	Maximum individual cancer risk (in 1 million) [1]		Estimated population at increased risk of cancer ≥ 1 in 1 million [4]	Estimated annual cancer incidence (cases per year) [4]	Maximum chronic non-cancer TOSHI [2]		Worst-case maximum refined screening acute non-cancer HQ [3]
	Based on actual emissions level	Based on allowable emissions level			Based on actual emissions level	Based on allowable emissions level	
Major Source (52).	1	20	2	0.0006	0.05	1	HQ_{REL} 0.7 (HCl)
Area Source (103).	0.4	6	0	0.0006	0.0003	0.005	
Facility-wide Major Source.	20	.....	62,000	0.006	0.4	.....	

[1] Estimated maximum individual excess lifetime cancer risk due to HAP emissions from the source category. We did not have allowable emissions information at the facilitywide level, therefore, risk estimates based on facilitywide allowable emissions were not calculated.

[2] Maximum TOSHI. The target organ with the highest TOSHI for the secondary aluminum source category is the respiratory system.

[3] There is no acute dose-response value for dioxins, thus an acute HQ value for area sources was not calculated. See Section III.B of this preamble for explanations of acute dose-response values.

[4] These estimates are based on actual emissions.

The results of the chronic inhalation cancer risk assessment for major sources indicate that the maximum lifetime individual cancer risk, considering actual emissions, could be up to 1 in 1 million, driven by dioxin emissions. The maximum cancer risks for this source category exceeded a cancer risk of 1 in 1 million at 1 of 52 facilities. The total estimated cancer incidence from this source category based on actual emission levels is 0.0006 excess cancer cases per year, or one excess case in every 1,666 years. No people were estimated to have cancer risks above 10 in a million and approximately 2 people were estimated to have cancer risks above 1 in 1 million considering all major source facilities in this source category. Based on MACT-allowable emissions for the major sources in this category, the MIR could be up to 20 in 1 million.

With respect to chronic inhalation noncancer risk from major sources, we estimate a maximum TOSHI value of 0.05 for the Secondary Aluminum source category, primarily from hydrochloric acid from Group 1 furnaces. Considering MACT-allowable emissions, this maximum TOSHI value is estimated to be 1. Moreover, our worst-case highest acute screening value for major sources was 0.7 based on the REL for HCL.

Considering facility wide emissions at the 52 major sources, the MIR is estimated to be up to 20 in 1 million, the estimated annual incidence is 0.006 cases per year, and the chronic non-cancer TOSHI value is calculated to be 0.4.

In addition, we estimated risks associated with dioxin emissions at the 103 area sources in the Secondary Aluminum Production source category. The results of the chronic inhalation cancer risk assessment indicate that the maximum lifetime individual cancer risk could be up to 0.4 in 1 million and an estimated annual incidence of 0.0006 cases per year. Considering MACT-allowable emissions, the MIR could be up to 6 in 1 million. With respect to chronic inhalation noncancer risk from D/F emissions at area sources, we estimate a maximum TOSHI value of 0.0003. Considering MACT-allowable emissions, this maximum TOSHI value is estimated to be 0.005 for area sources.

In addition to the analyses presented above, to screen for potential multipathway effects from emissions of PB–HAP (such as cadmium, dioxins and PAHs) we compared actual emission rates from major source facilities in this source category to the screening values for these PB HAP described above (see Section III(A)(4)). For dioxins, we also screened for potential multipathway effects from emissions of D/F from area sources by comparing the estimated actual emission rates from these area sources to the screening value for D/F described above. (see Risk Assessment Document Appendix 4 for a more detailed discussion of screening emission rates). Results of this worst-case screen estimate that actual POM emissions from 10 of the 52 major source facilities exceed the POM screening emission rate. With respect to D/F, of the 46 major sources that emitted dioxins, 39 exceeded our screening emission rate. Similarly, 76 out of 103 area sources exceeded our D/F screening rate. These exceedances of the worst-case multipathway screening level for POM and dioxins indicate that there may be potential multipathway impacts of concern due to emissions of POM and dioxins. In general, emission rates below the worst-case multipathway screening level indicate no significant potential for multipathway-related health or environmental effects; whereas emission levels above this worst-case screening level only indicate the potential for multipathway-related health or environmental risks of concern based on a worst-case scenario. Thus, we note that these screening values are biased high for purposes of screening and are subject to significant uncertainties. As such, they do not represent refined estimates of risk and thus, do not necessarily indicate that potential multipathway risks from the source category may be a concern; we can only say that we cannot rule them out.

With respect to the potential for adverse environmental effects from non PB–HAP, we note that for both major

and area sources all chronic non-cancer HQ values for all pollutants considering actual emissions are well below 1 using human health reference values. Thus, we believe that it is unlikely that adverse environmental effects would occur at the actual HAP concentrations estimated in our human health risk assessment.

B. What are our proposed decisions regarding risk acceptability and ample margin of safety?

1. Risk Acceptability

As noted in Section III.C of this preamble, we weigh all health risk factors in our risk acceptability determination, including the MIR, the numbers of persons in various risk ranges, cancer incidence, the maximum noncancer HI, the maximum acute noncancer hazard, the extent of noncancer risks, the potential for adverse environmental effects, distribution of risks in the exposed population, and risk estimation uncertainties (54 FR 38044, September 14, 1989).

For the Secondary Aluminum Production source category, the risk analysis indicates that the cancer risks to the individual most exposed could be up to 1 in 1 million due to actual emissions and up to 20 in 1 million due to MACT-allowable emissions. These risks are considerably less than 100 in 1 million, which is the presumptive upper limit of acceptable risk. The risk analysis also shows very low cancer incidence (0.0006 cases per year), as well as no potential for adverse chronic or acute non-cancer health effects. In addition, the risk assessment indicates no significant potential for adverse environmental effects.

In addition to the analyses presented above, to screen for potential multipathway effects from emissions of D/F and POM, we compared the estimated actual emission rates from facilities in this source category to the multipathway screening levels described in section III.B. With respect to POM and dioxins, both major and area sources in the category exceeded our worst-case screening levels. However, we note that this is a worst-case conservative screening level analysis, therefore these results are biased high for purposes of screening and are subject to significant uncertainties. Moreover, we note that due to data limitations we were unable to further refine this worst-case screening scenario. As such, they do not necessarily indicate that significant multipathway risks actually exist at secondary aluminum facilities, only that we cannot rule them out as a possibility. With regard to facilitywide multipathway risk, based on the low level of risk identified for the source category, a facilitywide multipathway risk analysis was not conducted for this source category.

Considering all of the health risk information and factors discussed above, including the uncertainties discussed in section IV.A.7 of this preamble, we propose that the risks from the Secondary Aluminum Production source category are acceptable.

2. Ample Margin of Safety Analysis

We next considered whether the existing MACT standard provides an ample margin of safety to protect public health. Under the ample margin of safety analysis, we evaluated the cost and feasibility of available control technologies and other measures (including the controls, measures and costs reviewed under the technology review) that could be applied in this source category to further reduce the risks (or potential risks) due to emissions of HAP identified in our risk assessment, along with all of the health risks and other health information considered in the risk acceptability determination described above. In this analysis we considered the results of the technology review, risk assessment and other aspects of our MACT rule review to determine whether there are any cost-effective controls or other measures that would reduce emissions further to provide an ample margin of safety with respect to the risks associated with these emissions.

For POM, THC and metal HAP emissions, our risk analysis indicated very low potential for risk from the facilities in the source category. Our technology review did not identify any new practices, controls or process options that are being used in this industry or in other industries that would be cost-effective for further reduction of these emissions. Based on the estimated low risk levels and absence of new practices or control options, we conclude that the provisions of the current MACT provide for an ample margin of safety for public health with respect to emissions of POM, THC and metal HAP.

Our multipathway screening analysis results indicated exceedances of the worst-case screening levels which do not necessarily indicate any risks, however, they do suggest a potential for risks that cannot be ruled out. To evaluate the potential to reduce D/F emissions to ensure an ample margin of safety, our analysis for D/F focused on two options: (1) Lowering the existing D/F limit from 15 to 10 μg TEQ/Mg feed for Group 1 furnaces processing other than clean charge at all facilities; and (2) lowering the existing D/F limit for Group 1 furnaces processing other than clean charge, after applying a subcategorization based on facility production capacity. The lower D/F limits potentially could be met by using an activated carbon injection (ACI) system. With regard to the option of lowering the emission limit to 10 μg TEQ/Mg feed for Group 1 furnaces handling other than clean charge, we estimate that about 11 facilities would need to reduce their D/F emissions and that the costs would be about $5.9 million in total capital costs with total annualized costs of about $2.7 million. This option would achieve an estimated 1.66 grams TEQ reduction of D/F emissions with an overall cost-effectiveness of about $1.61 million per gram D/F TEQ. The second option of lowering the emission limit based on a subcategorization according to facility production capacity yielded cost-effectiveness estimates of greater than $1 million per gram D/F TEQ reduced. Furthermore, our analysis indicates that these options would not result in significant emissions reductions and would not, therefore, result in significant changes to the potential risk levels. After considering the costs and the small reductions that would be achieved, we have decided not to propose any of these options. For more information, please refer to the Draft Technical Document for the Secondary Aluminum Production Source Category that is available in the public docket for this proposed rulemaking.

We also evaluated possible options based on work practices to achieve further emissions reductions. The current subpart RRR NESHAP includes work practices to minimize D/F emissions which include scrap inspection, limitations on materials processed by group 2 furnaces, temperature and residence time requirements for afterburners controlling sweat furnaces, labeling requirements, capture/collection requirements, and requirements for an operations, maintenance and monitoring plan that contains details on the proper operation and maintenance of processes and control equipment. We searched for and evaluated other possible work practices such as good combustion practices, better scrap inspection and cleaning, and process monitoring. However, none of these potential work practices were determined to be feasible and effective in reducing D/F emissions

for this source category. Thus, we did not identify any feasible or applicable work practices for this industry beyond those that are currently in the MACT rule. Further detail on work practices and control options are provided in the Draft Technology Review for the Secondary Aluminum Production Source Category, which is available in the docket.

In accordance with the approach established in the Benzene NESHAP, we weighed all health risk information and factors considered in the risk acceptability determination, including uncertainties, along with the cost and feasibility of control technologies and other measures that could be applied in this source category, in making our ample margin of safety determination. In summary, we did not identify any cost-effective approaches to further reduce POM, THC, metal HAP or D/F emissions beyond the reductions that are already being achieved by the current NESHAP. Further, our analysis indicates that none of the options considered would result in significant emissions reductions and would not, therefore, result in significant changes to the potential risk levels.

Because of the high cost associated with the use of activated carbon injection systems and because work practices are already required to help ensure low emissions, we propose that the existing MACT standards provide an ample margin of safety to protect public health and prevent an adverse environmental effect.

C. What are the results and proposed decisions based on our technology review?

As described above, the typical controls used to minimize emissions at secondary aluminum facilities include fabric filters for control of PM from aluminum scrap shredders; afterburners for control of THC and D/F from thermal chip dryers; afterburners plus lime-injected fabric filters for control of PM, HCl, THC, and D/F from scrap dryers/delacquering kilns/decoating kilns; afterburners for control of D/F from sweat furnaces; fabric filters for control of PM from dross-only furnaces and rotary dross coolers; lime-injected fabric filters for control of PM and HCl from in-line fluxers; and lime-injected fabric filters for control of PM, HCl and D/F from group 1 furnaces. There have been some developments in practices, processes, or control technologies that have been implemented in this source category since promulgation of the current NESHAP. However, based on information available to the EPA, these technologies do not clearly reduce HAP emissions relative to technologies that were considered by the EPA when promulgating the Secondary Aluminum Production NESHAP in 2000. In addition, we evaluated whether lime-injection fabric filters with activated carbon injection could be used to further reduce D/F from group 1 furnaces in a cost-effective manner.

At least one company supplies multichamber furnaces that combine the functions of a delacquering kiln and a melting furnace. At least 16 of these furnaces are in operation in Europe, Asia and the Middle East, however emission test data for these facilities is not available. One furnace of this type is presently operating in the U.S. and is permitted as a group 1 furnace handling other than clean charge.

However, the limited D/F emission test data available for the one operating U.S. multichamber furnace is within the range of test data for Group 1 furnaces and delacquering kilns that are in compliance with subpart RRR using control technologies considered by the EPA in the subpart RRR NESHAP. Based on available information it is not clear that this technology would reduce HAP emissions relative to technologies that were considered by the EPA in promulgating the subpart RRR NESHAP and are already used by other facilities. Based on our analysis, we conclude that it would not be appropriate at this time to revise subpart RRR standards based on use of this technology.

Eddy current separators are used to separate a concentrated aluminum fraction from a heterogeneous scrap feed. These units operate at ambient temperature and emit no D/F or other gaseous pollutants. They are used on the material output from mechanical shredders that shred automobiles and appliances (not on the scrap shredders used in the secondary aluminum industry). These units can potentially decrease the need for sweat furnaces. However, the product of eddy current separators is not clean charge, as with a sweat furnace. Therefore, the product of eddy current separators must undergo further processing to produce clean charge, and it is not possible to directly compare eddy current separators with sweat furnaces.

Catalytic filtration systems, including catalytic filter bags, are available to reduce D/F emissions. These bags incorporate an expanded polytetrafluoroethylene membrane coated with a precious metal catalyst which promotes the oxidation of D/F. The manufacturer claims that this system is installed in over 100 applications around the world, including at least 1 secondary aluminum processing plant. However, no respondents to our all-company ICR reported using this technology and we have no data on the D/F emission levels that can be achieved at secondary aluminum production facilities using this technology. Therefore we cannot conclude that they are more effective at reducing D/F emissions than the control technologies considered by the EPA in the 2000 subpart RRR NESHAP. We therefore conclude, based on information available to the EPA, that catalytic filtration systems are not at present a demonstrated control technology that should be used as the technical basis to require more stringent emission limits for the secondary aluminum production source category.

We also evaluated the potential to lower D/F emissions under the technology review by lowering the emissions limits based on the broader use of activated carbon injection technology. Under this analysis, we evaluated the same approach that was evaluated under the ample margin of safety analysis described in section IV.B. In summary, we evaluated two main options, as follows: (1) Lower the existing D/F limit from 15 to 10 μg TEQ/Mg feed for Group 1 furnaces processing other than clean charge at all facilities; and (2) lower the existing D/F limit for Group 1 furnaces processing other than clean charge, after applying a subcategorization based on facility production capacity. The lower D/F emissions limits potentially could be met by using an activated carbon injection (ACI) system. With regard to the option of lowering the emission limit to 10 μg TEQ/Mg feed for Group 1 furnaces handling other than clean charge, we estimate that about 11 facilities would need to reduce their D/F emissions and that the costs would be about $5.9 million in total capital costs with total annualized costs of about $2.7 million. This option would achieve an estimated 1.66 grams TEQ reduction of D/F emissions with an overall cost-effectiveness of about $1.61 million per gram D/F TEQ. The second option of lowering the emission limit based on a subcategorization according to facility production capacity yielded cost-effectiveness estimates of greater than $1 million per gram D/F TEQ reduced. Furthermore, our analysis indicates that these options would not result in significant emissions reductions. After considering the compliance costs and the small associated emission reductions that would be achieved, we are not proposing revised subpart RRR standards based on either of these options that rely on the use of ACI

injection technology under section 112(d)(6) of the CAA.

Overall, based on our review of developments in practices, processes, and control technologies, we have not identified any control approaches that clearly reduce HAP emissions in a cost-effective manner relative to technologies that were available and considered by the EPA at the time of promulgation of the Secondary Aluminum Production NESHAP in 2000. Therefore, we are not proposing any revisions to the NESHAP as a result of our technology review. Additional details regarding these analyses can be found in the following technical document for this action which is available in the docket: *Draft Technology Review for the Secondary Aluminum Production Source Category.*

D. What other actions are we proposing?

This section discusses revisions that are being proposed to correct and clarify provisions in the rule as well as solicitations of comments and requests for additional information. We are proposing revisions to the rule to address SSM provisions within the rule that were vacated by a court ruling and we are adding a requirement for electronic submission of all test results to increase the ease and efficiency of data submittal and improve data accessibility. In addition, since promulgation of the subpart RRR NESHAP in March 2000 (65 FR 15689), we have received recommendations and suggestions from individual representatives from state regulatory agencies and industry, as well as within EPA, to correct errors in the rule and to help clarify the intent and implementation of the rule. Table 5 provides a summary of these proposed changes. Following Table 5 are detailed descriptions of the proposed revisions.

TABLE 5—SUMMARY OF TECHNICAL CORRECTIONS/CLARIFICATIONS TO THE SECONDARY ALUMINUM PRODUCTION NESHAP

Correction/Clarification	Description
1. Startup, shutdown and malfunctions (63.1503, 63.1506(l) and (m), 63.1506(q),and 63.1520).	• Addresses vacated General Provision (GP) requirements. • Deletes references to vacated GP sections. • Requires all sources to comply with emission limits including during periods of startup and shutdown. • Adds definition for affirmative defense. Adds affirmative defense provisions for malfunctions.
2. Electronic Reporting (63.1516(b)(3))	• Requires owners and operators to report performance test results through the EPA Electronic Reporting System (ERT).
3. ACGIH Guidelines	• The capture and collection provision of § 63.1506(c)(1) that reference the ''Industrial Ventilation: A Manual of Recommended Practice'', is revised to allow 23rd or 27th Editions and take out specific references to chapters 3 and 5. • Requests comments on methods other than ACGIH Guidelines to ensure capture and collection and alternatives to the currently required hooding requirements.
4. Scrap Inspection Program for Group 1 Furnace without Add-on Air Pollutions Control Devices (63.1510(p)).	• Considering improvements to scrap inspection program. • Requesting comments and information.
5. Multiple Tests for Worst Case Scenarios (63.1511(b)(6)).	• Clarifies that multiple tests may be required to reflect the range of emissions likely for each regulated pollutant.
6. Lime Injection Rate Verification (63.1510(i)(4))	• Requires verification of the lime mass injection rate at least once per month.
7. Flux Monitoring (63.1510(j)(4))	• Clarifies that solid flux must be tracked at each addition during the cycle or time period used in the performance test.
8. Cover fluxes (63.1503)	• Clarifies definition of cover flux.
9. Capture and Collection Systems (63.1503)	• Adds a definition of capture and collection systems.
10. Bale Breakers (63.1503)	• Adds a definition of a bale breaker to clarify that a bale breaker is not a scrap shredder.
11. Bag Leak Detection Systems (BLDS) (63.1510(f)(1)(ii)).	• Removes reference to an outdated guidance document and requires use of manufacturer's maintenance and operating instructions.
12. Sidewell Furnaces (63.1510(n)(1))	• Requires visual inspection after each tap rather than after each charge. • Allows other means of measuring molten metal level.
13. Testing Representative Units (63.1511(f)(6))	• Clarifies that all performance test runs must be conducted on the same affected source or emission unit.
14. Inital Performance Tests (63.1511(b))	• Revises performance test requirements to allow 180 days to conduct initial performance test consistent with GP.
15. Definition of Scrap Dryer/Delacquering Kiln/Decoating Kiln and Scrap Shredder (63.1503).	• Clarifies definition of Scrap Dryer/Delacquering/Decoating Kiln to include delamination of aluminum from paper or plastic. • Clarifies definition of scrap shredder to include granulation and shearing.
16. Transporting metal (63.1503)	• Clarifies definition of Group 2 furnace to exclude pots used to transport metal.
17. Specifications for Cleaning Processes	• Not proposing cleaning specifications at this time.

TABLE 5—SUMMARY OF TECHNICAL CORRECTIONS/CLARIFICATIONS TO THE SECONDARY ALUMINUM PRODUCTION NESHAP—Continued

Correction/Clarification	Description
	• Invites comments and solicits information on appropriate cleaning procedures.
18. HF Emissions Compliance Provisions (63.1503, 63.1505, 63.1511(c)(9), 63.1513).	• Adds definition of HF. • Adds emissions standard for HF. • Requires EPA Method 26A for measurement of HF.
19. Uncontrolled furnaces that do not Comply with ACGIH Hooding Guidelines (63.1512(e)(4)).	• Requires owner/operators with uncontrolled group 1 furnaces to construct hoods for performance testing to demonstrate compliance, or assume 67 percent capture efficiency if hooding does not meet ACGIH guidelines. • Seeks comments on alternative approaches.
20. Clarify the possible Number of SAPUs (63.1503)	• Revises ''SAPU'' definition to clarify there can be more than 1 new SAPU.
21. Aluminum Scrap Containing Anodizing Dyes or Sealants (63.1503).	• Clarifies ''clean charge'' definition to exclude anodized material that contains dyes or sealants that contain organic material.
22. Afterburner Residence Time (63.1503)	• Clarifies ''residence time'' definition to include refractory lined ductwork up to the control thermocouple.
23. SAPU Feed/Charge Rate (63.1505(k))	• Clarifies that daily throughput must be used to calculate allowable emissions within the SAPU.
24. Changing Furnace Classifications (§ 63.1514)	• Allows owners/operators to change furnace classifications. • Specifies requirements for changing.
25. Dross Only Versus Dross/Scrap Furnaces	• Clarifies that owners/operators have the option to conduct performance tests under different operating conditions to address charge/flux changes.
26. Annual Hood Inspections (63.1510(d)(2))	• Clarifies that annual hood inspections include flow rate measurements.
27. Applicability of Rule to Area Sources (63.1506(a), 63.1510(a)).	• Clarifies which operating, monitoring and other standards apply to area sources.
28. Altering Parameters during Testing with New Scrap Streams (63.1511(b)(1)).	• Clarifies that owners/operators can deviate from established parametric limits during performance testing being done to establish new parametric limits.
29. Controlled Furnaces that are Temporarily Idled (63.1506(q)(5)).	• Allows control device for furnaces to be shut down if furnace will remain idle for 24 hours or longer.
30. Annual Compliance Certification for Area Sources (63.1516(c)).	• Clarifies that area sources must submit an annual compliance certification.

1. Startup, Shutdown and Malfunctions

The United States Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in the EPA's CAA Section 112 regulations governing the emissions of HAP during periods of startup, shutdown and malfunction (SSM). *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008). Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation, commonly referred to as the ''General Provisions Rule,'' that the EPA promulgated under CAA section 112. When incorporated into CAA Section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

We are proposing the elimination of the SSM exemption in this rule. Consistent with *Sierra Club* v. *EPA,* the EPA is proposing standards in this rule that apply at all times. We are also proposing several revisions to Appendix A to subpart RRR of part 63 (the General Provisions Applicability table). For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that the source develop an SSM plan. We also are proposing to eliminate or revise certain recordkeeping and reporting requirements related to the SSM exemption. The EPA has attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

In proposing standards in this rule, the EPA has taken into account startup and shutdown periods and is proposing standards for startup and shutdown periods for all process units.

We are proposing that the subpart RRR standards apply at all times, including periods of startup and shutdown. Because the scrap processed at secondary aluminum production facilities is the source of emissions, we expect that emissions during startup and shutdown would be no higher and probably much lower than emissions during normal operations since no scrap would be processed. We know of no reason why the existing standards should not apply at all times. For production processes in the secondary aluminum production source category where the standards are expressed in units of pounds per ton of feed or similar units (i.e. thermal chip dyers, scrap dryer/delacquering kiln/decoating kilns, dross-only furnaces, in-line

fluxers using reactive flux, and group 1 furnaces), we are proposing certain methods for demonstrating compliance with those limits, as discussed further in the *Technical Document for the Secondary Aluminum Production Source Category* that is available in the docket for this proposed rulemaking.

We solicit comment on the proposed standards during startup and shutdown periods. Specifically, for those processes that have production-based limits (i.e., thermal chip dyers, scrap dryer/delacquering kiln/decoating kilns, dross-only furnaces, in-line fluxers using reactive flux, and group 1 furnaces), we solicit comment as to whether work practices under section 112(h) of the CAA should be applied during startup and shutdown. If you believe work practices would be appropriate for such processes, please explain how the requirements of section 112(h)(2) are met and identify any work practices that would be effective in limiting HAP emissions during periods of startup and shutdown for such processes.

For these processes (thermal chip dryers, scrap dryers/delacquering kilns/decoating kilns, dross-only furnaces, group 1 furnaces, in-line fluxers, dross only furnaces, sweat furnaces, and group 2 furnaces), startup begins with ignition and equipment warming from a cold start or a complete shutdown, using natural gas or other clean fuel. At the point that feed is introduced, startup ends and the process is in normal operation. Similarly for shutdown periods, when an operator halts the introduction of feed or charge to, and has removed all product (e.g., tapped a furnace), the shutdown phase has begun. For more information about the application of subpart RRR standards to periods of Startup and shutdown, including revised methods to demonstrate compliance, see the *Technical Support Document for the Secondary Aluminum Production* Source Category that is available in the docket for this proposed rulemaking.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operation. However, by contrast, malfunction is defined as a ''sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * *'' (40 CFR 63.2). The EPA has determined that CAA section 112 does not require that emissions that occur during periods of malfunction be factored into development of CAA section 112 standards. Under section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in section 112 that directs the agency to consider malfunctions in determining the level ''achieved'' by the best performing or best controlled sources when setting emission standards. Moreover, while the EPA accounts for variability in setting emission standards consistent with the section 112 case law, nothing in that case law requires the agency to consider malfunctions as part of that analysis. Section 112 of the CAA uses the concept of ''best controlled'' and ''best performing'' unit in defining the level of stringency that CAA section 112 performance standards must meet. Applying the concept of ''best controlled'' or ''best performing'' to a unit that is malfunctioning presents significant difficulties, as malfunctions are sudden and unexpected events.

Further, accounting for malfunctions would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, e.g., *Sierra Club* v. *EPA,* 167 F. 3d 658, 662 (D.C. Cir. 1999) (The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to ''invest the resources to conduct the perfect study.''). *See also, Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation''). In addition, the goal of a best controlled or best performing source is to operate in such a way as to avoid malfunctions of the source, and accounting for malfunctions could lead to standards that are significantly less stringent than levels that are achieved by a well-performing non-malfunctioning source. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, ''sudden, infrequent, not reasonably preventable'' and was not instead ''caused in part by poor maintenance or careless operation'' 40 CFR 63.2 (definition of malfunction).

Finally, the EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause a violation of the relevant emission standard. (See, e.g., State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983)). The EPA is therefore proposing to add to the final rule an affirmative defense to civil penalties for violations of emission limits that are caused by malfunctions. See 40 CFR 63.1503 (defining ''affirmative defense'' to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding). We also are proposing other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 40 CFR 63.1520 (See 40 CFR 22.24). The criteria ensure that the affirmative defense is available only where the event that causes a violation of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions ''[w]ere

caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner * * *.'' The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with 40 CFR 63.1506(a)(5) and § 1520(a)(8) and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that ''[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *'' and that ''[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *.'' In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with Section 113 of the Clean Air Act (see also 40 CFR 22.27).

The EPA included an affirmative defense in the proposed rule in an attempt to balance a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission limits may be exceeded under circumstances beyond the control of the source. The EPA must establish emission standards that ''limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.'' 42 U.S.C. § 7602(k) (defining ''emission limitation and emission standard''). See generally *Sierra Club* v. *EPA,* 551 F.3d 1019, 1021 (D.C. Cir. 2008). Thus, the EPA is required to ensure that section 112 emissions limitations are continuous. The affirmative defense for malfunction events meets this requirement by ensuring that even where there is a malfunction, the emission limitation is still enforceable through injunctive relief. While ''continuous'' limitations, on the one hand, are required, there is also case law indicating that in many situations it is appropriate for the EPA to account for the practical realities of technology. For example, in *Essex Chemical* v. *Ruckelshaus,* 486 F.2d 427, 433 (D.C. Cir. 1973), the D.C. Circuit acknowledged that in setting standards under CAA Section 111 ''variant provisions'' such as provisions allowing for upsets during startup, shutdown and equipment malfunction ''appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force.'' See also, *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973). Though intervening case law such as *Sierra Club* v. *EPA* and the CAA 1977 amendments undermine the relevance of these cases today, they support the EPA's view that a system that incorporates some level of flexibility is reasonable. The affirmative defense simply provides for a defense to civil penalties for excess emissions that are proven to be beyond the control of the source. By incorporating an affirmative defense, the EPA has formalized its approach to upset events. In a Clean Water Act setting, the Ninth Circuit required this type of formalized approach when regulating ''upsets beyond the control of the permit holder.'' *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253, 1272–73 (9th Cir. 1977). But see, *Weyerhaeuser Co.* v. *Costle,* 590 F.2d 1011, 1057–58 (D.C. Cir. 1978) (holding that an informal approach is adequate). The affirmative defense provisions give the EPA the flexibility to both ensure that its emission limitations are ''continuous'' as required by 42 U.S.C. § 7602(k), and account for unplanned upsets and thus support the reasonableness of the standard as a whole.

Specifically, we are proposing the following rule changes:

- Add general duty requirements in 40 CFR 63.1506(a)(5) and § 63.1520(a)(8) to replace General Provision requirements that reference vacated SSM provisions.
- Revise language in 40 CFR 63.1515 that references notifications for SSM events.
- Add paragraphs in 40 CFR 63.1520 concerning the reporting of malfunctions as part of the affirmative defense provisions.
- Add paragraph in 40 CFR 63.1516(d) regarding reporting of malfunctions and revised § 63.1516(b)(1)(v) to remove reference to malfunction.
- Revise paragraph in 40 CFR 63.1510(s)(iv) to remove reference to malfunction.
- Add paragraphs in 40 CFR 63.1517 concerning the keeping of certain records relating to malfunctions as part of the affirmative defense provisions.
- Revise Appendix A to subpart RRR of part 63 to reflect changes in the applicability of the General Provisions to this subpart resulting from a court vacatur of certain SSM requirements in the General Provisions.

2. Electronic Reporting

The EPA must have performance test data to conduct effective reviews of CAA sections 112 and 129 standards, as well as for many other purposes including compliance determinations, emissions factor development and annual emissions rate determinations. In conducting these required reviews, the EPA has found it ineffective and time consuming, not only for us, but also for regulatory agencies and source owners and operators, to locate, collect, and submit performance test data because of varied locations for data storage and varied data storage methods. In recent years, though, stack testing firms have typically collected performance test data in electronic format, making it possible to move to an electronic data submittal system that would increase the ease and efficiency of data submittal and improve data accessibility.

Through this proposal the EPA is presenting a step to increase the ease and efficiency of data submittal and improve data accessibility. Specifically, the EPA is proposing that owners and operators of Secondary Aluminum Production facilities submit electronic copies of required performance test reports to the EPA's WebFIRE database. The WebFIRE database was constructed to store performance test data for use in developing emissions factors. A description of the WebFIRE database is available at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main.*

As proposed above, data entry would be through an electronic emissions test report structure called the Electronic Reporting Tool. The ERT would generate an electronic report which would be submitted using the Compliance and Emissions Data Reporting Interface (CEDRI). The submitted report would be transmitted through EPA's Central Data Exchange (CDX) network for storage in the WebFIRE database making submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/index.html* and CEDRI can be accessed through the CDX Web site (*www.epa.gov/cdx*). The proposal to submit performance test data electronically to the EPA would apply only to those performance tests conducted using test methods that will be supported by the ERT. The ERT contains a specific electronic data entry form for most of the commonly used EPA reference methods. A listing of the pollutants and test methods supported by the ERT is available at *http://www.epa.gov/ttn/chief/ert/index.html.*

We believe that industry would benefit from this proposed approach to electronic data submittal. Having these data, the EPA would be able to develop improved emissions factors, make fewer information requests and promulgate better regulations.

One major advantage of the proposed submittal of performance test data through the ERT is a standardized method to compile and store much of the documentation required to be reported by this rule. Another advantage is that the ERT clearly states what testing information would be required. Another important proposed benefit of submitting these data to the EPA at the time the source test is conducted is that it should substantially reduce the effort involved in data collection activities in the future. When the EPA has performance test data in hand, there will likely be fewer or less substantial data collection requests in conjunction with prospective required residual risk assessments or technology reviews. This would result in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and the EPA (in terms of preparing and distributing data collection requests and assessing the results).

State, local and tribal agencies could also benefit from more streamlined and accurate review of electronic data submitted to them. The ERT would allow for an electronic review process rather than a manual data assessment making review and evaluation of the source provided data and calculations easier and more efficient. Finally, another benefit of the proposed data submittal to WebFIRE electronically is that these data would greatly improve the overall quality of existing and new emissions factors by supplementing the pool of emissions test data for establishing emissions factors and by ensuring that the factors are more representative of current industry operational procedures. A common complaint heard from industry and regulators is that emissions factors are outdated or not representative of a particular source category. With timely receipt and incorporation of data from most performance tests, the EPA would be able to ensure that emissions factors, when updated, represent the most current range of operational practices. In summary, in addition to supporting regulation development, control strategy development and other air pollution control activities, having an electronic database populated with performance test data would save industry, state, local, tribal agencies and the EPA significant time, money and effort while also improving the quality of emissions inventories and, as a result, air quality regulations.

3. ACGIH Guidelines

Capture and Collection Requirements

Subpart RRR specifies the ACGIH Industrial Ventilation Manual as the standard for acceptable capture and collection of emissions from a source with an add-on air pollution control device. See § 63.1506(c)(1) and Table 3 to subpart RRR. The rule currently incorporates by reference ''Chapters 3 and 5 of Industrial Ventilation: A Manual of Recommended Practice'', American Conference of Government Industrial Hygienists (ACGIH), 23rd edition, 1998. Two issues have been raised with respect to the ACGIH Guidelines since inception of the rule.

First the referenced version of the manual is no longer in print. Therefore we are proposing that the 23rd edition or the most recent 27th edition to the manual may be used. Further we are proposing to remove the specific chapter reference due to difference in the manual versions.

Second, the current rule requires that emissions capture and collection systems be designed consistent with the ACGIH industrial ventilation guidelines and that the methodologies of demonstrating compliance with capture and collection are consistent with ACGIH requirements. We are proposing that affected sources that are equipped with air pollution control devices must follow the ACGIH Guidelines, 23rd or 27th editions. Industry representatives point out that the manual contains ''recommended'' ventilation practices and assert that subpart RRR inappropriately requires compliance with the guidelines. For example, the guidance establishes design criteria for determining minimum hood dimensions and flow; however, industry representatives allege that the relevant equation is not appropriate for determining minimum flow requirements for ''oversized'' hoods that are used in the secondary aluminum production industry. The equations for sizing hoods in Chapter 3 of the 23rd edition were said to over-predict the required flow rates. According to industry representatives, the ACGIH manual should be used only as a guideline for judging the effectiveness of the hoods and that engineering evaluations of hoods can be performed similarly to those for other engineered processes. Also, there may be rules and ventilation guidelines developed by other professional organizations, governmental agencies or industry organizations that are appropriate and could be used.

Therefore, we are considering allowing other recognized design criteria and methodologies for the capture and collection of emissions in the demonstration of compliance, which will provide more flexibility to the industry. We are inviting comments on alternatives to the ACGIH guidelines or other suggestions for revising the rule to increase flexibility for the industry while ensuring that capture and collection systems are adequately designed and operated to insure that emissions are captured and fugitive emissions minimized. In particular, we would be interested in obtaining information on minimum face velocity, elimination of visible emissions, minimum pressure drop or other suitable parameter(s) to determine capture effectiveness.

4. Scrap Inspection Program for Group 1 Furnace Without Add-on Air Pollution Control Device

Under the current subpart RRR NESHAP, the owner or operator of a group 1 furnace that is not equipped with an add-on air pollution control device must prepare a written monitoring plan describing the measures that will be taken to ensure continuous compliance with all applicable emissions limits. One such measure is the inspection of scrap to determine the levels of contaminants in the scrap that will be charged to the furnace. Section 63.1510(p) lists the requirements for a scrap inspection program although this scrap inspection program is not mandatory. Because the Agency considers a well designed and implemented scrap inspection program important to ensuring that emissions are maintained at levels below the applicable emissions limits, we are interested in how we could improve the current scrap inspection provisions as well as how we would make the scrap inspection program more usable. Therefore, we are soliciting comments and information on what such a program should include. We are particularly interested in receiving comments and information from companies, organizations or individuals that may have experience with scrap inspection programs and may have been involved in developing and implementing such programs.

5. Multiple Tests for Worst Case Scenarios

The existing rule currently allows testing to demonstrate compliance under a range of operating scenarios. Facilities that process a range of

materials (such as dross, used beverage containers (UBC), etc.) may have different scenarios (production levels, range of charge materials, and reactive fluxing rates) that result in a range of emissions for the different regulated pollutants. For example, the scenario resulting in the highest emissions of HCl may be while processing dross; the scenario resulting in the highest emissions of D/F formation may be while processing UBC; and the scenario resulting in the highest emissions of PM is most likely UBC as well. The EPA is aware of concerns that under the original rule and subsequent amendments, there may be some uncertainty about different testing conditions that may be required for different HAP. We are proposing amendments to § 63.1511 to clarify that performance tests under multiple scenarios may be required in order to reflect the emissions ranges for each regulated pollutant.

6. Lime Injection Rate Verification

The rule currently requires owners/operators to verify that continuous lime injection system maintains free-flowing lime in the hopper at all times and maintain the lime feeder setting at the same level established during the performance test. However the rule does not specifically require that the feeder setting be verified with a pound per hour (lb/hr) injection rate as established in the performance test. Due to continuous usage of the equipment, the feeder setting and injection rate may not correlate as they did during the performance test. Periodic verification of the actual injection rate in pounds per hour would ensure that the necessary amount of lime is reaching the baghouse and it would give a better indication of continuous compliance. We are proposing to revise § 63.1510 by adding a requirement for the verification of the lime injection rate in pounds per hour at least once per month. We are also proposing changes to clarify that for the purposes of monitoring the rate of lime injection, the lime injection feeder setting must be set no lower than that determined in the performance test; however, it may be set above that level.

7. Flux Monitoring

Flux monitoring provisions in § 63.1510(j)(3)(ii) require the owner/operator to record, for each 15-minute block period during each operating cycle or time period used in the performance test during which reactive fluxing occurs, the time, weight and type of flux for each addition of solid reactive flux. Solid flux, however, may be added intermittently during the operating cycle dependent upon the needs of the furnace. We are proposing amendments to revise these monitoring requirements to clarify that solid flux should be tracked at each addition during the cycle or time period used in the performance test.

8. Cover Fluxes

Cover flux is defined in § 63.1503 as ''salt added to the surface of molten aluminum in a group 1 or group 2 furnace, without agitation of the molten aluminum for the purpose of preventing oxidation''. We have received information from industry and state agencies indicating that most furnaces are agitated. Rotary furnaces are constantly rotated until the metal is tapped and reverberatory furnaces have a molten metal pump circulating aluminum from the hearth to the charge well providing agitation to melt the scrap. In order to avoid major source status, a few secondary aluminum facilities have claimed that they were using cover fluxes when they were actually using reactive fluxes which may lead to higher emissions. Other sources claiming to use a cover flux were using them in furnaces in which the melt was being agitated and, therefore, did not meet the definition of cover flux. To address this, we are proposing to clarify the definition of cover flux by adding to the definition the following: Any flux added to a rotary furnace or other furnace that uses a molten metal pump or other device to circulate the aluminum is not a cover flux. Any reactive flux cannot be a cover flux.

9. Capture and Collection System

Affected sources under the current rule that are controlled by an air pollution control device must use a capture and collection system meeting the guidelines of the ACGIH in order to minimize fugitive emissions and ensure that emissions are routed to the control device where the pollutants are removed from the exhaust gas stream. As part of efforts to clarify hooding and capture requirements we are proposing a definition for capture and collection systems, as follows: Capture and collection system means the system of hood(s), duct system and fan used to collect a contaminant at or near its source, and for affected sources equipped with an air pollution control device, transport the contaminated air to the air cleaning device.

10. Bale Breakers and Scrap Shredders

The current regulation exempts bale breakers from the requirements for aluminum scrap shredders and the definition of shredders is intentionally broad. To clarify that a bale breaker is not a scrap shredder, we are proposing a definition for bale breaker. We are also proposing to clarify in the definition of aluminum scrap shredder that both high speed and low speed shredding devices are considered scrap shredders.

11. Bag Leak Detection Systems (BLDS)

The current requirements for BLDS in the rule cite a 1997 guidance document on bag leak detection systems that operate on the triboelectric effect (when materials become electrically charged through contact and separation from another material). BLDS currently in use operate digitally and are not addressed by the 1997 guidance. We are proposing to update § 63.1510(f) to remove the reference to the 1997 guidance document and require that the manufacturer's maintenance and operating instructions be followed at all times.

12. Sidewell Furnaces

The monitoring requirements for sidewell group 1 furnaces with uncontrolled hearths specify recording the level of molten metal (above or below the arch between the sidewell and hearth) for each charge to the furnace. Because there are emission units that add charge continuously and emission units that add charge intermittently, the requirements to record levels during each charge can be problematic for some sources. Also, the only option for verifying the molten level is visual observation which may be difficult in some cases. To address these issues, we are proposing revisions to § 63.1510(n) to require the monitoring to be done after each tap, rather than each charge. We are also proposing that where visual inspection of the molten metal level is not possible, physical measurement to determine the molten metal level in sidewell group 1 furnaces will be required. We are also proposing to add a definition of tap to mean the end of an operating cycle when processed molten aluminum is poured from a furnace.

13. Testing Representative Units

Section 63.1511 allows testing of a representative uncontrolled Group 1 furnace or in-line fluxer to determine the emission rate of other similar units. Some secondary aluminum facilities have conducted one test run on each of multiple emission units to comprise one test, rather than performing all test runs on the same unit. This is not the intent of the rule. We are proposing to amend § 63.1511(f) to clarify that the three test

runs must be conducted on the same unit.

14. Initial Performance Tests

Section 63.1511(b) of the current rule requires a new source (i.e., a source that commences construction after 1999) to conduct its initial performance tests for a new or modified source within 90 days of start-up to show compliance with emission limits and to establish its operating parameters. Other MACT standards provide sources 180 days in which to conduct their initial performance test. The General Provisions in § 63.7 set this time limit at 180 days. Because a period of 180 days to conduct testing would help the secondary aluminum industry avoid the cost of unnecessary repeat testing and it is consistent with the General Provisions, we are proposing to revise § 63.1511 to allow 180 days to conduct an initial performance test.

15. Definitions of Scrap Dryer/Delacquering Kiln/Decoating Kiln and Aluminum Scrap Shredder

We are proposing revisions to the definition of scrap dryer/delacquering kiln/decoating kiln to clarify that thermal delaminating of aluminum scrap and mechanical granulation of the recovered metal are affected sources under Subpart RRR. Heat is used to separate foil from paper and plastic in scrap. These sources operate chambers with a maximum temperature of 900 degrees Fahrenheit and with no melting of the recovered aluminum. Under the proposed definition, subsequent melting of recovered aluminum need not occur at the same facility that conducts the recovery operation. We are also proposing to amend the definition of a scrap shredder to include granulation and shearing in addition to crushing, grinding, and breaking of aluminum scrap into a more uniform size prior to processing or charging to a scrap dryer/delacquering kiln/decoating kiln or furnace.

16. Transporting Metal

We are addressing questions as to the applicability of the rule to pots that are used to transport metal to customers. The rule does not currently regulate these pots and we are proposing to amend the definition of Group 2 furnace to clarify the fact that the rule does not regulate these pots.

17. Specifications for Cleaning Processes

We considered whether to add specifications for cleaning processes such as those required for runaround scrap to ensure that scrap processed by certain methods qualifies as clean scrap. Specifications considered include minimum residence time and temperature for thermal drying process and minimum speed and residence time for centrifuging processes. We are not proposing these revisions in today's action. However, we invite comments on this issue and solicit information on appropriate specifications that could be applied to these processes to ensure that the cleaning process produces clean charge.

18. HF Emissions Compliance Provisions

The current subpart RRR standards applicable to major sources contain limits for HCl emissions from group 1 furnaces and require operators to conduct performance tests for HCl emissions. The EPA stated in the subpart RRR NESHAP that HCl would serve as a surrogate for all acid gases, including HF. Where chlorine-containing fluxes were used along with fluorine-containing fluxes, lime-injected fabric filters would effectively control HCl and HF so that determining compliance with the HCl limit was considered sufficient, and a separate compliance measure for HF was not required.

In this rulemaking, we are proposing to modify the compliance provisions in subpart RRR to ensure that HF emissions from group 1 furnaces without add-on control devices are addressed consistent with the intent of the promulgated standards. Specifically, a secondary aluminum facility with an uncontrolled Group 1 furnace may use fluorine-containing fluxes without using chlorine-containing fluxes, and would not be required under the current rule to test the furnace for HF, so any HF emissions would be neither controlled nor accounted for in any HCl testing.

We are proposing to require owners and operators of uncontrolled group 1 furnaces to test for both HF and HCl. We are proposing that the limits for HF from these furnaces would be 0.4 lb/ton of feed, equivalent to the existing subpart RRR limits for HCl from Group 1 furnaces. Our reasoning is that secondary aluminum facilities use chlorine-containing and fluorine-containing fluxes to perform the same function of enabling the removal of impurities (such as magnesium) from aluminum. They are also chemically similar, in that both are halogens. Therefore, if an uncontrolled Group 1 furnace has a given mass of impurities to be removed from the aluminum, the owner/operator may either use a chlorine-containing or fluorine-containing flux, and based on the information currently available to EPA, we propose that uncontrolled Group 1 furnaces be subject to testing for HF and an associated HF emission limit that is the same as the currently applicable HCl emission limit. We are proposing that EPA Method 26A be used, which is capable of measuring HCl and HF. The testing requirement for HF would coincide with HCl testing at the next scheduled performance test after the effective date of the final rule. As an alternative to testing for HF, we are proposing that the owner or operator may choose to determine the rate of reactive flux addition for an affected source, and may assume that, for the purposes of demonstrating compliance with the SAPU emission limit, all fluorine in the reactive fluxes added to the source are emitted as HCl or HF. This alternative is already available for operators using chlorine-containing reactive fluxes.

Based on information received from industry, we estimate that approximately 199 group 1 furnaces at approximately 29 secondary aluminum production facilities are uncontrolled. These furnaces are already required to be tested to determine HCl emissions at least once every five years. Therefore, the only additional costs for these sources would be the laboratory analysis for HF. We estimate these costs to be approximately $1,000 per test. We expect that only furnaces that use fluorine-containing fluxes would potentially test for HF. Approximately 55 furnaces at eight facilities use fluorine-containing fluxes. Therefore, the total cost of this proposed rule revision is approximately $55,000 every 5 years, or approximately $11,000 per year. More information is available in the *Cost Estimates for 2012 Proposed Rule Changes to Secondary Aluminum NESHAP* which is available in the docket for this proposed rule.

19. Requirements for Uncontrolled Furnaces That Do Not Presently Comply With ACGIH Ventilation Guidelines

Section 63.1506(c)(1) requires that, for each affected source or emission unit equipped with an add-on air pollution control device, the owner or operator must design and install a system for the capture and collection of emissions to meet the engineering standards for minimum exhaust rates as published by the ACGIH in chapters 3 and 5 of ''Industrial Ventilation: A Manual of Recommended Practice.'' However, there are no similar requirements for furnaces that are not equipped with an add-on air pollution control device. Furnaces that are uncontrolled for fugitive emissions do not account for

fugitive emissions that escape during testing for example through open doors and therefore underestimate emissions during performance testing.

Accordingly, we are proposing that owner/operators with uncontrolled affected sources either: (1) Construct hooding for testing that meets the ACGIH guidelines, and include emissions captured by that hooding in the compliance determination, or (2) assume a capture efficiency of 66.67 percent (i.e., multiply stack test results by a factor of 1.5) to account for emissions not captured. The basis for this proposed requirement is further discussed in the *Draft Technical Support Document for the Secondary Aluminum Production Source Category* included in the docket for this rule. If the source fails to demonstrate compliance using the 66.67 percent capture efficiency approach, we are proposing that the owner/operator retest with hoods meeting the ACGIH guidelines within 180 days. These proposed requirements would be implemented at the next scheduled performance test after the effective date of the final rule. We recognize that there may be situations (e.g., various furnace configurations) where constructing hooding may be problematic. Therefore, we are seeking comments and information on these proposed requirements and regarding other possible approaches that could be applied, such as emissions monitoring to address these unmeasured fugitive emissions. We also seek comments and information on work practices that could be applied during compliance testing that would minimize the escape of these fugitive emissions, including approaches that could be adapted for different furnace configurations, and to ensure that the vast majority of emissions from these units are accounted for during compliance testing.

We estimate that there are 107 uncontrolled furnaces that would be required to either install hooding that meets ACGIH guidelines for testing or to assume the 66.67 percent capture efficiency. We estimate that the capital cost of constructing the appropriate hooding would be $57,000 per affected furnace, resulting in a total capital cost of up to $6,099,000 for the source category (conservatively assuming that all these furnaces choose the hooding option), and an annualized cost of up to $1,220,000 (again based on the conservative assumption that all facilities choose the option of constructing hooding).

20. Clarify the Possible Number of New SAPUs

The rule currently states that there can be only one existing SAPU at an aluminum plant but is not clear on whether there can be more than one new SAPU. We are proposing revisions to clarify that more than one new SAPU is allowed under the rule.

21. Aluminum Scrap Containing Anodizing Dyes or Sealants

The current definition of ''clean charge'' does not clearly indicate the status of anodized aluminum. Some anodized aluminum parts contain dyes and/or sealants that contain organic materials. Therefore, we propose to amend the definition of ''clean charge'' to indicate that clean charge does not include anodized material that contains dyes or sealants that contain organic material.

22. Afterburner Residence Time

Currently, the standard contains the following definition: ''*Residence time* means, for an afterburner, the duration of time required for gases to pass through the *afterburner* combustion zone. Residence time is calculated by dividing the afterburner combustion zone volume in cubic feet by the volumetric flow rate of the gas stream in actual cubic feet per second.''

At some secondary aluminum facilities, the ductwork has been included as part of the combustion chamber to increase the calculated residence time and meet the requirements to qualify for alternative limits in § 63.1505(e). While this interpretation may not be consistent with the current definition, it can be shown that in some afterburners, the temperature in the duct work is adequate for D/F destruction, which would justify the inclusion of the duct work in the calculation of residence time.

We found that the basis for the residence time requirements for sweat furnaces and delacquering kilns in § 63.1505 did include the refractory lined duct up to the thermocouple measurement location. Therefore, we are proposing to amend the definition of residence time as follows, ''Residence time means, for an afterburner, the duration of time required for gases to pass through the afterburner combustion zone. Residence time is calculated by dividing the afterburner combustion zone volume in cubic feet by the volumetric flow rate of the gas stream in actual cubic feet per second. The combustion zone volume includes the reaction chamber of the afterburner in which the waste gas stream is exposed to the direct combustion flame and the complete refractory lined portion of the furnace stack up to the measurement thermocouple.''

23. SAPU Feed/Charge Rate

There has been confusion over the interpretation of certain SAPU requirements such that a SAPU emission limit should be calculated based on feed/charge rates during performance test. Our interpretation has always been that allowable emissions are calculated on a daily basis using feed/charge throughput, which can change daily. Because of the confusion over the appropriate method, we are proposing clarifications that will make it clear that the daily throughput, and not the throughput at the time of the performance test, is used in the calculation of allowable emissions in each emissions unit (group 1 furnace or in-line fluxer) within the SAPU. Consistent with the existing rule, area sources of HAP would not be required to calculate, or comply with a SAPU emission limit for PM or HCl. The owner or operator would be required to demonstrate compliance with these limits and these calculated SAPU emission limits would be used to establish compliance in accordance with the procedures in § 63.1513.

24. Changing Furnace Classification

The current subpart RRR regulatory text does not explicitly address whether and under what conditions a secondary aluminum production furnace may change its classification between group 1 furnace with add-on air pollution control device (APCD) (i.e., group 1 controlled furnace), group 1 furnace without add-on APCD (i.e., group 1 uncontrolled furnace), and group 2 furnace. This has led to uncertainty for facilities when considering available compliance options. The EPA proposes a new § 63.1514 that would allow an owner/operator to change a furnace's classification (also called an operating mode), as long as the change and new operating mode are fully compliant with all substantive and procedural requirements of the subpart RRR. The proposed procedures include limits on the frequency with which furnace operating modes can be changed. Practical implementation and enforcement of requirements such as SAPU compliance, Operation, Maintenance and Monitoring (OM&M) plans, and labeling require that furnace operating modes are not in a state of constant change. Therefore, we are proposing that a change in furnace operating mode and reversion to the

previous operating mode occurs no more frequently than once every 6 months, with an exception for control device maintenance requiring shutdown. Furnaces equipped with APCDs that meet the requirements for changing furnace classifications would be permitted to change operating mode and revert to the previous operating mode without restriction on frequency in cases where an APCD was shut down for planned maintenance activities such as bag replacement.

These proposed revisions specify the emissions testing that would be required to change furnace operating modes; operating requirements, such as labeling, flux use, scrap charging for the furnace before, during, and after changing; and recordkeeping requirements. These proposed revisions will provide industry with the flexibility to efficiently operate furnaces in response to changes in the availability of feed materials and other operational conditions. While providing increased flexibility, it is also important that EPA maintain its compliance oversight of these affected sources to ensure furnace operations are compliant with the rule. Therefore, EPA is proposing certain limitations on how and when furnaces can change from one operating mode to another. For example, when a furnace is changed from a group 1 furnace to a group 2 furnace, we are proposing that performance testing be conducted when the furnace is changed to the group 2 mode to verify that the furnace is not emitting HAP at levels above the relevant limits as a result of any HAP-containing feed or flux left in the furnace. We are also proposing requirements for this scenario to confirm that HAP emissions are sufficiently low to ensure that the furnace, while operating as a group 2 furnace, is performing as a group 2 furnace, that is, with little or no HAP emissions. To ensure that furnaces have had sufficient throughput (or time) in their new operating mode such that performance tests are representative of their new operating mode, the proposed amendments would require waiting periods of one or more charge-to-tap cycles or 24 operating hours before conducting performance testing. For alternate operating modes we are proposing that the testing be required in order to demonstrate that the furnace remains compliant with all applicable emission limits. Major sources would be required to repeat the required tests at least once every 5 years. When following the substantive and procedural requirements of this rule, some owners/operators may be able to turn off associated air pollution control devices. Because of this increased flexibility, we estimate an annual savings of $1,100,000, based on an estimate of controls for 50 furnaces being turned off for 6 months per year. We estimate additional testing costs of $500,000 per year. Therefore, we estimate the net cost to be negative $600,000 per year (a savings of $600,000 per year). We solicit comment on our estimates of avoided costs and testing costs.

25. Dross Only Versus Dross/Scrap Furnaces

Dross only furnaces at area sources are not subject to subpart RRR D/F emission limitations and therefore are not subject to the MACT operating parameter limitations. Industry representatives have inquired about the requirements for a furnace processing scrap on some occasions and then dross at other times.

We note that dross only furnaces are defined as furnaces that only process dross. A furnace that processes scrap may be a group 1 furnace or a group 2 furnace. Operators of group 1 furnaces have the option of conducting performance tests under different operating conditions to establish operating parameters applicable to different combinations of types of charge and fluxing rates. We have added language to clarify this in the proposed amendments. We note that dross is not clean charge, as defined in the rule, and thus any group 1 furnace processing dross is subject to limitations on emissions of D/F, and other requirements for group 1 furnaces processing other than clean charge.

26. Annual Hood Inspections

Industry representatives have stated that our interpretation that annual hood inspections include an annual hood flow measurement represents an unnecessary cost burden for each regulated facility. Industry representatives recommended that flow testing should only be required after modifications to the hood, furnace, and/or controls that could negatively impact the capture and, only then if they cannot be demonstrated by alternate engineering calculations or operating parameters. They contend that due to stringent OM&M protocols, it should be sufficient to certify that there have been no changes, with possible verification of flow by visual inspections of hoods and ductwork for leaks and possible verification of fan amperage. We disagree that these measures alone are sufficient to verify that flow is sufficient and that annual hood flow measurement represents an unnecessary cost burden. We are proposing to codify in the rule our existing interpretation that annual hood inspections include flow rate measurements. These flow rate measurements supplement the effectiveness of the required visual inspection for leaks (which may be difficult or uncertain for certain sections of ductwork), to reveal the presence of obstructions in the ductwork, confirm that fan efficiency has not declined, and provide a measured value for air flow.

27. Applicability of Rule to Area Sources

While the emissions standards that apply to area sources are evident in the current rule, the applicable operating, monitoring, and recordkeeping and reporting requirements are less clear. In general, the intent of the rule is to subject area sources to standards for D/F with corresponding monitoring, testing, reporting, and recordkeeping. We are proposing amendments that would clarify which of the operating, monitoring and other requirements apply to area sources.

28. Altering Parameters During Testing With New Sources of Scrap

Currently, the rule requires that when a process parameter or add-on air pollution control device operating parameter deviates from the value or range established during a performance test, the owner or operator must initiate corrective action. However, when the owner or operator is conducting performance testing with a new type of scrap, it may be necessary to deviate from the previously established values. The rule was not intended to prevent owners/operators from establishing new or revised operating parameters, if necessary to process different types of scrap. Accordingly, we are modifying the rule to allow deviations from the values and ranges in the OM&M plan during performance testing only, provided that the site-specific test plan documents the intent to establish new or revised parametric limits.

29. Controlled Furnaces That Are Temporarily Idled

Currently, the rule does not specify if an owner or operator may discontinue the operation of its control device if a furnace is not in use, but is not completely empty or shut down. Industry has requested that the EPA provide allowances for control devices to be turned off while the furnaces are not in operation or being charged with aluminum scrap or fluxing agents. This typically occurs over the weekend and accounts for unnecessary electrical and

operating costs. Accordingly, we are modifying the rule to allow for the discontinued use of control devices for these furnaces that will remain idle for 24 hours or longer.

30. Annual Compliance Certification for Area Sources

Because area sources that are subject to subpart RRR are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, it was not clear how area sources certified their annual compliance. To clarify that area sources are required to certify their annual compliance, we are proposing clarifying language to § 63.1516(c).

E. Compliance Dates

We are proposing that existing facilities must comply with all changes proposed in this action 90 days after promulgation of the final rule. All new or reconstructed facilities must comply with all requirements in the final rule upon startup.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected sources?

We estimate that there are 161 secondary aluminum production facilities that will be affected by this proposed rule, of which 53 are major sources of HAPs, and 108 are area sources. We estimate that 10 secondary aluminum facilities have co-located primary aluminum operations. The affected sources at secondary aluminum production facilities include new and existing scrap shredders, thermal chip dryers, scrap dryer/delacquering kiln/decoating kilns, group 2 furnaces, sweat furnaces, dross-only furnaces, rotary dross cooler and secondary aluminum processing units containing group 1 furnaces and in-line fluxers.

B. What are the air quality impacts?

No reductions are being proposed to numerical emissions limits. The proposed amendments include requirements that affected sources comply with the numerical emissions limits at all times including periods of startup and shutdown to help ensure that emissions from those affected sources are minimized. The proposed amendments would help to clarify the existing provisions and would help to improve compliance. The proposed amendment to limit and require testing of HF emissions for uncontrolled group 1 furnaces is not expected to significantly reduce HF emissions but will help to ensure that HF emissions remain low. We believe that the proposed revisions would result in little or no emissions reductions. Therefore, no air quality impacts are expected.

C. What are the cost impacts?

We estimate the total cost of the proposed amendments to be up to approximately $611,000 per year. We estimate that 56 unique facilities are affected and that the cost per facility ranges from negative $36,000 per year for a facility changing furnace operating modes to $112,000 per year for a facility installing hooding for testing. Our estimate includes an annualized cost of up to $1,200,000 for installing uncontrolled furnace testing hooding that meets ACGIH requirements, assuming that 107 furnaces choose that option (rather than assuming a 67 percent capture efficiency for their existing furnace exhaust system). Our estimate also includes an annualized cost of $11,000 for testing for HF on uncontrolled furnaces that are already testing for HCl. Finally, we estimate cost savings of $600,000 per year for furnaces that change furnace operating modes and turn off their control devices. Our estimate is based on 50 furnaces turning off their controls for approximately 6 months every year. This savings is net of the cost of testing to demonstrate that these furnaces remain in compliance with emission limits after their control devices have been turned off. The estimated costs are explained further in the Cost Estimates for 2012 Proposed Rule Changes to Secondary Aluminum NESHAP, which is available in the docket.

D. What are the economic impacts?

We performed an economic impact analysis for the proposed modifications in this rulemaking. That analysis estimates total annualized costs of approximately $0.6 million at 28 facilities and cost to sales ratios of less than 0.02 percent for the Secondary Aluminum Production source category. For more information, please refer to the Economic Impact Analysis for the Proposed Secondary Aluminum NESHAP that is available in the public docket for this proposed rulemaking.

E. What are the benefits?

We do not anticipate any significant reductions in HAP emissions as a result from these proposed amendments. However, we think that the proposed amendments would help to improve the clarity of the rule, which can help to improve compliance and help to ensure that emissions are kept to a minimum. Certain provisions may also provide operational flexibility to the industry at no increase in HAP emissions.

VI. Request for Comments

We are soliciting comments on all aspects of this proposed action. In addition to general comments on this proposed action, we are also interested in any additional data that may help to reduce the uncertainties inherent in the risk assessments and other analyses. We are specifically interested in receiving corrections to the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses are available for download on the RTR web page at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html*. The data files include detailed information for each HAP emissions release point for the facility included in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR Web page, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information. The data fields that may be revised include the following:

Data element	Definition
Control Measure	Are control measures in place? (yes or no).
Control Measure Comment	Select control measure from list provided, and briefly describe the control measure.
Delete	Indicate here if the facility or record should be deleted.

Data element	Definition
Delete Comment	Describes the reason for deletion.
Emissions Calculation Method Code For Revised Emissions	Code description of the method used to derive emissions. For example, CEM, material balance, stack test, etc.
Emissions Process Group	Enter the general type of emissions process associated with the specified emissions point.
Fugitive Angle	Enter release angle (clockwise from true North); orientation of the y-dimension relative to true North, measured positive for clockwise starting at 0 degrees (maximum 89 degrees).
Fugitive Length	Enter dimension of the source in the east-west (x-) direction, commonly referred to as length (ft).
Fugitive Width	Enter dimension of the source in the north-south (y-) direction, commonly referred to as width (ft).
Malfunction Emissions	Enter total annual emissions due to malfunctions (tpy).
Malfunction Emissions Max Hourly	Enter maximum hourly malfunction emissions here (lb/hr).
North American Datum	Enter datum for latitude/longitude coordinates (NAD27 or NAD83); if left blank, NAD83 is assumed.
Process Comment	Enter general comments about process sources of emissions.
REVISED Address	Enter revised physical street address for MACT facility here.
REVISED City	Enter revised city name here.
REVISED County Name	Enter revised county name here.
REVISED Emissions Release Point Type	Enter revised Emissions Release Point Type here.
REVISED End Date	Enter revised End Date here.
REVISED Exit Gas Flow Rate	Enter revised Exit Gas Flow Rate here (ft^3/sec).
REVISED Exit Gas Temperature	Enter revised Exit Gas Temperature here (F).
REVISED Exit Gas Velocity	Enter revised Exit Gas Velocity here (ft/sec).
REVISED Facility Category Code	Enter revised Facility Category Code here, which indicates whether facility is a major or area source.
REVISED Facility Name	Enter revised Facility Name here.
REVISED Facility Registry Identifier	Enter revised Facility Registry Identifier here, which is an ID assigned by the EPA Facility Registry System.
REVISED HAP Emissions Performance Level Code	Enter revised HAP Emissions Performance Level here.
REVISED Latitude	Enter revised Latitude here (decimal degrees).
REVISED Longitude	Enter revised Longitude here (decimal degrees).
REVISED MACT Code	Enter revised MACT Code here.
REVISED Pollutant Code	Enter revised Pollutant Code here.
REVISED Routine Emissions	Enter revised routine emissions value here (tpy).
REVISED SCC Code	Enter revised SCC Code here.
REVISED Stack Diameter	Enter revised Stack Diameter here (ft).
REVISED Stack Height	Enter revised Stack Height here (ft).
REVISED Start Date	Enter revised Start Date here.
REVISED State	Enter revised State here.
REVISED Tribal Code	Enter revised Tribal Code here.
REVISED Zip Code	Enter revised Zip Code here.
Shutdown Emissions	Enter total annual emissions due to shutdown events (tpy).
Shutdown Emissions Max Hourly	Enter maximum hourly shutdown emissions here (lb/hr).
Stack Comment	Enter general comments about emissions release points.
Startup Emissions	Enter total annual emissions due to startup events (tpy).
Startup Emissions Max Hourly	Enter maximum hourly startup emissions here (lb/hr).
Year Closed	Enter date facility stopped operations.

2. Fill in the commenter information fields for each suggested revision (i.e., commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (e.g., performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID Number EPA–HQ–OAR–2010–0544 (through one of the methods described in the **ADDRESSES** section of this preamble). To expedite review of the revisions, it would also be helpful if you submitted a copy of your revisions to the EPA directly at RTR@epa.gov in addition to submitting them to the docket.

5. If you are providing comments on a facility, you need only submit one file for that facility, which should contain all suggested changes for all sources at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Access files, which are provided on the RTR Web Page at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html*.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a significant regulatory action because it raises novel legal and policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by the EPA has been assigned the EPA ICR number 2453.01. The information collection requirements are not enforceable until OMB approves them. The information requirements are based on notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emissions standards. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to agency policies set forth in 40 CFR part 2, subpart B.

We are proposing new paperwork requirements to the Secondary Aluminum Production source category in the form of reporting for furnace changes in classification and affirmative defense and recordkeeping with regard to verification of lime injection rates and change in furnace classifications. New monitoring requirements under the proposed revisions include testing for HF, and testing related to furnace classification changes.

For this proposed rule, the EPA is adding affirmative defense to the estimate of burden in the ICR. To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, the EPA has provided administrative adjustments to this ICR to show what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. The EPA's estimate for the required notification, reports and records for any individual incident, including the root cause analysis, totals $3,142 and is based on the time and effort required of a source to review relevant data, interview plant employees, and document the events surrounding a malfunction that has caused a violation of an emissions limit. The estimate also includes time to produce and retain the record and reports for submission to the EPA. The EPA provides this illustrative estimate of this burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

Given the variety of circumstances under which malfunctions could occur, as well as differences among sources' operation and maintenance practices, we cannot reliably predict the severity and frequency of malfunction-related excess emissions events for a particular source. It is important to note that the EPA has no basis currently for estimating the number of malfunctions that would qualify for an affirmative defense. Current historical records would be an inappropriate basis, as source owners or operators previously operated their facilities in recognition that they were exempt from the requirement to comply with emissions standards during malfunctions. Of the number of excess emissions events reported by source operators, only a small number would be expected to result from a malfunction (based on the definition above), and only a subset of excess emissions caused by malfunctions would result in the source choosing to assert the affirmative defense. Thus we believe the number of instances in which source operators might be expected to avail themselves of the affirmative defense will be extremely small.

With respect to the Secondary Aluminum Production source category, we estimate the annual recordkeeping and reporting burden after the effective date of the proposed rule for affirmative defense to be 30 hours at a cost of $3,142.

We expect to gather information on such events in the future and will revise this estimate as better information becomes available. We estimate 161 regulated entities are currently subject to subpart RRR. The annual monitoring, reporting and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the standards) for these amendments to subpart RRR is estimated to be $1,876,521 per year. This includes 1,725 labor hours per year at a total labor cost of $165,521 per year, and total non-labor capital and operation and maintenance (O&M) costs of $1,711,000 per year. The total burden for the Federal government (averaged over the first 3 years after the effective date of the standard) is estimated to be 271 labor hours per year at an annual cost of $12,231. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When these ICRs are approved by OMB, the agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control numbers for the approved information collection requirements contained in the final rules.

To comment on the agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–OAR–2010–0544. Submit any comments related to the ICR to the EPA and OMB. See the **ADDRESSES** section at the beginning of this notice for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after February 14, 2012, a comment to OMB is best assured of having its full effect if OMB receives it by March 15, 2012. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed 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 that is independently owned and operated and is not dominant in its field. For this source category, which has the NAICS code 331314, the SBA small business size standard is 750 employees according to the SBA small business standards definitions.

After considering the economic impacts of these proposed changes on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We determined in the economic and small business analysis that, using the results from the cost memorandum, 28 entities will incur costs associated with the proposed rule. Of these 28 entities, nine of them are small. Of these nine, all of them are estimated to experience a negative cost (i.e., a cost savings) as a result of the rule according to our analysis. For more information, please refer to the Economic and Small Business Analysis that is in the docket.

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, the EPA nonetheless has tried to reduce the impact of this rule on small entities. To reduce the impacts, we are correcting certain provisions of the rule as well as proposing revisions to help clarify the rule's intent. We have also proposed new provisions that increase industry's flexibility as to how they operate group 1 furnaces. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a Federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The proposed rule would not result in expenditures of $100 million or more for State, local, and tribal governments, in aggregate, or the private sector in any 1 year. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of the UMRA.

This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that apply to such governments nor does it impose obligations upon them.

E. Executive Order 13132: Federalism

This proposed rule 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. None of the facilities subject to this action are owned or operated by State governments. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). There are no secondary aluminum production facilities that are owned or operated by tribal governments. Thus, Executive Order 13175 does not apply to this action.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

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

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866. Moreover, the agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children.

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

This action is not a ''significant energy action'' as defined under Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not likely to have significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

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

This proposed rulemaking does not involve use of any new technical standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority, low income, or indigenous populations because we have concluded that the existing rules adequately protect human health with an ample margin of safety and the proposed amendments do not decrease the level of protection provided to human health or the environment. Our analyses show that adverse environmental effects, human health multi-pathway effects and acute and chronic noncancer health impacts are unlikely. Our additional analysis of facilitywide risks for major sources showed that the maximum facilitywide cancer risks are within the range of acceptable risks and that the maximum chronic noncancer risks are unlikely to cause health impacts. Because our residual risk assessment determined that there was minimal residual risk associated with the emissions from facilities in this source category, a demographic risk analysis was not necessary for this category.

However, the Agency reviewed this rule to determine if there is an overrepresentation of minority, low income, or indigenous populations near the sources such that they may currently face disproportionate risks from pollutants that could be mitigated by this rulemaking. This demographic distribution analysis only gives some indication of the prevalence of sub-populations that may be exposed to HAP pollution from the sources affected by this rulemaking; it does not identify the demographic characteristics of the

most highly affected individuals or communities, nor does it quantify the level of risk faced by those individuals or communities.

The demographic distribution analysis shows that while most demographic categories are below or within 10 percent of their corresponding national averages, the African American percentage within 3 miles of any source affected by this rulemaking exceeds the national average by 3 percentage points (16 percent versus 13 percent), or +23 percent. The area source sector-wide analysis of near source populations reveals that several demographic categories exceed 10 percent of their corresponding national averages: Minority by +16 percentage points (44% vs. 28%), or +57%; Hispanic or Latino by +17 percentage points (34% vs. 17%), or +100%; Without a High School Diploma by +6 percentage points (16% vs. 10%), or +60%, and; Below National Poverty Line: +7 percentage points (21% vs. 14%), or +50%. The facility-level demographic analysis results and the details concerning their development are presented in the OAQPS Environmental Justice Analytical Team Report, Secondary Aluminum—Area Sources, and OAQPS Environmental Justice Analytical Team Report, Secondary Aluminum—Major Sources, copies of which are available in the docket for this action (EPA–HQ–OAR–2010–0544).

National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production

List of Subjects in 40 CFR Part 63

Air pollution control, Environmental protection, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: January 30, 2012.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, part 63 of title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

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

2. Section 63.1501 is amended by adding paragraph (d) to read as follows:

§ 63.1501 Dates.

* * * * *

(d) The owner or operator of an existing affected source must comply with the following requirements of this subpart by [DATE 90 DAYS FROM PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]: § 63.1505(a), (i)(4), (k), (k)(1),(k)(2), (k)(3); § 63.1506 (a)(1), (a)(5), (c)(1),(g)(5), (k)(3), (m)(4),(n)(1); § 63.1510 (a), (b), (b)(5),(b)(9), (d)(2), (f)(1)(ii), (i)(4), (j)(4), (n)(1), (o)(1), (o)(1)(ii), (s)(2)(iv), (t), (t)(2)(i), (t)(2)(ii), (t)(4), (t)(5); § 63.1511(a), (b), (b)(1), (b)(6), (c)(9), (f)(6), (g)(5); § 63.1512(e)(1), (e)(2),(e)(3), (e)(4), (e)(5), (h)(1), (h)(2), (j), (j)(1)(I, (j)(2)(i), (o)(1), (p), (p)(2); § 63.1513(b), (b)(1), (e)(1), (e)(2), (e)(3); § 63.1514; § 63.1516(a), (b), (b) (1)(v), (b)(2)(iii), (b)(3), (c),(d); § 63.1517(b)(16)(i), (b)(18), (c); § 63.1520.

* * * * *

3. Section 63.1502 is amended by revising paragraph (a)(1) and adding paragraph (a)(3) to read as follows:

§ 63.1502 Incorporation by reference.

(a) * * *

(1) ''Industrial Ventilation: A Manual of Recommended Practice,'' American Conference of Governmental Industrial Hygienists, (23rd edition, 1998), IBR approved for § 63.1506(c), and

* * * * *

(3) ''Industrial Ventilation: A Manual of Recommended Practice,'' American Conference of Governmental Industrial Hygienists, (27rd edition, 2010), IBR approved for § 63.1506(c).

* * * * *

4. Section 63.1503 is amended by:

a. Adding, in alphabetical order, new definitions of ''affirmative defense,'' ''bale breaker,'' ''capture and collection system,'' ''HF'' and ''Tap''; and

b. Revising the definitions of ''aluminum scrap shredder,'' ''clean charge,'' ''cover flux,'' ''Group 2 furnace,'' ''HCl,'' ''residence time,'' ''scrap dryer/delacquering kiln/decoating kiln'' and ''secondary aluminum processing unit (SAPU).''

§ 63.1503 Definitions.

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

Aluminum scrap shredder means a high speed or low speed unit that crushes, grinds, granulates, shears or breaks aluminum scrap into a more uniform size prior to processing or charging to a *scrap dryer/delacquering kiln/decoating kiln,* or furnace. A bale breaker is not an *aluminum scrap shredder.*

Bale breaker means a device used to break apart a bale of aluminum scrap for further processing. Bale breakers are not used to crush, grind, granulate, shear or break aluminum scrap into more uniform size pieces.

Capture and collection system means the system of hood(s), duct system and fan used to collect a contaminant at or near its source, and for affected sources equipped with an air pollution control device, transport the contaminated air to the air cleaning device.

Clean charge means furnace charge materials, including molten aluminum; T-bar; sow; ingot; billet; pig; alloying elements; aluminum scrap known by the owner or operator to be entirely free of paints, coatings, and lubricants; uncoated/unpainted aluminum chips that have been thermally dried or treated by a centrifugal cleaner; aluminum scrap dried at 343 °C (650 °F) or higher; aluminum scrap delacquered/decoated at 482 °C (900 °F) or higher, and runaround scrap. Anodized aluminum that contains dyes or sealants with organic compounds is not clean charge.

Cover flux means salt added to the surface of molten aluminum in a *group 1* or *group 2 furnace,* without agitation of the molten aluminum, for the purpose of preventing oxidation. Any flux added to a rotary furnace or other furnace that uses a molten metal pump or other device to circulate the aluminum is not a cover flux. Any reactive flux cannot be a cover flux.

Group 2 furnace means a furnace of any design that melts, holds, or processes only *clean charge* and that performs no *fluxing* or performs *fluxing* using only nonreactive, non-HAP-containing/non-HAP-generating gases or agents. Pots used to transport metal to customers are not furnaces.

HCl means hydrogen chloride.

HF means hydrogen fluoride.

Residence time means, for an *afterburner,* the duration of time required for gases to pass through the *afterburner* combustion zone. *Residence time* is calculated by dividing the *afterburner* combustion zone volume in cubic feet by the volumetric flow rate of the gas stream in actual cubic feet per second. The combustion zone volume includes the reaction chamber of the afterburner in which the waste gas stream is exposed to the direct combustion flame and the complete refractory lined portion of the furnace stack up to the measurement thermocouple.

Scrap dryer/delacquering kiln/decoating kiln means a unit used primarily to remove various organic contaminants such as oil, paint, lacquer, ink, plastic, and/or rubber from *aluminum scrap* (including used

beverage containers) prior to melting, or that separates aluminum foil from paper and plastic in scrap.

Secondary aluminum processing unit (SAPU). An existing SAPU means all existing *group 1 furnaces* and all existing *in-line fluxers* within a *secondary aluminum production facility.* Each existing *group 1 furnace* or existing *in-line fluxer* is considered an *emission unit* within a *secondary aluminum processing unit.* A new *SAPU* means any combination of individual *group 1 furnaces* and *in-line fluxers* within a *secondary aluminum processing facility* which either were constructed or reconstructed after February 11, 1999, or have been permanently redesignated as new emission units pursuant to § 63.1505(k)(6). Each of the *group 1 furnaces* or *in-line fluxers* within a new *SAPU* is considered an *emission unit* within that *secondary aluminum processing unit.* A *secondary aluminum production facility* may have more than one new *SAPU.*

Tap means the end of an operating cycle when processed molten aluminum is poured from a furnace.

* * * * *

5. Section 63.1505 is amended by:

a. Revising paragraph (a);
b. Revising paragraph (i)(4);
c. Revising paragraph (k);
d. Revising paragraph (k)(1)
e. Revising paragraph (k)(2); and
f. Revising paragraph (k)(3) to read as follows:

§ 63.1505 Emission standards for affected sources and emission units.

(a) *Summary.* (1) The owner or operator of a new or existing affected source must comply at all times with each applicable limit in this section, including periods of startup and shutdown. Table 1 to this subpart summarizes the emission standards for each type of source.

(2) For a new or existing affected sources subject to an emissions limit in paragraphs (b) through (j) of this section expressed in units of pounds per ton of feed, or µg TEQ or ng TEQ per Mg of feed, calculate your emissions during periods of startup and shutdown by dividing your measured emissions in lb/hr or µg/hr or ng/hr by the appropriate feed rate in tons/hr or Mg/hr from your most recent or current performance test.

* * * * *

(i) * * *

(4) 0.20 kg of HF per Mg (0.40 lb of HF per ton) of feed/charge from an uncontrolled group 1 furnace and 0.20 kg of HCl per Mg (0.40 lb of HCl per ton) of feed/charge or, if the furnace is equipped with an add-on air pollution control device, 10 percent of the uncontrolled HCl emissions, by weight, for a group 1 furnace at a secondary aluminum production facility that is a major source.

* * * * *

(k) *Secondary aluminum processing unit.* On and after the compliance date established by § 63.1501, the owner or operator must comply with the emission limits calculated using the equations for PM, HCl and HF in paragraphs (k)(1) and (2) of this section for each secondary aluminum processing unit at a secondary aluminum production facility that is a major source. The owner or operator must comply with the emission limit calculated using the equation for D/F in paragraph (k)(3) of this section for each secondary aluminum processing unit at a secondary aluminum production facility that is a major or area source.

(1) The owner or operator must not discharge or allow to be discharged to the atmosphere any 3-day, 24-hour rolling average emissions of PM in excess of:

$$L_{C_{PM}} = \frac{\sum_{i=1}^{n}\left(L_{ti_{PM}} \times T_{ti}\right)}{\sum_{i=1}^{n}\left(T_{ti}\right)} \qquad \text{(Eq. 1)}$$

Where,

L_{tiPM} = The PM emission limit for individual emission unit i in paragraph (i)(1) and (2) of this section for a group 1 furnace or in paragraph (j)(2) of this section for an in-line fluxer;

T_{ti} = The mass of feed/charge for 24 hours for individual emission unit i; and

L_{cPM} = The daily PM emission limit for the secondary aluminum processing unit which is used to calculate the 3-day, 24-hour PM emission limit applicable to the SAPU.

Note: In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the PM limit.

(2) The owner or operator must not discharge or allow to be discharged to the atmosphere any 3-day, 24-hour rolling average emissions of HCl or HF in excess of:

$$L_{cHCl/HF} = \frac{\sum_{i=1}^{n}\left(L_{tiHCl/HF} \times T_{ti}\right)}{\sum_{i=1}^{n}\left(T_{ti}\right)} \qquad \text{(Eq. 2)}$$

Where,

$L_{tiHCl/HF}$ = The HCl emission limit for individual emission unit i in paragraph (i)(4) of this section for a group 1 furnace or in paragraph (j)(1) of this section for an in-line fluxer; or the HF emission limit for individual emission unit i in paragraph (i)(4) of this section for an uncontrolled group 1 furnace; and

$L_{cHCl/HF}$ = The daily HCl or HF emission limit for the secondary aluminum processing unit which is used to calculate the 3-day, 24-hour HCl or HF emission limit applicable to the SAPU.

Note: Only uncontrolled group 1 furnaces are included in this HF limit calculation and in-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the HCl limits.

(3) The owner or operator must not discharge or allow to be discharged to the atmosphere any 3-day, 24-hour rolling average emissions of D/F in excess of:

$$L_{cD/F} = \frac{\sum_{i=1}^{n}\left(L_{tiD/F} \times T_{ti}\right)}{\sum_{i=1}^{n}\left(T_{ti}\right)} \qquad \text{(Eq. 3)}$$

Where,

$L_{tiD/F}$ = The D/F emission limit for individual emission unit i in paragraph (i)(3) of this section for a group 1 furnace; and

$L_{cD/F}$ = The daily D/F emission limit for the secondary aluminum processing unit which is used to calculate the 3-day, 24-hour D/F emission limit applicable to the SAPU.

Note: Clean charge furnaces cannot be included in this calculation since they are not subject to the D/F limit.

* * * * *

6. Section 63.1506 is amended by:

a. Revising paragraph (a)(1);

b. Adding paragraph (a)(5);

c. Revising paragraph (c)(1);

d. Revising paragraph (g)(5);

e. Revising paragraph (k)(3);

f. Revising paragraph (m)(4); and

g. Revising paragraph (n)(1) to read as follows:

§ 63.1506 Operating requirements.

(a) * * *

(1) On and after the compliance date established by § 63.1501, the owner or operator must operate all new and existing affected sources and control equipment according to the requirements in this section. The affected sources, and their associated control equipment, listed in § 63.1500(c)(1) through (4) of this subpart that are located at a secondary aluminum production facility that is an area source are subject to the operating requirements of paragraphs (b), (c), (d), (f), (g), (h), (m), (n), and (p) of this section.

* * * * *

(5) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

* * * * *

(c) * * *

(1) Design and install a system for the capture and collection of emissions to meet the engineering standards for minimum exhaust rates as published by the American Conference of Governmental Industrial Hygienists in ''Industrial Ventilation: A Manual of Recommended Practice'' 23rd or 27th edition (ACGIH Guidelines) (incorporated by reference in § 63.1502 of this subpart);

* * * * *

(g) * * *

(5) For a continuous injection device, maintain free-flowing lime in the hopper to the feed device at all times and maintain the lime feeder setting at or above the level established during the performance test.

* * * * *

(k) * * *

(3) For a continuous injection system, maintain free-flowing lime in the hopper to the feed device at all times and maintain the lime feeder setting at or above the level established during the performance test.

* * * * *

(m) * * *

(4) For a continuous lime injection system, maintain free-flowing lime in the hopper to the feed device at all times and maintain the lime feeder setting at or above the level established during the performance test.

* * * * *

(n) * * *

(1) Maintain the total reactive chlorine flux injection rate and fluorine flux addition rate for each operating cycle or time period used in the performance test at or below the average rate established during the performance test.

* * * * *

7. Section 63.1510 is amended by:

a. Revising paragraph (a);

b. Revising paragraph (b) introductory text;

c. Revising paragraph (b)(5);

d. Adding paragraph (b)(9);

e. Revising paragraph (d)(2);

f. Revising paragraph (f)(1)(ii);

g. Adding paragraph (i)(4);

h. Revising paragraph (j)(4);

i. Revising paragraph (n)(1);

j. Revising paragraph (o)(1);

k. Revising paragraph (o)(1)(ii);

l. Revising paragraph (s)(2)(iv);

m. Revising paragraph (t) introductory text;

n. Adding paragraph (t)(2)(i);

o. Adding paragraph (t)(2)(ii);

p. Revising paragraph (t)(4); and

q. Revising paragraph (t)(5) to read as follows:

§ 63.1510 Monitoring requirements.

(a) *Summary.* On and after the compliance date established by § 63.1501, the owner or operator of a new or existing affected source or emission unit must monitor all control equipment and processes according to the requirements in this section. Monitoring requirements for each type of affected source and emission unit are summarized in Table 3 to this subpart. Area sources are subject to monitoring requirements for those affected sources listed in § 63.1500(c)(1)–(4) of this subpart, and associated control equipment as required by paragraphs (b) through (k), (n) through (q), and (s) through (w) of this section, including but not limited to:

(1) The operation, maintenance and monitoring plan required in paragraph (b) of this section pertaining to each affected source listed in § 63.1500(c)(1)–(4) of this subpart,

(2) The labeling requirements described in paragraph (c) of this section pertaining to group 1 furnaces processing other than clean charge, and scrap dryer/delacquering kiln/decoating kilns,

(3) The requirements for capture and collection described in paragraph (d) of this section for each controlled affected source listed in § 63.1500(c)(1)–(4) of this subpart,

(4) The feed charge weight monitoring requirements described in paragraph (e) of this section applicable to group 1 furnaces processing other than clean charge, scrap dryer/delacquering kiln/decoating kilns and thermal chip dryers,

(5) The bag leak detection system requirements described in paragraph (f) of this section applicable to all bag leak detection systems installed on fabric filters and lime injected fabric filters used to control each affected source listed in § 63.1500(c)(1)–(4) of this subpart,

(6) The requirements for afterburners described in paragraph (g) of this section applicable to sweat furnaces, thermal chip dryers, and scrap dryer/delacquering kiln/decoating kilns,

(7) The requirements for monitoring fabric filter inlet temperature described

in paragraph (h) of this section for all lime injected fabric filters used to control group 1 furnaces processing other than clean charge, sweat furnaces and scrap dryer/delacquering kiln/decoating kilns,

(8) The requirements for monitoring lime injection described in paragraph (i) of this section applicable to all lime injected fabric filters used to control emissions from group 1 furnaces processing other than clean charge, thermal chip dryers, sweat furnaces and scrap dryer/delacquering kiln/decoating kilns,

(9) The requirements for monitoring total reactive flux injection described in paragraph (j) of this section for all group 1 furnaces processing other than clean charge,

(10) The requirements described in paragraph (k) of this section for thermal chip dryers,

(11) The requirements described in paragraph (n) of this section for controlled group 1 sidewell furnaces processing other than clean charge,

(12) The requirements described in paragraph (o) of this section for uncontrolled group 1 sidewell furnaces processing other than clean charge,

(13) The requirements described in paragraph (p) of this section for scrap inspection programs for uncontrolled group 1 furnaces,

(14) The requirements described in paragraph (q) of this section for monitoring scrap contamination level for uncontrolled group 1 furnaces,

(15) The requirements described in paragraph (s) of this section for secondary aluminum processing units, limited to compliance with limits for emissions of D/F from group 1 furnaces processing other than clean charge,

(16) The requirements described in paragraph (t) of this section for secondary aluminum processing units limited to compliance with limits for emissions of D/F from group 1 furnaces processing other than clean charge,

(17) The requirements described in paragraph (u) of this section for secondary aluminum processing units limited to compliance with limits for emissions of D/F from group 1 furnaces processing other than clean charge,

(18) The requirements described in paragraph (v) of this section for alternative lime addition monitoring methods applicable to lime coated fabric filters used to control emissions from group 1 furnaces processing other than clean charge, thermal chip dryers, sweat furnaces and scrap dryer/delacquering kiln/decoating kilns, and

(19) The requirements described in paragraph (w) of this section for approval of alternate methods for monitoring group 1 furnaces processing other than clean charge, thermal chip dryers, scrap dryer/delacquering kiln/decoating kilns and sweat furnaces and associated control devices for the control of D/F emissions.

(b) *Operation, maintenance, and monitoring (OM&M) plan.* The owner or operator must prepare and implement for each new or existing affected source and emission unit, a written operation, maintenance, and monitoring (OM&M) plan. The owner or operator of an existing affected source must submit the OM&M plan to the responsible permitting authority no later than the compliance date established by § 63.1501(a). The owner or operator of any new affected source must submit the OM&M plan to the responsible permitting authority within 90 days after a successful initial performance test under § 63.1511(b), or within 90 days after the compliance date established by § 63.1501(b) if no initial performance test is required. The plan must be accompanied by a written certification by the owner or operator that the OM&M plan satisfies all requirements of this section and is otherwise consistent with the requirements of this subpart. The owner or operator must comply with all of the provisions of the OM&M plan as submitted to the permitting authority, unless and until the plan is revised in accordance with the following procedures. If the permitting authority determines at any time after receipt of the OM&M plan that any revisions of the plan are necessary to satisfy the requirements of this section or this subpart, the owner or operator must promptly make all necessary revisions and resubmit the revised plan. If the owner or operator determines that any other revisions of the OM&M plan are necessary, such revisions will not become effective until the owner or operator submits a description of the changes and a revised plan incorporating them to the permitting authority. The owner or operator must not begin operating under the revised plan until approval is received or until after 60 days, whichever is sooner. Each plan must contain the following information:

* * * * *

(5) Procedures for monitoring process and control device parameters, including lime injection rates, procedures for annual inspections of afterburners, and if applicable, the procedure to be used for determining charge/feed (or throughput) weight if a measurement device is not used.

* * * * *

(9) Procedures to be followed when changing furnace classification under the provisions of § 63.1514.

* * * * *

(d) * * *

(2) Inspect each capture/collection and closed vent system at least once each calendar year to ensure that each system is operating in accordance with the operating requirements in § 63.1506(c) and record the results of each inspection. This inspection shall include a volumetric flow rate measurement taken at a location in the ductwork downstream of the hoods which will be representative of the actual volumetric flow rate without the interference of leaks, the introduction of ambient air for cooling, or other ducts manifolded from other hoods. The measurement shall be performed using EPA Reference Methods 1 and 2 in appendix A to 40 CFR part 60.

* * * * *

(f) * * *

(1) * * *

(ii) Each bag leak detection system must be installed, calibrated, operated, and maintained according to the manufacturer's operating instructions.

* * * * *

(i) * * *

(4) At least once per month, verify that the lime injection rate in pound per hour (lb/hr) is no less than 90 percent of the lime injection rate used to demonstrate compliance during your performance test.

(j) * * *

(4) Calculate and record the total reactive flux injection rate for each operating cycle or time period used in the performance test using the procedure in § 63.1512(o). For solid flux that is added intermittently, record the amount added for each operating cycle or time period used in the performance test using the procedures in § 63.1512(o).

* * * * *

(n) * * *

(1) Record in an operating log for each tap of a sidewell furnace whether the level of molten metal was above the top of the passage between the sidewell and hearth during reactive flux injection, unless the furnace hearth was also equipped with an add-on control device. If visual inspection of the molten metal level is not possible, the molten metal level must be determined using physical measurement methods.

(2) Submit a certification of compliance with the operational standards in § 63.1506(m)(6) for each 6-month reporting period. Each certification must contain the information in § 63.1516(b)(2)(iii).

(o) * * *

(1) The owner or operator must develop, in consultation with the responsible permitting authority, a written site-specific monitoring plan. The site-specific monitoring plan must be submitted to the permitting authority as part of the OM&M plan. The site-specific monitoring plan must contain sufficient procedures to ensure continuing compliance with all applicable emission limits and must demonstrate, based on documented test results, the relationship between emissions of PM, HCl (and, for uncontrolled group 1 furnaces, HF), and D/F and the proposed monitoring parameters for each pollutant. Test data must establish the highest level of PM, HCl (and, for uncontrolled group 1 furnaces, HF), and D/F that will be emitted from the furnace. This may be determined by conducting performance tests and monitoring operating parameters while charging the furnace with feed/charge materials containing the highest anticipated levels of oils and coatings and fluxing at the highest anticipated rate. If the permitting authority determines that any revisions of the site-specific monitoring plan are necessary to meet the requirements of this section or this subpart, the owner or operator must promptly make all necessary revisions and resubmit the revised plan to the permitting authority.

* * * * *

(ii) The permitting authority will review and approve or disapprove a proposed plan, or request changes to a plan, based on whether the plan contains sufficient provisions to ensure continuing compliance with applicable emission limits and demonstrates, based on documented test results, the relationship between emissions of PM, HCl (for uncontrolled group 1 furnaces, HF) and D/F and the proposed monitoring parameters for each pollutant. Test data must establish the highest level of PM, HCl (for uncontrolled group 1 furnaces, HF) and D/F that will be emitted from the furnace. Subject to permitting agency approval of the OM&M plan, this may be determined by conducting performance tests and monitoring operating parameters while charging the furnace with feed/charge materials containing the highest anticipated levels of oils and coatings and fluxing at the highest anticipated rate.

* * * * *

(s) * * *

(2) * * *

(iv) The inclusion of any periods of startup or shutdown in emission calculations.

* * * * *

(t) *Secondary aluminum processing unit.* Except as provided in paragraph (u) of this section, the owner or operator must calculate and record the 3-day, 24-hour rolling average emissions of PM, HCl (for uncontrolled group 1 furnaces, HF) and D/F for each secondary aluminum processing unit on a daily basis. To calculate the 3-day, 24-hour rolling average, the owner or operator must:

* * * * *

(2) * * *

(i) Where no performance test has been conducted, for a particular emission unit, because the owner of operator has, with the approval of the permitting authority, chosen to determine the emission rate of an emission unit by testing a representative unit, in accordance with § 63.1511(f), the owner of operator shall use the emission rate determined from the representative unit in the SAPU emission rate calculation required in § 63.1510(t)(4).

(ii) If the owner or operator has not conducted performance tests for HCl and HF for an uncontrolled group 1 furnace or for HCL for an in-line fluxer, in accordance with the provisions of § 63.1512(d)(3), (e)(3), or (h)(2), the calculation required in § 63.1510(t)(4) to determine SAPU-wide HCl and HF emissions shall be made under the assumption that all chlorine-containing reactive flux added to the emission unit is emitted as HCl and all fluorine-containing reactive flux added to the emission unit is emitted as HF.

* * * * *

(4) Compute the 24-hour daily emission rate using Equation 4:

$$E_{day} = \frac{\sum_{i=1}^{n} (T_i \times ER_i)}{\sum_{i=1}^{n} (T_i)} \qquad \text{(Eq. 4)}$$

Where:

E_{day} = The daily PM, HCl, D/F and, for uncontrolled group 1 furnaces, HF emission rate for the secondary aluminum processing unit for the 24-hour period;

T_i = The total amount of feed, or aluminum produced, for emission unit i for the 24-hour period (tons or Mg);

ER_i = The measured emission rate for emission unit i as determined in the performance test (lb/ton or µg/Mg of feed/charge); and

n = The number of emission units in the secondary aluminum processing unit.

(5) Calculate and record the 3-day, 24-hour rolling average for each pollutant each day by summing the daily emission rates for each pollutant over the 3 most recent consecutive days and dividing by 3. The SAPU is in compliance with an applicable emission limit if the 3-day, 24-hour rolling average for each pollutant is no greater than the applicable SAPU emission limit determined in accordance with § 63.1505(k)(1)–(3).

* * * * *

8. Section 63.1511 is amended by:

a. Revising paragraph (a);

b. Revising paragraph (b) introductory text;

c. Revising paragraph (b)(1);

d. Adding paragraph (b)(6);

e. Revising paragraph (c)(9);

f. Adding paragraph (f)(6); and

g. Adding paragraph (g)(5) to read as follows:

§ 63.1511 Performance test/compliance demonstration general requirements.

(a) Site-specific test plan. Prior to conducting any performance test required by this subpart, the owner or operator must prepare a site-specific test plan which satisfies all of the requirements, and must obtain approval of the plan pursuant to the procedures, set forth in § 63.7(c). Performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

(b) *Initial performance test.* Following approval of the site-specific test plan, the owner or operator must demonstrate initial compliance with each applicable emission, equipment, work practice, or

operational standard for each affected source and emission unit, and report the results in the notification of compliance status report as described in § 63.1515(b). The owner or operator of any existing affected source for which an initial performance test is required to demonstrate compliance must conduct this initial performance test no later than the date for compliance established by § 63.1501(a). The owner or operator of any new affected source for which an initial performance test is required must conduct this initial performance test within 180 days after the date for compliance established by § 63.1501(b). Except for the date by which the performance test must be conducted, the owner or operator must conduct each performance test in accordance with the requirements and procedures set forth in § 63.7(c). Owners or operators of affected sources located at facilities which are area sources are subject only to those performance testing requirements pertaining to D/F. Owners or operators of sweat furnaces meeting the specifications of § 63.1505(f)(1) are not required to conduct a performance test.

(1) The performance tests must be conducted with the scrap containing the highest level of contamination, at the highest rate of production and using the highest reactive fluxing rate while an air pollution control device is operating. Any subsequent performance tests for the purposes of establishing new or revised parametric limits shall be allowed upon pre-approval from the permitting authorities as specified in the site-specific test plan. These new parametric settings shall be used to demonstrate compliance for the period being tested.

* * * * *

(6) Apply paragraphs (b)(1) through (5) of this section for each pollutant separately if a different production rate, charge material or, if applicable, reactive fluxing rate would apply and thereby result in a higher expected emissions rate for that pollutant.

(c) * * *

(9) Method 26A for the concentration of HCl and HF. Where a lime-injected fabric filter is used as the control device to comply with the 90-percent reduction standard, the owner or operator must measure the fabric filter inlet concentration of HCl at a point before lime is introduced to the system.

* * * * *

(f) * * *

(6) All 3 separate runs of a performance test must be conducted on the same unit.

(g) * * *

(5) If the owner or operator wants to conduct a new performance test and establish different operating parameter values, they must meet the requirements in paragraphs (g)(1) through (4) of this section and submit a revised site specific test plan and receive approval in accordance with paragraph (a) of this section.

* * * * *

9. Section 63.1512 is amended by:

a. Revising paragraph (e)(1);

b. Revising paragraph (e)(2);

c. Revising paragraph (e)(3);

d. Adding paragraphs (e)(4);

e. Adding paragraphs (e)(5);

f. Revising paragraph (h)(1);

g. Revising paragraph (h)(2);

h. Revising paragraph (j);

i. Revising paragraph (j)(1)(i);

j. Revising paragraph (j)(2)(i);

k. Revising paragraph (o)(1);

l. Revising paragraph (p)(2) to read as follows:

§ 63.1512 Performance test/compliance demonstration requirements and procedures.

* * * * *

(e) * * *

(1) If the group 1 furnace processes other than clean charge material, the owner or operator must conduct emission tests to measure emissions of PM, HCl, HF, and D/F.

(2) If the group 1 furnace processes only clean charge, the owner or operator must conduct emission tests to simultaneously measure emissions of PM, HCl and HF. A D/F test is not required. Each test must be conducted while the group 1 furnace (including a melting/holding furnace) processes only clean charge.

(3) The owner or operator may choose to determine the rate of reactive flux addition to the group 1 furnace and assume, for the purposes of demonstrating compliance with the SAPU emission limit, that all reactive flux added to the group 1 furnace is emitted. Under these circumstances, the owner or operator is not required to conduct an emission test for HCl or HF.

(4) When testing an existing uncontrolled furnace, the owner or operator must comply with the requirements of either paragraph (e)(4)(i) or paragraph (e)(4)(ii) of this section at the next required performance test.

(i) Install hooding that meets ACGIH Guidelines, or

(ii) Assume a 67-percent capture efficiency for the furnace exhaust (i.e., multiply emissions measured at the furnace exhaust outlet by 1.5) if hooding does not meet ACGIH Guidelines. If the source fails to demonstrate compliance using the 67-percent capture efficiency assumption, the owner or operator must re-test with a hood that meets the ACGIH Guidelines within 90 days, or petition the permitting authority that such hoods are impracticable and propose testing procedures that will minimize fugitive emissions.

(5) When testing a new uncontrolled furnace the owner or operator must either:

(i) Install hooding that meets ACGIH Guidelines, or

(ii) Petition the permitting authority that such hoods are impracticable and propose testing procedures that will minimize fugitive emissions.

* * * * *

(h) * * *

(1) The owner or operator of an in-line fluxer that uses reactive flux materials must conduct a performance test to measure emissions of HCl and PM or otherwise demonstrate compliance in accordance with paragraph (h)(2) of this section. If the in-line fluxer is equipped with an add-on control device, the emissions must be measured at the outlet of the control device.

(2) The owner or operator may choose to limit the rate at which reactive flux is added to an in-line fluxer and assume, for the purposes of demonstrating compliance with the SAPU emission limit, that all chlorine in the reactive flux added to the in-line fluxer is emitted as HCl. Under these circumstances, the owner or operator is not required to conduct an emission test for HCl. If the owner or operator of any in-line flux box which has no ventilation ductwork manifolded to any outlet or emission control device chooses to demonstrate compliance with the emission limits for HCl by limiting use of reactive flux and assuming that all chlorine in the flux is emitted as HCl, compliance with the HCl limit shall also constitute compliance with the emission limit for PM, and no separate emission test for PM is required. In this case, the owner or operator of the unvented in-line flux box must utilize the maximum permissible PM emission rate for the in-line flux boxes when determining the total emissions for any SAPU which includes the flux box.

* * * * *

(j) *Secondary aluminum processing unit.* The owner or operator must conduct performance tests as described in paragraphs (j)(1) through (3) of this section. The results of the performance tests are used to establish emission rates in lb/ton of feed/charge for PM, HCl and HF and μg TEQ/Mg of feed/charge for D/F emissions from each emission unit.

These emission rates are used for compliance monitoring in the calculation of the 3-day, 24-hour rolling average emission rates using the equation in § 63.1510(t). A performance test is required for:

(1) * * *

(i) Emissions of HCl or HF (for the emission limits); or

* * * * *

(2) * * *

(i) Emissions of HCl or HF (for the emission limits); or

* * * * *

(o) * * *

(1) Continuously measure and record the weight of gaseous or liquid reactive flux injected for each 15 minute period during the HCl, HF and D/F tests, determine and record the 15-minute block average weights, and calculate and record the total weight of the gaseous or liquid reactive flux for the 3 test runs;

* * * * *

(p) * * *

(2) Record the feeder setting and lime injection rate for the 3 test runs. If the feed rate setting and lime injection rates vary during the runs, determine and record the average feed rate and lime injection rate from the 3 runs.

* * * * *

10. Section 63.1513 is amended by:

a. Revising paragraph (b) introductory text;

b. Revising paragraph (b)(1);

c. Revising paragraph (e)(1);

d. Revising paragraph (e)(2); and

e. Revising paragraph (e)(3)to read as follows:

§ 63.1513 Performance test/compliance demonstration requirements and procedures.

* * * * *

(b) *PM, HCl, HF and D/F emission limits.* (1) Use Equation 7 of this section to determine compliance with an emission limit for PM, HCl or HF:

$$E = \frac{C \times Q \times K_1}{P} \qquad \text{(Eq. 7)}$$

Where:

E = Emission rate of PM, HCl or HF, kg/Mg (lb/ton) of feed;

C = Concentration of PM, HCl or HF, g/dscm (gr/dscf);

Q = Volumetric flow rate of exhaust gases, dscm/hr (dscf/hr);

K_1 = Conversion factor, 1 kg/1,000 g (1 lb/7,000 gr); and

P = Production rate, Mg/hr (ton/hr).

* * * * *

(e) * * *

(1) Use Equation 9 to compute the mass-weighted PM emissions for a secondary aluminum processing unit. Compliance is achieved if the mass-weighted emissions for the secondary aluminum processing unit (E_{cPM}) is less than or equal to the emission limit for the secondary aluminum processing unit (L_{cPM}) calculated using Equation 1 in § 63.1505(k).

$$E_{c_{PM}} = \frac{\sum_{i=1}^{n}\left(E_{ti_{PM}} \times T_{ti}\right)}{\sum_{i=1}^{n}\left(T_{ti}\right)} \qquad \text{(Eq. 9)}$$

Where,

E_{cPM} = The mass-weighted PM emissions for the secondary aluminum processing unit;

E_{tiPM} = Measured PM emissions for individual emission unit, or group of co-controlled emission units, i;

T_{ti} = The average feed rate for individual emission unit i during the operating cycle or performance test period, or the sum of the average feed rates for all emission units in the group of co-controlled emission unit i; and

n = The number of individual emission units, and groups of co-controlled emission units in the secondary aluminum processing unit.

(2) Use Equation 10 to compute the aluminum mass-weighted HCl or HF emissions for the secondary aluminum processing unit. Compliance is achieved if the mass-weighted emissions for the secondary aluminum processing unit ($E_{cHCl/HF}$) is less than or equal to the emission limit for the secondary aluminum processing unit ($L_{cHCl/HF}$) calculated using Equation 2 in § 63.1505(k).

$$E_{cHCl/HF} = \frac{\sum_{i=1}^{n}\left(E_{tiHCl\,/\,HF} \times T_{ti}\right)}{\sum_{i=1}^{n}\left(T_{ti}\right)} \qquad \text{(Eq. 10)}$$

Where,

$E_{cHCl/HF}$ = The mass-weighted HCl or HF emissions for the secondary aluminum processing unit; and

$E_{tiHCl/HF}$ = Measured HCl or HF emissions for individual emission unit, or group of co-controlled emission units i.

(3) Use Equation 11 to compute the aluminum mass-weighted D/F emissions for the secondary aluminum processing unit. Compliance is achieved if the mass-weighted emissions for the secondary aluminum processing unit is less than or equal to the emission limit for the secondary aluminum processing unit ($L_{cD/F}$) calculated using Equation 3 in § 63.1505(k).

$$E_{cD/F} = \frac{\sum_{i=1}^{n}\left(E_{ti_{D/F}} \times T_{ti}\right)}{\sum_{i=1}^{n}\left(T_{ti}\right)} \qquad \text{(Eq. 11)}$$

Where,

$E_{cD/F}$ = The mass-weighted D/F emissions for the secondary aluminum processing unit; and

$E_{tiD/F}$ = Measured D/F emissions for individual emission unit, or group of co-controlled emission units i.

* * * * *

11. Section 63.1514 is revised to read as follows:

§ 63.1514 Change of Furnace Classification.

The requirements of this section are in addition to the other requirement of this subpart that apply to group 1 and group 2 furnaces.

(a) *Changing from a group 1 controlled furnace processing other than clean charge to group 1 uncontrolled furnace processing other than clean charge.*

An owner or operator wishing to change operating modes must conduct performance tests to demonstrate to the regulatory authority that compliance can be achieved under both modes. Operating parameters relevant to each mode of operation must be established during the performance test.

(1) Operators of major sources must conduct performance tests for PM, HCl and D/F, according to the procedures in § 63.1512(d) with the capture system and control device operating normally. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) The performance tests must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected and using the highest rate of reactive flux injection expected to be processed in controlled mode.

(ii) Parameters for capture, flux rate, and lime injection must be established during these tests.

(iii) The emission factors for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(2) Operators of major sources must conduct additional performance tests for PM, HCl, HF and D/F, according to the procedures in § 63.1512(e) without operating a control device. Performance tests must be repeated at least once every 5 years to demonstrate compliance with each operating mode.

(i) Testing under this paragraph may be conducted at any time after the furnace has completed 1 or more charge to tap cycles, or 24 operating hours with scrap of the highest level of contamination expected to be processed in uncontrolled mode.

(ii) Testing under this paragraph must be conducted with furnace emissions captured in accordance with the provisions of § 63.1512(e)(4) and directed to the stack or vent tested.

(iii) Parameters for capture and flux rate must be established during these tests.

(iv) The emission factors for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(3) Operators of area sources must conduct performance tests for D/F, according to the procedures in § 63.1512(d) with the capture system and control device operating normally.

(i) The performance tests must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processes and using the highest rate of reactive flux expected to be injected in controlled mode.

(ii) Parameters for capture, flux rate, and lime injection must be established during these tests.

(iii) The emission factors for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(4) Operators of area sources must conduct performance tests for D/F, according to the procedures in § 63.1512(e) without operating a control device.

(i) Testing under this paragraph may be conducted at any time after the furnace has completed 1 or more charge to tap cycles, or 24 operating hours with scrap of the highest level of contamination expected to be processed in uncontrolled mode.

(ii) Testing under this paragraph must be conducted with furnace emissions captured in accordance with the provisions of § 63.1506(c) and directed to the stack or vent tested.

(iii) Parameters for capture and flux rate must be established during these tests. In addition, the number of cycles of furnace operation with scrap of the highest level of contamination expected to be processed in uncontrolled mode that elapsed prior to the performance test(s) conducted in uncontrolled mode is established as a parameter.

(iv) The D/F emission factor for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(5) To change modes of operation from uncontrolled to controlled, the owner or operator must, before charging scrap to the furnace that exceeds the contaminant level established for uncontrolled mode,

(i) Change the label on the furnace to reflect controlled operation,

(ii) Direct the furnace emissions to the control device, and

(iii) Begin lime addition to the control device at the rate established for controlled mode.

(6) To change modes of operation from controlled to uncontrolled, the owner or operator must, before turning off or bypassing the control device,

(i) Change the label on the furnace to reflect controlled operation,

(ii) Charge scrap with a level of contamination no greater than that used in the performance test for uncontrolled furnaces for the number of charge to tap cycles that elapsed with scrap of a contamination level no higher than that used in the uncontrolled mode performance test(s), and

(iii) Decrease the flux addition rate to no higher than the flux addition rate used in the uncontrolled mode performance test.

(7) In addition to the recordkeeping requirements of § 63.1517, the owner or operator must maintain records of the nature of each mode change (controlled to uncontrolled, or uncontrolled to controlled), the time the change is initiated, and the time the exhaust gas is diverted from control device to bypass or bypass to control device.

(b) *Changing from a group 1 controlled furnace processing other than clean charge to a group 1 uncontrolled furnace processing clean charge.* An owner or operator wishing to operate under controlled mode with other than clean charge and uncontrolled mode with clean charge must conduct performance tests to demonstrate to the delegated regulatory authority that

compliance can be achieved in both modes. Operating parameters relevant to each mode of operation must be established during the performance test.

(1) Operators of major sources must conduct performance tests for PM, HCl and D/F, according to the procedures in § 63.1512 with the capture system and control device operating normally. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) The performance tests must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processed and using the highest rate of reactive flux injection expected in controlled mode.

(ii) Parameters for capture, flux rate, and lime injection must be established during these tests.

(iii) The emission factors for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(2) Operators of major sources must conduct performance tests for PM, HCl and D/F, according to the procedures in § 63.1512 without operating a control device. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) Testing under this paragraph may be conducted at any time after the furnace has completed 1 or more charge to tap cycles with clean charge.

(ii) Testing under this paragraph must be conducted with furnace emissions captured in accordance with the provisions of § 63.1506(c) and directed to the stack or vent tested.

(iii) Parameters for capture and flux rate must be established during these tests.

(iv) Emissions of D/F during this test must not exceed 1.5 μg TEQ/Mg of feed/charge processed, or this mode of operation is not allowed.

(v) The emission factors for PM, HCl and HF for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(3) Operators of area sources must conduct additional performance tests for D/F, according to the procedures in § 63.1512 with the capture system and control device operating normally.

(i) The performance tests must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processed and using the highest rate of reactive flux injection expected in controlled mode.

(ii) Parameters for capture, flux rate, and lime injection must be established during these tests.

(iii) The D/F emission factor for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(4) Operators of area sources must conduct additional performance tests for D/F, according to the procedures in § 63.1512(e) without operating a control device.

(i) Testing may be conducted at any time after the furnace has completed 1 or more charge to tap cycles with scrap of the highest level of contamination expected to be processed in uncontrolled mode at the highest throughput expected to be processed in uncontrolled mode.

(ii) Testing under this paragraph must be conducted with furnace emissions captured in accordance with the provisions of § 63.1506(c) and directed to the stack or vent tested.

(iii) Parameters for flux rate must be established during these tests. In addition the number of cycles of furnace operation with scrap of the highest level of contamination expected to be processed in uncontrolled mode that elapsed prior to the performance test(s) conducted in uncontrolled mode is established as a parameter.

(iv) The D/F emission factor for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(5) To change modes of operation from uncontrolled to controlled, the owner or operator must, before charging scrap to the furnace that exceeds the contaminant level established for uncontrolled mode,

(i) Change the label on the furnace to reflect controlled operation,

(ii) Direct the furnace emissions to the control device, and

(iii) Begin lime addition to the control device at the rate established for controlled mode.

(6) To change modes of operation from controlled to uncontrolled, the owner or operator must, before turning off or bypassing the control device,

(i) Change the label on the furnace to reflect controlled operation,

(ii) Charge clean charge for the number of charge to tap cycles that elapsed before the uncontrolled mode performance test was conducted, and

(iii) Decrease the flux addition rate to no higher than the flux addition rate used in the uncontrolled mode performance test.

(7) In addition to the recordkeeping requirements of § 63.1517, the owner or operator must maintain records of the nature of each mode change (controlled to uncontrolled, or uncontrolled to controlled), the time the furnace operating mode change is initiated, and the time the exhaust gas is diverted from control device to bypass or bypass to control device.

(c) *Changing from a group 1 controlled or uncontrolled furnace to a group 2 furnace.* An owner or operator wishing to change operating modes must conduct additional performance tests to demonstrate to the delegated regulatory authority that compliance can be achieved under group 1 mode and establish the number of cycles of operation with clean charge and no reactive flux addition necessary to elapse before changing to group 2 mode. Operating parameters relevant to group 1 operation must be established during the performance test.

(1) Operators of major sources must conduct additional performance tests for PM, HCl, HF and D/F, according to the procedures in § 63.1512. Controlled group 1 furnaces must conduct performance tests with the capture system and control device operating normally. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) The performance tests must be conducted with scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processed and using the highest rate of reactive flux expected to be injected in controlled mode.

(ii) Parameters for throughput, capture, flux rate, and lime injection must be established during these tests.

(iii) The emission factors for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(2) While in compliance with the operating requirements of § 63.1506(o) for group 2 furnaces, operators of major sources must conduct additional performance tests for PM, HCl, HF and D/F, according to the procedures in § 63.1512(e) without operating a control device. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) Testing under this paragraph may be conducted at any time after the furnace has completed 1 or more charge-to-tap cycles, or 24 operating hours with clean charge, and without reactive flux addition.

(ii) Testing under this paragraph must be conducted with furnace emissions captured in accordance with the provisions of § 63.1506(c) and directed to the stack or vent tested.

(iii) Owners or operators must demonstrate that emissions are no greater than:

(A) 1.5 μg D/F (TEQ) per ton of feed/charge,

(B) 0.04 lb HCl or HF per ton of feed/charge, and

(C) 0.04 lb PM per ton of feed/charge.

(iv) The number of charge-to-tap cycles, or operating hours elapsed before the group 2 furnace performance tests were conducted is established as an operating parameter to be met before changing to group 2 mode.

(3) Operators of area sources must conduct an additional performance test for D/F, according to the procedures in § 63.1512. Controlled group 1 furnaces must conduct performance tests with the capture system and control device operating normally.

(i) The performance test must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processed and using the highest rate of reactive flux expected to be injected in group 1 mode.

(ii) Parameters for throughput, flux rate, and lime injection must be established during these tests.

(iii) If the furnace is equipped with a control device parameter(s) for capture must be established.

(iv) The D/F emission factor for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(4) While in compliance with the operating standards of § 63.1506(o) for group 2 furnaces, operators of area sources must conduct an additional performance test for D/F, according to the procedures in § 63.1512(e), without operating a control device.

(i) Testing under this paragraph may be conducted at any time after the furnace has completed 1 or more charge-to-tap cycles, or 24 operating hours with clean charge, and without reactive flux addition.

(ii) Testing under this paragraph must be conducted with furnace emissions captured in accordance with the provisions of § 63.1506(c) and directed to the stack or vent tested.

(iii) Owners or operators must demonstrate that emissions are no greater than 1.5 μg D/F (TEQ) per ton of feed/charge.

(iv) The number of charge-to-tap cycles, or operating hours elapsed before the group 2 furnace performance tests were conducted is established as an operating parameter to be met before changing to group 2 mode.

(5) To change modes of operation from a group 1 furnace to a group 2 furnace, the owner or operator must

(i) discontinue addition of other than clean charge;

(ii) discontinue addition of reactive flux;

(iii) change the label on the furnace to reflect group 2 operation;

(iv) and if the furnace is equipped with a control device, allow the number of cycles of operation established in paragraph (c) of this section to elapse before turning off the control device or diverting emissions from the control device. In addition control device parameters related to lime addition, capture, and inlet temperature must be maintained during this period.

(6) To change mode of operation from a group 2 furnace to group 1 furnace, the owner or operator must change the label to reflect group 1 operation. If a control device is required for group 1 operation, the owner or operator must direct the emissions to the control device and maintain control device parameters related to lime addition, capture, and inlet temperature.

(d) Changing from a group 1 controlled or uncontrolled furnace to group 2 furnace, for tilting reverberatory furnaces capable of completely removing furnace contents between batches. An owner or operator of a tilting reverberatory furnace capable of completely removing furnace contents between batches, wishing to change operating modes, must conduct additional performance tests to demonstrate that compliance can be achieved under group 1 mode. Operating parameters relevant to group 1 operation must be established during the performance test.

(1) Operators of major sources must conduct additional performance tests for PM, HCl, HF and D/F, according to the procedures in § 63.1512. Controlled group 1 furnaces must conduct performance tests with the capture system and control device operating normally. The performance tests must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processed and using the highest rate of reactive flux expected to be injected in controlled mode. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) Parameters for throughput, capture, flux rate, and lime injection must be established during these tests.

(ii) The emission factors for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(2) Operators of area sources must conduct an additional performance test for D/F, according to the procedures in § 63.1512. Operators of controlled group 1 furnaces must conduct performance tests with the capture system and control device operating normally. Performance tests must be repeated at least once every 5 years to demonstrate compliance for each operating mode.

(i) The performance test must be conducted with the scrap containing the highest level of contamination expected to be processed, at the highest throughput expected to be processed and using the highest rate of reactive flux injection expected in group 1 mode.

(ii) Parameters for throughput, flux rate, and lime injection must be established during these tests.

(iii) If the furnace is equipped with a control device parameter(s) for capture must be established.

(iv) The D/F emission factor for this mode of operation, for use in the demonstration of compliance with the emission limits for SAPUs specified in § 63.1505(k) must be determined.

(3) To change modes from group 1 to group 2 the operator must:

(i) Completely remove all aluminum from the furnace;

(ii) Change the furnace label;

(iii) Use only clean charge; and

(iv) Use no reactive flux;

(4) To change modes from group 2 to group 1 the owner or operator must, before charging other than clean charge and before adding reactive flux to the furnace;

(i) Change the label on the furnace to reflect group 1 operation,

(ii) Direct the furnace emissions to the control device, if any, and,

(iii) Begin lime addition to the control device, if any.

(5) In addition to the recordkeeping requirements of § 63.1517, the owner or operator must maintain records of the nature of each mode change (group 1 to group 2, or group 2 to group 1), the time the change is initiated, and, if the furnace is equipped with a control device, the time the exhaust gas is diverted from control device to bypass or bypass to control device.

(e) *Frequency of changing furnace operating mode.* Changing furnace operating mode and reversion to the previous mode, as provided in paragraphs (a) through (d) of this section

may not be done more frequently than once every 6 months, except that controlled furnaces may change operating modes (and revert to prechange operating mode) without restriction on frequency, when the air pollution control device must be shut down for planned maintenance.

* * * * *

§ 63.1515 [Amended]

12. Section 63.1515 is amended by removing paragraph (b)(10).

13. Section 63.1516 is amended by:

a. Removing and reserving paragraph (a);

b. Revising paragraph (b) introductory text;

c. Removing and reserving paragraph (b)(1)(v);

d. Revising paragraph (b)(2)(iii);

e. Adding paragraph (b)(3);

f. Revising paragraph (c) introductory text; and

g. Adding paragraph (d) to read as follows:

§ 63.1516 Reports.

(a) [Reserved]

(b) *Excess emissions/summary report.* The owner or operator of a major or area source must submit semiannual reports according to the requirements in § 63.10(e)(3). Except, the owner or operator must submit the semiannual reports within 60 days after the end of each 6-month period instead of within 30 days after the calendar half as specified in § 63.10(e)(3)(v). When no deviations of parameters have occurred, the owner or operator must submit a report stating that no excess emissions occurred during the reporting period.

* * * * *

(2) * * *

(iii) For each sidewell group 1 furnace with add-on air pollution control devices: ''Each furnace was operated such that the level of molten metal remained above the top of the passage between the sidewell and hearth during reactive fluxing, and reactive flux, except for cover flux, was added only to the sidewell or to a furnace hearth equipped with an add-on air pollution control device for PM, HCl, HF and D/F emissions during this reporting period.''

* * * * *

(3) * * *

(i) Within 60 days after the date of completing each performance test (defined in § 63.2) as required by this subpart you must transmit the results of the performance tests required by this subpart to EPA's WebFIRE database by using the Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through EPA's Central Data Exchange (CDX) (*www.epa.gov/cdx*). Performance test data must be submitted in the file format generated through use of EPA's Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/index.html*). Only data collected using test methods on the ERT Web site are subject to this requirement for submitting reports electronically to WebFIRE. Owners or operators who claim that some of the information being submitted for performance tests is confidential business information (CBI) must submit a complete ERT file including information claimed to be CBI on a compact disk or other commonly used electronic storage media (including, but not limited to, flash drives) to EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAPQS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT file with the CBI omitted must be submitted to EPA via CDX as described earlier in this paragraph. At the discretion of the delegated authority, you must also submit these reports, including the confidential business information, to the delegated authority in the format specified by the delegated authority.

(ii) All reports required by this subpart not subject to the requirements in paragraphs (1)(i) and (ii) of this section must be sent to the Administrator at the appropriate address listed in § 63.13. The Administrator or the delegated authority may request a report in any form suitable for the specific case (e.g., by commonly used electronic media such as Excel spreadsheet, on CD or hard copy). The Administrator retains the right to require submittal of reports subject to paragraph (1)(i) and (ii) of this section in paper format.

(c) *Annual compliance certifications.* For the purpose of annual certifications of compliance required by 40 CFR part 70 or 71, the owner or operator of a major or area source subject to this subpart must certify continuing compliance based upon, but not limited to, the following conditions:

* * * * *

(d) If there was a malfunction during the reporting period, the owner or operator must submit a report that includes the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with §§ 63.1506(a)(5) and 63.1520(a)(8), including actions taken to correct a malfunction.

* * * * *

14. Section 63.1517 is amended by:

a. Revising paragraph (b)(16)(i);

b. Adding paragraph (b)(18); and

c. Adding paragraph (c) to read as follows:

§ 63.1517 Records.

* * * * *

(b) * * *

(16) * * *

(i) [Reserved];

* * * * *

(18) For each malfunction for which the owner or operator chooses to claim coverage under the affirmative defense provisions, the owner or operator must maintain the following records;

(i) Records of the occurrence and duration of each malfunction of operation (i.e., process equipment) or the air pollution control equipment and monitoring equipment.

(ii) Records of actions taken during periods of malfunction to minimize emissions in accordance with §§ 63.1506(a)(5) and 63.1520(a)(8), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(c) All reports required by this subpart not subject to the requirements in paragraph (b) of this section must be sent to the Administrator at the appropriate address listed in § 63.13. If acceptable to both the Administrator and the owner or operator of a source, these reports may be submitted on electronic media. The Administrator retains the right to require submittal of reports subject to paragraph (b) of this section in paper format.

* * * * *

15. Section 63.1520 is revised to read as follows:

§ 63.1520 Affirmative defense for violation of emission limit during malfunction.

In response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for.

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) *Reports.* The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator within 45 days of the initial occurrence of the violation of the standards in this subpart, which may be the end of any applicable averaging period, to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the violation.

* * * * *

16. Table 1 to Subpart RRR of part 63 is amended to read as follows:

Table 1 to Subpart RRR - Emission standards for New and Existing Affected Sources

Affected source/Emission unit	Pollutant	Limit	Units
All new and existing affected sources and emission units that are controlled with a PM add-on control device and that choose to monitor with a COM; and all new and existing aluminum scrap shredders that choose to monitor with a COM or to monitor visible emissions	Opacity	10	Percent
New and existing aluminum scrap shredder	PM	0.01	Gr/dscf
New and existing thermal chip dryer	THC	0.8	lb/ton of feed
	D/F[a]	2.5	ug TEQ/Mg of feed
New and existing scrap dryer/delacquering kiln/decoating kiln or	PM	0.08	lb/ton of feed
	HCl	0.8	lb/ton of feed
	THC	0.06	lb/ton of feed
	D/F[b]	0.25	ug TEQ/Mg of feed
Alternative limits if afterburner has a design residence time of at least 1 second and operates at a temperature of at least 1400 F	PM	0.3	lb/ton of feed
	HCl	1.5	lb/ton of feed
	THC	0.2	lb/ton of feed
	D/F[a]	5	ug TEQ/Mg of feed
New or existing sweat furnace	D/F[a]	0.8	ng TEQ/dscm @ 11% O2[b]
New or existing dross-only furnace	PM	0.3	lb/ton of feed
New or existing in-line fluxer	HCL	0.04	lb/ton of feed
	PM	0.01	lb/ton of feed
New and existing in-line fluxer with no reactive fluxing		No limit	work practice: no reactive fluxing

New and existing rotary dross cooler	PM	0.04	gr/dscf
New and existing clean furnace (Group 2)		No limit	Work practices: clean charge only and no reactive fluxing
New and existing group 1 melting/holding furnace (processing only clean charge)[c]	PM	0.8	lb/ton of feed
	HCL	0.4	lb/ton of feed
	HF	0.4	lb/ton of feed
	or		
		10	percent of the HCl upstream of the add-on control device
New and existing group 1 furnace[c]	PM	0.4	lb/ton of feed
	HCL	0.4	lb/ton of feed
	HF	0.4	lb/ton of feed
	or		
		10	percent of the HCl upstream of the add-on control device
	D/F[b]	15	ug/TEQ/Mg of feed
New and existing group 1 furnace with clean charge only[c]	PM	0.4	lb/ton of feed
	HCL	0.4	lb/ton of feed
	HF	0.4	lb/ton of feed
	or		
		10	percent of the HCl upstream of the add-on control device
	D/F[a]	No limit	Clean charge only
New and existing secondary aluminum processing unit[a,d] (consists of all existing group 1 furnaces and existing in-line flux boxes at the facility, or all simultaneously constructed new group 1 furnaces and new in-lie fluxers)	PM[e]	$L_{C_{PM}} = \frac{\sum_{i=1}^{n} \left(L_{ti_{PM}} \times T_{ti}\right)}{\sum_{i=1}^{n} \left(T_{ti}\right)}$ (Eq. 1)	
	HCl or HF[f]	$L_{cHCl/HF} = \frac{\sum_{i=1}^{n} \left(L_{tiHCl/HF} \times T_{ti}\right)}{\sum_{i=1}^{n} \left(T_{ti}\right)}$ (Eq. 2)	

	D/F[g]	$L_{cD/F} = \frac{\sum_{i=1}^{n} (L_{tiD/F} \times T_{ti})}{\sum_{i=1}^{n} (T_{ti})}$ (Eq. 3)

[a] D/F limit applies to a unit at a major or area source.

[b] Sweat furnaces equipped with afterburners meeting the specifications of §63.1505(f)(1) are not required to conduct a performance test.

[d] These limits are also used to calculate the limits applicable to secondary aluminum processing units.

[d] Equation definitions: L_{iPM} = the PM emission limit for individual emission unit i in the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; T_i = the feed rate for individual emission unit i in the secondary aluminum processing unit; L_{tPM} = the overall PM emission limit for the secondary aluminum processing unit [kg/Mg (lb/Ton of feed)]; $L_{iHCL/HF}$ = the HCL or HF emission limit for individual emission unit i in the secondary aluminum processing unit [kg/Mg (lb/Ton) of feed]; $L_{tHCl/HF}$ = the overall HCl or HF emission limit for the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; $L_{iD/F}$ = the D/F emission limit for individual emission unit i [µg TEQ/Mg (gr TEQ/ton) of feed]; $L_{tD/F}$ = the overall D/F emission limit for the secondary aluminum processing unit [µg TEQ/Mg (gr TEQ/Ton) of feed]; n = the number of units in the secondary aluminum processing unit. (Need to check. These are slightly different that what is in the text of the rule)

[e] In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the PM limit.

[f] In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the HCL and HF limits.

[g] Clean charge furnaces cannot be included in this calculation since they are not subject to the D/F limit.

* * * * *

17. Table 2 to Subpart RRR of part 63 is amended by:

a. Revising the entry All affected sources and emission units with an add-on air pollution control device;

b. Revising the entry Scrap dryer/delacquering kiln/decoating kiln with afterburner and lime-injected fabric filter;

c. Revising the entry In-line fluxer with lime-injected fabric filter (including those that are part of a secondary aluminum processing unit);

d. Revising entry Group 1 furnace with lime-injected fabric filter (including those that are part of a secondary of aluminum processing unit);

e. Adding the entry Thermal chip dryer, scrap dryer/delacquering kiln/decoating kiln, sweat furnace, dross-only furnace, and group 1 furnace; and

f. Adding footnote d to Table 2 to read as follows:

TABLE 2 TO SUBPART RRR OF PART 63—SUMMARY OF OPERATING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS

Affected source/emission unit	Monitor type/operation/process	Operating requirements
* *	* * *	* *
All affected sources and emission units with an add-on air pollution control device.	Emission capture and collection system	Design and install in accordance with Industrial Ventilation: A Handbook of Recommended Practice, 23rd or 27th edition; operate in accordance with OM&M plan.[b]

TABLE 2 TO SUBPART RRR OF PART 63—SUMMARY OF OPERATING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS—Continued

Affected source/emission unit	Monitor type/operation/process	Operating requirements
* *	* * *	* *
Scrap dryer/delacquering kiln/decoating kiln with afterburner and lime-injected fabric filter.	Afterburner operating temperature	Maintain average temperature for each 3-hr period at or above average operating temperature during the performance test.
	Afterburner operation	Operate in accordance with OM&M plan.[b]
	Bag leak detector or	Initiate corrective action within 1-hr of alarm and complete in accordance with the OM&M plan;[b] operate such that alarm does not sound more than 5% of operating time in 6-month period.
	COM	Initiate corrective action within 1-hr of a 6-minute average opacity reading of 5% or more and complete in accordance with the OM&M plan.[b]
	Fabric filter inlet temperature	Maintain average fabric filter inlet temperature for each 3-hr period at or below average temperature during the performance test +14 °C (+25 °F).
	Lime injection rate	Maintain free-flowing lime in the feed hopper or silo at all times for continuous injection systems; maintain feeder setting at level established during the performance test for continuous injection systems.
* *	* * *	* *
In-line fluxer with lime-injected fabric filter (including those that are part of a secondary aluminum processing unit).	Bag leak detector or	Initiate corrective action within 1-hr of alarm and complete in accordance with the OM&M plan;[b] operate such that alarm does not sound more than 5% of operating time in 6-month period.
	COM	Initiate corrective action within 1-hr of a 6-minute average opacity reading of 5% or more and complete in accordance with the OM&M plan.[b]
	Lime injection rate	Maintain free-flowing lime in the feed hopper or silo at all times for continuous injection systems; maintain feeder setting at level established during performance test for continuous injection systems.
	Reactive flux injection rate	Maintain reactive flux injection rate at or below rate used during the performance test for each operating cycle or time period used in the performance test.
* *	* * *	* *
Group 1 furnace with lime-injected fabric filter (including those that are part of a secondary of aluminum processing unit)..	Bag leak detector or	Initiate corrective action within 1-hr of alarm; operate such that alarm does not sound more than 5% of operating time in 6-month period; complete corrective action in accordance with the OM&M plan.[b]
	COM	Initiate corrective action within 1-hr of a 6-minute average opacity reading of 5% or more; complete corrective action in accordance with the OM&M plan.[b]
	Fabric filter inlet temperature	Maintain average fabric filter inlet temperature for each 3-hour period at or below average temperature during the performance test +14 °C (+25 °F).
	Reactive flux injection rate	Maintain reactive flux injection rate (kg/Mg) (lb/ton) at or below rate used during the performance test for each furnace cycle.
	Lime injection rate	Maintain free-flowing lime in the feed hopper or silo at all times for continuous injection systems; maintain feeder setting at level established at performance test for continuous injection systems.

TABLE 2 TO SUBPART RRR OF PART 63—SUMMARY OF OPERATING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS—Continued

Affected source/emission unit	Monitor type/operation/process	Operating requirements
	Maintain molten aluminum level	Operate sidewell furnaces such that the level of molten metal is above the top of the passage between sidewell and hearth during reactive flux injection, unless the hearth is also controlled.
	Fluxing in sidewell furnace hearth	Add reactive flux only to the sidewell of the furnace unless the hearth is also controlled.
* *	* * *	* *
	Furnaces that will be idle for at least 24 hours and will burn clean fuel only, will not receive new charge, flux or alloying material.	Associated fans, hoods and APCD may be temporarily turned off. Before charging resumes, all associated fans, hoods and APCD must be turned on and operated continuously.
* *	* * *	* *

[d] APCD—Air pollution control device.

* * * * *

18. Table 3 to Subpart RRR of part 63 is amended by:

a. Revising the entry All affected sources and emission units with an add-on air pollution control device;

b. Revising the entry Aluminum scrap shredder with fabric filter;

c. Revising the entry Scrap dryer/delacquering kiln/decoating kiln with afterburner and lime-injected fabric filter;

d. Revising entry Dross-only furnace with fabric filter;

e. Revising the entry Rotary dross cooler with fabric filter;

f. Revising the entry In-line fluxer with lime-injected fabric filter;

g. Revising the entry Group 1 furnace with lime-injected fabric filter;

h. Removing footnote c to Table 3; and

i. Revising footnote d to Table 3 to read as follows:

TABLE 3 TO SUBPART RRR OF PART 63—SUMMARY OF MONITORING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS

Affected source/Emission unit	Monitor type/Operation/ Process	Monitoring requirements
*	* *	* * * *
All affected sources and emission units with an add-on air pollution control device.	Emission capture and collection system.	Annual inspection of all emission capture, collection, and transport systems to ensure that systems continue to operate in accordance with ACGIH standards. Inspection includes volumetric flow rate measurements.
*	* *	* * * *
Aluminum scrap shredder with fabric filter.	Bag leak detector or	Install and operate in accordance with manufacturer's operating instructions.
	COM or	Design and install in accordance with PS–1; collect data in accordance with subpart A of 40 CFR part 63; determine and record 6-minute block averages.
	VE	Conduct and record results of 30-minute daily test in accordance with Method 9.
*	* *	* * * *
Scrap dryer/delacquering kiln/decoating kiln with afterburner and lime-injected fabric filter.	Afterburner operating temperature..	Continuous measurement device to meet specifications in § 63.1510(g)(1); record temperature for each 15-minute block; determine and record 3-hr block averages.
	Afterburner operation	Annual inspection of afterburner internal parts; complete repairs in accordance with the OM&M plan.
	Bag leak detector or	Install and operate in accordance with manufacturer's operating instructions.
	COM	Design and Install in accordance with PS–1; collect data in accordance with subpart A of 40 CFR part 63; determine and record 6-minute block averages.
	Lime injection rate	For continuous injection systems, inspect each feed hopper or silo every 8 hours to verify that lime is free flowing; record results of each inspection. If blockage occurs, inspect every 4 hours for 3 days; return to 8-hour inspections if corrective action results in no further blockage during 3-day period, record feeder setting daily. Verify monthly that lime injection rate is no less than 90 percent of the rate used during the compliance demonstration test.
	Fabric filter inlet temperature..	Continuous measurement device to meet specifications in § 63.1510(h)(2); record temperatures in 15-minute block averages; determine and record 3-hr block averages.

TABLE 3 TO SUBPART RRR OF PART 63—SUMMARY OF MONITORING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS—Continued

Affected source/Emission unit	Monitor type/Operation/ Process	Monitoring requirements
*	* *	* * * *
Dross-only furnace with fabric filter.	Bag leak detector or	Install and operate in accordance with manufacturer's operating instructions.
	COM	Design and install in accordance with PS–1; collect data in accordance with subpart A of 40 CFR part 63; determine and record 6-minute block averages.
	Feed/charge material	Record identity of each feed/charge; certify charge materials every 6 months.
*	* *	* * * *
Rotary dross cooler with fabric filter.	Bag leak detector or	Install and operate in accordance with manufacturer's operating instructions.
	COM	Design and install in accordance with PS–1; collect data in accordance with subpart A of 40 CFR part 63; determine and record 6-minute block averages.
*	* *	* * * *
In-line fluxer with lime-injected fabric filter.	Bag leak detector or	Install and operate in accordance with manufacturer's operating instructions.
	COM	Design and install in accordance with PS–1; collect data in accordance with subpart A of 40 CFR part 63; determine and record 6-minute block averages.
	Reactive flux injection rate	Weight measurement device accuracy of ±1%[b]; calibrate according to manufacturer's specifications or at least once every 6 months; record time, weight and type of reactive flux added or injected for each 15-minute block period while reactive fluxing occurs; calculate and record total reactive flux injection rate for each operating cycle or time period used in performance test; or Alternative flux injection rate determination procedure per §63.1510(j)(5). For solid flux added intermittently, record the amount added for each operating cycle or time period used in the performance test.
	Lime injection rate	For continuous injection systems, record feeder setting daily and inspect each feed hopper or silo every 8 hrs to verify that lime is free-flowing; record results of each inspection. If blockage occurs, inspect every 4 hrs for 3 days; return to 8-hour inspections if corrective action results in no further blockage during 3-day period.[d] Verify monthly that the lime injection rate is no less than 90 percent of the rate used during the compliance demonstration test.
*	* *	* * * *
Group 1 furnace with lime-injected fabric filter.	Bag leak detector or	Install and operate in accordance with manufacturer's operating instructions.
	COM	Design and install in accordance with PS–1; collect data in accordance with subpart A of 40 part CFR 63; determine and record 6-minute block averages.
	Lime injection rate	For continuous injection systems, record feeder setting daily and inspect each feed hopper or silo every 8 hours to verify that lime is free-flowing; record results of each inspection. If blockage occurs, inspect every 4 hours for 3 days; return to 8-hour inspections if corrective action results in no further blockage during 3-day period.[d] Verify monthly that the lime injection rate is no less than 90 percent of the rate used during the compliance demonstration test.
	Reactive flux injection rate	Weight measurement device accuracy of ±1%[b]; calibrate every 3 months; record weight and type of reactive flux added or injected for each 15-minute block period while reactive fluxing occurs; calculate and record total reactive flux injection rate for each operating cycle or time period used in performance test; or Alternative flux injection rate determination procedure per §63.1510(j)(5). For solid flux added intermittently, record the amount added for each operating cycle or time period used in the performance test.
	Fabric filter inlet temperature.	Continuous measurement device to meet specifications in §63.1510(h)(2); record temperatures in 15-minute block averages; determine and record 3-hour block averages.
	Maintain molten aluminum level in sidewell furnace.	Maintain aluminum level operating log; certify every 6 months. If visual inspection of molten metal level is not possible, use physical measurement methods.
*	* *	* * * *
Group 1 furnace without add-on controls.	Fluxing in sidewell furnace hearth.	Maintain flux addition operating log; certify every 6 months.
	Reactive flux injection rate	Weight measurement device accuracy of +1%[b]; calibrate according to manufacturers specifications or at least once every six months; record weight and type of reactive flux added or injected for each 15-minute block period while reactive fluxing occurs; calculate and record total reactive flux injection rate for each operating cycle or time period used in performance test. For solid flux added intermittently, record the amount added for each operating cycle or time period used in the performance test.

TABLE 3 TO SUBPART RRR OF PART 63—SUMMARY OF MONITORING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS—Continued

Affected source/Emission unit	Monitor type/Operation/ Process	Monitoring requirements
	OM&M plan (approved by permitting agency).	Demonstration of site-specific monitoring procedures to provide data and show correlation of emissions across the range of charge and flux materials and furnace operating parameters.
	Feed material (melting/holding furnace).	Record type of permissible feed/charge material; certify charge materials every 6 months.
* * * * * * *		

[c] Permitting agency may approve other alternatives including load cells for lime hopper weight, sensors for carrier gas pressure, or HCl monitoring devices at fabric filter outlet.

* * * * *

19. Appendix A to Subpart RRR of part 63 is amended by:

a. Removing entry 63.6(e)(1)–(2);

b. Adding entries 63.6(e)(1)(i) and 63.6(e)(1)ii);

c. Adding entry 63.6(e)(2);

d. Revising entry 63.6(e)(3)

e. Removing entry 63.6(f);

f. Adding entries 63.6(f)(1) and 63.6(f)(2);

g. Removing entries 63.6((h);

h. Adding entries 63.6(h)(1) and 63.6(h)(2);

i. Removing entries 63.7((e);

j. Adding entries 63.7(e)(1) and 63.7(e)(2);

k. Removing entries 63.8((c)(1)–(3);

l. Adding entries 63.8(c)(1)(i), 63.8(c)(1)(ii), 63.8(c)(1)(iii), 63.8(c)(1)(iv) and 63.7(e)(2)–(3);

m. Removing entries 63.10((b);

n. Adding entries 63.10(b)(1), 63.10(b)(2)(i),(ii), (iv) and (v), and 63.10(b)(2)(iii);

o. Revising entry 63.10(c)(10)–(13);

p. Revising entry 63.10(d)(4)–(5); and

q. Revising entries 63.14 to read as follows:

APPENDIX A TO SUBPART RRR OF PART 63—APPLICABILITY OF GENERAL PROVISIONS 40 CFR PART 63, SUBPART RRR

Citation	Requirement	Applies to RRR	Comment
* * * * * * *			
63.6(e)(1)(i)		No	See § 63.1506(a)(5) for general duty requirement. Any other cross reference to § 63.6(3)(1)(i) in any other general provision incorporated by reference shall be treated as a cross reference to § 63.1506(a)(5).
63.6(e)(1)(ii)		No	
* * * * * * *			
63.6(e)(2))		Yes	
* * * * * * *			
§ 63.6(e)(3)	Startup, Shutdown Plan	No	
* * * * * * *			
§ 63.6(f)(1)	Compliance with Emission Standards.	No	
§ 63.6(f)(2)	Compliance with Emission Standards.	Yes	
* * * * * * *			
§ 63.6(h)(1)	Compliance with Opacity/VE Standards.	No	
§ 63.6(h)(2)	Compliance with Opacity/VE Standards.	Yes	
* * * * * * *			
§ 63.7(e)(1)	Conduct of Tests	No	See 63.1511(a).
§ 63.7(e)(2)	Conduct of Tests	Yes	
* * * * * * *			
63.8(c)(1)(i)		No	See 63.1506(a)(5) for general duty requirement.
63.8(c)(1)(ii)		Yes	
§ 63.8(c)(1)(iii)	CMS Operation and Maintenance	NO	

APPENDIX A TO SUBPART RRR OF PART 63—APPLICABILITY OF GENERAL PROVISIONS 40 CFR PART 63, SUBPART RRR—Continued

Citation	Requirement	Applies to RRR	Comment
* *	* *	* *	* *
§ 63.8(d)(3)	Quality Control	Yes, except for last sentence, which refers to an SSM plan. SSM plans are not required.	
* *	* *	* *	* *
§ 63.10(b)(1)	General Requirements	Yes	See 63.1517 includes additional requirements.
* *	* *	* *	* *
§ 63.10(b)(2)(i), (ii), (iv) and (v)	General Requirements	No	See 63.1517(b)(18) for recordkeeping of occurrence and duration of malfunctions and recordkeeping of actions taken during malfunction.
§ 63.10(b)(2)(iii) and (vi) to (ix)	General Requirements	Yes	See 63.1517 includes additional requirements.
* *	* *	* *	* *
§ 63.10(c)(10)–(13)		No	See 63.1517(b)(18) for recordkeeping of malfunctions.
* *	* *	* *	* *
§ 63.10(c)(15)	General Requirements	No	
* *	* *	* *	* *
§ 63.10(d)(4)–(5)	Progress Reports/Startup, Shutdown, and Malfunction Reports.	No	
* *	* *	* *	* *
§ 63.14	Incorporation by Reference	Yes	ACGIH Industrial Ventilation Manual for capture/collection systems; and Interim Procedures for Estimating Risk Associated with Exposure to Mixtures of Chlorinated Dibenzofurans (CDDs and CDFs) and 1989 Update (incorporated by reference in § 63.1502).
* *	* *	* *	* *

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Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Rayed Bean and Snuffbox Mussels Throughout Their Ranges; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2010–0019; 4500030113]

RIN 1018–AV96

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Rayed Bean and Snuffbox Mussels Throughout Their Ranges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status for the rayed bean (*Villosa fabalis*) and snuffbox (*Epioblasma triquetra*) mussels throughout their ranges, under the Endangered Species Act of 1973, as amended (Act).

DATES: This rule becomes effective on March 15, 2012.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R3–ES–2010–0019. Comments and materials received, as well as supporting documentation used in preparing this final rule are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Columbus Ecological Services Field Office, 4625 Morse Road, Suite 104, Columbus, OH 43230; phone 614–416–8993; facsimile 614–416–8994.

FOR FURTHER INFORMATION CONTACT: Angela Boyer, Endangered Species Coordinator, Columbus Ecological Services Field Office (see **ADDRESSES**). If you use a telecommunications devise for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

This document is a final rule to list as endangered the rayed bean (*Villosa fabalis*) and snuffbox (*Epioblasma triquetra*).

Previous Federal Action

Federal actions for these species prior to November 2, 2010, are outlined in our proposed rule for these actions (75 FR 67552). Publication of the proposed rule opened a 60-day comment period, which ended on January 3, 2011.

Species Information

Rayed Bean

The rayed bean is a small mussel, usually less than 1.5 inches (in) (3.8 centimeters (cm)) in length (Cummings and Mayer 1992, p. 142; Parmalee and Bogan 1998, p. 244; West *et al.* 2000, p. 248). The shell outline is elongate or ovate in males and elliptical in females, and moderately inflated in both sexes, but more so in females (Parmalee and Bogan 1998, p. 244). The valves are thick and solid. The anterior end is rounded in females and bluntly pointed in males (Cummings and Mayer 1992, p. 142). Females are generally smaller than males (Parmalee and Bogan 1998, p. 244). Dorsally, the shell margin is straight, while the ventral margin is straight to slightly curved (Cummings and Mayer 1992, p. 142). The beaks are slightly elevated above the hingeline (West *et al.* 2000, p. 248), with sculpture consisting of double loops with some nodules (Parmalee and Bogan 1998, p. 244). No posterior ridge is evident. Surface texture is smooth and sub-shiny, and green, yellowish-green, or brown in color, with numerous, wavy, dark-green rays of various widths (sometimes obscure in older, blackened specimens) (Cummings and Mayer 1992, p. 142; West *et al.* 2000, p. 248). Internally, the left valve has two pseudocardinal teeth (tooth-like structures along the hingeline of the internal portion of the shell) that are triangular, relatively heavy, and large, and two short, heavy lateral teeth (Cummings and Mayer 1992, p. 142). The right valve has a low, triangular pseudocardinal tooth, with possibly smaller secondary teeth anteriorly and posteriorly, and a short, heavy, and somewhat elevated lateral tooth (Parmalee and Bogan 1998, p. 244). The color of the nacre (mother-of-pearl) is silvery white or bluish and iridescent posteriorly. Key characters useful for distinguishing the rayed bean from other mussels are its small size, thick valves, unusually heavy teeth for a small mussel, and color pattern (Cummings and Mayer 1992, p. 142).

Snuffbox

The snuffbox is a small- to medium-sized mussel, with males reaching up to 2.8 in (7.0 cm) in length (Cummings and Mayer 1992, p. 162; Parmalee and Bogan 1998, p. 108). The maximum length of females is about 1.8 in (4.5 cm) (Parmalee and Bogan 1998, p. 108). The shape of the shell is somewhat triangular (females), oblong, or ovate (males), with the valves solid, thick, and very inflated. The beaks are located somewhat anterior of the middle, and are swollen, turned forward and inward, and extended above the hingeline (Cummings and Mayer 1992, p. 162). Beak sculpture consists of three or four faint, double-looped bars (Cummings and Mayer 1992, p. 162; Parmalee and Bogan 1998, p. 108). The anterior end of the shell is rounded, and the posterior end is truncated, highly so in females. The posterior ridge is prominent, being high and rounded, while the posterior slope is widely flattened. The posterior ridge and slope in females is covered with fine ridges and grooves, and the posterioventral shell edge is finely toothed (Cummings and Mayer 1992, p. 162). When females are viewed from a dorsal or ventral perspective, the convergence of the two valves on the posterior slope is nearly straight due to being highly inflated. This gives the female snuffbox a unique, broadly lanceolate or cordate perspective when viewed at the substrate and water column interface (Ortmann 1919, p. 329; van der Schalie 1932, p. 104). The ventral margin is slightly rounded in males and nearly straight in females. Females have recurved denticles (downward curved tooth-like structures) on the posterior shell margin that aid in holding host fish (Barnhart 2008, p. 1). The periostracum (external shell surface) is generally smooth and yellowish or yellowish-green in young individuals, becoming darker with age. Green, squarish, triangular, or chevron-shaped marks cover the umbone (the inflated area of the shell along the dorsal margin), but become poorly delineated stripes with age. Internally, the left valve has two high, thin, triangular, emarginate pseudocardinal teeth (the front tooth being thinner than the back tooth) and two short, strong, slightly curved, and finely striated lateral teeth. The right valve has a high, triangular pseudocardinal tooth with a single short, erect, and heavy lateral tooth. The interdentum (a flattened area between the pseudocardinal and lateral teeth) is absent, and the beak cavity is wide and deep. The color of the nacre is white, often with a silvery luster, and a gray-blue or gray-green tinge in the beak cavity. The soft anatomy was described by Oesch (1984, pp. 233–234) and Williams *et al.* (2008, p. 282). Key characters useful for distinguishing the snuffbox from other species include its unique color pattern, shape (especially in females), and high degree of inflation.

Taxonomy

The rayed bean is a member of the freshwater mussel family Unionidae and was originally described as *Unio fabalis* by Lea in 1831 (pp. 86–87). The type locality (the location of the first

identified specimen) is the Ohio River (Parmalee and Bogan 1998, p. 244), probably in the vicinity of Cincinnati, Ohio. Over the years, the rayed bean has been placed in the genera *Unio, Margarita, Margaron, Eurynia, Micromya,* and *Lemiox*. It was ultimately placed in the genus *Villosa* by Stein (1963, p. 19), where it remains today (Turgeon *et al.* 1998, p. 33). We recognize *Unio capillus, U. lapillus,* and *U. donacopsis* as synonyms of *Villosa fabalis*.

The snuffbox is a member of the freshwater mussel family Unionidae and was described as *Truncilla triqueter* (Rafinesque 1820, p. 300). The species name was later changed to *triquetra* (Simpson 1900, p. 517), from the Latin *triquetrous* meaning ''having three acute angles,'' a reference to the general shape of the female. The type locality is the Falls of the Ohio (Ohio River, Louisville, Kentucky) (Parmalee and Bogan 1998, p. 108). The synonymy (scientific names used for the species) of the snuffbox was summarized by Johnson (1978, pp. 248–249), Parmalee and Bogan (1998, p. 108), and Roe (2004, p. 3). This species has also been considered a member of the genera *Unio, Dysnomia, Plagiola, Mya, Margarita, Margaron,* and *Epioblasma* at various times since its description. The monotypic subgenus *Truncillopsis* was created for this species (Ortmann and Walker 1922, p. 65). The genus *Epioblasma* was not in common usage until the 1970s (Stansbery 1973, p. 22; Stansbery 1976, p. 48; *contra* Johnson 1978, p. 248), where it currently remains (Turgeon *et al.* 1998, p. 34). *Unio triqueter, U. triangularis, U. triangularis longisculus, U. triangularis pergibosus, U. cuneatus,* and *U. formosus* are recognized as synonyms of *E. triquetra*. Tricorn pearly mussel is another common name for this species (Clarke 1981a, p. 354).

Life History

The general biology of the rayed bean and the snuffbox is similar to other bivalved mollusks belonging to the family Unionidae. Adults are suspension-feeders, spending their entire lives partially or completely buried within the substrate (Murray and Leonard 1962, p. 27). Adults feed on algae, bacteria, detritus, microscopic animals, and dissolved organic material (Silverman *et al.* 1997, p. 1859; Nichols and Garling 2000, p. 873; Christian *et al.* 2004, pp. 108–109; Strayer *et al.* 2004, pp. 430–431). Recent evidence suggests that adult mussels may also deposit-feed on particles in the sediment (Raikow and Hamilton 2001, p. 520). For their first several months, juvenile mussels employ foot (pedal) feeding, consuming settled algae and detritus (Yeager *et al.* 1994, p. 221). Unionids have an unusual mode of reproduction. Their life cycle includes a brief, obligatory parasitic stage on fish. Eggs develop into microscopic larvae called glochidia within special gill chambers of the female mussel. The female expels the mature glochidia, which must attach to the gills or the fins of an appropriate fish host to complete development. Host fish specificity varies among unionids. Some species appear to use a single host, while others can transform on several host species. Following successful infestation, glochidia encyst (enclose in a cyst-like structure) and drop off as newly transformed juveniles. For further information on freshwater mussels, see Gordon and Layzer (1989, pp. 1–17).

Mussel biologists know relatively little about the specific life-history requirements of the rayed bean and the snuffbox. Most mussels, including the rayed bean and snuffbox, have separate sexes. The age at sexual maturity, which is unknown for the rayed bean and snuffbox, is highly variable (0–9 years) among and within species (Haag and Staton 2003, pp. 2122–2123), and may be sex-dependent (Smith 1979, p. 382). Both species are thought to be long-term brooders; rayed bean females brood glochidia from May through October (Parmalee and Bogan 1998, p. 108; Ecological Specialists, Inc. (ESI) 2000, p. 5; Woolnough 2002, p. 23), and snuffbox brood glochidia from September to May (Ortmann 1912, p. 355; 1919, p. 327). Tippecanoe darter *(Etheostoma tippecanoe)* is the only verified host fish for the rayed bean (White *et al.* 1996, p. 191). Other rayed bean hosts are thought to include the greenside darter *(E. blennioides),* rainbow darter *(E. caeruleum),* mottled sculpin *(Cottus bairdi),* and largemouth bass *(Micropterus salmoides)* (Woolnough 2002, p. 51). Based on inference of closely related species, additional hosts may be suitable, including other darter and sculpin species (Jones 2002, pers. comm.). Juvenile snuffbox have successfully transformed on logperch *(Percina caprodes),* blackside darter *(P. maculata),* rainbow darter, Iowa darter *(E. exile),* blackspotted topminnow *(Fundulus olivaceous),* mottled sculpin, banded sculpin *(C. carolinae),* Ozark sculpin *(C. hypselurus),* largemouth bass, and brook stickleback *(Culaea inconstans)* in laboratory tests (Sherman 1994, p. 17; Yeager and Saylor 1995, p. 3; Hillegass and Hove 1997, p. 25; Barnhart *et al.* 1998, p. 34; Hove *et al.* 2000, p. 30; Sherman Mulcrone 2004, pp. 100–103).

Habitat Characteristics

The rayed bean is generally known from smaller, headwater creeks, but occurrence records exist from larger rivers (Cummings and Mayer 1992, p. 142; Parmalee and Bogan 1998, p. 244). They are usually found in or near shoal or riffle (short, shallow length of stream where the stream flows more rapidly) areas, and in the shallow, wave-washed areas of glacial lakes, including Lake Erie (West *et al.* 2000, p. 253). In Lake Erie, the species is generally associated with islands in the western portion of the lake. Preferred substrates typically include gravel and sand. The rayed bean is oftentimes found among vegetation (water willow (*Justicia americana*) and water milfoil (*Myriophyllum sp.*)) in and adjacent to riffles and shoals (Watters 1988b, p. 15; West *et al.* 2000, p. 253). Specimens are typically buried among the roots of the vegetation (Parmalee and Bogan 1998, p. 245). Adults and juveniles appear to produce byssal threads (thin, protein-based fibers) (Woolnough 2002, pp. 99–100), apparently to attach themselves to substrate particles.

The snuffbox is found in small- to medium-sized creeks, to larger rivers, and in lakes (Cummings and Mayer 1992, p. 162; Parmalee and Bogan 1998, p. 108). The species occurs in swift currents of riffles and shoals and wave-washed shores of lakes over gravel and sand with occasional cobble and boulders. Individuals generally burrow deep into the substrate, except when spawning or attempting to attract a host (Parmalee and Bogan 1998, p. 108).

Strayer (1999a, pp. 471–472) demonstrated in field trials that mussels in streams occur chiefly in flow refuges, or relatively stable areas that display little movement of particles during flood events. Flow refuges conceivably allow relatively immobile mussels to remain in the same general location throughout their entire lives. Strayer thought that features commonly used in the past to explain the spatial patchiness of mussels (water depth, current speed, sediment grain size) were poor predictors of where mussels actually occur in streams.

Rayed Bean Historical Distribution

The rayed bean historically occurred in 115 streams, lakes, and some human-made canals in 10 States: Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia; and Ontario, Canada. The mussel occurred in parts of the upper (Lake Michigan

drainage) and lower Great Lakes systems, and throughout most of the Ohio and Tennessee River systems. During historical times, the rayed bean was fairly widespread and locally common in many Ohio River system streams based on collections made over a several-decade period. The species was once fairly common in the Belle, South Branch Thames, Detroit, Scioto, Wabash, and Duck Rivers; several tributaries in the Scioto system (Olentangy River, and Big Darby and Alum Creeks); and Tippecanoe Lake, based on literature and museum records (Call 1900; Watters 1994, p. 105; West *et al.* 2000, p. 251; Badra 2002, pers. comm.). The rayed bean was last reported from some streams several decades ago (North Branch Clinton, Auglaize, Ohio, West Fork, Beaver, Shenango, Mahoning, Mohican, Scioto, Green, Barren, Salamonie, White, Big Blue, Tennessee, Holston, South Fork Holston, Nolichucky, Clinch, North Fork Clinch, and Powell Rivers; Wolf, Conewango, Oil, Crooked, Pymatuning, Mill, Alum, Whetstone, Deer, Lick, and Richland Creeks; and Buckeye, Tippecanoe, Winona, and Pike Lakes). The rayed bean population in Lake Erie was once considerable (Ohio State University Museum of Biological Diversity (OSUM) collections), but has been eliminated by the zebra mussel.

Rayed Bean Current Distribution

Extant populations of the rayed bean are known from 31 streams and 1 lake in seven States and 1 Canadian province: Indiana (St. Joseph River (Fish Creek), Tippecanoe River (Lake Maxinkuckee, Sugar Creek)), Michigan (Black River (Mill Creek), Pine River, Belle River, Clinton River), New York (Allegheny River (Olean Creek, Cassadaga Creek)), Ohio (Swan Creek, Fish Creek, Blanchard River, Tymochtee Creek, Walhonding River, Mill Creek, Big Darby Creek, Scioto Brush Creek; Great Miami River, Little Miami River (East Fork Little Miami River), Stillwater River), Pennsylvania (Allegheny River (French Creek (Le Boeuf Creek, Muddy Creek, Cussewago Creek))), Tennessee (Duck River), and West Virginia (Elk River); and Ontario, Canada (Sydenham River, Thames River).

Rayed Bean Population Estimates and Status

Based on historical and current data, the rayed bean has declined significantly rangewide and is now known only from 31 streams and 1 lake (down from 115), a 73 percent decline (Table 1). This species has also been eliminated from long reaches of former habitat in hundreds of miles of the Maumee, Ohio, Wabash, and Tennessee Rivers and from numerous stream reaches and their tributaries. In addition, this species is no longer known from the States of Illinois, Kentucky, and Virginia. The rayed bean was also extirpated from West Virginia, until the 2006 reintroduction into the Elk River, and from Tennessee, until the 2008 reintroduction into the Duck River (Clayton 2007, pers. comm.; Urban 2010, pers. comm.; Moles and Layzer 2009, p. 2).

In this rule, mussel shell collection records have been classified according to the condition of shell material. Fresh dead shells still have flesh attached to the valves, they may or may not retain a luster to their nacre, and their periostracum is non-peeling, all indicating relatively recent death (generally less than 1 year) (Buchanan 1980, p. 4). Relic shells have lost the luster to their nacre, have peeling or absent periostracum, may be brittle or worn, and likely have been dead more than a year (Buchanan 1980, pp. 4–5; Zanatta *et al.* 2002, p. 482). Generally, fresh dead shells indicate the continued presence of the species at a site (Metcalf 1980, p. 4). The presence of relic shells only, along with repeated failure to find live animals or fresh dead shells, likely signifies that a population is extirpated (Watters and Dunn 1993–94, pp. 253–254). Shells labeled R may originally have been reported by collectors as either weathered dead (or weathered dry) or subfossil. If no details on shell condition were provided for a record, the shell is simply referred to as dead. In this document, a population is considered viable if evidence of successful reproduction is documented and it has enough individuals to sustain the population at its current level for the foreseeable future.

TABLE 1—RAYED BEAN EXTANT STREAM POPULATION SUMMARY BY STREAM OF OCCURRENCE

Stream (state)	Last observed	Recruiting	Potential viability	Population size	Population trend
Black River (MI)	2001	Unknown	Low	Small	Unknown.
Mill Creek (MI)	2002	Unknown	Unknown	Small	Unknown.
Pine River (MI)	2002	Yes	High	Small	Declining.
Belle River (MI)	2010	Unknown	Unknown	Small	Unknown.
Clinton River (MI)	2009	Yes	Unknown	Small	Unknown.
Sydenham River (ON)	2010	Yes	High	Large	Stable.
Thames River (ON)	2008	Unknown	High	Large	Unknown.
Swan Creek (OH)	2010	Yes	High	Large	Stable.
St. Joseph River (IN)	1998	Unknown	Low	Small	Declining.
Fish Creek (IN, OH)	2009	Unknown	Low	Small	Declining.
Blanchard River (OH)	2010	Yes	High	Large	Unknown.
Tymochtee Creek (OH)	1996	Unknown	Unknown	Small	Unknown.
Allegheny River (PA, NY)	2010	Yes	High	Large	Stable.
Olean Creek (NY)	2000	Yes	High	Small	Unknown.
Cassadaga Creek (NY)	1994	Yes	Low	Small	Unknown.
French Creek (PA)	2005	Yes	High	Large	Stable.
Le Boeuf Creek (PA)	2006	Unknown	Unknown	Unknown	Unknown.
Muddy Creek (PA)	2006	Unknown	Unknown	Unknown	Unknown.
Cussewago Creek (PA)	1991	Unknown	Unknown	Small	Unknown.
Walhonding River (OH)	1991–95	Unknown	Low	Small	Declining.
Elk River (WV)	2010	Unknown (Reintroduced in 2006).	Unknown	Small	Unknown.
Mill Creek (OH)	2011	Unknown	Unknown	Unknown	Unknown.
Big Darby Creek (OH)	2008	Unknown	Unknown	Small	Declining.
Scioto Brush Creek (OH)	1987	Unknown	Unknown	Small	Unknown.
Great Miami River (OH)	2010	Unknown	Unknown	Unknown	Unknown.
Little Miami River (OH)	1990–91	Unknown	Unknown	Unknown	Unknown.

TABLE 1—RAYED BEAN EXTANT STREAM POPULATION SUMMARY BY STREAM OF OCCURRENCE—Continued

Stream (state)	Last observed	Recruiting	Potential viability	Population size	Population trend
East Fork Little Miami River (OH)	1990–91	Unknown	Unknown	Unknown	Unknown.
Stillwater River (OH)	1987	Unknown	Unknown	Unknown	Unknown.
Tippecanoe River (IN)	1995	Unknown	Low	Unknown	Declining.
Lake Maxinkuckee (IN)	1997	Unknown	Unknown	Unknown	Declining.
Sugar Creek (IN)	1998	Unknown	Unknown	Unknown	Unknown.
Duck River (TN)	2008	Unknown (Reintroduced in 2008).	Unknown	Small	Unknown.

Upper Great Lakes Sub-Basin

The rayed bean was not known from the upper Great Lakes sub-basin until 1996, when relic specimens were documented from the Pigeon River, a tributary to the St. Joseph River that flows into Lake Michigan. No extant populations of the rayed bean are currently known from this system.

Lower Great Lakes Sub-Basin

Of the 115 water bodies from which the rayed bean was historically recorded, 27 are in the lower Great Lakes system. The species is thought to be extant in 12 streams, which are discussed below, but historically significant populations have been eliminated from Lake Erie and the Detroit River.

Black River—A tributary of the St. Clair River, linking Lakes Huron and St. Clair, the Black River is located in southeastern Michigan. Hoeh and Trdan (1985, p. 115) surveyed 17 sites in the Black River system, including 12 mainstem sites over approximately 47 miles (75 km), but failed to find the rayed bean. The rayed bean was not discovered there until the summer of 2001, when a single live individual was found in the lower river in the Port Huron State Game Area (PHSGA) (Badra 2002, pers. comm.). A survey in 2003 failed to find any rayed bean, and two surveys in 2005 found only two valves (Badra 2008, pers. comm.). An additional survey was performed in 2005 at six sites, but no rayed bean were found (Badra 2008, pers. comm.). The status of this population cannot be accurately assessed at this time, but would appear to be small and of questionable viability (Butler 2002, p. 8).

Mill Creek—Mill Creek is a tributary of the Black River, St. Clair County, in southeastern Michigan. The rayed bean was discovered in Mill Creek in August 2002. Five dead specimens were found approximately 0.5 miles (mi) (0.8 kilometers (km)) above its confluence with the Black River in the PHSGA (Badra 2002, pers. comm.). A Mill Creek site 0.25 mi (0.4 km) from the confluence of the Black River was surveyed in 2003 and 2004, with one rayed bean shell found during each survey (Badra 2008, pers. comm.). Similar to the population in the Black River, the status of this newly discovered population cannot be accurately assessed at this time.

Pine River—Another tributary of the St. Clair River, the Pine River is located in southeastern Michigan. The rayed bean was apparently not collected in the Pine River until 1982, when specimens were found at three sites (Hoeh and Trdan 1985, p. 116). These collections included 5 live individuals and 23 fresh dead specimens (Badra 2002, pers. comm.). Hoeh and Trdan (1985, p. 116) considered it to be ''rare,'' semi-quantitatively defined as occurring at a rate of less than one specimen per person-hour sampling effort. In 1997, two live individuals were found. The last survey in the Pine River occurred in 2002 (Badra 2008, pers. comm.), and one live rayed bean was documented (Badra and Goforth 2003, p. 6). Comparing the historical and most recent survey resulting, it appears that the species may have declined significantly since the 1980s, but it is probably still viable in the Pine River.

Belle River—The Belle River is a third tributary of the St. Clair River harboring an extant population of the rayed bean. This species was first collected from the Belle River in 1965, when 17 fresh dead specimens were collected (OSUM 1965:0106). The same site was revisited in 1978, but only one fresh dead shell is represented in OSUM 1978:0013. Since that time, live individuals or fresh dead specimens were found in 1983 and 1992, while only relic shells were found in 1994 (Badra 2008, pers. comm.). During summer 2002 sampling, single live specimens were found at two new sites in the Belle River, with four and two fresh dead specimens, respectively, also found at these sites (Badra 2008, pers. comm.). In 2010, five live individuals were found at the same two sites sampled in 2002 (Zanatta 2011, pers. comm.). These two sites are about 2 miles (3.2 km) apart in the lower portion of the river. The status of the Belle River population is still not well known, but appears to be small and restricted to a short reach in the lower river.

Clinton River—The rayed bean was first recorded from the Clinton River in 1933 (Badra 2008, pers. comm.). The mussel fauna in the entire mainstem of the Clinton River downstream of Pontiac, Michigan, was apparently wiped out by pollution between 1933 and 1977 (Strayer 1980, p. 147). In 1992, Trdan and Hoeh (1993, p. 102) found 26 live individuals using a suction dredge from a bridge site slated for widening, where Strayer (1980, p. 146) previously found only relic shells. The rayed bean represented 1.2 percent relative abundance of the 10 species collected at the site (Trdan and Hoeh 1993, p. 102). The population in the Clinton River is probably viable but currently restricted to about 3 mi (4.8 km) of stream in the western suburbs of Pontiac (Butler 2002, p. 9). Zanatta (2011, pers. comm.) found one live rayed bean in 2009. The rayed bean's long-term viability appears to be precarious in the Clinton River.

Sydenham River—The rayed bean in the Sydenham River represents one of the largest rayed bean populations remaining. West *et al.* (2000, pp. 252–253) presented a highly detailed collection history of the rayed bean in the Sydenham River. The rayed bean is currently thought to exist in an approximately 75-mi (120-km) reach of the middle Sydenham, from the general vicinity of Napier, Ontario, downstream to Dawn Mills. The species appears to be most abundant in the lower half of this river reach. Although the range has remained relatively consistent over time, abundance data at repeatedly sampled sites from the 1960s to the late 1990s indicate a general decline of the rayed bean. Based on the range of sizes and roughly equal number of specimens in various size classes of the live and fresh dead material they gathered, West *et al.* (2000, p. 256) considered the population to be ''healthy'' and ''reproducing'' (recruiting). Data from sampling in 2001 show evidence of

recruitment and variable size classes for both sexes from most of the sites (Woolnough 2002, p. 50). Based on this data, the rayed bean population in the Sydenham River is doing considerably better than West *et al.* (2000, pp. 252–253) suggested. Woolnough and Morris (2009, p. 19) estimate that there are 1.5 million mature rayed bean in the Sydenham River living in the 38-mile (61-km) stretch between Napier Road near Alvinston, Ontario, and Dawn Mills, Ontario.

Thames River—The Thames River flows west through southwestern Ontario. The rayed bean was historically known from only the south branch until 2008, when it was discovered in the north branch. In July 2008, six gravid (gills full of glochidia) females were collected at two north branch sites (Woolnough 2008, pers. comm.). In September 2008, four live females and two live males were collected at two different north branch sites (Woolnough 2008, pers. comm.). All of these individuals were collected within a 4.5-mi (7.2-km) reach of the river (Woolnough 2008, pers. comm.). Woolnough and Morris (2009, p. 19) estimate that there are 4,300 mature rayed bean in the Thames River.

Maumee River System—The Maumee River system, which flows into the western end of Lake Erie, was once a major center of distribution of the rayed bean. The species was historically known from eight streams in the system in addition to the mainstem Maumee. Further, an additional population was discovered in the system in 2005 in Swan Creek.

Swan Creek—Swan Creek is a tributary of the lower Maumee River in northwestern Ohio. This population was discovered in 2005. Surveys conducted in 2006 and 2007 found that the Swan Creek population is limited to about 3 river mi (5 river km) between river mile (RM) 18.3 and 15.3 (Grabarkiewicz 2008, p. 11). The rayed bean was the fourth most abundant unionid present within the 2006–2008 sample area, reaching densities of eight individuals per square meter in some areas and comprising about 14.1 percent of the total mussel community (Grabarkiewicz 2008, p. 10). The rayed bean population in Swan Creek is viable and, although limited to a short reach, may be one of the most robust remaining populations.

St. Joseph River—The St. Joseph River is one of the two major headwater tributaries to the Maumee, with a drainage area in southeastern Michigan, northwestern Ohio, and northeastern Indiana. The mainstem flows in a southwesterly direction to its confluence with the St. Mary's River to form the Maumee in Ft. Wayne, Indiana. The rayed bean was historically known from numerous sites on the river, but now apparently persists only at a couple of sites in the lower St. Joseph River in Allen and DeKalb Counties, Indiana (Watters 1988b, p. 15; 1998, Appendix C); a few fresh dead specimens were found in both studies, but no live individuals were found. Grabarkiewicz and Crail (2008, p. 13) surveyed six sites on the West Branch St. Joseph River in 2007, but did not encounter any rayed bean.

Fish Creek—A tributary of the St. Joseph River that begins in Ohio, Fish Creek flows west, then south through Indiana, then eventually east into Ohio before joining the St. Joseph River at Edgerton. The rayed bean persists in Williams County, Ohio, and possibly DeKalb County, Indiana. Based on the appearance of 2 live individuals and fresh dead shells, it inhabits the lower 10 mi (16.1 km) or less of the stream (Watters 1988b, p. 18; Grabarkiewicz 2009, pers. comm.). Watters (1988b, p. ii) considered Fish Creek to be ''the most pristine tributary of the St. Joseph system.'' A major diesel fuel spill from a ruptured pipeline in DeKalb County in 1993 resulted in a mussel kill in the lower portion of the stream (Sparks *et al.* 1999, p. 12). It is not known if the rayed bean was affected by the spill. Surveys in 2004 (at 64 qualitative sites) and 2005 (at 11 quantitative sites) failed to detect the species (Brady *et al.* 2004, p. 2; 2005, p. 3). However, Grabarkiewicz (2009, pers. comm.) reported finding two live and three fresh dead rayed bean in 2005, at the County Road 3 bridge in Ohio. In 2009, two fresh dead rayed bean were found in lower Fish Creek in Ohio (Boyer 2009, pers. obs.). The viability and status of this population are uncertain (Fisher 2008, pers. comm.).

Blanchard River—The Blanchard River is a tributary of the Auglaize River in the Maumee River system, in northwestern Ohio. First discovered in 1946, this population is one of the largest of the rayed bean rangewide. The rayed bean in the Blanchard River is restricted to 25–30 river mi (40–48 river km) in the upper portion of the stream in Hardin and Hancock Counties upstream of Findley (Hoggarth *et al.* 2000, p. 22). Hoggarth *et al.* (2000, p. 23) reported the rayed bean to be the fourth most common species in the drainage. Grabarkiewicz (2010, pers. comm.) found live individuals, including a juvenile, at six sites sampled in 2010. The population is considered to be viable.

Tymochtee Creek—Tymochtee Creek is a tributary to the upper Sandusky River in north-central Ohio, which flows into the southwestern portion of Lake Erie. The rayed bean is known from three sites in a reach of stream in Wyandot County and was first collected in 1970. All collections of the rayed bean have been small, with not more than five fresh dead shells found in any one collection effort. The last record is for 1996, when a pair and three unpaired valves were collected. The condition of at least one of the valves indicated that the rayed bean is probably still extant in the stream, although no live individuals were observed (Athearn 2002, pers. comm.). The rayed bean status in Tymochtee Creek is, therefore, currently unknown.

Ohio River System

The rayed bean was historically known from the Ohio River in the vicinity of Cincinnati, Ohio, downstream to the Illinois portion of the river. It undoubtedly occurred elsewhere in the upper mainstem. Few historical records are known (mostly circa 1900), and no recent collections have been made, indicating that it became extirpated there decades ago. It was historically known from 74 streams, canals, and lakes in the system, representing roughly two-thirds of its total range. Ortmann (1925, p. 354) considered the rayed bean to be ''abundant in small streams'' in the Ohio River system. Currently, only 18 streams and a lake are thought to have extant rayed bean populations in the system.

Allegheny River System—Nine streams and Chautauqua Lake historically harbored rayed bean populations in the Allegheny River system. Currently, the rayed bean is found in half of these water bodies, but in good numbers in two streams (Allegheny River and French Creek) in this drainage.

Allegheny River—The Allegheny River drains northwestern Pennsylvania and western New York, joining the Monongahela River at Pittsburgh, Pennsylvania, to form the Ohio River. Ortmann (1909a, p. 179; 1919, p. 262) was the first to report the rayed bean from the Allegheny. The population once stretched from Cataraugus County, New York, to Armstrong County, Pennsylvania. Based on historical collections, it appears that the rayed bean is more abundant now than it was historically in the Allegheny River. This may indicate that the rayed bean population in the Allegheny has expanded in the past 100 years. Many streams in western Pennsylvania have improved water quality since Ortmann's time, when he reported on the

wholesale destruction of mussels in several streams (Ortmann 1909b, pp. 11–12). The species currently occurs in Pennsylvania downstream of Allegheny (Kinzua) Reservoir in Warren County to the pool of Lock and Dam 6 in northern Armstrong County, a distance of over 100 river mi (161 river km) (Villella Bumgardner 2008, pers. comm.). The Allegheny population is viable and one of the most important remaining rangewide today.

Olean Creek—Olean Creek is a tributary of the Allegheny River in western New York. A small population of the rayed bean is known from the lower portions of the stream. Strayer *et al.* (1991, p. 67) reported the rayed bean from three sites during 1987–90 sampling, although just one live individual was located with relic shells from the other two sites. Only relic shells were found in Olean Creek in 1994, but three live individuals were found in 2000, at the proposed construction site of the City of Olean Water Treatment Plant (ESI 2000, p. 8). Collected only during their quantitative sampling effort, the rayed bean represented a relative abundance of 11.5 percent of the seven live species sampled. The rayed bean age distribution of these specimens also indicates recent recruitment into the population (ESI 2000, p. 9). Relic specimens are now known from an 8-mi (13-km) reach of stream, with live individuals known from less than 1.5 mi (2.4 km) of the lower creek. The Olean Creek population appears viable, but is small and tenuous (Butler 2008, pers. comm.)

Cassadaga Creek—Cassadaga Creek is a tributary of Conewango Creek in the Allegheny River system, in western New York. A small population of the rayed bean is known from a single riffle (Ross Mills) in the lower creek north of Jamestown. Four live specimens were found in 1994 (Strayer 1995). Muskrat middens (a pile of shells) collected during the winter of 2002 produced 38 fresh dead specimens with a size range of 0.8–1.7 in (2.0–4.3 cm) (Clapsadl 2002, pers. comm.). Although the rayed bean is not known from other sites in the stream, it appears to be viable at this site.

French Creek—French Creek is a major tributary of the middle Allegheny River, in western New York and northwestern Pennsylvania. One of the largest rayed bean populations known, it is found in much of the lower portions of the stream in four Pennsylvania counties (the species is not known from the New York portion of stream). Ortmann (1909a, p. 188; 1919, p. 264) reported the species from two counties, Crawford and Venango. Not until circa 1970 did the population become more thoroughly known, with museum lot sizes indicating sizable populations at several sites, particularly in the lower reaches of the stream. Recent collections indicate that population levels remain high with the rayed bean occurring throughout the mainstem (Villella Bumgardner 2002, pers. comm.; Smith and Crabtree 2005, pp. 15–17; Enviroscience 2006, p. 5).

Le Boeuf Creek—Le Boeuf Creek is a small western tributary of upper French Creek, flowing in a southerly direction just west of West Branch French Creek in Erie County, Pennsylvania. A total of five live individuals were collected at two out of five sites during a 2006 survey (Smith *et al.* 2009, pp. 68–76; Welte 2011, pers. comm.). No other information is available on the status of this population.

Muddy Creek—Muddy Creek is an eastern tributary of upper French Creek in Crawford County, Pennsylvania. The rayed bean was not discovered until the summer of 2006. Live and fresh dead rayed bean were reported from 2 of 20 lower river sites (Mohler *et al.* 2006, pp. 581–582). No live juveniles were found during the 2006 survey (Mohler *et al.* 2006, p. 576). No other information is available on the status of this population.

Cussewago Creek—Cussewago Creek is a tributary of lower French Creek, with its confluence at Meadville, Crawford County, Pennsylvania. A small population was reported in 1991 from Cussewago Creek (Proch 2001, pers. comm.). The rayed bean is thought to persist in the stream, but its current status is unknown.

Walhonding River—The Walhonding River is a tributary of the upper Muskingum River system, in central Ohio, forming the latter river at its confluence with the Tuscarawas River at Coschocton. Small numbers of rayed bean shells are represented in OSUM collections from the 1960s and 1970s. During 1991–93, Hoggarth (1995–96, p. 161) discovered one live individual and one fresh dead specimen at one site, while four relic specimens were found at three other sites. A small rayed bean population is thought to remain in the Walhonding River; its status is unknown, but is deemed highly tenuous, given the small population size. The population is probably nearing extirpation (Hoggarth 2008a, pers. comm.).

Elk River—The Elk River is a major 181-river-mi (291-river-km) tributary in the lower Kanawha River system draining central West Virginia and flowing west to the Kanawaha River at Charleston. The rayed bean was extirpated in the Elk River sometime in the 1990s. In 2006 and 2007, approximately 600 adults were reintroduced into the Elk River above Clendenin. In 2008, an effort was made to monitor the reintroduction. A 30-minute search yielded two live individuals, but efforts were discontinued due to high water and excessive habitat disturbance caused by the search effort (Clayton 2008, pers. comm.). In 2010, none of the individuals released in 2006 was found, but an additional 200 individuals were released (Clayton 2010, pers. comm.). The translocated adults are thought to persist in the stream, but it is unknown if this new population is reproducing.

Scioto River system—The Scioto River system, in central and south-central Ohio, is a major northern tributary of the Ohio River. A historically large metapopulation of the rayed bean occupied at least 11 streams, the Ohio and Erie Canal, and Buckeye Lake. Sizable populations were noted in at least the Olentangy River, and Alum and Big Darby Creeks, based on OSUM collections primarily from the 1960s. A series of system reservoirs, mostly north of Columbus, reduced habitat and contributed to the elimination of some populations in several streams (Alum, Big Walnut, and Deer Creeks; Olentangy and Scioto Rivers). The location of the Columbus Metropolitan Area in the heart of the watershed has also taken a major toll on the species. The historical Scioto rayed bean metapopulation has since been decimated by anthropogenic factors. Currently, remnant populations are known only from Mill Creek, Big Darby Creek, and Scioto Brush Creek.

Mill Creek—Mill Creek is a tributary of the Scioto River in central Ohio that joins the Scioto River at the O'Shaughnessy Reservoir northwest of the City of Columbus. In 2004, seven fresh dead specimens were found during a survey in the City of Marysville (Hoggarth 2005, p. 7). In 2007, Hoggarth (2007a, pp. 5–6) found two live rayed bean at the same site and one live individual at an additional site. No other information is available on the status of this population.

Big Darby Creek—Big Darby Creek is one of the major tributaries draining the northwestern portion of the Scioto River system in central Ohio. A sizable rayed bean population was noted in Big Darby Creek from OSUM collections, primarily from the 1960s. Watters (1994, p. 105) reported finding a few fresh dead specimens in 1986, but none in 1990, and indicated that the rayed bean was probably extirpated from Big Darby Creek. In 2006, one live individual was

found at the U.S. Highway 42 bridge replacement project site (Hoggarth 2006, p. 6). This individual was relocated to a site upstream out of the impact zone of the bridge project, and nine additional live individuals were subsequently found at the relocation site (Hoggarth 2006, p. 6). In 2007, three live rayed bean were found at the relocation site (Hoggarth 2007b, p. 9). Hoggarth (2008b, pers. comm.) visited the same relocation site in 2008, and reported finding ''numerous living specimens'' of the rayed bean. The status of this population cannot be accurately assessed at this time, but would appear to be small and of questionable viability.

Scioto Brush Creek—Scioto Brush Creek is a small western tributary of the lower Scioto River in Scioto County, south-central Ohio. Watters (1988a, p. 45) discovered the rayed bean in this stream in 1987, reporting two fresh dead and two relic specimens from a site, and a relic specimen from a second site among the 20 sites he collected. This population's current status is uncertain.

Great Miami River – The Great Miami River is a major northern tributary of the Ohio River in southwestern Ohio that originates from Indian Lake in west-central Ohio and flows into the Ohio River west of Cincinnati. The occurrence of the rayed bean in the Great Miami River was discovered in August 2009, during a mussel survey for a bridge project in Logan County, Ohio. Only one individual was documented, a male approximately 7 to 8 years of age (Hoggarth 2009, pers. comm.). The following year, Hoggarth (2010, p. 5) found a juvenile rayed bean. The status of this newly discovered population is not known.

Little Miami River—The Little Miami River is a northern tributary of the Ohio River in southwestern Ohio, flowing into the latter at the eastern fringe of the Cincinnati metropolitan area. Hoggarth (1992, p. 248) surveyed over 100 sites in the entire system. He found one live individual at a site in Warren County and possibly a subfossil shell at another site, although there is contradictory data in his paper (Butler 2002, p. 17). The latter site may have been the same as that reported for a pre-1863 record (Hoggarth 1992, p. 265). The rayed bean appears to be very rare in the Little Miami, having been found extant at only 1 of 46 mainstem sites. Hoggarth (1992, p. 267) highlighted the ''fragile nature'' of the extant mussel community in the system, while noting that localized reaches of the Little Miami were ''severely impacted.'' The species' status in the river is uncertain, but apparently very tenuous and probably headed toward extirpation (Butler 2002, p. 17).

East Fork Little Miami River—The East Fork Little Miami River is an eastern tributary of the lower Little Miami River, with its confluence at the eastern fringe of the Cincinnati metropolitan area. According to OSUM records, eight fresh dead specimens were reported from a site in eastern Clermont County in 1973. Hoggarth (1992, p. 265) reported one live, three fresh dead, and one relic rayed bean from three sites in a 7-river-mi (11-river-km) stretch of the stream in western Clermont and adjacent Brown County (including the 1973 site). Harsha Reservoir on the East Fork destroyed several miles of potential stream habitat for the rayed bean a few miles downstream of the extant population. The status of the rayed bean in the river is uncertain, but probably of doubtful persistence (Butler 2002, p. 17).

Stillwater River—The Stillwater River is a western tributary of the middle Great Miami River in southwestern Ohio. The rayed bean is known from two specimens, one fresh dead and one relic, collected in 1987 at two sites spanning the Miami–Montgomery County line (OSUM records). Both sites occur in the footprint of Englewood Reservoir (constructed circa 1920), which serves as a retarding basin (a constructed empty lake used to absorb and contain flooding in periods of high rain) that is normally a free-flowing river except in times of flood, therefore continuing to provide riverine habitat that is normally destroyed by permanently impounded reservoirs. The rayed bean in the Stillwater River may be extant, but its status is currently unknown and considered highly imperiled (Butler 2002, p. 17).

Tippecanoe River—The Tippecanoe River is a large northern tributary of the middle Wabash River in north-central Indiana. The first records for the rayed bean date to circa 1900 (Daniels 1903, p. 646). Historically, this species was known from numerous sites in six counties in the Tippecanoe River. A total of 12 fresh dead specimens from 5 of 30 sites were found when sampled in 1992. The rayed bean ''is apparently on the decline'' in the river (ESI 1993, p. 87). The Tippecanoe rayed bean population was thought to be recruiting by Fisher (2008, pers. comm.), but appears tenuous and its long-term viability is questionable.

Lake Maxinkuckee—Lake Maxinkuckee is a glacial lake in the headwaters of the Tippecanoe River in north-central Indiana. The rayed bean has been known from the lake for more than a century (Blatchley 1901). A 1997 OSUM record included seven fresh dead specimens collected at its outlet to the Tippecanoe River. Fisher (2002, pers. comm.), who made the 1997 OSUM collection, noted that many native mussels had zebra mussels attached to their valves that were apparently contributing to their mortality. The status of the rayed bean in Lake Maxinkuckee is, therefore, highly tenuous, and its long-term persistence questionable.

Sugar Creek—Sugar Creek is a tributary of the East Fork White River, in the lower Wabash River system in south-central Indiana. A rayed bean population was first reported there in 1930 (Butler 2002, p. 19). Harmon (1992, p. 33) sampled 27 mainstem and 16 tributary sites, finding fresh dead specimens at 3 mainstem sites and relic specimens from 2 other sites. The sites with fresh dead material were found in the lowermost 6 mi (9.7 km) of stream. The status and viability of this tenuous population is uncertain (Fisher 2008, pers. comm.).

Tennessee River System

Historically, the rayed bean was known from the Tennessee River and 12 of its tributary streams. Ortmann (1924, p. 55) reported that the rayed bean had a ''rather irregular distribution''; however, museum lots show that it was fairly common in some streams (North Fork Clinch, Duck Rivers). The last live rayed bean records from the system, with the exception of the Duck River, were from the 1960s or earlier. The species persisted in the Duck until the early 1980s. Prior to the 2008 reintroduction into the Duck River, intensive sampling in the Duck watershed had failed to locate even a relic shell of the rayed bean (Ahlstedt *et al.* 2004, p. 29). Tributaries in this system have been extensively sampled over the past 25 years.

Duck River—The Duck River is the downstream-most large tributary of the Tennessee River draining south-central Tennessee and flowing 285 river miles (459 river km) west to its confluence near the head of Kentucky Reservoir. The rayed bean was considered to be extirpated from the river until a reintroduction took place in September 2008. A total of 969 adults were collected from the Allegheny River at East Brady, Pennsylvania, in 2008 (Welte 2011, pers. comm.). Following quarantine and retention of several individuals for propagation, a total of 681 rayed bean were translocated to the Duck River near Lillard Mill, Tennessee (Urban 2010, pers. comm.; Moles and Layzer 2009, pp. 2–3; Welte 2011, pers. comm.). Although the rayed bean was extirpated from the Duck River about 25 years ago, major improvements in water

quality and physical habitat conditions have occurred in the past 15 years. In response to these improvements, recruitment of nearly all extant mussel species has been documented and suggests that reintroduction of the rayed bean might be successful (Anderson 2008, pers. comm.). The status of the reintroduced population was assessed in 2009. Rayed bean survival rates from three plots and downstream dispersal areas ranged from 38 to 62 percent (Moles and Layzer 2009, pp. 4–7).

Summary of Rayed Bean Population Estimates and Status

The information presented in this final rule indicates that the rayed bean has experienced a significant reduction in range and most of its populations are disjunct, isolated, and, with few exceptions, appear to be declining (West *et al.* 2000, p. 251). The extirpation of this species from over 80 streams and other water bodies within its historical range indicates that substantial population losses have occurred. Relatively few streams are thought to harbor sizable viable populations (Sydenham, Blanchard, and Allegheny Rivers, and French and Swan Creeks). Small population size and restricted stream reaches of current occurrence are a real threat to the rayed bean due to the negative genetic aspects associated with small, geographically isolated populations. This can be especially true for a species, like the rayed bean, that was historically widespread and had population connectivity among mainstem rivers and multiple tributaries. The current distribution, abundance, and trend information illustrates that the rayed bean is imperiled.

Snuffbox Historical Distribution

The snuffbox historically occurred in 210 streams and lakes in 18 States and 1 Canadian province: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin; and Ontario, Canada. The major watersheds of historical streams and lakes of occurrence include the upper Great Lakes sub-basin (Lake Michigan drainage), lower Great Lakes sub-basin (Lakes Huron, Erie, and Ontario drainages), upper Mississippi River sub-basin, lower Missouri River system, Ohio River system, Cumberland River system, Tennessee River system, lower Mississippi River sub-basin, and White River system.

Snuffbox Current Distribution

Extant populations of the snuffbox are known from 79 streams in 14 States and 1 Canadian province: Alabama (Tennessee River, Paint Rock River, and Elk River), Arkansas (Buffalo River, Spring River, and Strawberry River), Illinois (Kankakee River and Embarras River), Indiana (Pigeon River, Salamonie River, Tippecanoe River, Sugar Creek, Buck Creek, Muscatatuck River, and Graham Creek), Kentucky (Tygarts Creek, Kinniconick Creek, Licking River, Slate Creek, Middle Fork Kentucky River, Red Bird River, Red River, Rolling Fork Salt River, Green River, and Buck Creek), Michigan (Grand River, Flat River, Maple River, Pine River, Belle River, Clinton River, Huron River, Davis Creek, South Ore Creek, and Portage River), Minnesota (Mississippi River, St. Croix River), Missouri (Meramec River, Bourbeuse River, St. Francis River, and Black River), Ohio (Grand River, Ohio River, Muskingum River, Walhonding River, Killbuck Creek, Olentangy River, Big Darby Creek, Little Darby Creek, Salt Creek, Scioto Brush Creek, South Fork Scioto Brush Creek, Little Miami River, and Stillwater River), Pennsylvania (Allegheny River, French Creek, West Branch French Creek, Le Boeuf Creek, Woodcock Creek, Muddy Creek, Conneaut Outlet, Little Mahoning Creek, Shenango River, and Little Shenango River), Tennessee (Clinch River, Powell River, Elk River, and Duck River), Virginia (Clinch River and Powell River), West Virginia (Ohio River, Middle Island Creek, McElroy Creek, Little Kanawha River, Hughes River, North Fork Hughes River, and Elk River), and Wisconsin (St. Croix River, Wolf River, Embarrass River, Little Wolf River, and Willow Creek); and Ontario, Canada (Ausable River and Sydenham River). It is probable that the species persists in some of the 132 streams or lakes where it is now considered extirpated (Butler 2007, p. 16); however, if extant, these populations are likely to be small and not viable.

Snuffbox Population Estimates and Status

Based on historical and current data, the snuffbox has declined significantly rangewide and is now known only from 79 streams (down from 210 historically), representing a 62 percent decline in occupied streams (Table 2). Because multiple streams may comprise a single snuffbox population (French Creek system), the actual number of extant populations is fewer than 79. Extant populations, with few exceptions, are highly fragmented and restricted to short reaches. Available records indicate that 25 of 79, or 32 percent, of streams considered to harbor extant populations of the snuffbox are represented by only one or two recent live or fresh dead individuals (Little Wolf, Maple, Pigeon, Kankakee, Meramec, Ohio, Muskingum, Olentangy, Stillwater, Hughes, Green, Powell, Duck, and Black Rivers; and Little Mahoning, Woodcock, McElroy, Big Darby, Little Darby, Salt, South Fork Scioto Brush, Slate, and Buck (Indiana), Graham, and Buck (Kentucky) Creeks.

TABLE 2—SNUFFBOX EXTANT STREAM POPULATION SUMMARY BY STREAM OF OCCURRENCE

Stream (state)	Last observed	Recruiting	Potential viability	Population size	Population trend	Status category
Wolf River (WI)	2010	Yes	High	Large	Declining	Stronghold.
Embarrass River (WI)	2006	Unknown	Unknown	Small	Unknown	Marginal.
Little Wolf River (WI)	2004	Unknown	Unknown	Small	Unknown	Marginal.
Willow Creek (WI)	2001	Unknown	Unknown	Small	Unknown	Marginal.
Grand River (MI)	2002	Yes	High	Medium	Unknown	Significant.
Flat River (MI)	2010	Yes	High	Medium	Unknown	Significant.
Maple River (MI)	2001	Unknown	Unknown	Small	Unknown	Marginal.
Pine River (MI)	2002	Unknown	Low	Small	Stable	Marginal.
Belle River (MI)	2010	Yes	High	Small	Unknown	Significant.
Clinton River (MI)	2009	Yes	High	Large	Declining	Significant.
Huron River (MI)	2008	Unknown	Low	Medium	Unknown	Significant.
Davis Creek (MI)	2008	Yes	High	Medium	Unknown	Significant.
South Ore Creek (MI)	1999	Yes	High	Small	Unknown	Significant.
Portage River (MI)	1998	Yes	High	Medium	Unknown	Significant.
Grand River (OH)	2006	Yes	High	Medium	Unknown	Significant.

TABLE 2—SNUFFBOX EXTANT STREAM POPULATION SUMMARY BY STREAM OF OCCURRENCE—Continued

Stream (state)	Last observed	Recruiting	Potential viability	Population size	Population trend	Status category
Upper Mississippi River (MN)	2010	No	Unknown	Unknown	Unknown	Marginal.
St. Croix River (MN and WI)	2010	Yes	High	Large	Declining	Significant.
Kankakee River (IL)	1991	Unknown	Unknown	Small	Unknown	Marginal.
Meramec River (MO)	1997	Unknown	Unknown	Small	Declining	Marginal.
Bourbeuse River (MO)	2006	Yes	High	Large	Improving	Stronghold.
Ohio River (OH, WV)	2001	Unknown	Low	Small	Unknown	Marginal.
Muskingum River (OH)	2005	Unknown	Unknown	Small	Unknown	Marginal.
Walhonding River (OH)	1991	Unknown	Unknown	Small	Declining	Significant.
Killbuck Creek (OH)	2010	Unknown	Unknown	Small	Declining	Marginal.
Olentangy River (OH)	1989	Unknown	Unknown	Small	Declining	Marginal.
Big Darby Creek (OH)	2008	Unknown	Unknown	Small	Declining	Marginal.
Little Darby Creek (OH)	1999	Unknown	Unknown	Small	Declining	Marginal.
Salt Creek (OH)	1987	Unknown	Unknown	Small	Unknown	Marginal.
Scioto Brush Creek (OH)	1987	Unknown	Unknown	Small	Unknown	Marginal.
South Fork Scioto Brush Creek (OH)	1987	Unknown	Unknown	Small	Unknown	Marginal.
Little Miami River (OH)	1991	Unknown	Unknown	Small	Unknown	Marginal.
Stillwater River (OH)	1987	Unknown	Unknown	Small	Unknown	Marginal.
Pigeon River (IN)	1998	Unknown	Unknown	Small	Unknown	Marginal.
Salamonie River (IN)	2004	Yes	Low	Small	Unknown	Significant.
Tippecanoe River (IN)	2003	Unknown	Unknown	Small	Declining	Marginal.
Embarras River (IL)	2008	Yes	Low	Small	Declining	Significant.
Sugar Creek (IN)	1990	Unknown	Unknown	Small	Declining	Marginal.
Buck Creek (IN)	1990	Unknown	Unknown	Small	Unknown	Marginal.
Muscatatuck River (IN)	1988	Unknown	Unknown	Small	Unknown	Marginal.
Graham Creek (IN)	1990	Unknown	Unknown	Small	Declining	Marginal.
St. Francis River (MO)	2006	Yes	High	Medium	Stable	Significant.
Black River (MO)	2002	Yes	Low	Small	Unknown	Significant.
Tygarts Creek (KY)	1995	Unknown	Unknown	Small	Declining	Marginal.
Kinniconick Creek (KY)	2005	Unknown	Low	Small	Declining	Marginal.
Licking River (KY)	2006	Unknown	Low	Small	Unknown	Marginal.
Slate Creek (KY)	1992	Unknown	Unknown	Small	Declining	Marginal.
Middle Fork Kentucky River (KY)	1997	Unknown	Unknown	Small	Unknown	Marginal.
Red Bird River (KY)	1995	Unknown	Unknown	Small	Unknown	Marginal.
Red River (KY)	~2002	Unknown	Unknown	Small	Unknown	Significant.
Rolling Fork Salt River (KY)	~2005	Unknown	Unknown	Small	Unknown	Marginal.
Green River (KY)	1989	Unknown	Unknown	Small	Declining	Marginal.
Buck Creek (KY)	1987–90	Unknown	Unknown	Small	Declining	Marginal.
Clinch River (TN and VA)	2006	Yes	High	Large	Stable or Declining.	Stronghold.
Powell River (TN and VA)	2008	Unknown	Unknown	Small	Declining	Marginal.
Tennessee River (AL)	2006	Unknown	Unknown	Small	Unknown	Marginal.
Paint Rock River (AL)	2008	Yes	High	Large	Improving	Stronghold.
Elk River (TN and AL)	2007	Yes	Low	Small	Stable	Significant.
Duck River (TN)	2001	Unknown	Unknown	Small	Unknown	Marginal.
Buffalo River (AR)	2006	Unknown	Unknown	Small	Unknown	Marginal.
Spring River (AR)	2005	Unknown	Low	Medium	Unknown	Significant.
Strawberry River (AR)	1997	Unknown	Unknown	Small	Unknown	Marginal.
Allegheny River (PA)	2001	Unknown	Unknown	Small	Unknown	Marginal.
French Creek (PA)	2008	Yes	High	Large	Stable	Stronghold.
West Branch French Creek (PA)	2008	Unknown	Unknown	Small	Unknown	Marginal.
Le Boeuf Creek (PA)	2006	Yes	Low	Small	Unknown	Marginal.
Woodcock Creek (PA)	2007	Unknown	Unknown	Small	Unknown	Marginal.
Muddy Creek (PA)	2008	Yes	Low	Medium	Unknown	Significant.
Conneaut Outlet (PA)	1997	Unknown	Unknown	Small	Unknown	Marginal.
Little Mahoning Creek (PA)	1991	Unknown	Unknown	Small	Unknown	Marginal.
Shenango River (PA)	2010	Yes	Unknown	Small	Unknown	Significant.
Little Shenango River (PA)	2002	Unknown	Unknown	Small	Unknown	Significant.
Middle Island Creek (WV)	2009	Unknown	Unknown	Small	Declining	Marginal.
McElroy Creek (WV)	2010	Unknown	Unknown	Unknown	Unknown	Marginal.
Little Kanawha River (WV)	2010	Yes	Unknown	Unknown	Unknown	Significant.
Hughes River (WV)	2008	Unknown	Unknown	Unknown	Unknown	Marginal.
North Fork Hughes River (WV)	2001	Unknown	Low	Small	Declining	Significant.
Elk River (WV)	2010	Unknown	Low	Medium	Improving	Significant.
Ausable River (ON)	2008	Yes	High	Large	Unknown	Stronghold.
Sydenham River (ON)	2010	Yes	High	Large	Unknown	Stronghold.

Butler (2007, pp. 70–71) categorized the extant populations into three groups based on population size: general distribution, evidence of recent recruitment, and assessment of current viability. Stronghold populations were

described as having sizable populations; generally distributed over a significant, and more or less contiguous, length of stream (30 or more river mi (48 or more river km)), with ample evidence of recent recruitment; and currently considered viable. Significant populations were defined as small, generally restricted populations with limited recent recruitment and viability. Many significant populations are susceptible to extirpation, but this category has a broad range of quality. The third category, marginal populations, are defined as those which are very small and highly restricted, with no evidence of recent recruitment, of questionable viability, and that may be on the verge of extirpation in the immediate future. Following this criteria, there are 7 stronghold populations, 24 significant populations, and 48 marginal populations of snuffbox.

A population is considered extant if live individuals or fresh dead specimens have been located since approximately 1985. A population is considered to be recruiting if there was recent (within approximately 10 years) evidence of subadults (generally, individuals less than or equal to 1.5 in (3.8 cm) long or less than or equal to 4 years). Table 2 provides information on the 79 streams thought to harbor extant populations. Butler (2007, pp. 160–200) provides the complete distributional history of the snuffbox, including streams where the snuffbox is thought to be extirpated.

Upper Great Lakes Sub-Basin

The snuffbox was formerly known from 15 streams and lakes in the upper Great Lakes sub-basin. The Fox River system in Wisconsin, particularly its major tributary, the Wolf River (and its tributaries), had a widespread and locally abundant population. The species is thought to be extant in eight sub-basin streams; however, all but the Wolf and Grand Rivers have populations that are considered marginal.

Wolf River—The Wolf River is the major tributary of the Fox River draining a large portion of northeastern Wisconsin and flowing southward to join the Fox River at Lake Butte Des Morts, near Oshkosh. Snuffbox records are known from Shawano, Waupaca, and Outagamie Counties. The snuffbox is known from a 30-river-mi (48-river-km) reach of the Wolf River (Butler 2007, p. 21). It is one of the few stronghold populations, but appears to exhibit a low level of recruitment. Only 4 of 257 individuals collected in the mid-1990s were less than 6 years old (Butler 2007, p. 21). A bridge replacement project on the south side of Shawano, scheduled to begin in 2010, may adversely impact the large snuffbox bed located just downstream (ESI 2006, p. 10). The zebra mussel occurs in this river, with a 0.7 percent infestation rate on unionids sampled in 2006 (ESI 2006, p. 6). This large population continues to be viable but appears to be in decline (Butler 2008, pers. comm.).

Embarrass River—A western tributary of the lower Wolf River, the Embarrass River parallels the western bank of the Wolf River before joining it at New London, Wisconsin. A population of the snuffbox is located in the headwaters below a small dam at Pella, Wisconsin. Records exist for three live individuals and two dead specimens during 1987–1988 and a single dead specimen in 1995 (Butler 2007, p. 22). Its current status is unknown.

Little Wolf River—The Little Wolf River is a western tributary of the lower Wolf River in Waupaca County, Wisconsin. The snuffbox is known from a single live individual collected in 1988 at RM 14, below the Mill Pond dam at Manawa (Butler 2007, p. 22). Five dead specimens were found during 1999 at RM 2, where shells were abundant in a muskrat midden (Butler 2007, p. 22). Nothing else is known regarding this population.

Willow Creek—Willow Creek flows eastward into Lake Poygan, a large flow-through lake of the Wolf River system, in Waushara County, Wisconsin. The snuffbox is known from a single observation of two live females in 2001 (Butler 2007, p. 22). No other information is available on the status of this population.

Grand River—The Grand River, a major Lake Michigan tributary, represents the largest lotic (moving water) watershed in Michigan and is located in the southwestern portion of the State. The snuffbox is sporadically distributed in approximately 25 river mi (40 river km) of the middle Grand River, approximately between the confluences of the Flat and Maple Rivers. The medium-sized population appears to be viable, with recruitment noted in 1999 (Badra 2008, pers. comm.; Zanatta 2011, pers. comm.).

Flat River—The Flat River is a tributary to the Grand River. Zanatta (2011, pers. comm.) found 32 live snuffbox in the Flat River immediately upstream of the confluence with the Grand River in 2009. The snuffbox only occurs in the lower Flat River for approximately 0.5 river mi (0.75 river km) from the mouth upstream to the dam at State Route 21 (Zanatta 2011, pers. comm.).

Maple River—The Maple River is a northeastern tributary of the Grand River draining south-central Michigan. A single snuffbox record (one live individual) is known from 2001 in southern Gratiot County, approximately 20 river mi (32 river km) upstream of the Grand River (Badra 2008, pers. comm.). Portions of the Maple River and several tributaries have been channelized, but the suitability of these channelized areas for the snuffbox is unknown (Badra 2010, pers. comm.). The current status of this small population is unknown.

Pigeon River—The Pigeon River is a headwater tributary of the St. Joseph River system of Lake Michigan, flowing westward across northern-most Indiana, crossing the State border to its confluence in southwestern Michigan. One very large fresh dead specimen was found in 1998, among thousands of shells in LaGrange County, Indiana (Butler 2007, p. 24). The same site was sampled in 1996 without evidence of this species, and relic shells were found at three of nine sites sampled in 2004 (Butler 2007, p. 24). The snuffbox's occupied reach historically covered more than 10 river mi (16.1 river km) in north-central LaGrange County. The species is very rare in this river, and its viability is unknown.

Lower Great Lakes Sub-Basin

Of all the water bodies from which the snuffbox was historically recorded, 32 are in the lower Great Lakes sub-basin, including several chains-of-lakes, springs, and channels in some systems (Clinton, Huron Rivers). Historically, sizable populations occurred in some streams (Lake Erie; Belle, Clinton, Huron, Portage, and Niagara Rivers), but the species had become ''characteristically uncommon'' by the 1970s (Strayer 1980, p. 147). A pre-zebra-mussel decline of unionids in Lake Erie was noted (Mackie *et al.* 1980, p. 101), and the snuffbox appeared extirpated there by the late 1960s. The Lake St. Clair population of snuffbox persisted until around 1983 (Nalepa and Gauvin 1988, p. 414; Nalepa 1994, p. 2231; Nalepa *et al.* 1996, p. 361), which was the year the zebra mussel is thought to have invaded (Schloesser *et al.* 1998, p. 70). Observations of live and fresh dead snuffbox from the Detroit River were made until 1994, but the mussel fauna has since been devastated by zebra mussels, and the snuffbox is now considered to be extirpated (Schloesser *et al.* 1998 p. 69; Butler 2007, p. 25). Other snuffbox populations in the sub-basin may also have suffered from zebra mussel invasions, but not those in the Ausable and Sydenham Rivers in

Ontario. The lack of impounded area on these streams has likely prevented the introduction or the establishment of zebra mussels (Dextrase *et al.* 2000, p. 10; Ausable River Recovery Team 2005, p. 12). The snuffbox is considered extant in 10 streams of the lower Great Lakes sub-basin, including stronghold populations in the Sydenham and Ausable Rivers and sizable but reach-limited populations in the Clinton River and Davis Creek. A single fresh dead valve was reported in 1998, from among 24 sites sampled in the Thames River, but no evidence of the snuffbox was found at 16 Thames sites in 2004 (McGoldrick 2005, pers. comm.). Currently, the species is considered extant in Canada only in the Ausable and Sydenham Rivers (Morris and Burridge 2006, p. 9). Both of these populations are viable.

Ausable River—The Ausable River is a southeastern tributary of Lake Huron, draining southwestern Ontario, Canada. A survey conducted in 2008 found that a sizable population of snuffbox occurs in the lower portion of the stream in over 36 river mi (59 river km) (Zanatta 2011, pers. comm.). The size range of individuals found in the 2008 survey indicates recent recruitment in the viable population (Zanatta 2011, pers. comm.).

Pine River—A tributary of the St. Clair River, the Pine River flows south and is located in St. Clair County, in southeastern Michigan. Although apparently stable, the snuffbox population is small, very restricted in range, and has a low potential for viability (Badra 2002, pers. comm.; Badra and Goforth 2003, p. 23).

Belle River—The Belle River is another tributary of the St. Clair River in St. Clair County, flowing in a southeasterly direction. Records for the snuffbox date to the early 1960s, but all live and fresh dead records over the past 40 years have been from the same lower mainstem site. Historically, a sizable population was found in the Belle (65 specimens, 1965). In 2010, Zanatta (2010, pers. comm.) found four live individuals at one site and one fresh dead at another site. The Belle is located in a primarily agricultural watershed (Hoeh and Trdan 1985, p. 115), and is impacted by sedimentation and runoff. The population has declined to the point of being small, but shows evidence of recruitment and viability (Badra 2002, pers. comm.; Badra and Goforth 2003, p. 24; Sherman 2005, pers. comm.).

Clinton River—The Clinton River is an eastward flowing chain-of-lakes tributary of Lake St. Clair in southeastern Michigan. The snuffbox population in the Clinton River is limited to around 10 river mi (16.2 river km) and lakeshore in the western suburbs of Pontiac, primarily between Cass and Loon Lakes. This population appears to be recruiting (Sherman Mulcrone 2004, p. 64; Zanatta 2011, pers. comm.) and viable, although apparently in decline since the early 1990s (Badra 2002, pers. comm.; Butler 2007, p. 27).

Sydenham River—The Sydenham River is a large, southeasterly flowing, eastern tributary of Lake St. Clair in extreme southwestern Ontario. The snuffbox was reported in the mid-1960s and early 1970s, but was overlooked during surveys in 1985 (except dead shells) and 1991 (Butler 2007, p. 28). During the 1997–1999 sampling, a total of 10 live and fresh dead individuals were found from 4 of 12 sites, including the 3 1960s sites (Metcalfe-Smith *et al.* 2003, p. 41). The snuffbox was recorded at a rate of 0.22 per hour of effort during 1997–1998 (Metcalfe-Smith *et al.* 2000, p. 728). More recent sampling found 57 live and fresh dead individuals from 21 collection events (some individuals may have been counted multiple times) at six sites during 2000–2002. The increase in numbers relative to historical collections may be attributed to more intensive sampling methods rather than to improving population size (Metcalfe-Smith *et al.* 2003, p. 46), thus making population trend assessments difficult (Morris and Burridge 2006, p. 12). This stronghold population is recruiting (Butler 2007, p. 28), viable, and is currently known from approximately 30 river miles (48 km) of the middle Sydenham.

Huron River—The Huron River is a major tributary of western Lake Erie draining a significant portion of southeastern Michigan. It is a complex system of flow-through chains-of-lakes and tributaries. The snuffbox is considered extant in two disjunct upper mainstem reaches. Individuals in the middle Huron River reach and in Davis Creek are considered a single population segment (Marangelo 2005a, pers. comm.).

Zebra mussels invaded the Huron River system in the early 1990s. Zebra mussel densities on individual mussels increased from less than 1 in spring 1995 to 245 in winter 1998 (Nichols *et al.* 2000, p. 72). Despite the increasing presence of zebra mussels, the Huron population is probably recruiting and viable (Butler 2007, p. 29).

Davis Creek—Davis Creek is a chain-of-lakes in the upper Huron River system, primarily in southeastern Livingston County, Michigan. The snuffbox appears to be limited to the lower 3 river mi (4.8 river km), comprising a single population with one of the extant Huron River population segments in this area. This viable population appears to be sizable and is experiencing recent recruitment (Marangelo 2005a, pers. comm.; Zanatta 2005, pers. comm.).

South Ore Creek—South Ore Creek is a northern tributary of the Huron River, forming a southward flowing chain-of-lakes draining southeastern Livingston County, Michigan. The snuffbox was discovered in 1999, just upstream of Ore Lake, which is near the Huron River confluence (Butler 2007, p. 31). Three subadult snuffbox (two age 2, one age 3–4) were recorded. Despite the lack of additional information, the small population appears to be viable, based on recent recruitment.

Portage River—The Portage River is a chain-of-lakes in the northwestern portion of the Huron River system. Two University of Michigan Museum of Zoology (UMMZ) records suggest historical abundance (Badra 2002, pers. comm.). The species was reported as ''rare'' in the lower river during 1976–78 (Strayer 1979, p. 94). At least 22 live, young (age 4 and younger) individuals were identified in 1998, at one of three sites upstream of Little Portage Lake and Portage Lake (Butler 2007, p. 31). The localized population appears to be medium-sized and viable.

Grand River—The Grand River is a 99-river-mi (159-river-km) tributary of Lake Erie, flowing north, then west to its confluence northeast of Cleveland, Ohio. Several museum snuffbox records date back to the 1800s. Dozens of fresh dead snuffbox were found washed up on the banks in the vicinity of the Interstate 90 crossing in Lake County, Ohio, following a major flood in 2006 (Butler 2007, p. 32). The species is known from approximately 12 river mi (19.3 river km) downstream of Harpersfield Dam (Huehner *et al.* 2005, p. 59; Zimmerman 2008a, pers. comm.). The sizable population was considered recruiting, based on the 1995 Huehner *et al.* (2005, p. 59) survey.

Upper Mississippi River Sub-Basin

The snuffbox was historically known from 17 streams in the upper Mississippi River sub-basin. Records exist for Mississippi River Pools (MRPs) 3–4, 5a–6, and 14–16 (Kelner 2003, p. 6), with early surveys summarized by van der Schalie and van der Schalie (1950, p. 456). The snuffbox was considered to be extirpated from the mainstem of the Mississippi River until 2010, when it was reintroduced (Havlik and Sauer 2000, p. 4; Davis and Pletta 2010, p. 2). Only 5 of 17 historical

populations remain, but they include two of the largest rangewide (St. Croix and Bourbeuse Rivers). Three populations, including the St. Croix, appear to be declining.

Upper Mississippi River—The Upper Mississippi River is the portion of the Mississippi River upstream of Cairo, Illinois. From the headwaters at Lake Itasca, Minnesota, the river flows approximately 1,250 miles (2,000 km) to Cairo, where it is joined by the Ohio River to form the Lower Mississippi River. The snuffbox was reported live in the upper river in the 1920s (Grier 1922, p. 15; Grier 1926, p. 119), but not from subsequent surveys (254 sites upstream of the Ohio River during 1930–1931 (UMMZ, Ellis 1931, pp. 1–10), MRPs 5–7 and 9 in 1965 (Finke 1966, Table 2; Thiel 1981, p. 16), MRPs 3–11 during 1977–79 (Thiel 1981, p. 16)). A reintroduction effort into the Mississippi River was initiated in 2010, when 200 logperch inoculated with snuffbox glochidia were placed into cages in Upper Pool 2 (Davis and Pletta 2010, p. 2: Delphey 2011, pers. comm.). It is not yet known if this reintroduction effort was successful.

St. Croix River—The St. Croix River is a major south-flowing tributary of the upper Mississippi River and forms the border between southeastern Minnesota and northwestern Wisconsin. Densities of juvenile snuffbox declined at eight sites between 1992 and 2002 (Hornbach *et al.* 2003, p. 344). Snuffbox density at Interstate Park declined significantly between 1988 and 2004 (WIDNR 2004). A flood in 2001 may have contributed to these declines in mussel density, but post-flood recruitment was also surprisingly low (WIDNR 2004). The St. Croix snuffbox population occurs from the Northern States Power Dam, at RM 54.2 to RM 36.8 (Heath 2005, pers. comm.); represents the species' northernmost occurrence; and despite recent observed declines, remains one of the most significant populations rangewide.

Kankakee River—The Kankakee River is a major, westward-flowing, upper Illinois River tributary with its headwaters in northwest Indiana and northeast Illinois. The snuffbox was reported over a century ago (Baker 1906, p. 63), but surveys in 1911 (43 sites; Wilson and Clark 1913, pp. 41–50), 1978 (13 sites; Suloway 1981, p. 236), 1975–2000 (18 samples from an unknown number of sites in Will County, Illinois; Sietman *et al.* 2001, p. 279), and 1999 (4 sites, Stinson *et al.* 2000, Appendix C) failed to find it. It was considered extirpated from the Kankakee by Cummings *et al.* (1988, p. 16), but single fresh dead specimens in Illinois (Will County in 1988, Kankakee County in 1991) were subsequently found. Only relic shells have been found since 1991. The Kankakee River population, if extant, appears small, localized, and of doubtful viability.

Meramec River—The Meramec River is a 236-mi (380-km) tributary that flows northeasterly into the Mississippi River downstream of St. Louis and drains the northeastern slope of the Ozark Plateaus in east-central Missouri. Early species lists failed to report the snuffbox (Grier 1916, p. 518; Utterback 1917, p. 28). Buchanan (1980, p. 63) found fresh dead specimens at three sites and relic shells at two other sites sampled in 1977–78. Roberts and Bruenderman (2000, p. 85) sampled 42 sites in 1997, including 26 of Buchanan's (1980, p. 5) sites, and found fresh dead specimens at RM 33.5, 48.8, and 59.8; and one live individual at RM 39.8. The live individual (2.4 in (6.1 cm), approximately 6 years old) was reported from a reach where a die-off, perhaps attributable to disease, was reported in 1978 (Buchanan 1986, p. 44). There was an obvious decline of mussels in the system based on catch-per-unit-effort data over the 20-year period (Roberts and Bruenderman 2000, p. 8). The Meramec snuffbox population is rare, sporadically distributed over approximately 26 river mi (41.8 river km), and of unknown viability.

Bourbeuse River—The Bourbeuse River is a 149-mi (240-km), northeasterly flowing, northern tributary of the Meramec River, joining it at RM 68. The snuffbox is currently distributed over about 60 river mi (96.6 river km) upstream of RM 16, plus a disjunct site at the mouth of the river. Although it was considered to have ''greatly declined'' by the late 1990s (Roberts and Bruenderman 2000, p. 15), post-2000 sampling indicates that the population is recruiting, viable, and improving (McMurray 2006, pers. comm.). The Bourbeuse, one of the few stronghold snuffbox populations rangewide, has been augmented with laboratory propagated juveniles since 2002 (McMurray 2006, pers. comm.).

Lower Missouri River System

The snuffbox was historically known from four streams in this system. The highly disjunct occurrences suggest that it was more widespread historically. All populations in the system are considered extirpated (Butler 2007, p. 36).

Ohio River System

Half of the water body occurrences for the snuffbox rangewide are known from the Ohio River system. The Ohio River system once represented the largest block of available habitat for this species prior to the initiation of the navigational improvements in 1830 (Butler 2007, p. 36). Nearly the entire Ohio River mainstem is now impounded with a series of locks and dams (Butler 2007, p. 37). Sizable populations historically occurred in at least a dozen streams in the system. Today, only French Creek is considered to have a stronghold population, although nine others are also significant. Currently, the species is known from 45 of the 107 streams of historical occurrence.

Ohio River—The Ohio River is the largest eastern tributary of the Mississippi, with its confluence marking the divide between the upper and lower portions of the latter system. Numerous historical records are known from throughout the River. Recently, single fresh dead and live specimens have been reported from just below Belleville Lock and Dam, Ohio and West Virginia, in 1995 and 2001, respectively (ESI 2002, p. 27). Having persisted in this highly modified river may indicate that the small population exhibits at least a low level of viability.

Allegheny River—The 325-mi (523-km) Allegheny River drains northwestern Pennsylvania and a small portion of adjacent New York flowing south before joining the Monongahela River at Pittsburgh to form the Ohio River. Snuffbox collections are sporadically known since around 1900 in Pennsylvania from Forest County downstream to Armstrong County. The snuffbox is currently known from three disjunct sites over a 42-river-mi (67.6-river-km) reach centered in Venango County (Butler 2007, p. 37). Its occurrence in the lower Allegheny River and lower French Creek could be considered a single population segment. The viability status of the small population is unknown.

French Creek—French Creek is a major tributary of the middle Allegheny River with its headwaters in western New York and flowing south into northwestern Pennsylvania. The snuffbox is known from the length of the stream in Pennsylvania in Erie, Crawford, Mercer, and Venango Counties. Most records date since approximately 1970 (Dennis 1971, p. 97). Snuffbox collections made during 2002–2004 were summarized by Smith (2005, p. 3–9). Live and fresh dead specimens were found at 19 sites throughout the stream. The size of the L individuals indicated that multiple year classes were represented, including subadults. The species stretches for approximately 80 river mi (128.7 river km) from around RM 10, upstream. The

population encompasses several of its tributary population segments as well, making it relatively more secure when compared to most of the other stronghold populations that are linearly distributed and, thus, more susceptible to stochastic events (Sydenham, Bourbeuse, and Clinch Rivers). The French Creek snuffbox population is considered large and viable (Evans 2003a, pers. comm.; Zimmerman 2008c, pers. comm.), appears stable, and may represent the best stronghold population rangewide.

West Branch French Creek—West Branch of French Creek follows a southerly course to its parent stream in Erie County, Pennsylvania. The only record for the snuffbox dates from 1993, but the number of specimens and shell condition are unknown (Evans 2003b, pers. comm.). Union City Lake isolates the upper French Creek and West Branch French Creek population segment from the main French Creek population. The snuffbox was not found at three sites sampled in 2006 (Smith 2006, pers. comm.). Zimmerman (2008c, pers. comm.) documented 38 live individuals at a site near Wattsburg, Pennsylvania. This population appears to be small and of unknown viability.

Le Boeuf Creek—Le Boeuf Creek is a small western tributary of upper French Creek flowing in a southerly direction just west of West Branch French Creek in Erie County. The first snuffbox collections in this creek were made 100 years ago (Ortmann 1909a, p. 188). Two fresh dead and 6 relic shells were reported in 1988 (Evans 2003b, pers. comm.), and 1 live, 16 fresh dead, and 8 relic specimens were found in 1991 (Butler 2007, p. 40). Three live individuals were found at a site in 2006 (Smith 2006, pers. comm.; Smith *et al.* 2009, p. 69). The snuffbox population has recently recruited and exhibits some level of viability, but appears to be very limited in extent.

Woodcock Creek—Woodcock Creek is an eastern tributary of upper French Creek in Crawford County, Pennsylvania. Until recently, the snuffbox was thought to be extirpated from this stream. In 2007, one live male was found at one of three sites sampled (Smith *et al.* 2009, pp. 84–85). Viability is unknown.

Muddy Creek—Muddy Creek is an eastern tributary of upper French Creek in Crawford County, Pennsylvania. The snuffbox was not discovered until the summer of 2003. Forty-two L individuals were reported from 11 of 20 lower river sites (Morrison 2005, pers. comm.; Mohler *et al.* 2006, pp. 581–582). Low numbers were found at most sites, but 18 live individuals were collected from a site near the mouth of the river. This occurrence is considered to be part of the more extensive French Creek snuffbox population. Zimmerman (2008c, pers. comm.) documented one live female in 2008. The population is medium-sized, occurs along 8 river mi (12.9 river km) of the lower mainstem, and is recruiting, as recent juveniles were recorded (Morrison 2005, pers. comm.; Mohler *et al.* 2006, p. 576).

Conneaut Outlet—This stream forms the outlet to Conneaut Lake, flowing in a southeasterly direction until its confluence with middle French Creek, Crawford County. The snuffbox was first reported by Ortmann (1909a, p. 188), and was rediscovered live in 1997, but without collection details (Butler 2007, p. 40). No specimens were found at a site sampled in 2006 (Smith 2006, pers. comm.). The snuffbox is considered rare in this stream and its viability is unknown.

Little Mahoning Creek—Little Mahoning Creek is a tributary of Mahoning Creek, a lower eastern tributary of the Allegheny River northeast of Pittsburgh. The snuffbox was discovered in 1991, when sampling produced two FD and one R specimen at 1 of 12 sites in the system (Butler 2007, p. 41). The lower 10 miles (16 km) of Little Mahoning Creek are subject to periodic inundation by a reservoir on Mahoning Creek (Butler 2010, pers. comm.). However, the impact of this periodic flooding on the snuffbox is not known. A 2007 survey failed to find any live or fresh dead snuffbox (Chapman and Smith 2008, p. 166). Viability is unknown.

Shenango River—The Shenango is a large tributary in the Beaver River system, a northern tributary of the upper Ohio River in west-central Pennsylvania. The snuffbox was reported from four sites on the Shenango in 1908 (Ortmann 1919, p. 328). Six live individuals were collected from three sites sampled in 2001–2002 between Jamestown and New Hamburg (about 25 river mi (40.2 river km)). Nelson and Villella (2010, p. 17) found 45 L individuals in 2010. The upper reach is considered the best habitat in the Shenango River. The population is small and has declined, although some recent reproduction is evident (Zimmerman 2008b, pers. comm.; Nelson and Villella 2010, p. 17).

Little Shenango River—The Little Shenango River is a small tributary of the upper Shenango River, Mercer County, Pennsylvania. This population was not located during limited surveys (Dennis 1971, p. 97; Bursey 1987, p. 42), but a single fresh dead museum record from 1991 exists. The species was reported to be relatively abundant and reproducing in the lower portion in 2002 (Zimmerman 2008b, pers. comm.). Viability of the small population is unknown.

Middle Island Creek—Middle Island Creek is a small tributary of the Ohio River in northwestern West Virginia. The first snuffbox records were made at six sites in 1969, when the species was locally common in Doddridge, Tyler, and Pleasants Counties (Taylor and Spurlock 1981, p. 157). The snuffbox was later found at two sites in Tyler County in 1980, and the overall mussel population was considered to be ''thriving'' (Taylor and Spurlock 1981, p. 157). The most recent records are for three live individuals in 2009 at two sites and four live individuals in 2010 at three sites (Clayton 2011, pers. comm.). This snuffbox population has declined, is currently rare, and has questionable viability (Zimmerman 2008b, pers. comm.).

McElroy Creek—McElroy Creek is a tributary to Middle Island Creek in West Virginia. There are no historical records for the snuffbox in McElroy Creek. Clayton (2011, pers. comm.) reported finding one live individual in 2010 in Tyler County. The status of this snuffbox population is unknown.

Muskingum River—The Muskingum River is a large, southerly flowing, northern tributary of the upper Ohio River draining a significant portion of east-central Ohio. The snuffbox, which has a long collection history dating to the early 1800s, occurred along the entire mainstem and was locally abundant. Two live individuals and two fresh dead shells were found in 1979, but no live or fresh dead snuffbox were found in surveys conducted in 1979–81 (Stansbery and King 1983) and in 1992–93 (Watters and Dunn 1993–94, p. 241). A single live male was located during sampling for a construction project in 2005 near Dresden, Ohio (Jones *et al.* 2005, p. 30). Viability of this population is unknown.

Walhonding River—The Walhonding River is a short (23.3 river mi (37.5 river km)), east flowing tributary of the Muskingum River in central Ohio, forming the latter river at its confluence with the Tuscarawas River, and formed by the confluence of the Mohican and Kokosing Rivers. The snuffbox historically occurred throughout the river. The extant snuffbox reach (RM 1.8–6.8) is downstream from Killbuck Creek. The population had apparently declined in range and size by the early 1990s, and possibly further since. A once productive site about 0.25 mi (0.40 km) downstream of the Killbuck Creek confluence yielded only a few mussels

of very common species in 2006, but no snuffbox (Butler 2007, p. 44). The Walhonding River population is considered small and of unknown viability.

Killbuck Creek—Killbuck Creek is a large tributary of the lower Walhonding River, flowing south from southern Medina County to Coshocton County and entering the latter at approximately RM 7. Live and fresh dead snuffbox were found by Hoggarth (1997, p. 33) at eight sites from RM 15 to the mouth. Its occurrence has become more sporadic in the last 10 years. In spring 2006, 4 live adults were found at 2 sites approximately 3 river mi (4.8 river km) apart, while 9 large live individuals and a single fresh dead specimen were collected near RM 13 during fall 2006 (Ahlstedt 2007, pers. comm.; Butler 2007, p. 45). Two large live males were collected in 2010 (Ahlstedt 2010, pers. comm.). A shrinking distribution, declining population size, and lack of evidence of recent recruitment suggest that the population may be losing viability and trending towards extirpation.

Little Kanawha River—The Little Kanawha River is a 169-mi (269-km) long tributary of the Ohio River in western West Virginia. Schmitt *et al.* (1983, p. 137) reported snuffbox from three sites during a 1981–82 survey. Snuffbox were not documented again in the Little Kanawha River until 2010, when four live individuals, including at least one young mussel, were found at a site in Gilmer County, West Virginia (Clayton 2011, pers. comm.). Additionally, two fresh dead specimens were found in 2010, below Wells Dam near Elizabeth, Wirt County, West Virginia (Clayton 2011, pers. comm.). The current status of this snuffbox population is unknown.

Hughes River—The Hughes River is an 18-mile (29-km) long tributary of the Little Kanawha River in western West Virginia. Schmitt *et al.* (1983, p. 137) reported snuffbox during a 1981–82 survey. No additional snuffbox were found in the Hughes River until 2008, when one fresh dead specimen was found in Wirt County (Clayton 2011, pers. comm.). The current status of this snuffbox population is unknown.

North Fork Hughes River—The North Fork Hughes River is a westerly flowing tributary of the Hughes River in the lower Little Kanawha River system in northwestern West Virginia. The snuffbox was found at one of six North Fork sites sampled during a 1981–1982 survey of the Little Kanawha River system (Schmidt *et al.* 1983). A total of 41 live adult individuals (23 reported as gravid) were reported at 5 sites located over a 1.5-mi (2.4-km) reach in North Fork State Park, Richie County, in 1993 (Butler 2007, p. 46). At least 10 live individuals were found at a site in the park in 1997 (Butler 2007, p. 46), and a single fresh dead specimen was collected at an additional site downstream in 2001 (Butler 2007, p. 46). This small snuffbox population is declining and currently restricted to less than 4 river mi (6.4 river km), but may be viable.

Elk River—The Elk River is a major, 181-mi (291-km) tributary in the lower Kanawha River system draining central West Virginia flowing west to the Kanawha at Charleston. The snuffbox went undetected in a 1920s survey (Butler 2007, p. 46). Ten live individuals were collected during 1991–1995, the smallest being about 5 years old (Butler 2007, pp. 46–47). Collectively, 16 live individuals were identified at 8 sites in a 13-river-mi (20.9-river-km) reach in Kanawha County in 2002, and 4 live individuals were found at 4 sites in 2004 over a 16.8-river-mi (27-river-km) reach farther upstream (Douglas 2005, pers. comm.). This medium-sized population extends over 30 river mi (48.3 river km), is viable, and may have improved since the 1970s.

Tygarts Creek—Tygarts Creek is a small, north-flowing, southern tributary of the Ohio River in northeastern Kentucky. Thirteen snuffbox were reported from one of five sites sampled in 1977 (Taylor 1980, p. 90). Fresh dead specimens are also known from 1981 and 1987 (Cicerello 2003, pers. comm.). Nine live (Butler 2007, p. 47) and 36 fresh dead specimens were found at 2 sites, respectively, in 1988, while 1 live and 2 fresh dead were reported from at least 2 sites in 1995 (Cicerello 2003, pers. comm.). The overall mussel population appeared ''healthy'' in 1977 (Taylor 1980), but the small snuffbox population has recently declined, and its viability is unknown.

Scioto River System—The Scioto River system in central and south-central Ohio is a major northern tributary of the upper Ohio River. The system was one of the most routinely sampled watersheds for mussels (mostly OSUM records), and historically harbored a large and thoroughly dispersed snuffbox population in the mainstem and 16 tributaries. The system was either exceptional for its snuffbox population, or it provided a general historical perspective of what researchers may have found if other systems had been as thoroughly sampled. Sizable populations were noted in at least the Olentangy River, Big Darby Creek, and Big Walnut Creek. Development associated with the Columbus metropolitan area has taken a major toll on the aquatic fauna. Pollutants from the 1800s included wastes from sawmills, breweries, and slaughterhouses (Butler 2007, p. 48). Only a few fish species were found in the Scioto River 100 years ago (Trautman 1981, p. 33). Currently, 90 to 95 percent of the normal summer-fall flow in the river consists of wastewater treatment plant discharges (Yoder *et al.* 2005, p. 410). Museum records indicate that the snuffbox had completely disappeared from the mainstem by the 1970s. A series of reservoirs around Columbus fragmented habitat and eliminated or reduced populations (Olentangy and Scioto Rivers; Alum, Big Walnut and Deer Creeks). Currently, remnant populations remain in six streams, making the snuffbox precariously close to extirpation throughout this once rich system.

Olentangy River—The Olentangy River is a major headwater tributary of the Scioto River, draining central Ohio and flowing south to its confluence in Franklin County. OSUM snuffbox records date to the 1870s, although most are from the 1950s and 1960s. The snuffbox was reported from 15 of 31 mainstem sites collected during a 1960–1961 survey, when it appeared ''fairly common'' in the lower river (Stein 1963, p. 138). A single live individual in southern Delaware County and two fresh dead specimens in eastern Marion County were found among 30 sites in 1989, with relic shells at 7 other sites (Hoggarth 1990, pp. 20–27). The small population has declined (Hoggarth 1990, p. 14), and its viability is unknown.

Big Darby Creek—Big Darby Creek is one of the major tributaries draining the northwestern portion of the Scioto River system in central Ohio. Dozens of large OSUM lots of snuffbox date to the late 1950s; six Pickaway County collections in 1962 alone had 250 live and fresh dead specimens. Watters (1990, p. 4; 1994, p. 100) surveyed 42 mainstem sites in 1986 and 49 sites in 1990. Combining the data from both years, 80 live and fresh dead snuffbox were collected at 22 sites (Watters 1994, p. 101). The population in 1990 occurred in a reach from approximately RM 11.5 to RM 42.5. The snuffbox was recruiting (Watters 1994, p. 101); four individuals during both 1986 and 1990 were 2 to 5 years of age. The overall population trend over the past 40 years has been downward. Between 1986 and 1990, the number of live and fresh dead specimens was reduced from 54 to 16, and the population's distribution declined from 17 to 8 sites. Two fresh

dead specimens were found at sites in Franklin (1996) and Pickaway (2000) Counties, and three other sites produced only relic specimens (OSUM records). This historically large snuffbox population has declined to marginal status, and its viability is questionable.

Little Darby Creek—Little Darby Creek is the major tributary in the Big Darby Creek system, flowing in a southeasterly direction to its confluence in southwestern Franklin County, Ohio. The 25 OSUM lots for this species are small (fewer than 5 specimens per lot), date to the early 1960s, and represent lower mainstem sites in Madison County. Single fresh dead and relic specimens were collected in 1999, from a Union County site (OSUM 66740), where live individuals were collected in 1964 (Stein 1966, p. 23). This site yielded only relic specimens in 1990 (Watters 1990, Appendix A.11; 1994, p. 102). Overall, the snuffbox was historically known from 35 river mi (56 river km). The well-documented OSUM collection history illustrates the steady decline of a snuffbox population nearing extirpation.

Salt Creek—Salt Creek is an eastern tributary in the Scioto River system, south-central Ohio. All records (OSUM) were collected in the lower mainstem (Ross County) beginning in 1958. A single live individual from 1987 represents the last known record. The mussels in this system ''have been heavily impacted, apparently by the towns of Adelphi and Laurelville'' (Watters 1992, p. 78). The current status of this snuffbox population is unknown.

Scioto Brush Creek—Scioto Brush Creek is a small, western tributary of the lower Scioto River in Scioto County, south-central Ohio. The snuffbox was discovered here in the 1960s (Watters 1988a, p. 45). Three live and fresh dead specimens from 2 sites and relic shells from 2 other sites were collected during a 1987 survey covering 11 sites (Watters 1988a, pp. 210–220). The snuffbox population, collectively known from five fragmented sites along the lower two-thirds of stream, is small, and its viability is unknown.

South Fork Scioto Brush Creek—South Fork Scioto Brush Creek is a small tributary of Scioto Brush Creek, in the lower Scioto River system. A single snuffbox was found during a survey of five sites in 1987 (Watters 1988a, pp. 210–220). The South Fork and Scioto Brush Creek populations can be considered a single population unit; the viability of this unit is uncertain.

Kinniconick Creek—Kinniconick Creek is a small, southern tributary of the Ohio River in northeastern Kentucky. Snuffbox were reported live from 4 of 15 sites sampled in 1982, with relic shells from an additional 2 sites (Warren *et al.* 1984, pp. 48–49). Single fresh dead and live snuffbox were collected in 2001 and 2004, respectively, from sampling efforts at several sites (Butler 2007, p. 51), and a single fresh dead specimen was found while resurveying four sites in 2005 (Butler 2007, p. 51). The snuffbox declined in the past few decades, it is considered rare, and its viability is uncertain.

Little Miami River—The Little Miami River is a northern tributary of the Ohio River in southwestern Ohio, flowing south into the latter at the eastern fringe of the Cincinnati metropolitan area. Snuffbox records from the Little Miami date to the mid-1800s, but most collections are from the past several decades. Seven fresh dead specimens were found at 4 of 46 mainstem sites surveyed during 1990–1991, with 10 relic shells at 6 other sites (Hoggarth 1992, p. 265). The fresh dead specimens were found in approximately 20 river mi (32.2 river km), mostly in Warren County. Current viability of this small population is unknown.

Licking River—The Licking River is a southern tributary of the Ohio River in northeastern Kentucky, flowing in a northwesterly direction to its confluence across from Cincinnati. The snuffbox occurred at 13 of 60 historical mainstem sites below Cave Run Reservoir (Laudermilk 1993, p. 45) and a preimpoundment site in the reservoir footprint (Clinger 1974, p. 52). The population extended approximately 50 river mi (80.5 river km). All collections of snuffbox are small in number (Butler 2007, p. 52). A single live individual and a fresh dead specimen were found at 2 sites, and relic shells were reported from 7 other sites among 49 sites sampled in 1991 (Laudermilk 1993, p. 45). Single live and fresh dead snuffbox were collected in 1999 (Cicerello 2003, pers. comm.), and a single live individual was found in 2006 (Butler 2007, p. 53). At this location, the snuffbox has become very rare and sporadic in occurrence, and its viability is questionable.

Slate Creek—Slate Creek is a southern tributary of the Licking River below Cave Run Dam in east-central Kentucky. Historically, the snuffbox was considered ''extremely abundant throughout the stream'' (Taylor and Spurlock 1983) and collectively known from six sites (Laudermilk 1993, p. 45). Seventeen dead specimens were recorded from a site in 1987 (Cicerello 2003, pers. comm.). A single fresh dead and seven relic specimens were found at three sites sampled in 1991 (Butler 2007, p. 53), when it was considered ''occasional'' in distribution (Laudermilk 1993, p. 45). Twelve live individuals were found in 1992 (Cicerello 2003, pers. comm.). Subsequent sampling has produced no additional snuffbox; two sites and four sites yielded only relic specimens in 2001 and 2002, respectively (Cicerello 2005, pers. comm.). If extant, the population is marginal at best, with unlikely viability.

Stillwater River—The Stillwater River is a 67-mi (108-km), western tributary of the Great Miami River draining southwestern Ohio. The species was collectively known from eight sites throughout the river (Watters 1988a, pp. 59–71; OSUM records). One fresh dead specimen below Englewood Dam in Montgomery County was found among 18 sites surveyed in 1987, with relic shells from 5 other sites (Watters 1988a, pp. 59–71). No other information on the small population is available, and its viability is unknown.

Middle Fork Kentucky River—The Middle Fork is one of three headwater tributaries (with the North and South Forks) forming the Kentucky River, flowing in a northerly then westerly direction and draining a portion of southeastern Kentucky. The snuffbox was first reported in 1966. Three live individuals and a relic shell were found at three sites in 1996, and a single live individual was collected from another site in 1997 (Cicerello 2003, pers. comm.). All sites occur within a 10-river-mi (16-river-km) reach above Buckhorn Reservoir in Leslie County. This small population has unknown viability.

Red Bird River—The Red Bird River is a north-flowing headwater tributary of the South Fork Kentucky River in Clay County, southeastern Kentucky, forming the latter at its confluence with Goose Creek. Ten fresh dead specimens were recorded from two sites in 1988, and three live and one fresh dead snuffbox were collected from four sites in 1995 (Cicerello 2003, pers. comm.). This small population occurs sporadically in the lower 20 river mi (32 river km), and viability is unknown (Cicerello 2003, pers. comm.; 2006, pers. comm.).

Red River—The Red (or North Fork Red) River is a westerly flowing tributary of the upper Kentucky River in eastern Kentucky. No live snuffbox were found in surveys of the 9-river-mi (15-river-km) reach of the Wild River section during surveys of 1980, 1986, and 1991 (Houp 1980, p. 56; 1993, p. 96), but two fresh dead and one live snuffbox were found at three sites in 1988, while five live individuals were found in 1996 (Cicerello 2006, pers.

comm.). Mostly males have been found since 2002, and they are being held in captivity for future culture efforts (Butler 2007, p. 55). A small population persists over a 10-river-mi (16-river-km) reach in the lower section of the Red River Gorge Geological Area of the Daniel Boone National Forest in Menifee, Wolfe, and Powell Counties (Cicerello 2006, pers. comm.). Viability of this population is unknown.

Rolling Fork Salt River—The Rolling Fork is a major southern tributary of the Salt River in central Kentucky, flowing in a northwesterly direction to join the Salt near its mouth. The snuffbox was first reported in 1958 (Rosewater 1959, p. 62). Seven fresh dead specimens and a single live subadult were collected in 1988, from four sites in Larue, Marion, and Nelson Counties (Cicerello 2003, pers. comm.; Haag 2006, pers. comm.). A survey of 12 mainstem and 30 tributary sites in the Rolling Fork system in 1998–1999 yielded no evidence of the snuffbox, prompting an investigator to consider it extirpated (Akers 2000, p. 13), but occasional specimens may still be found (Butler 2007, p. 55). The species is sporadically distributed over 40 river miles of the upper river (Cicerello 2006, pers. comm.). If it is still extant, the viability of this small population is unknown.

Green River—A major southern tributary of the lower Ohio River, the Green River flows in a westerly direction and drains west-central Kentucky. Ortmann (1926, p. 182) considered the snuffbox to be well-distributed over the system, but not abundant. Large museum collections of snuffbox were taken from Munfordville during 1961–1966, but only six relic shells were reported there in 1967. The snuffbox has been rare since. Five live and fresh dead snuffbox were collected at 4 of 42 sites during 1987–1989 sampling in Mammoth Cave National Park (Cicerello and Hannan 1990, pp. 16–17). Three live and six fresh dead snuffbox were reported in the upper Green River from 1984–1990 (Cicerello 2003, pers. comm.). A single live individual was collected in Taylor County in 1989 (Layzer 2009, pers. comm.), but no evidence of the snuffbox was reported at numerous other sites in 1999, 2000, 2001, and 2003 (Cicerello 2006, pers. comm.). Once abundant and occurring over 200 river mi (322 river km), the species has become exceedingly rare since the 1960s. Current snuffbox viability is unknown, and it may be nearing extirpation from the entire Green River system, where it was formerly known from eight tributaries.

Wabash River system—The Wabash River is the second largest sub-basin within the Ohio River system, the watershed of the 350-mi (563-km) river encompassing much of Indiana, west-central Ohio, and southeastern Illinois. The mainstem and at least 27 streams had one of the largest snuffbox population clusters. The species persists today as seven small populations in the system; the viability of these populations is unknown (Butler 2007, p. 57).

Salamonie River—The Salamonie River is a southern tributary of the upper Wabash River, flowing in a northwesterly direction and draining east-central Indiana. Two historical museum records were found. Nine sites were surveyed during 1993–1994, without finding any evidence of the snuffbox (ESI 1995, p. 19). The snuffbox was rediscovered in 2004, above Salamonie Reservoir, where two live individuals at one site and fresh dead shells, including a very small juvenile, were found at another site 2 mi (3 km) away (Fisher 2005, pers. comm.). The small population is considered to be recruiting and viable at some level.

Tippecanoe River—The largest tributary of the upper Wabash River system, the Tippecanoe River drains north-central Indiana and flows westerly, then southerly before joining the Wabash near Lafayette. Nearly all records of the snuffbox were made in the past 20 years. Two weathered shells were found in the lower mainstem among 16 sites sampled in 1987 (Cummings *et al.* 1987, p. 25; Cummings and Berlocher 1990, p. 93) and 30 sites in 1991–1992 (ESI 1993, p. 68). One L individual and over 32 fresh dead specimens were found at a site at the upper end of Freeman Reservoir during a 1993 drawdown that may have contributed to their demise (Fisher 2003, pers. comm.). A single fresh dead specimen was found below Shafer Reservoir among 13 sites sampled in 2003 (ESI 2003, p. 9). The viability of this declining population is unknown, but it appears close to extirpation (Fisher 2003, pers. comm.).

Embarras River—The Embarras River is a southerly flowing, western tributary of the lower Wabash River in southeastern Illinois. Museum lots represent collections dating to 1956 and contain snuffbox from nine mainstem and two tributary sites. A total of 9 live and 15 fresh dead specimens were collected at four sites in 1986, in Coles and Douglas Counties (Cummings *et al.* 1988, p. 8). Although overall mussel abundance at the 21 sites sampled in both 1956 and 1986 dropped 86 percent, the snuffbox was one of only five species that showed relatively stable population size over the 30-year period (Cummings *et al.* 1988, p. 9). Additional L and FD snuffbox from museum collections were recorded from single sites in 1988. Three L and eight FD snuffbox were found at two sites in 1992, and one live and three fresh dead were found at three of six sites surveyed during 2001–2002. Since 1986, the small snuffbox population has occurred sporadically at six sites over 50 river mi (80 river km) of the upper river. The species was reported as significant and viable by Butler (2007 pers. comm.), but it has declined to some extent. Recent surveys, however, documented only one live individual in 2005 and 5 live adult males in 2008, indicating that the Embarras River population may be closer to a marginal population than a significant one (Tiemann 2010, p. 53).

Sugar Creek—Sugar Creek is a tributary in the upper East Fork White River system, draining central Indiana east and south of Indianapolis. A single live individual from one site, fresh dead specimens from seven sites, and relic shells from an additional eight sites were reported in 1990 (Harmon 1992, pp. 40–41 1998). The snuffbox population occurred sporadically over 35 river mi (56 km) to near the mouth. Only relic shells were found while resampling some historical sites in 1995, 1998, and 2001 (Butler 2007, p. 59). It is questionable whether the population remains extant.

Buck Creek—Buck Creek is a southerly flowing, western tributary of Sugar Creek in the upper East Fork White River system east of Indianapolis. A fresh dead snuffbox was found near the mouth and relic specimens at an upstream site in 1990 (Harmon 1992, p. 41). Similar to the parent stream population in Sugar Creek, the snuffbox may already be extirpated in Buck Creek (Fisher 2003, pers. comm.).

Muscatatuck River—The Muscatatuck River is a large, westerly flowing tributary of the upper East Fork White River in southeastern Indiana. The snuffbox was first reported from the stream by Daniels (1903, p. 646). Fresh dead specimens (unknown number) were recorded at a site downstream from Graham Creek that was sampled in 1988 (Harmon 1989, p. 118). Status and viability of snuffbox in the Muscatatuck River are unknown.

Graham Creek—Graham Creek flows southwesterly to join Big Creek in forming the Muscatatuck River in the East Fork White River system in southeastern Indiana. The species was found fresh dead (numbers unknown) at six sites over 10 river mi (16 river km) of the lower stream in Jennings County

in 1988 (Harmon 1989, p. 117), and a single fresh dead specimen was found in 1990 (Harmon 1998). Viability of these small populations is unknown.

Cumberland River System—Snuffbox populations are known from the mainstem Cumberland River and 6 of its tributaries. With few exceptions, most mainstem records were made prior to the 1920s, when the species was locally common (Wilson and Clark 1914, p. 45). The snuffbox is considered extirpated from the mainstem. Currently, a single tributary population may be extant, but is considered not viable. The species is likely to become extirpated from the entire river system in the foreseeable future.

Buck Creek—Buck Creek is a southerly flowing, northern tributary of the upper Cumberland River below Cumberland Falls in southeastern Kentucky. One dead valve was found at a site in 1981 (Clarke 1981b, Appendix), and two live and one fresh dead snuffbox were reported from three sites during 1983–1984 (Schuster *et al.* 1989, p. 82). The species was also reported live from a lower mainstem site among seven sites sampled from 1987–1990 (Layzer and Anderson 1992, p. 16). A recent survey found only relic shells at 3 of 23 sites (Hagman 2000, p. 21). If extant, the declining snuffbox population in Buck Creek is likely to become extirpated in the foreseeable future.

Tennessee River System

The Tennessee River is the largest tributary of the Ohio River, draining seven southeastern States and joining the Ohio near its mouth in western Kentucky. The snuffbox originally was known from throughout all but the lower section of river and 17 of its tributaries. Hundreds of miles of large river habitat on the mainstem have been lost under nine reservoirs, with additional dams on several tributaries (Clinch, Holston, and Elk Rivers) (Tennessee Valley Authority (TVA) 1971, p. 4). The loss of mussel resources has been substantial (Watters 2000, p. 262). Muscle Shoals, the 53-river-mi (85-river-km) reach in northwestern Alabama, historically harbored 69 mussel species, the most diverse mussel fauna ever known (Garner and McGregor 2001, p. 155). The construction of three dams (Wilson in 1925, Wheeler in 1930, and Pickwick Landing in 1940) inundated most of the mussel beds. No live snuffbox have been reported at Muscle Shoals for around 100 years (Garner and McGregor 2001, p. 162). The snuffbox may persist in the mainstem at a very low density and in only five tributaries. The Clinch River maintains a stronghold population, but highly restricted populations persist in the other streams.

Clinch River—The 350-mi (563-km) Clinch River is a major tributary of the upper Tennessee River originating in southwestern Virginia, and flowing in a southwesterly direction to its confluence near Kingston in eastern Tennessee. No other river in North America has extant populations of more federally endangered (15) species of mussels than does the upper Clinch River above Norris Reservoir. The snuffbox was reported from nine sites by Ortmann (1918, pp. 601–606). Museum records from Hancock County, Tennessee, during 1965–1971 documented a very large population of snuffbox. The snuffbox is generally distributed from RM 170 to RM 195 in Hancock County, but is sporadic in Virginia (RM 213–235), where it has recently declined (Butler 2007, p. 62). The snuffbox population is recruiting, viable, and currently stable, although decreased in size and range from 40 years ago. The Clinch River ranks among the six stronghold snuffbox populations rangewide.

Powell River—The Powell River is the major tributary of the upper Clinch River flowing in a southwesterly direction parallel to and northwest of the Clinch River in southwestern Virginia and northeastern Tennessee. The snuffbox was reported at three sites by Ortmann (1918, pp. 597–598), five sites during 1973–1978 by Dennis (1981, p. 3), four sites from 1975–1978 by Ahlstedt and Brown (1979, p. 42), and four Virginia sites in 1988–1989 by Wolcott and Neves (1994, p. 7). Large collections attest to its former abundance. The species was found live and fresh dead in the Powell River, Tennessee, during 1989–1990 (Hubbs *et al.* 1991, Appendix A). Of twenty two sites sampled in the Powell River, Johnson (2010) collected seven L individuals among three sites between RM 80.4 and 95.3. The population has declined, viability is questionable, and its extirpation may be imminent (Butler 2007, p. 63).

Tennessee River—The snuffbox originally was known from all but the lower section of the river. Butler (2007, p. 61) reported the snuffbox as ''believed to be extirpated from the entire Tennessee River.'' However, Yokley (2002, p. 1) collected a single fresh dead male in 2002 at the U.S. 231 Bridge, Madison and Morgan Counties, Alabama. In 2006, one live female was found at the same location, although it was the only snuffbox out of 8,978 mussels collected at the site (Yokley 2006, p. 1). Nothing further is known about the status of the snuffbox in the Tennessee River mainstem.

Paint Rock River—The Paint Rock River is a southerly flowing, northern tributary of the southern bend of the Tennessee River in northeastern Alabama and adjacent Tennessee. The snuffbox was first reported from one of six mainstem sites by Ortmann (1925, p. 359). No evidence of snuffbox was found in two surveys during 1965–1967 (Isom and Yokley 1973, p. 444) and a 1980 survey (Butler 2007, p. 64). Twelve live and fresh dead snuffbox were found at four sites between RMs 13 and 21 (Ahlstedt 1995–1996, p. 70). The species was again absent from 10 upper mainstem sites surveyed in 2002 (Godwin 2002, p. 9). Four fresh dead specimens of varying sizes were found at lower river sites in 2002 (Fraley 2003, pers. comm.; Smith 2005, pers. comm.) and 2003–2006 (Freeman 2006, pers. comm.). One live and 11 fresh dead specimens were found at RM 21 in 2005, and 2 live and 16 fresh dead were collected at RM 31 in 2007 (Gangloff 2007, pers. comm.). In July 2008, Freeman (2008, pers. comm.) observed multiple age classes (sizes) of fresh dead snuffbox in middens between RM 34.7 and 32.5. Fobian *et al.* (2008, p. 14) collected 21 live snuffbox at 7 sites and fresh dead specimens at 8 sites between RM 46.7 and 13.1. A stronghold snuffbox population exists between RMs 13 and 44, and is recruiting, viable, and has clearly improved since 1980.

Elk River—The Elk River is a large, northern tributary flowing 200 river mi (322 river km) in a southwesterly direction in the southern bend of the Tennessee River in south-central Tennessee and north-central Alabama. Snuffbox collections have been sporadic. The species was found at 2 sites in the mid-1960s (Isom *et al.* 1973, p. 440), and a single live individual was found among 108 sites sampled in 1980 (Ahlstedt 1983, p. 47). Single specimens were also reported from 4 sites sampled in the lower river in 1997 (Madison and Layzer 1998, Table 6) and 16 sites sampled in 1999 (Service 1999, p. 3). A very large fresh dead specimen was found at RM 51 among 4 sites sampled in 2001 (Hubbs 2002, p. 5; Butler 2007, p. 65). A single live and a fresh dead snuffbox were found at a site in Giles County during qualitative sampling events at five sites in 2005 (Ahlstedt *et al.* 2006). Ford (2008, pers. comm.) reported collecting a fresh dead specimen at Stairstep Shoals in Giles County, Tennessee, in July 2007. The small snuffbox population has recently recruited and exhibits some level of viability, and its numbers appear relatively stable in recent history.

Duck River—The Duck River is the downstream-most large tributary of the Tennessee River draining south-central Tennessee and flowing 285 river miles (459 river km) west to its confluence near the head of Kentucky Reservoir. The snuffbox historically occurred throughout the Duck River and, based on museum records, was locally common 40 to 50 years ago, but was absent in surveys from RM 180 downstream in the mid-1970s (Ahlstedt 1981, p. 62; Dennis 1984, p. 38). Two live individuals were collected from 2 of 99 sites surveyed in 1979 (Butler 2007, p. 66). A single live individual was discovered in Maury County among 72 sites sampled during 2000–2003 (Ahlstedt *et al.* 2004, p. 119), but none were found at 11 lower sites surveyed in 2000 (Schilling and Williams 2002, p. 409). The snuffbox is very rare, and its viability is uncertain.

Lower Mississippi River Sub-Basin

The Lower Mississippi River Sub-basin includes 954 miles (1,535 km) of the Mississippi River from its confluence with the Ohio River at Cairo, Illinois, to its mouth in the Gulf of Mexico. The snuffbox is known from five streams in this system, four of which are tributaries to the White River.

St. Francis River—The St. Francis River is a major tributary of the lower Mississippi, with its headwaters in southeastern Missouri and flowing south into northeastern Arkansas. The only Arkansas records available for this 450-mi (724-km) river are from 1964, located approximately 1 mi southwest of Parkin in Cross County (Bates and Dennis 1983, p. 63; Harris *et al.* 2007, p. 10). Snuffbox records exist for Butler, Wayne, and Stoddard Counties, Missouri, where it was considered ''locally abundant'' (Oesch 1984, p. 235). The species is known from above Wappapello Reservoir, but was absent from Missouri surveys conducted below Wappapello Dam in 1983 (Bates and Dennis 1983, p. 63) and 1986 (Ahlstedt and Jenkinson 1991, p. 240). Twelve live snuffbox were sampled at sites in 2002 (Hutson and Barnhart 2004, pp. 84–85). Live individuals were found during collections at RM 172.1 in 2005 and 2006 (Butler 2007, p. 67). The snuffbox is restricted to a 10-mi (16-km) reach (RM 172.1–182.0) on the northeastern edge of the Ozark Plateaus in the vicinity of Sam A. Baker State Park, Wayne County (Hutson and Barnhart 2004, p. 85). This medium-sized snuffbox population appears to be stable and viable, but restricted in distribution.

White River System—The 690-mi (1,110-km) White River is a large tributary system of the western bank of the Mississippi River. A snuffbox population once occurred in the mainstem and six of its larger tributaries. The last record from the mainstem in Arkansas is pre-1921 (Harris *et al.* 2007, p. 10). Highly restricted populations persist in four streams.

Buffalo River—The Buffalo River is a large, eastward-flowing tributary of the middle White River in north-central Arkansas. The snuffbox was not found during surveys in 1910 (26 sites; Meek and Clark 1912, p. 13) or 1995 (40 sites; Harris 1996, p. 9), but two live individuals were found at a single site among 60 sites surveyed in 2006 (Matthews 2007, pers. comm.). The small population occurs in the lower river in Marion County, and its viability is unknown.

Black River—The Black River is the largest tributary in the White River system, draining much of southeastern Missouri and northeastern Arkansas before flowing in a southerly direction into the White River near Newport, Arkansas. A long but sporadic collection history for the snuffbox appears in the 300-mi (483-km) Black River. A single, approximately 4-year-old live male was collected at RM 65.5, Wayne County, among 51 Missouri sites sampled in 2002 (Hutson and Barnhart 2004, p. 154). The species has become extirpated from the lower river on the Mississippi Embayment, including Arkansas. This population of snuffbox appears rare but viable at some level.

Spring River—The Spring River is a large tributary of the Black River that drains the eastern Ozark Plateaus in south-central Missouri and northeastern Arkansas. Based on pre-1986 records, the snuffbox was known in low numbers from at least four sites in approximately 20 river mi (34 river km) of the lowermost mainstem in Arkansas (Harris and Gordon 1987, p. 53). A single live adult male was found in Lawrence County in 2005, and represents the first live specimen found in Arkansas in more than 20 years (Butler 2007, p. 69). Further, 53 fresh dead snuffbox were collected in four large muskrat middens (Harris *et al.* 2007, p. 15). The extent of the population is not known, but it is probably limited to relatively few miles in the lower mainstem in Lawrence and Randolph Counties. This population appears small, and its status and viability are unknown.

Strawberry River—The Strawberry River is a western tributary of the Black River draining a portion of the southeastern Ozark Plateaus in northeastern Arkansas. The only snuffbox records were from around 1983 and 1997 in the middle mainstem in Sharp County (Butler 2007, p. 69). No other details on these collections or the status of the population are known. Considering the dearth of records, the snuffbox appears to be very rare in the Strawberry River, and its viability is unknown.

Summary of Snuffbox Population Estimates and Status

The snuffbox has declined rangewide and appears to be extant in 79 of 210 streams and lakes of historical occurrence, a 62 percent decline in occupied streams. Realistically, much more than 62 percent of the habitat historically available for this species no longer supports its populations. Habitat losses measured in the thousands of miles have occurred rangewide. As multiple streams may comprise single snuffbox population segments (for example, the French Creek system), the actual number of extant populations is somewhat less. Extant populations, with few exceptions, are highly fragmented and restricted to short reaches. The elimination of this species from scores of streams and thousands of miles of stream reaches indicates catastrophic population losses and a precipitous decline in overall abundance. It is reasonable to estimate that total range reduction and overall population losses for the snuffbox each approximate, if not exceed, 90 percent.

Public Comments

In the proposed rule published on November 2, 2010 (75 FR 67552), we requested that all interested parties submit information that might contribute to development of a final rule. We reviewed all comments received for substantive issues and new information regarding the proposed listing of these two species, and we have addressed those comments below.

Summary of Comments and Recommendations

During the open comment period for the proposed rule (75 FR 67552), we requested all interested parties submit comments or information concerning the proposed listing of the rayed bean and snuffbox. We contacted appropriate State and Federal agencies, Ontario's Department of Fisheries and Oceans, elected officials, scientific organizations, and other interested parties and invited them to comment.

During the comment period, we received a total of 16 comments from 4 State agencies, 2 Federal agencies (3 comments in total), 4 groups, and 5 individuals, including 2 peer reviewers.

We have read and considered all comments received for substantive issues and new data regarding these two mussels. We updated the rule where it was appropriate. For readers' convenience, we have combined similar comments into single comments and responses.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we requested the expert opinions of five knowledgeable individuals with expertise on freshwater mollusks. The purpose of such review is to ensure that the designation is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists. We received written responses from two of the peer reviewers. Both peer reviewers stated that they supported the proposal to list both species as endangered.

Peer Reviewer Comments

(1) *Comment:* Peer reviewers provided updated information on rayed bean and snuffbox populations throughout the ranges of these species.

Our Response: The updates have been incorporated into this final rule, where appropriate.

(2) *Comment:* One peer reviewer provided information on recent genetic studies on snuffbox populations that suggests strong genetic isolation among populations.

Our Response: The new information has been incorporated into the rule in the section discussing listing Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence. This information is important because it provides additional support to the thought that many snuffbox populations are potentially below the effective population size required to maintain genetic heterogeneity and population viability.

(3) *Comment:* One peer reviewer provided information on coal mining as a threat to both species throughout their ranges in Pennsylvania due to the discharge of acid mine drainage containing injurious substances (e.g., total dissolved solids and sulfates) from active and abandoned mines.

Our Response: The new information has been incorporated into the rule in the section discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range. We find that this additional information provides additional support for our determination that the rayed bean and snuffbox have declined as a result of past destruction, modification, and or curtailment of their habitat or ranges and that this factor continues to threaten the continued existence of these species.

(4) *Comment:* One peer reviewer provided information on a January 1, 2011, State rulemaking in Pennsylvania that banned the use of all species of mussels as bait in Pennsylvania. Prior to this State rulemaking, individuals holding a valid Pennsylvania fishing license could collect up to 50 mussels per day for use as fish bait.

Our Response: The information has been incorporated into the rule in the section discussing listing Factor D: The Inadequacy of Existing Regulatory Mechanisms.

(5) *Comment:* One peer reviewer provided information on golden algae (*Prymnesium parvum*) as a threat to rayed bean and snuffbox populations in areas where water is withdrawn for shale gas drilling. Shale gas drilling has the potential to impact 23 of the 79 remaining snuffbox populations and 9 of the 32 remaining rayed bean populations.

Our Response: The information has been incorporated into the rule in the sections discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range and Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

Comments From States

(6) *Comment:* The Pennsylvania Fish and Boat Commission and Virginia Department of Conservation and Recreation provided comments stating that they support the proposal to list both species.

Our Response: These comments support the Service's proposal. We are grateful for support of the States and recognize that State partnerships are essential for the conservation of these species.

(7) *Comment:* The Pennsylvania Fish and Boat Commission and the Wisconsin Department of Natural Resources provided information on State protection of these species in their respective States. The snuffbox was State listed as endangered in Pennsylvania on July 11, 2009. Listing of the rayed bean in Pennsylvania has been deferred, pending the results of additional survey efforts. The snuffbox has been listed as State endangered in Wisconsin since August 1, 1989.

Our Response: These comments support the Service's proposal. We are grateful for support of the States and recognize that partnerships are essential for the conservation of these species.

(8) *Comment:* The Pennsylvania Fish and Boat Commission, Wisconsin Department of Natural Resources Bureau of Endangered Species, Illinois Department of Natural Resources, and Virginia Department of Conservation and Recreation provided updated historical and current information on populations of both species in their States.

Our Response: We appreciate the submission of the updated information. The updates have been incorporated into this rule, where appropriate.

(9) *Comment:* The Pennsylvania Fish and Boat Commission provided information on a rayed bean reintroduction into the Duck River in Tennessee. In 2008, nearly 1,000 rayed bean were collected from the Allegheny River and reintroduced into the Duck River.

Our Response: We appreciate the submission of the updated information. The information has been incorporated into this rule, where appropriate.

(10) *Comment:* The Pennsylvania Fish and Boat Commission provided information on threats to both species from natural gas extraction from the Marcellus Shale formation. Current increases in natural gas extraction related to Marcellus Shale present a number of potential threats to the rayed bean and snuffbox, including the removal of large volumes of surface and groundwater for hydraulic fracturing (fracking), spills of untreated fracking flowback water, and development of infrastructure associated with natural gas extraction.

Our Response: We appreciate the submission of information on the potential threats of natural gas extraction as it supports our assumption that this activity could threaten multiple populations of both species. The information has been incorporated into this rule in the sections discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range and Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

(11) *Comment:* The Wisconsin Department of Natural Resources Bureau of Endangered Species provided a comment regarding black carp (*Mylopharyngodon piceus*), a notorious molluscivore (mussel-eater), as a potential threat to these species due to its occurrence in the Illinois and Mississippi Rivers.

Our Response: We appreciate the submission of the updated information. Information on the black carp as a threat to these species has been incorporated into this rule in the section discussing

listing Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

(12) *Comment:* The Wisconsin Department of Natural Resources Bureau of Endangered Species provided a comment that the proposed rule did not discuss the significance of the host fish and that if the host fish are negatively impacted, the mussels are also negatively impacted.

Our Response: Discussion on the role of the host fish was included in the proposed rule in the Life History section and in the discussion of listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range and Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

(13) *Comment:* The Virginia Department of Conservation and Recreation was not aware of multiple historical records of the rayed bean in the Clinch River in Virginia.

Our Response: Seven records of the rayed bean from the Clinch River can be found at the Ohio State University Museum of Biological Diversity (OSUM) and the Museum of Fluviatile Mollusks (MFM). Two OSUM records exist for the Clinch River from 1965 in Russell and Scott Counties, Virginia. Three OSUM records also exist for the Clinch River in 1963 in Russell, Wise, and Scott Counties, Virginia. MFM holds two records for the rayed bean from the Clinch River from 1953 and 1955.

Comments From Federal Agencies

(14) *Comment:* The Natural Resources Conservation Service and Genoa National Fish Hatchery provided comments supporting the proposal to list both species.

Our Response: These comments support the Service's proposal. We are grateful for support of these Federal agencies and recognize that partnerships are essential for the conservation of these species.

(15) *Comment:* The Natural Resources Conservation Service provided comments encouraging agency partnerships with the Service to conserve both species.

Our Response: The Service seeks partnerships with all interested parties to conserve these species. We encourage the Natural Resources Conservation Service to be an active participant in the recovery planning and implementation process for these species.

(16) *Comment:* The Genoa National Fish Hatchery provided information on propagation of the snuffbox and recommends propagation as a tool for recovery of the species.

Our Response: The data will be incorporated into recovery planning for these species. We encourage the Genoa National Fish Hatchery to be an active participant in the recovery planning and implementation process.

Comments From Groups

(17) *Comment:* The Service received comments from three groups supporting the proposal to list both species.

Our Response: These comments support the Service's proposal. We are grateful for support of these non-governmental organizations and recognize that partnerships are essential for the conservation of these species.

(18) *Comment:* Pennsylvania Biological Survey, Western Pennsylvania Conservancy, and The Nature Conservancy provided updated historical and current information on populations of both species in Pennsylvania, Virginia, and West Virginia.

Our Response: We appreciate the submission of the updated information. The updates have been incorporated into this rule, where appropriate.

(19) *Comment:* The Nature Conservancy, Pennsylvania Biological Survey, and Western Pennsylvania Conservancy provided information on threats to both species from natural gas extraction from the Marcellus Shale formation.

Our Response: We appreciate the submission of information on the potential threats of natural gas extraction as it supports our assumption that this activity could threaten multiple populations of both species. The information has been incorporated into this rule in the sections discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range and Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

(20) *Comment:* Western Pennsylvania Conservancy provided information on the potential future threats to both species from natural gas extraction from the Utica Shale formation within the French Creek drainage.

Our Response: We appreciate the submission of information on the potential threats of natural gas extraction as it supports our assumption that this activity could threaten multiple populations of both species. The information has been incorporated into this rule in the sections discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range and Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

(21) *Comment:* American Rivers provided the Service with a list of 14 mussel references that reported on the species' ranges and populations.

Our Response: We appreciate the submission of the updated information. Information from these references has been incorporated into this rule, where appropriate.

(22) *Comment:* Pennsylvania Biological Survey provided information on sand and gravel extraction from the Allegheny River's navigational pools as a threat to the rayed bean.

Our Response: We appreciate the submission of information on this threat to the Allegheny River rayed bean population. The information has been incorporated into this rule in the section discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range.

(23) *Comment:* The Western Pennsylvania Conservancy provided a comment regarding black carp (*Mylopharyngodon piceus*) as a potential threat to these species as this species of carp specializes in the consumption of mollusks (snails and mussels).

Our Response: We appreciate the submission of information on this threat to mussels. Information on the black carp as a threat to these species has been incorporated into this rule in the section discussing listing Factor E: Other Natural or Manmade Factors Affecting Their Continued Existence.

(24) *Comment:* The Nature Conservancy provided information on current and foreseeable threats to both species from mountaintop removal mines in the Elk River drainage in West Virginia.

Our Response: We appreciate the submission of information on this threat to the Elk River snuffbox and rayed bean populations. The information has been incorporated into this rule in the section discussing listing Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range.

(25) *Comment:* The Nature Conservancy provided information on current threats to both species from old deep coal mining operations still affecting water quality in some Elk River tributaries in West Virginia.

Our Response: We appreciate the submission of information on this threat to the Elk River snuffbox and rayed bean populations. The information has been incorporated into this rule in the section discussing listing Factor A: The Present or Threatened Destruction,

Modification, or Curtailment of Their Habitat or Range.

Comments From Individuals

(26) *Comment:* The Service received two comments from individuals supporting the proposal to list both species.

Our Response: We are grateful for support of private citizens and recognize that partnerships are essential for the conservation of these species. These comments support the Service's proposal.

(27) *Comment:* The Service received information from one individual providing updated information on a population of snuffbox in Tygarts Creek in Kentucky.

Our Response: We appreciate the submission of the updated information. The information has been incorporated into this rule, where appropriate.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may determine a species to be endangered or threatened due to one or more of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range

Both species have experienced significant curtailment of their occupied habitats (see Background, above). The rayed bean has been eliminated from about 73 percent of the streams in which it historically occurred. This species has also been eliminated from long reaches of former habitat in hundreds of miles of the Maumee, Ohio, Wabash, and Tennessee Rivers, and from numerous stream reaches in their tributaries. The snuffbox has been eliminated from about 62 percent of the streams in which it historically occurred. Furthermore, extant populations, with few exceptions, are highly fragmented and restricted to short reaches. Available records indicate that 32 percent of streams considered to harbor extant populations of the snuffbox are represented by only one or two recent L or FD individuals. The primary cause of range curtailment for both species has been modification and destruction of river and stream habitats, primarily by the construction of impoundments.

Impoundment—Impoundments result in the dramatic modification of riffle and shoal habitats and a resulting loss of mussel resources, especially in larger rivers. Neves *et al.* (1997, pp. 63–64) and Watters (2000, pp. 261–262) reviewed the specific effects of impoundments on freshwater mollusks. Dams interrupt a river's ecological processes by modifying flood pulses; controlling impounded water elevations; altering water flow, sediments, nutrients, and energy inputs and outputs; increasing depth; decreasing habitat heterogeneity; decreasing stability due to subsequent sedimentation; blocking host fish passage; and isolating mussel populations from fish hosts. Even small, low-head dams can have some of these effects on mussels.

The reproductive process of riverine mussels is generally disrupted by impoundments, making the rayed bean and snuffbox unable to successfully reproduce and recruit under reservoir conditions. Population losses due to impoundments have likely contributed more to the decline and imperilment of the rayed bean and snuffbox than has any other single factor. Neither species occurs in reservoirs lacking riverine characteristics, although both persist in some reaches of large rivers with dams (Ohio River and Allegheny River), they are restricted to sections retaining riverine characteristics (generally tailwaters). Both species, however, historically occurred in the wave-washed shallows of several glacial lakes, an environment very different from that found in impoundments.

Stream habitat throughout major portions of the range of both species has been impounded. The majority of the Tennessee and Cumberland River mainstems and many of their largest tributaries are now impounded. There are 36 major dams located in the Tennessee River system, and about 90 percent of the Cumberland River downstream of Cumberland Falls is either directly impounded by U.S. Army Corps of Engineers (Corps) structures or otherwise impacted by cold tailwater released from dams. Watters (2000, pp. 262–263) summarizes the tremendous loss of mussel species from various portions of the Tennessee and Cumberland River systems. The rayed bean has been eliminated from the Tennessee River system and the snuffbox, once widespread throughout both systems, now persists in only five Tennessee River tributaries and one Cumberland River tributary.

This impoundment scenario is similar in many other parts of the range of the rayed bean and snuffbox, and includes numerous navigational locks and dams (Ohio, Allegheny, Muskingum and Green Rivers), major dams (Shenango, Elk, Walhonding, Scioto, Little Miami, Green, Nolin, Barren, Tippecanoe, Wabash, Mississinewa, Salamonie, and Duck Rivers), and low-head dams (Pine, Belle, Clinton, Huron, Maumee, Auglaize, Sandusky, Mahoning, Tuscarawas, Walhonding, Scioto, Olentangy, Wabash, Mississinewa, East Fork White, West Fork White, and Duck Rivers; and Middle Island, Big Walnut, Alum, Big Darby, Little Darby, Sugar, and Richland Creeks) that have contributed to the loss of the species' habitat. Sediment accumulations behind dams of all sizes generally preclude the occurrence of the rayed bean and snuffbox (Butler 2002, p. 22; Butler 2007, p. 73).

Dredging and Channelization—Dredging and channelization activities have profoundly altered riverine habitats nationwide. Hartfield (1993, pp. 131–141), Neves *et al.* (1997, pp. 71–72), and Watters (2000, pp. 268–269) reviewed the specific effects of channelization on freshwater mollusks. Channelization impacts a stream's physical (accelerated erosion, reduced depth, decreased habitat diversity, geomorphic instability, and riparian canopy loss) and biological (decreased fish and mussel diversity, changed species composition and abundance, decreased biomass, and reduced growth rates) characteristics (Hartfield 1993, p. 131; Hubbard *et al.* 1993, pp. 136–145). Channel construction for navigation has been shown to increase flood heights (Belt 1975, p. 189). This is partially attributed to a decrease in stream length and increase in gradient (Hubbard *et al.* 1993, p. 137). Flood events may thus be exacerbated, conveying into streams large quantities of sediment, potentially with adsorbed contaminants. Channel maintenance may result in profound impacts downstream (Stansbery 1970, p. 10), such as increases in turbidity and sedimentation, which may smother benthic (bottom-dwelling) organisms such as the rayed bean and snuffbox.

The only known rayed bean populations that remain in navigation channels are in the upper four navigation pools of the Allegheny River. Sand and gravel extraction from these

pools continues to occur, and a recent study found evidence that habitat alteration and loss from sand and gravel dredging has had an adverse effect on the mussel fauna in the navigation pools of the Allegheny River (Walsh 2010, pers. comm.; Smith and Meyer 2010, p. 556). Activities associated with navigation channels may have contributed to the elimination of the rayed bean from the Ohio, lower Allegheny, and Muskingum Rivers, and potentially others. Channel maintenance operations for barge navigation have impacted habitat for the snuffbox in several large rivers. Impacts associated with barge traffic, which include construction of fleeting areas, mooring cells, docking facilities, and propeller wash, also disrupt habitat. Navigation maintenance activities may continue to adversely affect this species in the upper Ohio River. Hundreds of miles of streams containing rayed bean (Olentangy, Salamonie, Mississinewa, Vermilion, North Fork Vermilion, Embarras Rivers) and snuffbox (Grand, Kankakee, Sangamon, Kaskaskia, Olentangy, Salamonie, Mississinewa, Eel, Vermilion, North Fork Vermilion, Embarras, Paint Rock, and St. Francis Rivers; and Tonawanda, Killbuck, Chickamauga, and Bear Creeks) were dredged and channelized decades ago, and some populations have been eliminated from these streams. The entire length of the Kankakee River in Indiana was channelized by 1917. In addition, hundreds of drains (formed from ditching low-gradient creeks and swales) were created around 100 years ago in Illinois, Michigan, and other midwestern States. Stream channelizations were attempts to reduce flooding, drain low-lying areas, and ''improve'' storm flow runoff.

Chemical Contaminants—Chemical contaminants are ubiquitous throughout the environment and are considered a major threat in the decline of freshwater mussel species (Cope *et al.* 2008, p. 451; Richter *et al.* 1997, p. 1081; Strayer *et al.* 2004, p. 436; Wang *et al.* 2007, p. 2029). Chemicals enter the environment through both point and nonpoint discharges, including spills, industrial sources, municipal effluents, and agricultural runoff. These sources contribute organic compounds, heavy metals, pesticides, and a wide variety of newly emerging contaminants to the aquatic environment. As a result, water and sediment quality can be degraded to the extent that mussel populations are adversely impacted.

Chemical spills can be especially devastating to mussels because they may result in exposure of a relatively immobile species to extremely elevated concentrations that far exceed toxic levels and any water quality standards that might be in effect. Some notable spills that released large quantities of highly concentrated chemicals resulting in mortality to mussels include: Massive mussel kills on the Clinch River at Carbo, Virginia, occurred from a power plant alkaline fly ash pond spill in 1967 and a sulfuric acid spill in 1970 (Crossman *et al.* 1973, p. 6); approximately 18,000 mussels of several species including 750 individuals from three endangered mussel species were eliminated from the upper Clinch River near Cedar Bluff, Virginia, in 1998, when an overturned tanker truck released 1,600 gallons (6,056 liters) of a chemical used in rubber manufacturing (Jones *et al.* 2001, p. 20; Schmerfeld 2006, p. 12); and an ongoing release starting in 1999 of sodium dimethyl dithiocarbamate, a chemical used to reduce and precipitate hexachrome, impacted approximately 10 river miles (16 km) of the Ohio River and resulted in an estimated loss of one million mussels, including individuals from two federally listed species (DeVault 2009, pers. comm.; Clayton 2008, pers. comm.). These are not the only instances where chemical spills have resulted in the loss of high numbers of mussels (Brown *et al.* 2005, p. 1457; Neves 1991, p. 252; Jones *et al.* 2001, p. 20; Schmerfeld 2006, pp. 12–13), but are provided as examples of the serious threat chemical spills pose to mussel species. The rayed bean and snuffbox are especially threatened by chemical spills because these spills can occur anywhere there are highways with tanker trucks, industries, or mines and where these overlap with rayed bean and snuffbox distribution. For example, a gas station close to the flood zone upstream of the rayed bean population in Cassadaga Creek makes the rayed bean extremely susceptible to a stochastic event, such as a toxic chemical spill.

Exposure of mussels to lower concentrations of contaminants more likely to be found in aquatic environments can also adversely affect mussels and result in the decline of freshwater mussel species. Such concentrations may not be immediately lethal, but, over time, can result in mortality, reduced filtration efficiency, reduced growth, decreased reproduction, changes in enzyme activity, and behavioral changes to all mussel life stages. Frequently, procedures which evaluate the 'safe' concentration of an environmental contaminant (for example, national water quality criteria) do not have data for freshwater mussel species or exclude data that is available for freshwater mussels (March *et al.* 2007, pp. 2066–2067, 2073).

Current research is now starting to focus on the contaminant sensitivity of freshwater mussel glochidia and newly-released juvenile mussels (Goudreau *et al.* 1993, pp. 219–222; Jacobson *et al.* 1997, p. 2390; Wang, 2007a, pp. 2041–2046; Valenti 2005, pp. 1244–1245; Valenti 2006, pp. 2514–2517; March 2007, pp. 2068–2073) and juveniles (Bartsch *et al.* 2003, p. 2561; Augspurger *et al.* 2003, p. 2569; Mummert *et al.* 2003, p. 2549, Wang, 2007b, pp. 2053–2055, Wang, 2007a, pp. 2041–2046, Valenti 2005, pp. 1244–1245; Valenti 2006, pp. 2514–2517; March 2007, pp. 2068–2073) to such contaminants as ammonia, metals, chlorine, and pesticides. The toxicity information presented in this section focuses on recent water-only laboratory acute (sudden and severe exposure) and chronic (prolonged or repeated exposure) toxicity tests with early life stages of freshwater mussels using the standard testing methodology published by the American Society for Testing and Materials (ASTM) (American Society for Testing and Materials 2008, pp. 1442–1493). Use of this standard testing method generates consistent, reliable toxicity data with acceptable precision and accuracy (Wang *et al.* 2007a, p. 2035) and was used for toxicity tests on ammonia, copper, chlorine, and select pesticides (Augspurger *et al.* 2007, p. 2025; Bringolf *et al.* 2007a, p. 2087; Bringolf *et al.* 2007c, p. 2101; Wang *et al.* 2007a, p. 2029; Wang *et al.* 2007b, p. 2036; Wang *et al.* 2007c, p. 2048). Use of these tests has documented that while mussels are sensitive to some contaminants, they are not universally sensitive to all contaminants (Augspurger *et al.* 2007, pp. 2025–2026).

One chemical that is particularly toxic to early life stages of mussels is ammonia. Sources of ammonia include agricultural sources (animal feedlots and nitrogenous fertilizers), municipal wastewater treatment plants, and industrial waste (Augspurger *et al.* 2007, p. 2026), as well as precipitation and natural processes (decomposition of organic nitrogen) (Goudreau *et al.* 1993, p. 212; Hickey and Martin 1999, p. 44; Augspurger *et al.* 2003, p. 2569; Newton 2003, p. 1243). Therefore, ammonia is considered a limiting factor for survival and recovery of some mussel species due to its ubiquity in aquatic environments and high level of toxicity, and because the highest concentrations typically occur in sediment pore water where mussels are found (Augspurger *et al.* 2003, p. 2574). In addition, studies

have shown that ammonia concentrations increase with increasing temperature and low-flow conditions (Cherry *et al.* 2005, p. 378; Cooper *et al.* 2005, p. 381), which may be exacerbated by the effects of climate change, and may cause ammonia to become more problematic for juvenile mussels. The Environmental Protection Agency's (EPA's) established ammonia water quality criteria (EPA 1985, pp. 94–99) may not be protective of mussels (Augspurger *et al.* 2003, p. 2572; Sharpe 2005, p. 28) under current and future climate conditions.

Mussels are also affected by metals (Keller and Zam 1991, p. 543), such as cadmium, chromium, copper, mercury, and zinc, which can negatively affect biological processes such as growth, filtration efficiency, enzyme activity, valve closure, and behavior (Naimo 1995, pp. 351–355; Keller and Zam 1991, p. 543; Jacobson *et al.* 1997, p. 2390; Valenti *et al.* 2005, p. 1244). Metals occur in industrial and wastewater effluents and are often a result of atmospheric deposition from industrial processes and incinerators. Glochidia and juvenile freshwater mussels have recently been studied to determine the acute and chronic toxicity of copper to these life stages (Wang 2007a, pp. 2036–2047; Wang 2007b, pp. 2048–2056). The chronic values determined for copper ranged from 8.5 to 9.8 micrograms per liter (ug/L) for survival and from 4.6 to 8.5 ug/L for growth of juveniles. These chronic values are below the EPA's 1996 chronic water quality criterion of 15 ug/L (hardness 170 mg/L) for copper (Wang 2007b, pp. 2052–2055). March (2007, pp. 2066, 2073) identifies that copper water quality criteria and modified State water quality standards may not be protective of mussels.

Mercury is another heavy metal that has the potential to negatively affect mussel populations, and it is receiving attention due to its widespread distribution and potential to adversely impact the environment. Mercury has been detected throughout aquatic environments as a product of municipal and industrial waste and atmospheric deposition from coal-burning plants. One study evaluated the sensitivity of early life stages of mussels to mercury (Valenti 2005, p. 1242). This study determined that, for the mussel species used (rainbow mussel, *Villosa iris*), glochidia were more sensitive to mercury than were juvenile mussels, with the median lethal concentration value of 14 ug/L compared to 114 ug/L for the juvenile life stage. The chronic toxicity tests conducted determined that juveniles exposed to mercury greater than or equal to 8 ug/L exhibited reduced growth. These observed toxicity values are greater than EPA's Criteria Continuous Concentration and Criteria Maximum Concentration, which are 0.77 ug/L and 1.4 ug/L, respectively. Based on these data, we find that EPA's water quality standards for mercury should be protective of juvenile mussels and glochidia, except in cases of illegal dumping, permit violations, or spills. However, impacts to mussels from mercury toxicity may be occurring in some streams. According to the National Summary Data reported by States to the EPA, 3,770 monitored waters do not meet EPA standards for mercury in the United States (*http://iaspub.epa.gov*, accessed 6/28/2010). Acute mercury toxicity was determined to be the cause of extirpation of a diverse mussel fauna for a 70-mile (112-km) portion of the North Fork Holston River (Brown *et al.* 2005, pp. 1455–1457).

In addition to ammonia, agricultural sources of chemical contaminants include two broad categories that have the potential to adversely impact mussel species: nutrients and pesticides. Nutrients (such as nitrogen and phosphorus) can impact streams when their concentrations reach levels that cannot be assimilated, a condition known as over-enrichment. Nutrient over-enrichment is primarily a result of runoff from livestock farms, feedlots, and heavily fertilized row crops (Peterjohn and Correll 1984, p. 1471). Over-enriched conditions are exacerbated by low-flow conditions, such as those experienced during typical summer-season flows and that might occur with greater frequency and magnitude as a result of climate change. Bauer (1988, p. 244) found that excessive nitrogen concentrations can be detrimental to the adult freshwater pearl mussel (*Margaritifera margaritifera*), as was evident by the positive linear relationship between mortality and nitrate concentration. Also, a study of mussel lifespan and size (Bauer 1992, p. 425) showed a negative correlation between growth rate and eutrophication, and longevity was reduced, as the concentration of nitrates increased. Nutrient over-enrichment can result in an increase in primary productivity, and the subsequent respiration depletes dissolved oxygen levels. This may be particularly detrimental to juvenile mussels that inhabit the interstitial spaces in the substrate where lower dissolved oxygen concentrations are more likely than on the sediment surface where adults tend to live (Sparks and Strayer 1998, pp. 132–133).

Elevated concentrations of pesticides frequently occur in streams due to pesticide runoff, overspray application to row crops, and lack of adequate riparian buffers. Agricultural pesticide applications often coincide with the reproductive and early life stages of mussels, and thus impacts to mussels due to pesticides may be increased (Bringolf *et al.* 2007a, p. 2094). Little is known regarding the impact of currently used pesticides to freshwater mussels even though some pesticides, such as glyphosate (Roundup®), are used globally. Recent studies tested the toxicity of glyphosate, its formulations, and a surfactant (MON 0818) used in several glyphosate formulations, to early life stages of the fatmucket (*Lampsilis siliquoidea*), a native freshwater mussel (Bringolf *et al.* 2007a, p. 2094). Studies conducted with juvenile mussels and glochidia determined that the surfactant (MON 0818) was the most toxic of the compounds tested and that fatmucket glochidia were the most sensitive organism tested to date (Bringolf *et al.* 2007a, p. 2094). Roundup®, technical grade glyphosate isopropylamine salt, and isopropylamine were also acutely toxic to juveniles and glochidia (Bringolf *et al.* 2007a, p. 2097). The impacts of other pesticides, including atrazine, chlorpyrifos, and permethrin, on glochidia and juvenile life stages have also recently been studied (Bringolf *et al.* 2007b, p. 2101). This study determined that chlorpyrifos was toxic to both fatmucket glochidia and juveniles (Bringolf *et al.* 2007b, p. 2104). The above results indicate the potential toxicity of commonly applied pesticides and the threat to mussel species as a result of the widespread use of these pesticides. All of these pesticides are commonly used throughout the range of the rayed bean and snuffbox.

A potential, but undocumented, threat to freshwater mussel species, including rayed bean and snuffbox, are contaminants referred to as ''emerging contaminants'' that are being detected in aquatic ecosystems at an increasing rate. Pharmaceuticals, hormones, and other organic contaminants have been detected downstream from urban areas and livestock production (Kolpin *et al.* 2002, p. 1202). A large potential source of these emerging contaminants is wastewater being discharged through both permitted (National Pollutant Discharge Elimination System (NPDES)) and nonpermitted sites throughout the country. Permitted discharge sites are ubiquitous in watersheds with rayed bean and snuffbox populations, providing ample opportunities for contaminants to impact the species (for

example, there are more than 250 NPDES sites in the Meramec River, Missouri system, which harbors a declining population of snuffbox) (Roberts and Bruenderman 2000, p. 78).

The information presented in this section represents some of the threats from chemical contaminants that have been documented, both in the laboratory and field, and demonstrates that chemical contaminants pose a substantial threat to the rayed bean and snuffbox. This information indicates the potential for contaminants to contribute to declining rayed bean and snuffbox populations—from spills that are immediately lethal to species, to chronic contaminant exposure, which results in death, reduced growth, or reduced reproduction of rayed bean and snuffbox.

Mining—The low pH commonly associated with coal mine runoff can reduce glochidial encystment rates, thus impacting mussel recruitment (Huebner and Pynnönen 1992, p. 2350). Additionally, adverse impacts from heavy-metal-rich drainage from coal mining and associated sedimentation have been documented in portions of historical rayed bean and snuffbox habitat in the upper Ohio River system in western Pennsylvania (Ortmann 1909c, p. 97), West Virginia, and southeastern Ohio. Likewise, coal mining has impacted rayed bean habitat in the upper Tennessee River system, Virginia (Kitchel *et al.* 1981, p. 21), and snuffbox habitat in eastern Kentucky (lower Ohio and Mississippi River systems in southeastern Illinois and western Kentucky; upper Cumberland River system in southeastern Kentucky and northeastern Tennessee; and upper Tennessee River system in southwestern Virginia) (Ortmann 1909c, p. 103; Neel and Allen 1964, pp. 428–430; Kitchel *et al.* 1981, p. 21; Anderson *et al.* 1991, pp. 6–7; Gordon 1991, p. 2; Bogan and Davis 1992, p. 2; Layzer and Anderson 1992, pp. 91–94; Ahlstedt and Tuberville 1997, p. 75; Milam *et al.* 2000, p. 53; Warren and Haag 2005, p. 1394). Acid mine drainage was implicated in the mussel die-off in the Little South Fork Cumberland River, Kentucky (Anderson *et al.* 1991, pp. 6–7; Layzer and Anderson, 1992, p. 94; Ahlstedt and Saylor 1995–96, pp. 92–93; Warren and Haag 2005, p. 1394). Tailings (the materials left over after extracting the desirable component of an ore) pond failures have also impacted aquatic resources (Powell River, Virginia; Butler 2007, p. 83). A decline of the snuffbox and other imperiled mussels in the Powell River was blamed on coal-mining impacts (Ahlstedt and Tuberville 1997, p. 75). Increased mining activities in the upper Clinch River system are resulting in ''blackwater'' events (Jones and Neves 2004, p. 2). Anecdotal evidence suggests that coal fines (very small coal particles) are increasing in the Clinch River reach that harbors a stronghold snuffbox population (Butler 2007, p. 84). A coal-fired power plant planned for the upper Clinch River in Virginia would further increase mining in the Clinch and Powell watersheds.

Currently, active coal mining activities occur in the range of both species in the Elk River in West Virginia and Dunkard Creek, a tributary to the Monongahela River that straddles the Pennsylvania and West Virginia State lines (Douglas 2010, pers. comm.). The coal mining threat to the rayed bean and snuffbox in the Elk River in West Virginia includes new and scheduled-to-expand mountaintop removal mines in large tributaries to the Elk (Cimarolli and Beaty 2011, pers. comm.). Additionally, deep mining operations are still affecting water quality in some Elk River tributaries in West Virginia and in Dunkard Creek (Cimarolli and Beaty 2011, pers. comm.; Welte 2001, pers. comm.). In 2009, a golden algae bloom caused an aquatic life kill in 43 mi (69 km) of Dunkard Creek, eliminating the stream's mussel community, which included the snuffbox (USEPA 2009, p. 5). The algal bloom was associated with a spike in conductivity (dissolved impurities) thought to be associated with a discharge from an underground mine (USEPA 2009, p. 5; Anderson and Kreeger 2010, p. 9). If coal mining activities are reinitiated in western Pennsylvania, they could also become a threat to populations of both species in the lower French Creek and the Allegheny River.

Instream and alluvial (clay, silt, sand, or other material deposited by running water) gravel mining has been implicated in the destruction of several mussel populations (Hartfield 1993, pp. 135–136; Brown and Curole 1997, pp. 239–240). Negative impacts associated with gravel mining include stream channel modifications (altered habitat, disrupted flow patterns, sediment transport), water quality modifications (increased turbidity, reduced light penetration, increased temperature), macroinvertebrate population changes (elimination, habitat disruption, increased sedimentation), and changes in fish populations (impacts to spawning and nursery habitat, food web disruptions) (Kanehl and Lyons 1992, pp. 26–27; Roell 1999, p. 5). Gravel mining may continue to be a localized threat to rayed bean and snuffbox populations (Allegheny River (Pennsylvania), Kankakee, Bourbeuse, Walhonding, Elk (Tennessee), and Strawberry Rivers; Big Darby and Buck (Kentucky) Creeks).

Other mining activities that impact snuffbox populations include mining for metals (lead, cadmium, zinc) in Missouri. Mining has been implicated in the decline of mussels from the upper St. Francis River (Hutson and Barnhart 2004, pp. 86–87). Lead and barite mining is common in the Big River, a Meramec River tributary. A tailings-pond blowout discharged 81,000 cubic yards of mine tailings in 1977 that impacted approximately 80 river mi (129 river km) (Buchanan 1980, p. 9; Roberts and Bruenderman 2000, p. 24). As of 2000, high levels of heavy metals were still detected in the system (Roberts and Bruenderman 2000, p. 24) and may continue to hinder stream recovery. Forty-five tailings ponds and numerous tailings piles remain in the watershed (Roberts and Bruenderman 2000, p. 24).

Oil and gas production may have contributed to the decline of the rayed bean and snuffbox in certain drainages (Sangamon River in the upper Mississippi River system; Slippery Rock and Connoquenessing Creeks in the upper Ohio River system; Green, Kentucky, Salamonie, and Mississinewa Rivers in the lower Ohio River system) (Ortmann 1909c, p.104; Schanzle and Cummings 1991, p. 1; ESI 1995, p. 39; Cicerello 1999, p. 11). Pollutants include brines (salt water), high levels of potassium, and numerous organic compounds (Imlay 1971, p. 39). An increasing demand for domestic energy resources is expected to accelerate oil and gas exploration in certain rayed bean and snuffbox streams in the foreseeable future.

Oil and natural gas resources are present in some of the watersheds that are known to support rayed bean and snuffbox, including the Allegheny River, Middle Island Creek, and the Elk River. Exploration and extraction of these energy resources can result in increased siltation, fluctuating levels of water flow, and altered water quality even at a distance from the mine or well field. Suspended sediments can interfere with mussel respiration and feeding. Low water levels can expose mussels to the atmosphere, which can result in stress and mortality, especially during cold or hot conditions. Rayed bean and snuffbox habitat in larger streams can be threatened by the cumulative effects of multiple mines and well fields (USFWS 2008, p. 11).

Oil and gas resources extraction has increased dramatically in recent years,

particularly in Pennsylvania and West Virginia (USFWS 2008, p. 10; Urban 2010, pers. comm.; Walsh 2010, pers. comm.; Bier 2011, pers. comm.). Although oil and gas extraction generally occurs away from the river, extensive road networks are required to construct and maintain wells. These road networks frequently cross or occur near tributaries, contributing sediment to the receiving waterway. In addition, the construction and operation of wells may result in the discharge of brine (salt water), which can cause acute toxicity and mortality of mussels if mussel tolerance levels are exceeded (Anderson and Kreeger 2010, p. 8). Point source discharges are typically regulated; however, nonpoint inputs such as silt and other contaminants may not be sufficiently regulated, particularly those originating some distance from a waterway. In 2006, the Pennsylvania Department of Environmental Protection issued more than 3,700 permits for oil and gas wells and 98 citations for permit violations at 54 wells (Hopey 2007, p. 1; USFWS, 2008, p. 12).

One issue of particular concern is the increase in natural gas extraction from the Marcellus Shale formation. The Marcellus formation is a black shale that is found from southern New York, across Pennsylvania, and into western Maryland, West Virginia, and eastern Ohio (Marcellus Formation 2011, p. 2). This shale contains significant quantities of natural gas that is now being extracted using new drilling technologies and because of an increased demand for natural gas (Soeder and Kappel 2009, p. 1). In order to extract the natural gas from the shale, large volumes of water are needed to drill and hydraulically fracture the rock. After the drilling and fracturing is completed, the water must be removed from the well before the gas can flow. Extensive water withdrawals associated with the Marcellus Shale wells can dewater mussel beds and reduce habitat suitability (Douglas 2010, pers. comm.). Concerns about the availability of water supplies needed for gas production and questions about wastewater disposal have been raised by water-resource agencies and citizens throughout the Marcellus Shale gas development region (Soeder and Kappel 2009, pp. 3–4).

Below the Marcellus Shale lies the Utica Shale, which also holds a significant amount of natural gas (*http://geology.com* 2011). The Utica Shale is thicker than the Marcellus, it is more geographically extensive, and it has already proven its ability to support commercial production (*http://geology.com* 2011). Extraction of natural gas from the Utica Shale would employ the same drilling and fracturing methods as with Marcellus Shale and, therefore, the same potential impacts on surface water. Natural gas extraction in the Marcellus and Utica Shales has the potential to negatively impact rayed bean and snuffbox populations throughout New York, Pennsylvania, West Virginia, eastern Ohio, and Ontario, Canada.

Siltation—Excessive sedimentation affects an estimated 28 percent of all U.S. streams (Judy *et al.* 1984, p. 38), including the majority of the streams with extant rayed bean and snuffbox populations. Sedimentation has been implicated in the decline of mussel populations nationwide and is a threat to rayed bean and snuffbox (Kunz 1898, p. 328; Ellis 1936, pp. 39–40; Marking and Bills 1979, p. 204; Vannote and Minshall 1982, p. 4105–4106; Dennis 1984, p. 212; Wolcott and Neves 1990, pp. 74–75; Brim Box 1999, p. 79; Fraley and Ahlstedt 2000, p. 194; Poole and Downing 2004, pp. 119–120). Specific biological impacts include reduced feeding and respiratory efficiency due to clogged gills, disrupted metabolic processes, reduced growth rates, limited burrowing activity, and physical smothering (Ellis 1936, pp. 39–40; Stansbery 1971, p. 6; Imlay 1972, p. 76; Marking and Bills 1979, p. 210; Vannote and Minshall 1982, p. 4105; Waters 1995, p. 7).

Studies indicate that excessive sediment level impacts are sublethal, with detrimental effects not immediately apparent (Brim Box and Mossa 1999, p. 101). Physical habitat effects include altered suspended and bed material loads, and bed sediment composition associated with increased sediment production and run-off; clogged interstitial habitats and reduced interstitial flow rates and dissolved oxygen levels; changed channels in form, position, and degree of stability; altered depth or width-depth ratio that affects light penetration and flow regime; aggraded (filling) or degraded (scouring) channels; and changed channel positions that dewater mussel beds (Vannote and Minshall 1982, p. 4105; Gordon *et al.* 1992, pp. 296–297; Kanehl and Lyons 1992, pp. 26–27; Brim Box and Mossa 1999, p. 102).

Interstitial spaces in the substrate provide essential habitat for juvenile mussels. When they are clogged, interstitial flow rates and spaces may become reduced (Brim Box and Mossa 1999, p. 100), thus reducing juvenile habitat availability. The rayed bean burrows deep into interstitial substrates, making it particularly susceptible to degradation of this habitat. Sediment may act as a vector for delivering contaminants, such as nutrients and pesticides, to streams. Juveniles can readily ingest contaminants adsorbed to silt particles during normal feeding activities. These factors may explain, in part, why so many mussel populations, including those of the rayed bean and snuffbox, appear to be experiencing recruitment failures.

Agricultural activities produce the most significant amount of sediment that enters streams (Waters 1995, pp. 17–18). Neves *et al.* (1997, p. 65) stated that agriculture (including both sediment and chemical runoff) affects 72 percent of the impaired river miles in the country. Unrestricted access by livestock is a significant threat to many streams and their mussel populations (Fraley and Ahlstedt 2000, p. 193). Soil compaction for intensive grazing may reduce infiltration rates and increase runoff, and trampling of riparian vegetation increases the probability of erosion (Armour *et al.* 1991, pp. 8–10; Trimble and Mendel 1995, pp. 238–239; Brim Box and Mossa 1999, p. 103).

The majority of extant rayed bean and snuffbox populations are threatened by some form of agricultural runoff (e.g., nutrients, pesticides, and sediment). The Maumee River system, for example, has a drainage area that contains approximately 89 percent agricultural land (Sanders 2002, p. 10.1). The decline of rayed bean and snuffbox in this system may be largely attributed to stream habitat impacts resulting from intensive farming and associated runoff. The rayed bean and snuffbox once occurred in the Maumee River mainstem, as well as in up to nine of its tributaries. Currently, the snuffbox is extirpated from the Maumee River system and the rayed bean is only found in distinct but small reaches of the St. Joseph River, Fish Creek, Swan Creek, and Blanchard River. All of these remaining populations (which comprise about 20 percent of all remaining rayed bean populations rangewide) are currently threatened by ongoing agricultural activities. This scenario is echoed across the remaining extant range of the rayed bean and snuffbox.

Other Activities Affecting Rayed Bean and Snuffbox Habitat—Activities associated with urbanization can be detrimental to stream habitats (Couch and Hamilton 2002, p. 1) and were summarized by Feminella and Walsh (2005, pp. 585–587). Developmental activities may impact streams and their mussel fauna where adequate streamside buffers are not maintained and erosion of impacted land is allowed to enter streams (Brainwood *et al.* 2006, p. 511). Types of development may include highway construction, parking

lots, building construction, general infrastructure (e.g., utilities, sewer systems), and recreation facilities. Factors impacting rayed bean and snuffbox populations in urban and suburban areas include lawn care chemicals (Conners and Black 2004, pp. 366–367), sedimentation, toxic effluents, domestic sewage, road salts, and general runoff.

Impervious surfaces are detrimental to mussel habitat by altering various hydrological factors, including: Increased volumes of flow, annual flow rates, peak flows and duration, and temperature; decreased base flow; and changes in sediment loadings (Galli 1991, p. 28; EPA 1997, p. 4; DeWalle *et al.* 2000, p. 2655; Myers-Kinzie *et al.* 2002, p. 822). These factors result in flooding, erosion, channel widening, altered streambeds, channel instability, riparian and instream habitat loss, and loss of fish populations (EPA 1997, p. 4). As little as 10 percent of a watershed being impervious can cause channel instability and a host of other stream habitat effects (Booth 1991, p. 98; Booth and Reinelt 1993, p. 549). Impervious surfaces may reduce sediment input into streams but result in channel instability by accelerating stormwater runoff, which increases bank erosion and bed scouring (Brim Box and Mossa 1999, p. 103). Stream channels become highly unstable as they respond to increased flows by eroding a groove in the bottom of the channel (incising), which increases the force of the water against the channel (shear stress) and bed mobilization (Doyle *et al.* 2000, p. 156). Hydrological variability influences the distribution of mussels in streams, with distinct communities associated with hydrologically flashy and hydrologically stable streams (Di Maio and Corkum 1995, p. 669). High shear stress, peak flows, and substrate movement limit mussel communities, reduce abundance (particularly for juveniles), and increasingly dislodge mussels and move them downstream (Layzer and Madison 1995, p. 337; Myers-Kinzie *et al.* 2002, p. 822; Gangloff and Feminella 2007, p. 70). Recruitment is also significantly reduced in high discharge years (Howard and Cuffey 2006, p. 688). Most rayed bean and snuffbox streams have been impacted by general developmental activities and increased impervious surface levels (Butler 2002, p. 25; Butler 2007, p. 88).

All rayed bean or snuffbox streams are crossed by bridges and roads. Effects from these structures were reviewed by Wheeler *et al.* (2005). Categories of impacts include primary effects (construction), secondary effects (post-construction), and indirect effects (development associated with highway presence) (Angermeier *et al.* 2004, pp. 21–24). Culverts act as barriers to fish passage (Wheeler *et al.* 2005, p. 149), particularly by increasing flow velocity (Warren and Pardew 1998, p. 637). Stream channels become destabilized when culverted or improperly bridged by interrupting the transport of woody debris, substrate, and water (Wheeler *et al.* 2005, p. 152).

Anthropogenic activities can lower water tables, making rayed bean, snuffbox, and other mussel populations susceptible to depressed flow levels. Water withdrawals for irrigation, municipal, and industrial water supplies are an increasing concern. United States water consumption doubled from 1960 to 2000 and is likely to increase further (Naiman and Turner 2000, p. 960). Therefore, we anticipate water withdrawals and potential stream dewatering to be a threat to rayed bean and snuffbox in the foreseeable future.

Summary of Factor A: We have identified a number of threats to the habitat of the rayed bean and snuffbox which have operated in the past, are impacting the species now, and will continue to impact the species in the foreseeable future. On the basis of this analysis, we find that the present and threatened destruction, modification, or curtailment of the species' habitats are a threat to the rayed bean and snuffbox throughout all of their range. Based on our analysis of the best available data, we determine that the present or threatened destruction, modification, or curtailment of rayed bean or snuffbox habitat will not change in the foreseeable future. The decline of the freshwater mussels in the eastern United States is primarily the result the long-lasting effects of habitat alterations such as impoundments, channelization, chemical contaminants, mining, and sedimentation. Although efforts have been made to restore habitat in some areas, the long-term effects of large-scale and wide-ranging habitat modification, destruction, and curtailment will last far into the foreseeable future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The rayed bean and snuffbox are not commercially valuable species. Rare species like the rayed bean and snuffbox may increasingly be sought by lay and experienced collectors. Most stream reaches inhabited by these species are restricted, and the populations are generally small. Although scientific collecting is not thought to represent a significant threat, localized populations could become impacted and possibly extirpated by over-collecting, particularly if this activity is unregulated. Native Americans were known to harvest the rayed bean for food, but because of its size, utilization rates were very low (Bogan 1990, p. 134). Localized declines of snuffbox from use as bait by fishermen have been noted (Cumberland River; Wilson and Clark 1914, p. 45), although it is unlikely that exploitation activities have eliminated any snuffbox populations.

On the basis of the best scientific and commercial data available, we find that overutilization for commercial, recreational, scientific, or educational purposes is currently not a threat to the rayed bean or snuffbox in any portion of their range or likely to become a significant threat in the foreseeable future.

C. Disease or Predation

Little is known about diseases in freshwater mussels (Grizzle and Brunner 2007, p. 2). However, mussel die-offs have been documented in rayed bean and snuffbox streams (Neves 1986, p. 9), and some researchers believe that disease may be a factor contributing to the die-offs (Buchanan 1986, p. 53; Neves 1986, p. 11). Mussel parasites include water mites, trematodes, oligochaetes, leeches, copepods, bacteria, and protozoa (Grizzle and Brunner 2007, p. 2). Generally, parasites are not suspected of being a major limiting factor (Oesch 1984, p. 16), but a study provides contrary evidence. Reproductive output and physiological condition were negatively correlated with mite and trematode abundance, respectively (Butler 2007, p. 88). Stressors that reduce fitness may make mussels more susceptible to parasites (Butler 2007, p. 90). Furthermore, nonnative mussels may carry diseases and parasites that are potentially devastating to native mussel fauna, including rayed bean and snuffbox (Strayer 1999b, p.88).

The muskrat (*Ondatra zibethicus*) is cited as the most prevalent mussel predator (Kunz 1898, p. 328; Hanson *et al.* 1989, p. 15). Muskrat predation may limit the recovery potential of endangered mussels or contribute to local extirpations of previously stressed populations, according to Neves and Odom (1989, p. 940), but they consider it primarily a seasonal or localized threat. The snuffbox ranked fourth among 12 species in a St. Croix River muskrat midden (shell pile), being nearly four times more abundant than in quantitative surveys (Tyrrell and Hornbach 1998, p. 304). Mussel

numbers were too low to determine selectivity indices or statistics.

Muskrats were not thought to be a threat to the rayed bean by West *et al.* (2000, pp. 255–256), due to their general selection of mussels larger than 1.4–1.6 in (3.6–4.1 cm) long (Convey *et al.* 1989, p. 656; Hanson *et al.* 1989, p. 24). Neves and Odom (1989, pp. 938–939) also noted that muskrats did not select for small mussels. Nevertheless, some muskrat predation on the rayed bean has recently been documented in Cassadaga Creek, New York, but is generally considered insignificant (Butler 2002, p. 26).

Other mammals (raccoon (*Procyon lotor*), mink (*Mustela vison*), river otter (*Lutra canadensis*), striped skunk (*Mephitis mephitis*), hog (*Sus scrofa*), rat (*Rattus* spp.)), amphibians (hellbender (*Cryptobranchus alleganiensis*)), turtles, aquatic birds, and fishes (freshwater drum (*Aplodinotus grunniens*), redear sunfish (*Lepomis microlophus*)) feed on mussels (Kunz 1898, p. 328; Meek and Clark 1912, p. 6; Neck 1986, p. 64; Tyrrell and Hornbach 1998, p. 301). Hydra, non-biting midge larvae, dragonfly larvae, crayfish, and especially flatworms are invertebrate predators on newly metamorphosed juveniles (Zimmerman and Neves 2003, p. 28; Klocker and Strayer 2004, p. 174). However, the overall threat posed by these predators on the rayed bean and snuffbox is not considered significant.

Studies indicate that, in some localized areas, disease and predation may have negative impacts on mussel populations. However, based on our analysis of the best available scientific and commercial data available, we find that neither disease nor predation is a significant threat to the overall status of rayed bean or snuffbox, and we determine that these are not likely to become significant threats in the foreseeable future.

D. The Inadequacy of Existing Regulatory Mechanisms

Most States with extant rayed bean and snuffbox populations prohibit collection of mussels without a State collecting permit. However, enforcement of this permit requirement is difficult. Until recently, it was legal to collect 50 mussels per day for use as fish bait in Pennsylvania. This practice was banned by a Pennsylvania Fish and Boat Commission final rulemaking, effective January 1, 2011 (Welte 2011, pers. comm.; 40 Pennsylvania Bulletin 7233).

Sources of nonpoint source pollution include timber clearcutting, clearing of riparian vegetation, urbanization, road construction, and other practices that allow bare earth to enter streams (The Nature Conservancy 2004, p. 13). Current Federal and State laws do not adequately protect rayed bean and snuffbox habitat from nonpoint source pollution, as the laws to prevent sediment entering waterways are poorly enforced. Best management practices for sediment and erosion control are often recommended or required by local ordinances for construction projects; however, compliance, monitoring, and enforcement of these recommendations are often poorly implemented. Furthermore, there are currently no requirements within the scope of Federal environmental laws to specifically consider the rayed bean or snuffbox during Federal activities, or to ensure that Federal projects will not jeopardize their continued existence.

Point source discharges within the range of the rayed bean and snuffbox have been reduced since the inception of the Clean Water Act (33 U.S.C. 1251 *et seq.*), but this may not provide adequate protection for filter-feeding organisms that can be impacted by extremely low levels of contaminants (see *Chemical Contaminants* discussion under Factor A). There is no specific information on the sensitivity of the rayed bean and snuffbox to common industrial and municipal pollutants and very little information on other freshwater mussels. Therefore, it appears that a lack of adequate research and data prevents existing regulations, such as the Clean Water Act (administered by the EPA and the U.S. Army Corps of Engineers), from being fully used or effective.

Despite these existing regulatory mechanisms, the rayed bean and snuffbox continue to decline due to the effects of habitat destruction, poor water quality, contaminants, and other factors. We find that these regulatory measures have been insufficient to significantly reduce or remove the threats to the rayed bean and snuffbox and, therefore, that the inadequacy of existing regulatory mechanisms is a threat to these species throughout all of their range.

Based on our analysis of the best available scientific and commercial data, we do not find that the aforementioned regulations, which currently do not offer adequate protection to the rayed bean and snuffbox, will be improved in the foreseeable future.

E. Other Natural or Manmade Factors Affecting Their Continued Existence

Other factors have played a role in the decline of rayed bean and snuffbox populations. Reduced numbers of host fish have an indirect impact by contributing to reduced recruitment (Watters 1996, p. 83; Khym and Layzer 2000, p. 183). Factors associated with climate change likely to affect regional mussel populations include changes in stream temperature regimes and precipitation levels that may indirectly result in reduced habitat and declines in host fish stocks (Hastie *et al.* 2003, p. 44). Remedial (such as flood control structures) and preventative (for example, more renewable energy from hydroelectric facilities to reduce greenhouse gas emissions) measures to address climate change issues (Hastie *et al.* 2003, p. 45) may impact rayed bean and snuffbox populations in the future.

Population Fragmentation and Isolation—The majority of the remaining populations of the rayed bean and snuffbox are generally small and geographically isolated. The patchy distributional pattern of populations in short river reaches makes them much more susceptible to extirpation from single catastrophic events, such as toxic chemical spills (Watters and Dunn 1993–94, p. 257). Furthermore, this level of isolation makes natural repopulation of any extirpated population unlikely without human intervention. Population isolation prohibits the natural interchange of genetic material between populations, and small population size reduces the reservoir of genetic diversity within populations, which can lead to inbreeding depression (Avise and Hambrick 1996, p. 461).

The Scioto River system provides a good example of the impacts of population fragmentation and isolation. Historically, the rayed bean and snuffbox were widespread and locally abundant in the mainstem and numerous tributaries. The Scioto River became highly contaminated over a century ago (Trautman 1981, p. 33; Yoder *et al.* 2005, p. 410), and these species eventually died out in the mainstem and most tributaries. The population segments that persist have become increasingly isolated due to impoundments and other factors; all are very small, highly fragmented, and appear to be on a trend towards extirpation.

Many rayed bean and snuffbox populations are potentially below the effective population size (EPS) required to maintain genetic heterogeneity and population viability (Soulé 1980, p. 162). The EPS is the number of individuals in a population who contribute offspring to the next generation. Isolated populations eventually die out when population size drops below the EPS or below the

number of individuals needed to sustain the population. Recruitment reduction or failure is a potential problem for many small rayed bean and snuffbox populations rangewide, a condition likely exacerbated by their reduced range and increasingly isolated populations. Evidence of recruitment has not been documented in many populations, indicating that recruitment reduction or outright failure is possible. Many populations of both species may be experiencing the bottleneck effect of not attaining EPS. This is supported by research by Zanatta and Murphy (2008, pp. 378–381) that suggests strong genetic isolation among snuffbox populations. Small, isolated, below-EPS-threshold populations of short-lived species (most host fishes) theoretically die out within a decade or so, while below-threshold populations of long-lived species (like the rayed bean and snuffbox) might take decades to die out, even given years of total recruitment failure.

We find that fragmentation and isolation of small, remaining populations of the rayed bean and snuffbox are current and ongoing threats to both species throughout all of their range that will continue into the foreseeable future.

Exotic Species—Various exotic or nonnative species of aquatic organisms are firmly established in the range of the rayed bean and snuffbox. The exotic species that poses the most significant threat to the rayed bean and snuffbox is the zebra mussel (*Dreissena polymorpha*). The invasion of the zebra mussel poses a threat to the mussel fauna in many regions, and species extinctions are expected as a result of its continued spread in the eastern United States (Ricciardi *et al.* 1998, p. 616). Strayer (1999b, pp. 77–80) reviewed in detail the mechanisms by which zebra mussels impact native mussels. The primary means of impact is direct fouling of the shells of live native mussels. Zebra mussels attach in large numbers to the shells of live native mussels and are implicated in the loss of entire native mussel beds. Fouling impacts include impeding locomotion (both laterally and vertically), interfering with normal valve movements, deforming valve margins, and locally depleting food resources and increasing waste products. Heavy infestations of zebra mussels on native mussels may overly stress the animals by reducing their energy stores. Zebra mussels may also reduce food concentrations to levels too low to support native mussel reproduction, or even survival, in extreme cases.

Another way zebra mussels may impact native mussels is by filtering native mussel sperm and possibly glochidia from the water column, thus reducing reproductive potential. Habitat for native mussels may also be degraded by large deposits of zebra mussel pseudofeces (undigested waste material passed out of the incurrent siphon) (Vaughan 1997, p. 11).

Zebra mussels are thoroughly established in the Great Lakes drainages and much of the Ohio River system, overlapping much of the current range of the rayed bean and snuffbox. Zebra mussels have eliminated populations of the rayed bean in Lakes Erie and Tippecanoe and the Detroit River. The greatest current potential for zebra mussels to impact the rayed bean and snuffbox are in the Lake St. Clair drainages, Allegheny River, Tippecanoe River, French Creek, and Lake Maxinkuckee. In addition, there is long-term potential for zebra mussel invasions into other systems that currently harbor rayed bean and snuffbox populations. Significant, but highly fluctuating, zebra mussel populations remain largely restricted to navigational waterways, although smaller streams have also had their native mussel fauna virtually eliminated by zebra mussels (Martel *et al.* 2001, p. 2188). However, zebra mussels are not always a serious threat to rayed bean and snuffbox (Tippecanoe River, Fisher 2005, pers. comm.; Clinton River, Butler 2007, p. 94; French Creek, Butler 2007, p. 94). At least two of the stronghold snuffbox populations (Wolf River and French Creek) presently have low numbers of zebra mussels.

The Asian clam (*Corbicula fluminea*) has spread throughout the range of the rayed bean and snuffbox since its introduction in the mid-1900s. Asian clams compete with native mussels, especially juveniles, for food, nutrients, and space (Neves and Widlak 1987, p. 6; Leff *et al.* 1990, p. 415) and may ingest sperm, glochidia, and newly metamorphosed juveniles of native mussels (Strayer 1999b, p. 82; Yeager *et al.* 2001, p. 257). Dense Asian clam populations actively disturb sediments that may reduce habitat for juvenile mussels (Strayer 1999b, p. 82).

Asian clam densities vary widely in the absence of native mussels or in patches with sparse mussel concentrations, but clam density is never high in dense mussel beds, indicating that the clam is unable to successfully invade small-scale habitat patches with high unionid biomass (Vaughn and Spooner 2006, p. 335). The invading clam therefore appears to preferentially invade sites where mussels are already in decline (Strayer 1999b, p. 82; Vaughn and Spooner 2006, p. 332) and does not appear be a causative factor in the decline of mussels in dense beds. However, an Asian clam population that thrives in previously stressed, sparse mussel populations can exacerbate unionid imperilment through competition and impeding mussel population expansion (Vaughn and Spooner 2006, p. 335).

The round goby (*Neogobius melanostomus*) is another exotic fish species released into the Great Lakes that is well established and likely to spread through the Mississippi River system (Strayer 1999b, pp. 87–88). This species is an aggressive competitor of similar sized benthic fish (sculpins, darters), as well as a voracious carnivore despite its size (less than 10 in (25.4 cm) in length) that preys on a variety of foods, including small mussels and fishes that could serve as glochidial hosts (Strayer 1999b, p. 88; Janssen and Jude 2001, p. 325). Round gobies may therefore have indirect effects on the rayed bean and snuffbox through negative impacts to their host fishes.

The black carp (*Mylopharyngodon piceus*) is native to eastern Asia and a potential threat to the rayed bean and snuffbox (Strayer 1999b, p. 89). Nico *et al.* (2005) prepared a risk assessment of this species and summarized all known aspects of its ecology, life history, and intentional introduction (since the 1970s) into North America. A molluscivore, the black carp has been known to feed on unionids (bivalve mussels) and is proposed for widespread use by aquaculturists to control snails, the intermediate host of a trematode (flatworm) parasite infesting catfish in culture ponds. They are the largest of the Asian carp species, reaching 5 feet (1.5 meters) in length and achieving a weight in excess of 150 pounds (68 kilograms (kg)) (Nico *et al.* 2005, p. 25). Foraging rates for a 4-year-old fish average 3 or 4 pounds (1.4–1.8 kg) a day, indicating that a single individual could consume 10 tons (9,072 kg) of native mollusks over its lifetime (MICRA 2005, p. 1). Several black carp escaped from an aquaculture facility in Missouri during a flood in 1994, and a fish was caught a few years later in southern Illinois. The escape of nonsterile black carp is considered imminent by conservation biologists (Butler 2007, pp. 95–96). The black carp was officially added to the Federal list of injurious wildlife species on October 18, 2007 (72 FR 59019).

Another exotic species that has the potential to impact the rayed bean and snuffbox is *Didymosphenia geminate,* a diatom commonly known as ''didymo''

or ''rock snot.'' This species, native to portions of North America, has recently expanded its range, and has begun occurring in large nuisance blooms that can dominate stream surfaces by covering 100 percent of the substrate (USFWS 2010, pp. 17–18). Such dramatic alterations to streambed surfaces alone has the potential to directly affect embedded mussels and indirectly affect the ability of mussels to complete their life cycles by modifying the habitat of their host fish. Didymo has been found in the Elk River in West Virginia, a stream that currently supports both a snuffbox and rayed bean population. The extent of the didymo range in the Elk River currently appears to be upstream of the rayed bean and snuffbox occurrences. However, the potential for didymo to spread downstream poses a threat to both mussel species.

Another exotic species that has recently been found within the range of the snuffbox is golden algae (*Prymnesium parvum*) (USEPA 2009, p. 2). Golden algae is a saltwater algae with blooms associated with increased salinity. In 2009, an aquatic life kill in Dunkard Creek in Pennsylvania and West Virginia was attributed to bloom of this algae in response to high levels of total dissolved solids, possibly stemming from briny discharges from an underground coal mine (USEPA 2009, pp. 1–3). The toxic event is thought to have eliminated the snuffbox from Dunkard Creek (Clayton 2009, pers. comm.; USEPA 2009, p. 5).

Additional exotic species will invariably become established in the United States in the foreseeable future (Strayer 1999b, pp. 88–89). These include *Limnoperna fortunei,* a biofouling mussel (an animal that undesirably accumulates on wetted surfaces), from southeast Asia that has already spread to Japan and South America, and ''probably will have strong effects'' on native mussels (Strayer 1999b, p. 89). Furthermore, exotic species could carry diseases and parasites that may be devastating to the native biota. Because of our ignorance of mollusk diseases and parasites, ''it is imprudent to conclude that alien diseases and parasites are unimportant'' (Strayer 1999b, p. 88). Exotic species, such as those described above, are an ongoing threat to the rayed bean and snuffbox—a threat that is likely to increase as these exotic species expand their occupancy within the range of the rayed bean and snuffbox.

Summary of Factor E: The majority of the remaining populations of the rayed bean and snuffbox are generally small and geographically isolated, making natural repopulation of extirpated populations unlikely without human intervention. Furthermore, many of the remaining populations are likely below the EPS, making future extirpations likely within the foreseeable future. In addition, various exotic species are well established with the range of the rayed bean and snuffbox. Exotic species, including the zebra mussel, Asian clam, round goby, and black carp, threaten the rayed bean and snuffbox, or their host fish, or both, through mechanisms such as habitat modification, competition, and predation.

Summary of Threats

The decline of the rayed bean and snuffbox (described by Butler 2002, 2007) is primarily the result of habitat loss and degradation (Neves 1991, p. 252). These losses have been well documented since the mid-19th century (Higgins 1858, p. 551). Chief among the causes of decline are impoundments, channelization, chemical contaminants, mining, and sedimentation (Neves 1991, pp. 260–261; 1993, pp. 4–5; Williams *et al.* 1993, p. 7; Neves *et al.* 1997, pp. 60–72; Watters 2000, p. 269). These stressors have had profound impacts on rayed bean and snuffbox populations and their habitat.

Current Federal and State laws do not adequately protect rayed bean and snuffbox from non-point source pollution. The lack of information on the sensitivity of the rayed bean and snuffbox to point source discharges of common industrial and municipal pollutants prevents existing regulations, such as the Clean Water Act, from being fully used or effective. Despite the existing regulatory mechanisms, the rayed bean and snuffbox continue to decline due to the effects of habitat destruction, poor water quality, contaminants, and other factors.

The majority of the remaining populations of the rayed bean and snuffbox are generally small and geographically isolated (Butler 2002, p. 26; 2007, p. 92). The patchy distributional pattern of populations in short river reaches makes those populations much more susceptible to extirpation from single catastrophic events, such as toxic chemical spills (Watters and Dunn 1993–94, p. 257). Furthermore, this level of isolation makes natural repopulation of any extirpated population virtually impossible without human intervention. Various nonnative species of aquatic organisms are firmly established in the range of the rayed bean and snuffbox; however, the exotic species that poses the most significant threat to the rayed bean and snuffbox is the zebra mussel (*Dreissena polymorpha*) (Butler 2002, p. 27; 2007, p. 93).

Determination

Section 3 of the Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species that ''is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' We find that the rayed bean and snuffbox are presently in danger of extinction throughout their entire range, based on the immediacy, severity, and extent of the threats described above. Although there are ongoing attempts to alleviate some threats, there appear to be no populations without current significant threats and many threats are without obvious or readily available solutions. On the basis of the best available scientific and commercial data, the rayed bean and snuffbox meet the definition of endangered species under the Act, rather than threatened species, because the significant threats are occurring now, making these species in danger of extinction at the present time. Therefore, endangered status is appropriate for the rayed bean and snuffbox in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Threats to the rayed bean and snuffbox occur throughout their ranges. Therefore, we assessed the status of the species throughout their entire ranges. The threats to the survival of the species occur throughout the species' ranges and are not restricted to any particular significant portion of those ranges. Accordingly, our assessment and determination applies to the species throughout their entire ranges.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that guide when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprised of species experts, Federal and State agencies, non-government organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Columbus Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, non-governmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once a species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. Additionally, under section 6 of the Act, we would be able to grant funds to the States of Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia for management actions promoting the conservation of the rayed bean and to the States of Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin for the conservation of the snuffbox. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for these species. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes. Please send it to the street address provided in the **ADDRESSES** section.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer informally with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us.

Federal agency actions that may require conference or consultation as described in the preceding paragraph include the issuance of permits for reservoir construction, stream alterations, wastewater facility development, water withdrawal projects, pesticide registration, agricultural assistance programs, mining, road and bridge construction, and Federal loan programs. Activities will trigger consultation under section 7 of the Act if they may affect the rayed bean or snuffbox, or both species, addressed in this final rule.

Jeopardy Standard

Prior to and following listing and designation of critical habitat, if prudent and determinable, the Service applies an analytical framework for jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of the species. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the species in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area populations(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population to the survival and recovery of the species as a whole.

Section 9 Take

The Act and implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. With this final rule listing the rayed bean and snuffbox as endangered, these prohibitions are applicable to the rayed bean and snuffbox. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these), import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Further, it is illegal for any person to attempt to commit, to solicit another person to commit, or to cause to be committed, any of these acts. Certain exceptions apply to our agents and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. We codified the regulations governing permits for endangered species at 50 CFR 17.22. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, or for incidental take in the course of otherwise lawful activities.

It is our policy, published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act and associated regulations at 50 CFR 17.21. The intent of this policy is to increase public awareness of the effect of this final listing on proposed and ongoing activities within a species' range. We determine, based on the best available data, that the following actions will not result in a violation of the provisions of section 9 of the Act, provided these actions are carried out in accordance with existing regulations and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (e.g., bridge and highway construction, pipeline construction, hydropower licensing), when such activities are conducted in accordance with the consultation and planning requirements for listed species under section 7 of the Act.

(2) Any action carried out for scientific research or to enhance the propagation or survival of the rayed bean or snuffbox that is conducted in accordance with the conditions of a 50 CFR 17.22 permit.

(3) Any incidental take of rayed bean or snuffbox resulting from an otherwise lawful activity conducted in accordance with the conditions of an incidental take permit issued under 50 CFR 17.22. Non-Federal applicants may design a habitat conservation plan (HCP) for the species and apply for an incidental take permit. HCPs may be developed for listed species and are designed to minimize and mitigate impacts to the species to the greatest extent practicable.

We determine that the following activities would be likely to result in a violation of section 9 of the Act; however, possible violations are not limited to these actions alone:

(1) Unauthorized killing, collecting, handling, or harassing of individual rayed bean or snuffbox, or both species, at any life stage.

(2) Sale or offer for sale of rayed bean or snuffbox in addition to delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any rayed bean or snuffbox.

(3) Unauthorized destruction or alteration of the species' habitat (instream dredging, channelization, impoundment, streambank clearing, discharge of fill material) that actually kills or injures individual rayed bean or snuffbox by significantly impairing their essential behavioral patterns, including breeding, feeding, or sheltering.

(4) Violation of any discharge or water withdrawal permit within these species' occupied ranges that results in the death or injury of individual rayed bean or snuffbox by significantly impairing their essential behavioral patterns, including breeding, feeding, or sheltering.

(5) Discharge or dumping of toxic chemicals or other pollutants into waters supporting the species that actually kills or injures individual rayed bean or snuffbox by significantly impairing their essential behavioral patterns, including breeding, feeding, or sheltering.

We will review other activities not identified above on a case-by-case basis to determine whether they may be likely to result in a violation of section 9 of the Act. We do not consider these lists to be exhaustive and provide them as information to the public.

You should direct questions regarding whether specific activities may constitute a future violation of section 9 of the Act to the Field Supervisor of the Service's Columbus Ecological Services Field Office (see **ADDRESSES** section). Requests for copies of regulations regarding listed species and inquiries about prohibitions and permits should be addressed to the U.S. Fish and Wildlife Service, Ecological Services Division, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437 (Phone 612–713–5350; Fax 612–713–5292).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(I) essential to the conservation of the species and

(II) that may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

''Conservation'' is defined in section 3 of the Act as meaning the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the Federal action agency's and the applicant's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the physical and biological features (PBFs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species and that designation limited to those areas occupied at the time of listing would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data

available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, we designate critical habitat at the time we determine that a species is endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to collection or vandalism under Factor B (overutilization for commercial, recreational, scientific, or educational purposes) for the rayed bean or snuffbox, and identification of critical habitat is not expected to initiate such a threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7(a)(2) of the Act in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because the species may not be present; (2) focusing conservation activities on the most essential habitat features and areas; (3) increasing awareness of important habitat areas among State or county governments, or private entities; and (4) preventing inadvertent harm to the species.

Critical habitat designation includes the identification of the physical and biological features of the habitat essential to the conservation of each species that may require special management and protection. As such, these designations will provide useful information to individuals, local and State governments, and other entities engaged in activities or long-range planning that may affect areas essential to the conservation of the species. Conservation of the rayed bean and snuffbox and essential features of their habitats will require habitat management, protection, and restoration, which will be facilitated by disseminating information on the locations and the key physical and biological features of those habitats. In the case of the rayed bean and snuffbox, these aspects of critical habitat designation would potentially benefit the conservation of the species. Therefore, as we have determined that the designation of critical habitat will not likely increase the degree of threat to these species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the rayed bean and snuffbox. However, a designation of critical habitat would be limited to lands within the jurisdiction of the United States and not include stream reaches in Canada (50 CFR 424.12(h)).

Critical Habitat Determinability

As stated above, section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing ''to the maximum extent prudent and determinable.'' Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we must consider those physical and biological features essential to the conservation of the species. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distribution of a species.

We are currently unable to identify the physical and biological features essential for the conservation of the rayed bean and snuffbox because information on those features for these species is not known at this time. The apparent poor viability of the species'

occurrences observed in recent years indicates that current conditions are not sufficient to meet the basic biological requirements of these species in many rivers. Because the rayed bean and snuffbox have not been observed for decades in many of their historical locations, and much of the habitat in which they still persist has been drastically altered, the optimal conditions that would provide the biological or ecological requisites of these species are not known. Although we can surmise that habitat degradation from a variety of factors has contributed to the decline of these species, we do not know specifically what essential physical or biological features of that habitat are currently lacking for the rayed bean and snuffbox.

Key features of the basic life history, ecology, reproductive biology, and habitat requirements of most mussels, including the rayed bean and snuffbox, are unknown. Species-specific ecological requirements have not been determined (for example, minimum water flow and effects of particular pollutants). Population dynamics, such as species' interactions and community structure, population trends, and population size and age class structure necessary to maintain long-term viability, have not been determined for these species. Of particular concern to both species is that many of the remaining rayed bean and snuffbox populations consist of very low densities, a fact that limits our ability to investigate their population dynamics. Basics of reproductive biology for these species are unknown, such as age and size at earliest maturity, reproductive longevity, and the level of recruitment needed for species' survival and long-term viability. As we are unable to identify many physical and biological features essential to the conservation of the rayed bean and snuffbox, we are unable to identify areas that contain these features. Therefore, although we have determined that the designation of critical habitat is prudent for the rayed bean and snuffbox, because the biological and physical requirements of these species are not sufficiently known, we find that critical habitat for the rayed bean and snuffbox is not determinable at this time.

Required Determinations

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This final rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that we do not need to prepare an environmental assessment, as defined under the authority of the National Environmental Policy Act of 1969, in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this final rule is available on the Internet at *http://www.regulations.gov* or upon request from the Field Supervisor, Columbus Ecological Services Field Office (see **ADDRESSES** section).

Author

The primary author of this final rule is a staff member of the Columbus Ecological Services Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding new entries for ''Mussel, rayed bean'' and ''Mussel, snuffbox'' in alphabetical order under CLAMS to the List of Endangered and Threatened Wildlife as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
CLAMS							
*	*	*	*	*	*	*	
Mussel, rayed bean	*Villosa fabalis*	U.S.A. (IL, IN, KY, MI, NY, OH, PA, TN, VA, WV); Canada (ON).	NA	E	798	NA	NA
*	*	*	*	*	*	*	
Mussel, snuffbox	*Epioblasma triquetra*	U.S.A. (AL, AR, IL, IN, IA, KS, KY, MI, MN, MS, MO, NY, OH, PA, TN, VA, WV, WI); Canada (ON).	NA	E	798	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: January 26, 2012.

Hannibal Bolton,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2012–2940 Filed 2–13–12; 8:45 am]

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Part VII

Department of the Treasury

Internal Revenue Service

26 Parts 54 and 602

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2590

Department of Health and Human Services

45 CFR Part 147

Summary of Benefits and Coverage and Uniform Glossary; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 54 and 602

[TD 9575]

RIN 1545–BJ94

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AB52

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[CMS–9982–F]

45 CFR Part 147

RIN 0938–AQ73

Summary of Benefits and Coverage and Uniform Glossary

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This document contains final regulations regarding the summary of benefits and coverage and the uniform glossary for group health plans and health insurance coverage in the group and individual markets under the Patient Protection and Affordable Care Act. This document implements the disclosure requirements under section 2715 of the Public Health Service Act to help plans and individuals better understand their health coverage, as well as other coverage options. A guidance document published elsewhere in this issue of the **Federal Register** provides further guidance regarding compliance.

DATES: *Effective date.* These final regulations are effective April 16, 2012.

Applicability date. The requirements to provide an SBC, notice of modification, and uniform glossary under PHS Act section 2715 and these final regulations apply for disclosures to participants and beneficiaries who enroll or re-enroll in group health coverage through an open enrollment period (including re-enrollees and late enrollees) beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures to participants and beneficiaries who enroll in group health plan coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), the requirements under PHS Act section 2715 and these final regulations apply beginning on the first day of the first plan year that begins on or after September 23, 2012. For disclosures to plans, and to individuals and dependents in the individual market, these requirements are applicable to health insurance issuers beginning on September 23, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Heather Raeburn, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Jennifer Libster or Padma Shah, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (301) 492–4222.

SUPPLEMENTARY INFORMATION:

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's Web site (*http://www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (*http://www.cms.hhs.gov/HealthInsReformforConsume/01_Overview.asp*) and information on health reform can be found at *http://www.healthcare.gov.*

I. Executive Summary

A. Purpose of the Regulatory Action

1. Need for Regulatory Action

Under section 2715 of the Public Health Service Act (PHS Act), as added by the Patient Protection and Affordable Care Act (Affordable Care Act), the Departments of Health and Human Services, Labor, and the Treasury (the Departments) are to develop standards for use by group health plans and health insurance issuers offering group or individual health insurance coverage in compiling and providing a summary of benefits and coverage (SBC) that ''accurately describes the benefits and coverage under the applicable plan or coverage.'' PHS Act section 2715 also calls for the ''development of standards for the definitions of terms used in health insurance coverage.''

This regulation establishes the standards required to be met under PHS Act section 2715. Among other things, these standards ensure this information is presented in clear language and in a uniform format that helps consumers to better understand their coverage and better compare coverage options. The current patchwork of non-uniform consumer disclosure requirements makes shopping for coverage inefficient, difficult, and time-consuming, particularly in the individual and small group market, but also in some large employer plans in which workers may be confused about the value of their health benefits as part of their total compensation. As a result of this confusion, health insurance issuers and employers may face less pressure to compete on price, benefits, and quality, contributing to inefficiency in the health insurance and labor markets.

The statute is detailed but not self-implementing, contains ambiguities, and specifically requires the Departments to develop standards, consult with the National Association of Insurance Commissioners, and issue regulations. Therefore these consumer protections cannot be established without this regulation.

2. Legal Authority

The substantive authority for this regulation is generally PHS Act section 2715, which is incorporated by reference into Employee Retirement Income Security Act (ERISA) section 715 and the Internal Revenue Code (Code) section 9815. PHS Act section 2792, ERISA section 734, and Code section 9833 also provide rulemaking authority. (For a fuller discussion of the Departments' legal authority, see section V. of this preamble.)

B. Summary of the Major Provisions of This Regulatory Action

Paragraph (a) of the final regulations implements the general disclosure requirement and sets forth the standards for who provides an SBC, to whom, and when. The regulations outline three different scenarios under which an SBC will be provided: (1) By a group health insurance issuer to a group health plan; (2) by a group health insurance issuer and a group health plan to participants and beneficiaries; and (3) by a health insurance issuer to individuals and dependents in the individual market. For each scenario, an SBC must be provided in several different circumstances, such as upon application for coverage, by the first day of coverage (if information in the SBC has changed), upon renewal or reissuance, and upon request. The final regulations also

include special rules to prevent unnecessary duplication in the provision of an SBC with respect to group health coverage and individual health insurance coverage.

The final regulations set forth a list of requirements for the SBC that generally mirror those set forth in the statute. There are a total of 12 required content elements under the regulations, including uniform standard definitions of medical and health coverage terms, which will help consumers better understand their coverage; a description of the coverage including the cost sharing requirements such as deductibles, coinsurance, and co-payments; and information regarding any exceptions, reductions, or limitations under the coverage. The final regulations also require inclusion of coverage examples, which illustrate benefits provided under the plan or coverage for common benefits scenarios. In addition, the regulations specify requirements related to the appearance of the SBC, which generally must be presented in a uniform format, cannot exceed four double-sided pages in length, and must not include print smaller than 12-point font. These requirements are detailed further in a Notice published elsewhere in today's **Federal Register** providing additional guidance related to PHS Act section 2715 and these final regulations.

PHS Act section 2715 and the final regulations also require that plans and issuers provide notice of modification in any of the terms of the plan or coverage involved that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage.

Finally, the statute directs the Departments to develop standards for definitions for certain insurance-related and medical terms, as well as other terms that will help consumers understand and compare the terms of coverage and the extent of medical benefits (including any exceptions and limitations). Group health plans and health insurance issuers must provide the uniform glossary in the appearance specified by the Departments, so that the glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee or individual covered under an individual policy. A guidance document published elsewhere in today's **Federal Register** provides further guidance with respect to the uniform glossary.

The requirements to provide an SBC, notice of modification, and uniform glossary under PHS Act section 2715 and these final regulations apply for disclosures with respect to participants and beneficiaries who enroll or re-enroll in group health coverage through an open enrollment period (including re-enrollees and late enrollees), beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures to participants and beneficiaries who enroll in group health plan coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), the requirements under PHS Act section 2715 and these final regulations apply beginning on the first day of the first plan year that begins on or after September 23, 2012. For disclosures to plans, and to individuals and dependents in the individual market, these requirements apply to health insurance issuers beginning on September 23, 2012.

C. Costs and Benefits

The direct benefits of these final regulations come from improved information, which will enable consumers, both individuals and employers, to better understand the coverage they have and make better coverage decisions, based on their preferences with respect to benefit design, level of financial protection, and cost. The Departments believe that such improvements will result in a more efficient, competitive market. These final regulations will also benefit consumers by reducing the time they spend searching for and compiling health plan and coverage information.

Under the final regulations, group health plans and health insurance issuers will incur costs to compile and provide the summary of benefits and coverage and uniform glossary of health coverage and medical terms. The Departments estimate that the annualized cost may be around $73 million. As is common with regulations implementing new policies, there is considerable uncertainty arising from general data limitations and the degree to which economies of scale exist for disclosing this information. Nonetheless, the Departments believe that these final regulations lower overall administrative costs from the proposed regulations because of several policy changes, notably flexibility in the instructions for completing the SBC, the omission of premium (or cost of coverage) information from the SBC, the reduction in the number of coverage examples required from three to two, and provisions allowing greater flexibility for electronic disclosure.

In accordance with Executive Orders 12866 and 13563, the Departments believe that the benefits of this regulatory action justify the costs.

II. Background

The Patient Protection and Affordable Care Act, Pub. L. 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act, Pub. L. 111–152, was enacted on March 30, 2010 (these are collectively known as the ''Affordable Care Act''). The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term ''group health plan'' includes both insured and self-insured group health plans.[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by this reference are sections 2701 through 2728. PHS Act sections 2701 through 2719A are substantially new, though they incorporate some provisions of prior law. PHS Act sections 2722 through 2728 are sections of prior law renumbered, with some, mostly minor, changes.

Subtitles A and C of title I of the Affordable Care Act amend the requirements of title XXVII of the PHS Act (changes to which are incorporated into ERISA by section 715). The preemption provisions of ERISA section 731 and PHS Act section 2724[2] (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the requirements of part 7 of ERISA and title XXVII of the PHS Act, as amended by the Affordable Care Act, are not to be ''construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group or individual health insurance coverage except to the extent that such standard or

[1] The term ''group health plan'' is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term ''health plan,'' as used in other provisions of title I of the Affordable Care Act. The term ''health plan'' does not include self-insured group health plans.

[2] Code section 9815 incorporates the preemption provisions of PHS Act section 2724. Prior to the Affordable Care Act, there were no express preemption provisions in chapter 100 of the Code.

requirement prevents the application of a requirement'' of provisions added to the PHS Act by the Affordable Care Act. Accordingly, State laws with stricter health insurance issuer requirements than those imposed by the PHS Act will not be superseded by those provisions. (Preemption and State flexibility under PHS Act section 2715 are discussed more fully below under section III.D.)

The Departments of Health and Human Services (HHS), Labor, and the Treasury (the Departments) are taking a phased approach to issuing regulations implementing the revised PHS Act sections 2701 through 2719A and related provisions of the Affordable Care Act. These final regulations are being published to implement the disclosure requirements under PHS Act section 2715. As discussed more fully below, a document containing further guidance for compliance is published elsewhere in this issue of the **Federal Register**.

III. Overview of the Final Regulations

A. Summary of Benefits and Coverage

1. In General

Section 2715 of the PHS Act, added by the Affordable Care Act, directs the Departments to develop standards for use by a group health plan and a health insurance issuer offering group or individual health insurance coverage in compiling and providing a summary of benefits and coverage (SBC) that ''accurately describes the benefits and coverage under the applicable plan or coverage.'' PHS Act section 2715 also calls for the ''development of standards for the definitions of terms used in health insurance coverage.''

The statute directs the Departments, in developing such standards, to ''consult with the National Association of Insurance Commissioners'' (referred to in this document as the ''NAIC''), ''a working group composed of representatives of health insurance-related consumer advocacy organizations, health insurance issuers, health care professionals, patient advocates including those representing individuals with limited English proficiency, and other qualified individuals.'' [3] On July 29, 2011, the NAIC provided its final recommendations to the Departments regarding the SBC. On August 22, 2011, the Departments published in the **Federal Register** proposed regulations (76 FR 52442) and an accompanying document with templates, instructions, and related materials (76 FR 52475) for implementing the disclosure provisions under PHS Act section 2715. The proposed regulations and accompanying document adhered to the recommendations of the NAIC. After consideration of all the comments received on the proposed regulations and accompanying document, the Departments are publishing these final regulations. In conjunction with these final regulations, the Departments are also publishing a guidance document elsewhere in this issue of the **Federal Register** that contains further guidance for compliance, including information on how to obtain the SBC template (with instructions and sample language for completing the template) and the uniform glossary. All of these items are displayed at *www.dol.gov/ebsa/healthreform and www.cciio.cms.gov.*

2. Providing the SBC

Paragraph (a) of the final regulations implements the general disclosure requirement and sets forth the standards for who provides an SBC, to whom, and when. PHS Act section 2715 generally requires that an SBC be provided to applicants, enrollees, and policyholders or certificate holders. PHS Act section 2715(d)(3) places the responsibility to provide an SBC on ''(A) a health insurance issuer (including a group health plan that is not a self-insured plan) offering health insurance coverage within the United States; or (B) in the case of a self-insured group health plan, the plan sponsor or designated administrator of the plan (as such terms are defined in section 3(16) of ERISA).'' [4] Accordingly, the final regulations interpret PHS Act section 2715 to apply to both group health plans and health insurance issuers offering group or individual health insurance coverage. In addition, consistent with the statute, the final regulations hold the plan administrator of a group health plan responsible for providing an SBC. Under the final regulations, the SBC must be provided in writing and free of charge.

Several commenters argued that large group health plans or self-insured group health plans should be exempt from the requirement to provide the SBC. Many of these commenters noted that such plans already provide a wealth of useful information, including a summary plan description and open season materials that accurately describe the plan and any coverage options. However, the statute includes no such exemption for large or self-insured plans. Moreover, the Departments believe that the SBC's uniform format and appearance requirements will allow individuals to easily compare coverage options across different types of plans and insurance products, including those offered through Affordable Insurance Exchanges (Exchanges) beginning in 2014.

Several commenters asked whether the SBC is required to be provided with respect to all group health plans, including certain account-type arrangements such as health flexible spending arrangements (health FSAs) [5], health reimbursement arrangements (HRAs) [6], and health savings accounts (HSAs) [7]. An SBC need not be provided for plans, policies, or benefit packages that constitute excepted benefits. Thus, for example, an SBC need not be provided for stand-alone dental or vision plans or health FSAs if they constitute excepted benefits under the Departments' regulations.[8] If benefits under a health FSA do not constitute excepted benefits, the health FSA is a group health plan generally subject to the SBC requirements. For a health FSA that does not meet the criteria for excepted benefits and that is integrated with other major medical coverage, the SBC is prepared for the other major medical coverage, and the effects of the health FSA can be denoted in the appropriate spaces on the SBC for deductibles, copayments, coinsurance, and benefits otherwise not covered by the major medical coverage. A stand-alone health FSA must satisfy the SBC requirements independently.

An HRA is a group health plan. Benefits under an HRA generally do not constitute excepted benefits, and thus HRAs are generally subject to the SBC requirements. A stand-alone HRA generally must satisfy the SBC requirements (though many of the

[3] The NAIC convened a working group (NAIC working group) comprised of a diverse group of stakeholders. This working group met frequently each month for over one year while developing its recommendations. In developing its recommendations, the NAIC considered the results of various consumer testing sponsored by both insurance industry and consumer associations. Throughout the process, NAIC working group draft documents and meeting notes were displayed on the NAIC's Web site for public review, and several interested parties filed formal comments. In addition to participation from the NAIC working group members, conference calls and in-person meetings were open to other interested parties and individuals and provided an opportunity for non-member feedback. See *www.naic.org/committees_b_consumer_information.htm.*

[4] ERISA section 3(16) defines an administrator as: (i) The person specifically designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and plan sponsor cannot be identified, such other person as the Secretary of Labor may by regulation prescribe.

[5] See Code section 106(c)(2).

[6] See IRS Notice 2002–45, 2002–2 C.B. 93.

[7] See Code section 223.

[8] See 26 CFR 54.9831–1(c), 29 CFR 2590.732(c), 45 CFR 146.145(c).

limitations that apply under traditional fee-for-service or network plans do not apply under stand-alone HRAs). An HRA integrated with other major medical coverage need not separately satisfy the SBC requirements; the SBC is prepared for the other major medical coverage, and the effects of employer allocations to an account under the HRA can be denoted in the appropriate spaces on the SBC for deductibles, copayments, coinsurance, and benefits otherwise not covered by the other major medical coverage.

HSAs generally are not group health plans and thus generally are not subject to the SBC requirements. Nevertheless, an SBC prepared for a high deductible health plan associated with an HSA can mention the effects of employer contributions to HSAs in the appropriate spaces on the SBC for deductibles, copayments, coinsurance, and benefits otherwise not covered by the high deductible health plan.

There are three general scenarios under which an SBC will be provided: (1) By a group health insurance issuer to a group health plan; (2) by a group health insurance issuer and a group health plan to participants and beneficiaries; and (3) by a health insurance issuer to individuals and dependents in the individual market. In general, the proposed regulations directed that, in each of these scenarios, the SBC be provided when an employer or individual is comparing health coverage options, including prior to purchasing or enrolling in a particular plan or policy.

Some commenters asserted that certain timing requirements in the proposed regulations could be administratively difficult for plans and issuers to meet under certain conditions, such as when negotiations of policy terms are ongoing less than 30 days before renewal, making the proposed timeframe for providing the SBC difficult or impossible to achieve. In response to public comments, the final regulations streamline and harmonize the rules for providing the SBC, while ensuring that individuals and employers have timely and complete information under all three scenarios in which an SBC might be provided. Moreover, in certain circumstances, the final regulations provide plans and issuers with additional time to provide the SBC. For example, under the proposed regulations, an SBC would have been required to be provided as soon as practicable following an application for health coverage or a request for an SBC, but in no event later than seven days following the application or request. For all three scenarios under which an SBC might be provided, the final regulations substitute a seven business day period for the seven calendar day period in the proposed regulations in each place it appeared.

The Departments also received comments regarding issuance of an SBC at renewal or reissuance of coverage. The proposed regulations would have required that, if written application materials are required for renewal, the SBC must be provided no later than the date on which the materials are distributed. This requirement has been retained without change in the final regulations. In addition, upon an automatic renewal of coverage (that is, when written application materials are not required for renewal), the proposed regulations would have required a new SBC to be provided no later than 30 days prior to the first day of coverage under the new plan or policy year. The final regulations require that, in general, if renewal or reissuance of coverage is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year. However, with respect to insured coverage, in situations in which the SBC cannot be provided within this timeframe because, for instance, the issuer and the purchaser have not yet finalized the terms of coverage for the new policy year, the final regulations provide an exception. Under that circumstance, the SBC must be provided as soon as practicable, but in no event later than seven business days after the issuance of the policy, certificate, or contract of insurance (for simplicity, referred to collectively as a ''policy'' in the remainder of this preamble), or the receipt of written confirmation of intent to renew, whichever is earlier. The regulations provide this flexibility only when the terms of coverage are finalized in fewer than 30 days in advance of the new policy year; otherwise, the SBC must be provided upon automatic renewal no later than 30 days prior to the first day of coverage under the new plan or policy year.

a. Provision of the SBC by an Issuer to a Plan

Paragraph (a)(1)(i) of the final regulations requires a health insurance issuer offering group health insurance coverage to provide an SBC to a group health plan (including, for this purpose, its sponsor) upon an application by the plan for health coverage. The SBC must be provided as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application. If there is any change to the information required to be in the SBC before the first day of coverage, the issuer must update and provide a current SBC to the plan no later than the first day of coverage. If the information is unchanged, the SBC does not need to be provided again in connection with coverage for that plan year, except upon request. As noted later in this preamble, the final regulations, in contrast to the proposed regulations, do not include premium or cost of coverage information as a required element of the SBC. In many cases, the only change to the information the proposed regulations required to be in the SBC between application for coverage and the first day of coverage is the premium or cost of coverage information. Because these final regulations eliminate the requirement to include premium or cost of coverage information in the SBC, the Departments anticipate that the number of circumstances in which issuers will have to provide a second SBC will be significantly fewer under the final regulations than they would have been under the proposed regulations.

b. Provision of the SBC by a Plan or Issuer to Participants and Beneficiaries

Under paragraph (a)(1)(ii) of the final regulations, a group health plan (including the plan administrator), and a health insurance issuer offering group health insurance coverage, must provide an SBC to a participant or beneficiary [9] with respect to each benefit package offered by the plan or issuer for which the participant or beneficiary is eligible.[10] Some commenters stated that SBCs should only be provided to participants, not beneficiaries, or that the SBC should only be provided to beneficiaries upon request. The

[9] ERISA section 3(7) defines a participant as: Any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employers or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. ERISA section 3(8) defines a beneficiary as: A person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

[10] With respect to insured group health plan coverage, PHS Act section 2715 generally places the obligation to provide an SBC on both a plan and issuer. As discussed below, under section III.A.2.d., ''Special Rules to Prevent Unnecessary Duplication With Respect to Group Health Coverage'', if either the issuer or the plan provides the SBC, both will have satisfied their obligations. As they do with other notices required of both plans and issuers under Part 7 of ERISA, Title XXVII of the PHS Act, and Chapter 100 of the Code, the Departments expect plans and issuers to make contractual arrangements for sending SBCs. Accordingly, the remainder of this preamble generally refers to requirements for plans or issuers.

statutory language, which refers to ''applicants'' and ''enrollees,'' could be interpreted to support either interpretation. These final regulations retain the requirement that the SBC be provided to both participants and beneficiaries. However, as described below, the final regulations include an anti-duplication rule under which a single SBC may be provided to a family unless any beneficiaries are known to reside at a different address. Accordingly, separate SBCs need to be provided to beneficiaries only in limited circumstances.

The SBC must be provided as part of any written application materials that are distributed by the plan or issuer for enrollment. If the plan does not distribute written application materials for enrollment, the SBC must be distributed no later than the first date the participant is eligible to enroll in coverage for the participant or any beneficiaries. If there is any change to the information required to be in the SBC between the application for coverage and the first day of coverage, the plan or issuer must update and provide a current SBC to a participant or beneficiary no later than the first day of coverage.

Under the final regulations, the plan or issuer must also provide the SBC to special enrollees.[11] The proposed regulations would have required that the SBC be provided within seven calendar days of a request for special enrollment. One commenter stated that special enrollees should not be distinguished from other enrollees with such expedited disclosure, particularly since they have already enrolled in coverage and are no longer comparing coverage options. The final rule provides that special enrollees must be provided the SBC no later than when a summary plan description is required to be provided under the timeframe set forth in ERISA section 104(b)(1)(A) and its implementing regulations, which is 90 days from enrollment. The revised timing requirement related to providing an SBC in connection with special enrollment is expected to reduce administrative costs for providing SBCs to these individuals, who have already chosen the plan, policy, or benefit package in which to enroll. To the extent individuals who are eligible for special enrollment and are contemplating their coverage options would like to receive SBCs earlier, they may always request an SBC with respect to any particular plan, policy, or benefit package and the SBC is required to be provided as soon as practicable, but in no event later than seven business days following receipt of the request (as discussed more fully below).

c. Provision of the SBC Upon Request in Group Health Coverage

As discussed earlier in this preamble, a health insurance issuer offering group health insurance coverage must provide the SBC to a group health plan (and a plan or issuer must provide the SBC to a participant or beneficiary) upon request for an SBC or summary information about the health coverage, as soon as practicable, but in no event later than seven business days following receipt of the request. The Departments received several comments addressing the requirement to provide the SBC upon request. Many comments were supportive of this approach, especially with regards to participants and beneficiaries needing information about their coverage in the middle of a plan year after life changes. Other comments suggested that providing SBCs to employers and individuals who are only ''shopping'' for coverage and not yet enrolled is unnecessary and will require multiple SBCs to be provided as employers and individuals go through underwriting.

The final regulations retain the requirement that the SBC be provided upon request to participants, beneficiaries and employers, including prior to submitting an application for coverage, because the SBC provides information that not only helps consumers understand their coverage, but also helps consumers compare coverage options prior to selecting coverage. The Departments believe it is essential for employers, participants, and beneficiaries to have this information to help make informed coverage decisions and believe that the modifications to the SBC template, including the removal of premium information, adequately addresses the concerns that health insurance issuers will have to provide multiple SBCs to employers and individuals prior to underwriting.

Health insurance issuers offering individual market coverage must also provide the SBC to individuals upon request, to allow consumers reviewing coverage options the same ability to compare coverage options in the individual market, as well in the Exchanges and the group markets.

d. Special Rules to Prevent Unnecessary Duplication With Respect to Group Health Coverage

The proposed regulations provided three rules to streamline provision of the SBC and prevent unnecessary duplication with respect to group health plan coverage. Paragraph (a)(1)(iii) of the final regulations retains these special rules, with some modifications. The first states that the requirement to provide an SBC generally will be considered satisfied for all entities if it is provided by any entity, so long as all timing and content requirements are satisfied. The second states that a single SBC may be provided to a participant and any beneficiaries at the participant's last known address. However, if a beneficiary's last known address is different than the participant's last known address, a separate SBC is required to be provided to the beneficiary at the beneficiary's last known address. Finally, under the special rule providing that SBCs are not required to be provided automatically upon renewal for benefit packages in which the participant or beneficiary is not enrolled, a plan or issuer generally has up to seven business days (rather than seven calendar days, as specified in the proposed regulation) to respond to a request to provide the SBC with respect to another benefit package for which the participant or beneficiary is eligible.

Many commenters pointed out the potential duplication and confusion that can result with carve-out arrangements, which is generally when a plan or issuer contracts with an administrative service provider (such as a pharmacy benefit manager or managed behavioral health organization) to manage prescribed functions such as managed care and utilization review. Plans and issuers should coordinate with their service providers, and with each other, to ensure that the SBCs they provide are accurate.

e. Provision of the SBC by an Issuer Offering Individual Market Coverage

Under these final regulations, the Secretary of HHS sets forth standards applicable to individual health insurance coverage about who provides an SBC, to whom, and when. The provisions of the final regulations for individual market coverage parallel the group market requirements described above, with only those changes necessary to reflect the differences between the two markets, and the provisions of the final regulations are intended to more clearly reflect the similarity between the two sets of rules.

[11] Regulations regarding special enrollment are available at 26 CFR 54.9801–6, 29 CFR 2590.701–6, and 45 CFR 146.117.

For example, individuals and dependents in the individual market are comparable to group health plan participants and beneficiaries. Accordingly, an issuer offering individual health insurance coverage must provide an SBC to an individual or dependent upon receiving an application for any health insurance policy, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application. If there is any change in the information required to be in the SBC between the application for coverage and the first day of coverage, the issuer must update and provide a current SBC to an individual or dependent no later than the first day of coverage.[12] Additionally, an issuer must provide the SBC to any individual or dependent upon request for an SBC or summary information about a health insurance product as soon as practicable, but in no event later than seven business days following the request. Similar to the group market, a request for an SBC or summary information includes a request made at any time, including prior to applying for coverage.

The final regulations retain the individual market anti-duplication rule, similar to the group health coverage anti-duplication rule, for individual health insurance coverage that covers more than one individual (or an application for coverage that is being made for more than one individual). In that case, as under the proposed regulations, a single SBC may generally be provided to one address, unless any dependents are known to reside at a different address.

3. Content

PHS Act section 2715(b)(3) generally provides that the SBC must include:

a. Uniform definitions of standard insurance terms and medical terms so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage;

b. A description of the coverage, including cost sharing, for each category of benefits identified by the Departments;

c. The exceptions, reductions, and limitations on coverage;

d. The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations;

e. The renewability and continuation of coverage provisions;

f. A coverage facts label that includes examples to illustrate common benefits scenarios (including pregnancy and serious or chronic medical conditions) and related cost sharing based on recognized clinical practice guidelines;

g. A statement about whether the plan provides minimum essential coverage as defined under section 5000A(f) of the Code, and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable requirements;

h. A statement that the SBC is only a summary and that the plan document, policy, or certificate of insurance should be consulted to determine the governing contractual provisions of the coverage; and

i. A contact number to call with questions and an Internet web address where a copy of the actual individual coverage policy or group certificate of coverage can be reviewed and obtained.

The proposed regulations generally mirrored the content elements set forth in the statute, with four additional elements recommended by the NAIC: (1) For plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of the network providers; (2) for plans and issuers that maintain a prescription drug formulary, an Internet address where an individual may find more information about the prescription drug coverage under the plan or coverage; (3) an Internet address where an individual may review and obtain the uniform glossary; and (4) premiums (or cost of coverage for self-insured group health plans). The proposed regulations solicited comments on these additional four content elements. In addition, the proposed regulations solicited comments on whether the SBC should include a disclosure informing individuals of their right to receive a paper copy of the glossary upon request.

These final regulations retain the first two proposed additional content elements without change, modify the third, and delete the fourth. The final regulations retain: (1) The inclusion of an Internet address (or other contact information) for obtaining a list of the network providers, and (2) the inclusion of an Internet address (or similar contact information) where an individual may find more information about the prescription drug coverage under the plan or coverage. The final regulations also retain the requirement of the inclusion of an Internet address where an individual may review and obtain the uniform glossary, with a modification. The Departments received several comments regarding the inclusion of information concerning the uniform glossary including a suggestion that individuals be informed of their right to request a paper copy of the uniform glossary. Commenters noted that the omission of such a disclosure would deny important information to some individuals who are most in need of this information. After review and consideration of the comments, the final regulations require information for obtaining copies of the uniform glossary, which includes an Internet address where an individual may review the uniform glossary, a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies of the uniform glossary are available. It is important to note that the definitions in the glossary are solely for the purpose of these regulations; they do not, for example, apply to Medicare coverage policy nor the Secretary of Health and Human Services' definition of essential health benefits.

The final regulations do not require the SBC to include premium or cost of coverage information. The Departments received numerous comments on this issue. Comments supporting the inclusion of premium information stated that this information was essential for consumers to make meaningful coverage comparisons, and it was necessary for consumers to make coverage comparisons and understand their total financial exposure, as well as useful to encourage competition in the markets on both price and value. One comment stated that employees also need this information to know if the coverage offered by an employer meets the Affordable Care Act's affordability test,[13] which determines the eligibility of employees for premium tax credits with respect to qualified health plans purchased on an Exchange.[14] Comments opposing this additional content requirement stated that this requirement would be administratively burdensome in the group market, where health insurance issuers do not have information on employer contributions, and would not be able to provide

[12] As noted elsewhere in this preamble, the final regulations, in contrast to the proposed regulations, do not include premium information as a required element of the SBC. Because, in many cases, the only change to the information required to be in the SBC before the first day of coverage is the premium, the Departments anticipate that the number of circumstances in which issuers will have to provide a second SBC before the first day of coverage will significantly decrease under the final regulation.

[13] See Code section 36B(c)(2)(C)(i)(II), as added by section 1401 of the Affordable Care Act.

[14] Providing information in the SBC for individuals relating to Exchanges and the premium tax credit is addressed in the document containing further compliance guidance that is published elsewhere in this issue of the **Federal Register**.

accurate cost of coverage information to employees. In addition, some comments noted that it would not be possible to provide an accurate premium estimate prior to medical underwriting. Some comments recommended that premium information be provided in a separate document, for example, a premium table.

After considering all of the comments, the final regulations do not require the SBC to include premium or cost of coverage information. The Departments understand that it is administratively and logistically complex to convey this information to individuals in an SBC in divergent circumstances in both the individual and group markets, including, for example, when premiums differ based on family size and when, in the group market, employer contributions impact cost of coverage. The Departments recognize that the inclusion of premium information in the SBC could result in numerous SBCs being required to be provided to individuals. However, if premium information is not required, only a single SBC might be necessary. The Departments believe that premium information can be more efficiently and effectively provided by means other than the SBC. For example, in the individual market, the Departments note that some of this information may be available through the Federal health care reform Web portal, HealthCare.gov,[15] to individuals shopping for coverage. Furthermore, the Departments anticipate that premium information for qualified health plans will be made widely available through Exchanges for coverage effective beginning in 2014.

With respect to the uniform definitions required by the statute, the Departments proposed to follow the NAIC's recommended two-part approach, requiring provision of—(1) a uniform glossary, which includes definitions of health coverage terminology, to be provided in connection with the SBC, and (2) a ''Why this Matters'' column for the SBC template (with instructions for plans and issuers to use in completing the SBC template).[16] The Departments retain this approach in the final regulations. The guidance document published elsewhere in today's **Federal Register** addresses comments received on the SBC and related materials (including the uniform glossary) and details the changes from the initial proposal.

The statute also directs that the SBC include a statement about whether a plan or coverage provides minimum essential coverage, as defined under section 5000A(f) of the Code, (minimum essential coverage statement) and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable minimum value requirements (minimum value statement).[17] However, this content is not relevant until other elements of the Affordable Care Act are implemented. Therefore, the final regulations require the minimum essential coverage and minimum value statements to be included in SBCs with respect to coverage beginning on or after January 1, 2014.[18] Future guidance will address the minimum essential coverage and minimum value statements.

The statute also requires that an SBC contain a ''coverage facts label.'' For ease of reference, the proposed regulations used the term ''coverage examples'' in place of the statutory term. The Departments received many comments regarding the coverage examples. Some comments supported the general approach in the proposed regulations and indicated that coverage examples would be a valuable comparison tool for consumers. Other comments expressed concerns that the coverage examples would cause confusion for consumers, as the examples do not represent the actual treatment plan for any particular individual, or might not represent the actual costs that an individual might incur for a similar cost of treatment. Some such comments urged the Departments to take a different approach to the coverage examples, such as providing an actual cost calculator. The Departments also received comments on the number of coverage examples that should be required, as well as which benefit scenarios should be included in the final regulations. Comments varied with regards to the number of recommended coverage examples, ranging from one to more than six.

These final regulations retain the general approach to the coverage examples that was proposed.[19] Consumer testing performed on behalf of the NAIC[20] demonstrated that the coverage examples facilitated individuals' understanding of the benefits and limitations of a plan or policy and helped them make more informed choices about their options. Such testing also showed that individuals were able to comprehend that the examples were only illustrative. Additionally, while some plans provide very useful coverage calculators to their enrollees to help them make health care decisions, they are not uniform across all plans and most are not available to individuals prior to enrollment, making it difficult for individuals and employers to make coverage comparisons. Nonetheless, as discussed in the guidance document issued elsewhere in this issue of the **Federal Register**, the Departments are taking a phased approach to implementing the coverage examples and intend to consider additional feedback from consumer testing in the future.

To the extent a plan's terms that are required to be in the SBC template cannot reasonably be described in a manner consistent with the template and instructions, the plan or issuer must

[15] Established pursuant to 45 CFR 159.120 (75 FR 24470).

[16] National Association of Insurance Commissioners, Consumer Information Working Group, December 17, 2010, Final Package of Attachments. Available at *http://www.naic.org/documents/committees_b_consumer_information_ppaca_final_materials.pdf.*

[17] PHS Act section 2715(b)(3)(G) provides that this statement must indicate whether the plan or coverage (1) provides minimum essential coverage (as defined under section 5000A(f) of the Code) and (2) ensures that the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage is not less than 60 percent of such costs. The minimum essential coverage and minimum value requirements are part of a larger set of health coverage reforms that take effect on January 1, 2014.

[18] In the Notice providing compliance guidance published separately in today's **Federal Register**, the Departments state that the SBC template (with instructions, samples, and a guide for coverage example calculations to be used in completing the SBC template) does not provide language to comply with these requirements because the Notice authorizes these documents only with respect to the first year of applicability. Information on the minimum essential coverage statement and the minimum value statement will be provided in future guidance.

[19] The Departments are making one technical change in these final regulations. The proposed regulations stated that the underlying benefits scenario for a coverage example must be based on recognized clinical practice guidelines ''available through'' the National Guideline Clearinghouse (NGC), Agency for Healthcare Research and Quality. The Departments believe that the proposed regulations would have inadvertently excluded recognized clinical practice guidelines available through other sources, such as the National Comprehensive Cancer Network. Accordingly, these final regulations provide that a benefits scenario must be based on recognized clinical guidelines ''as defined by'' the NGC. Currently, the NGC uses a definition set forth by the Institute of Medicine. The current definition of clinical practice guidelines adopted by NGC is available at *http://www.guideline.gov/about/inclusion-criteria.aspx.*

[20] A summary of the focus group testing done by America's Health Insurance Plans is available at: *http://www.naic.org/documents/committees_b_consumer_information_101012_ahip_focus_group_summary.pdf,* a summary of the focus group testing done by Consumers Union on the coverage examples is available at: *http://prescriptionforchange.org/wordpress/wp-content/uploads/2011/08/A_New_Way_of_Comparing_Health_Insurance.pdf.*

accurately describe the relevant plan terms while using its best efforts to do so in a manner that is still consistent with the instructions and template format as reasonably possible. Such situations may occur, for example, if a plan provides a different structure for provider network tiers or drug tiers than is contemplated by the template and these instructions, if a plan provides different benefits based on facility type (such as hospital inpatient versus non-hospital inpatient), in a case where the effects of a health FSA or an HRA are being described, or if a plan provides different cost sharing based on participation in a wellness program.

Finally, the Departments solicited comments on whether any special rules are necessary to accommodate expatriate plans and received comments related to adjustments needed for expatriate plan coverage. Some commenters noted that PHS Act section 2715(d)(3) refers to a health insurance issuer ''offering health insurance coverage within the United States.'' [21] Other commenters suggested that coverage information that is particularly important to expatriates (such as medical evacuation, repatriation benefits, and country-appropriate care) be exempt from the requirements under PHS Act section 2715. These final regulations include a special provision that provides that, in lieu of summarizing coverage for items and services provided outside the United States, a plan or issuer may provide an Internet address (or similar contact information) for obtaining information about benefits and coverage provided outside the United States. Also, to the extent the plan or policy provides coverage available within the United States, the plan or issuer is still required to provide an SBC in accordance with PHS Act section 2715 that accurately summarizes benefits and coverage available within the United States.

4. Appearance

PHS Act section 2715 sets forth standards related to the appearance of the SBC. Specifically, the statute provides that the SBC is to be presented in a uniform format, utilizing terminology understandable by the average plan enrollee, that does not exceed four pages in length, and does not include print smaller than 12-point font. The final regulations retain the interpretation from the proposed regulations that the four-page limitation is four double-sided pages.[22]

The proposed regulations requested comments regarding the requirement to provide the SBC as a stand-alone document. Specifically, comments were requested about whether the SBC should be allowed to be included in a summary plan description (SPD) if it is intact and prominently displayed and the timing requirements for delivery of the SBC are met. The Departments received many comments in response to this request. Some comments opposed allowing the SBC to be included alongside or within an SPD, noting that SPDs tend to be lengthy documents and allowing this would be contrary to the purpose of requiring a short summary document. However, many comments supported this approach, indicating that permitting this option would reduce burdens and costs associated with printing and disseminating the SBC documents.

Paragraph (a)(3) of these final regulations requires plans and issuers to provide the SBC in the form specified by the Secretaries in guidance and completed in accordance with the instructions for completing the SBC that are specified by the Secretaries in guidance. A guidance document published elsewhere in this issue of the **Federal Register** provides such guidance. The Notice specifies that SBCs provided in connection with group health plan coverage may be provided either as a stand-alone document or in combination with other summary materials (for example, an SPD), if the SBC information is intact and prominently displayed at the beginning of the materials (such as immediately after the Table of Contents in an SPD) and in accordance with the timing requirements for providing an SBC. For health insurance coverage offered in the individual market, the SBC must be provided as a stand-alone document, but HHS notes that it can be included in the same mailing as other plan materials. This guidance regarding appearance may be modified for years after the first year of applicability.

5. Form

a. Group Health Plan Coverage

To facilitate faster and less burdensome disclosure of the SBC, and to be consistent with PHS Act section 2715(d)(2), which permits disclosure in either paper or electronic form, the proposed regulations set forth rules to permit greater use of electronic transmittal of the SBC. Those proposed regulations generally permitted issuers to provide the SBC to plans electronically (such as an email or Internet posting) if certain conditions were met, and required plans and issuers providing the SBC to participants and beneficiaries to comply with the Department of Labor's electronic disclosure safe harbor requirements at 29 CFR 2520.104b–1(c). In all circumstances, the proposed regulations permitted plans and issuers to provide SBCs in paper form.

Comments generally supported permitting provision of the SBC electronically; however, some comments also asked for more flexibility with regard to electronic provision to participants and beneficiaries. These comments generally requested the rule for provision to participants and beneficiaries mirror the rule for provision to plans, and suggested this change would reduce costs and burdens associated with delivery. Other comments raised concerns about decreased consumer protection if the rules for providing an electronic SBC are too flexible. Some commenters also asked to extend to the group market the option available to individual market issuers to provide information to HealthCare.gov to be in compliance with the requirement to provide the SBC upon request for information about coverage prior to submitting an application.

After taking into account all of the comments, these final regulations generally retain the approach from the proposed regulations with respect to an SBC provided electronically by an issuer to a plan. For SBCs provided electronically by a plan or issuer to participants and beneficiaries, these final regulations make a distinction between a participant or beneficiary who is already covered under the group health plan, and a participant or beneficiary who is eligible for coverage but not enrolled in a group health plan. This distinction should provide new flexibility in some circumstances, while also ensuring adequate consumer protections where necessary. For participants and beneficiaries who are already covered under the group health plan, these final regulations permit

[21] The Departments note that, in the context of group health plan coverage, section 4(b)(4) of ERISA provides that a plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens is exempt from ERISA title I, including ERISA section 715.

[22] PHS Act section 2715(b)(1) does not prescribe whether the four pages are four single-sided pages or four double-sided pages. The SBC template transmitted by NAIC exceeded four single-sided pages. After considering the extent of statutorily-required content in PHS Act section 2715(b)(3), as well as the appearance and language requirements of PHS Act sections 2715(b)(1) and (2), the Departments are interpreting four pages to be four double-sided pages, in order to ensure that this information is presented in an understandable and meaningful way.

provision of the SBC electronically if the requirements of the Department of Labor's regulations at 29 CFR 2520.104b–1 are met. (Paragraph (c) of those regulations includes an electronic disclosure safe harbor.[23]) For participants and beneficiaries who are eligible for but not enrolled in coverage, these final regulations permit the SBC to be provided electronically if the format is readily accessible and a paper copy is provided free of charge upon request. Additionally, if the electronic form is an Internet posting, the plan or issuer must timely advise the individual in paper form (such as a postcard) or email that the documents are available on the Internet, provide the Internet address, and notify the individual that the documents are available in paper form upon request. The Departments note that the rules for participants and beneficiaries who are eligible for but not enrolled in coverage are substantially similar to the requirements for an issuer providing an electronic SBC to a plan. Finally, as in the proposed regulations, plans, and participants and beneficiaries (both covered, and eligible but not enrolled) have the right to receive an SBC in paper format, free of charge, upon request.

b. Individual Health Insurance Coverage

The Departments received several comments on the proposed regulations, which generally required paper delivery of the SBC and set forth certain circumstances in which electronic disclosure is permissible. Some comments recommended the SBC for individual market coverage be provided in paper form by default, unless the individual explicitly elects electronic delivery. These comments cautioned against assuming individuals have regular access to a computer or a requisite level of computer literacy simply because an individual submits a request online. Instead, they argued individuals should be able to specify the form in which they prefer to receive the SBC.

Other comments recommended greater flexibility for electronic delivery to reduce the costs of compliance, including eliminating the requirement to acknowledge receipt of an SBC provided through electronic delivery methods. These comments urged the Departments to adopt broader standards that reflect the current state of technology. Specifically, they recommended extending the electronic delivery rules that apply to disclosure from the issuer to the plan in paragraph (a)(4)(i) of the final regulations, to disclosure in the individual market. Some comments also suggested that plans provide in their enrollment materials a notice of the individual's right to receive a paper copy of the SBC upon request, and a telephone number or other contact information for making such request.

The Departments determined it is appropriate to amend the individual market standards in the proposed regulations related to the form and manner of delivery. Rather than specifying the circumstances making paper or electronic appropriate, these final regulations establish the general standard that an issuer offering individual health insurance coverage must provide the SBC in a manner that can reasonably be expected to provide actual notice regardless of the format. These final regulations provide several examples of methods of delivery that may satisfy this requirement. For instance, an issuer may reasonably expect an individual or dependent to receive actual notice if the issuer provides the SBC by email to an individual who has agreed to receive the SBC (or other electronic disclosures) by email from the issuer and who has provided an email address for that purpose. Or, if the SBC is posted on the Internet, an individual may reasonably be expected to receive actual notice if the issuer timely advises the individual in paper form (such as a postcard) that the documents are available on the Internet and includes the applicable Internet address.

These final regulations substantially retain the safeguards for electronic disclosure in the proposed regulations. Under these final regulations, an issuer providing the SBC electronically must ensure that the format is readily accessible; the SBC is placed in a location that is prominent and readily accessible; the SBC is provided in an electronic form that is consistent with the appearance, content, and language requirements of these final regulations; and that the issuer notifies the individual or dependent that the SBC is available from the issuer in paper form without charge upon request. These final regulations remove the ''acknowledge receipt'' requirement. However, the regulations also require that the SBC be provided in an electronic form which can be electronically retained and printed. These final regulations provide standards for the form and manner of providing the SBC that balance the objective of protecting consumers by providing accessible information with the goal of simplifying information collection burdens on issuers.

Finally, the final regulations clarify the provision that would deem health insurance issuers in the individual market to be in compliance with the requirement to provide the SBC to an individual requesting information about coverage prior to submitting an application if the issuer provides the information to HealthCare.gov. The final regulations clarify that a health insurance issuer offering individual health insurance coverage must provide all of the content required under paragraph (a)(2), as specified in guidance by the Secretary, to HealthCare.gov to be deemed compliant with the requirement to provide an SBC to an individual requesting summary information prior to submitting an application for coverage. The final regulations further clarify that any SBC furnished pursuant to a request for an SBC, at the time of application or subsequently, would be required to be provided in a form and manner consistent with the rules described above. The Departments determined that this provision is consistent with the standards for electronic disclosure and reduces the burden of providing an SBC to individuals shopping for individual health insurance coverage.

The Departments received comments in support of this approach which stated HealthCare.gov provides useful summary information about health insurance products that are available to both individuals and small employers shopping for coverage and recommended the final regulations similarly extend the ''deemed compliance'' provision to the small group market. At this time, the Departments are reviewing comments requesting that the regulations extend the deemed compliance provision to the small group market and may issue future guidance on this issue.

6. Language

PHS Act section 2715(b)(2) provides that standards shall ensure that the SBC ''is presented in a culturally and linguistically appropriate manner.'' The final regulations retain the approach of the proposed regulations and provide that, to satisfy the requirement to provide the SBC in a culturally and linguistically appropriate manner, a plan or issuer follows the rules for

[23] On April 7, 2011, the Department of Labor published a Request for Information regarding electronic disclosure at 76 FR 19285. In it, the Department of Labor stated that it is reviewing the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries covered by employee benefit plans subject to ERISA. Because these regulations adopt the ERISA electronic disclosure rules by cross-reference, any changes that may be made to 29 CFR 2520.104b–1 in the future would also apply to the SBC.

providing notices with respect to claims and appeals in a culturally and linguistically appropriate manner under PHS Act section 2719, and paragraph (e) of its implementing regulations.[24] Note, nothing in these final regulations should be construed as limiting an individual's rights under Federal or State civil rights statutes, such as Title VI of the Civil Rights Act of 1964 (Title VI) which prohibits recipients of Federal financial assistance, including issuers participating in Medicare Advantage, from discriminating on the basis of race, color, or national origins. To ensure non-discrimination on the basis of national origin, recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by limited English proficient persons. For more information, see, ''Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,'' available at *http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html.* While the Departments received several comments regarding the thresholds set forth in the claims and appeals regulations, the Departments are not making any changes to those standards through these final regulations. Any changes suggested will be considered as part of future rulemakings related to the regulations under PHS Act section 2719, so that the two rules remain consistent.

B. Notice of Modification

PHS Act section 2715(d)(4) directs that a group health plan or health insurance issuer offering group or individual health insurance coverage must provide notice of any material modification if it makes a material modification (as defined under ERISA section 102) in any of the terms of the plan or coverage involved that is not reflected in the most recently provided SBC. The comments generally supported the standards regarding the notice of modification in the proposed regulations, which are adopted as final regulations without change.

However, some comments requested clarification concerning the requirement to provide a notice of modification. For example, several comments requested clarification on what changes in the terms of coverage would rise to the level of a material modification. For purposes of PHS Act section 2715, the proposed and final regulations interpret the statutory reference to the SBC to mean that only a material modification in the terms of the plan or coverage that would affect the content of the SBC; that is not reflected in the most recently provided SBC; and that occurs other than in connection with a renewal or reissuance of coverage would trigger the notice. In these circumstances, the notice would be required to be provided to enrollees (or, in the individual market, covered individuals) no later than 60 days prior to the date on which such change will become effective. A material modification, within the meaning of section 102 of ERISA, includes any modification to the coverage offered under a plan or policy that, independently, or in conjunction with other contemporaneous modifications or changes, would be considered by an average plan participant (or in the case of individual market coverage, an average individual covered under a policy) to be an important change in covered benefits or other terms of coverage under the plan or policy.[25] A material modification could be an enhancement of covered benefits or services or other more generous plan or policy terms. It includes, for example, coverage of previously excluded benefits or reduced cost-sharing. A material modification could also be a material reduction in covered services or benefits, as defined in 29 CFR 2520.104b–3(d)(3) of the Department of Labor' regulations, or more stringent requirements for receipt of benefits. As a result, it also includes changes or modifications that reduce or eliminate benefits, increase cost-sharing, or impose a new referral requirement.[26] (However, changes to the information in the SBC resulting from changes in the regulatory requirements for an SBC are not changes to the plan or policy requiring the mid-year provision of a notice of modification, unless specified in such new requirements.)

The Departments also received comments seeking clarification on when a notice of modification must be provided. Several comments suggested that this notice must also be provided for modifications effective for new plan or policy years. The final regulations require that this notice be provided only for changes other than in connection with a renewal or reissuance of coverage. At renewal, plans and issuers must provide an updated SBC in accordance with the requirements otherwise applicable to SBCs. PHS Act section 2715 and paragraph (b) of the final regulations specify the timing for providing a notice of modification in situations other than in connection with a renewal or reissuance of coverage. To the extent a plan or policy implements a mid-year change that is a material modification, that affects the content of the SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the final regulations require a notice of modification to be provided 60 days in advance of the effective date of the change. Comments generally supported the flexibility provided in the proposed regulations, which permitted plans and issuers to either provide an updated SBC reflecting the modifications or provide a separate notice describing the material modifications. Plans and issuers continue to have this flexibility under these final regulations.

For ERISA-covered group health plans subject to PHS Act section 2715, this notice is required in advance of the timing requirements under the Department of Labor's regulations at 29 CFR 2520.104b–3 for providing a summary of material modification (SMM) (generally not later than 210 days after the close of the plan year in which the modification or change was adopted, or, in the case of a material reduction in covered services or benefits, not later than 60 days after the date of adoption of the modification or change). In situations where a complete notice is provided in a timely manner under PHS Act section 2715(d)(4), an ERISA-covered plan will also satisfy the requirement to provide an SMM under Part 1 of ERISA.

C. Uniform Glossary

Section 2715(g)(2) of the PHS Act directs the Departments to develop standards for definitions for at least the following insurance-related terms: co-insurance, co-payment, deductible, excluded services, grievance and appeals, non-preferred provider, out-of-network co-payments, out-of-pocket limit, preferred provider, premium, and UCR (usual, customary and reasonable) fees. Section 2715(g)(3) of the PHS Act directs the Departments to develop standards for definitions for at least the following medical terms: durable medical equipment, emergency medical transportation, emergency room care, home health care, hospice services, hospital outpatient care, hospitalization, physician services, prescription drug coverage, rehabilitation services, and skilled nursing care. Additionally, the statute directs the Departments to

[24] *See* 75 FR 43330 (July 23, 2010), as amended by 76 FR 37208 (June 24, 2011).

[25] *See* DOL Information Letter, Washington Star/Washington-Baltimore Newspaper Guild to Munford Page Hall, II, Baker & McKenzie (February 8, 1985).

[26] See, *e.g., Ward* v. *Maloney,* 386 F.Supp.2d 607, 612 (M.D.N.C. 2005), which discusses judicial interpretations of when an amendment is and is not a material modification.

develop standards for such other terms as will help consumers understand and compare the terms of coverage and the extent of medical benefits (including any exceptions and limitations).

The final regulations adopt the approach of the proposed regulations with respect to the uniform glossary. This includes the adoption of the NAIC recommendation to include the following additional terms in the uniform glossary: Allowed amount, balance billing, complications of pregnancy, emergency medical condition, emergency services, habilitation services, health insurance, in-network co-insurance, in-network co-payment, medically necessary, network, out-of-network co-insurance, plan, preauthorization, prescription drugs, primary care physician, primary care provider, provider, reconstructive surgery, specialist, and urgent care.

The Departments received a number of comments on the proposed uniform glossary. Several comments recommended that the final glossary include additional terms. In general, these comments recommended additional terms to provide consumers with additional information to help them better understand their coverage and the content of the SBC. These comments suggested the glossary include additional terms that may appear in the SBC and that may cause confusion, including specialty drugs, mental health services and behavioral health, cosmetic surgery, and preventive care. In addition, some commenters recommended including definitions for complex or potentially confusing insurance terms, including explanations of plan types (such as health maintenance organizations or ERISA plans) and terms such as actuarial value and cost-sharing. Other commenters warned against making the uniform glossary too long.

Some commenters recommended modifications to certain definitions in the uniform glossary. For example, several comments recommended modification to the term ''medical necessity.'' In developing the final uniform glossary, the Departments were very cognizant of the consumer testing performed by the NAIC with respect to the uniform glossary included in the proposed regulations and the need to convey in concise, easy-to-understand language basic medical and coverage terms.[27] Accordingly, very minor changes were made in the final uniform glossary, and it continues to include a disclaimer that the terms and definitions of terms in particular plans or policies may differ from those contained in the glossary, together with information on how to get a copy of the actual policy or plan document.

Some commenters requested flexibility to use their own, plan-specific or policy-specific terms in the glossary. PHS Act section 2715(g) is titled ''Development of Standard Definitions.'' The NAIC developed the uniform glossary to provide generalized, plain-English definitions for common coverage and medical terms. The document was intended to help consumers understand the basics of insurance. At the same time, the document specifically cautions that it is intended to be a general educational tool and that individual plan terms may differ (and refers consumers to the SBC for information on how to get an accurate description of their actual plan or policy terms). A guidance document published elsewhere in this issue of the **Federal Register** announces the availability of the final uniform glossary. The SBC may be used by plans and issuers to convey more accurate descriptions, where appropriate.

Like the proposed regulations, the final regulations direct a plan or issuer to make the uniform glossary available upon request within seven business days. A plan or issuer satisfies this requirement by complying with the content requirement described in paragraph (a)(2)(i)(L) of the final regulations, which requires that the SBC include an Internet address where an individual may review and obtain the uniform glossary, a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available upon request. The Internet address may be a place where the document can be found on the plan's or issuer's Web site, or the Web site of either the Department of Labor or HHS. However, a plan or issuer must make a paper copy of the glossary available within seven business days upon request. Group health plans and health insurance issuers must provide the uniform glossary in the appearance specified by the Departments, so that the glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee or individual covered under an individual policy.

D. Preemption

Section 2715 of the PHS Act is incorporated into ERISA section 715, and Code section 9815, and is subject to the preemption provisions of ERISA section 731 and PHS Act section 2724 (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)). Under these provisions, the requirements of part 7 of ERISA and part A of title XXVII of the PHS Act, as amended by the Affordable Care Act, are not to be ''construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group or individual health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement'' of part A of title XXVII of the PHS Act. Accordingly, State laws that impose requirements on health insurance issuers that are stricter than those imposed by the Affordable Care Act will not be superseded by the Affordable Care Act. Moreover, PHS Act section 2715(e) provides that the standards developed under PHS Act section 2715(a), ''shall preempt any related State standards that require [an SBC] that provides less information to consumers than that required to be provided under this section, as determined by the [Departments].'' Reading these two preemption provisions together, the final regulations do not prevent States from imposing separate, additional disclosure requirements on health insurance issuers.

The Departments received several comments seeking clarification on the preemption of State disclosure standards. These comments indicate that many States have existing disclosure requirements that may be duplicative and noted consumers could be confused by multiple disclosures. These final regulations retain the preemption standard as stated in the proposed regulations. However, the Departments take note of the concerns about the potential for consumer confusion, and encourage States to take steps to harmonize existing State requirements with these Federal consumer disclosure requirements. The Departments will work with States to clarify the requirements, potential differences, and options.

In addition, some comments requested clarification that States may not require the modification of the SBC or uniform glossary in their own disclosure standards. Comments stated that any State modifications to these

[27] A summary of the focus group testing done by America's Health Insurance Plans is available at: *http://www.naic.org/documents/committees_b_consumer_information_101012_ahip_focus_group_summary.pdf,* a summary of the focus group testing done by Consumers Union on the SBC template and the uniform glossary is available at: *http://www.commonwealthfund.org/Publications/Issue-Briefs/2011/Feb/Making-Health-Insurance-Cost-Sharing-Clear.aspx.*

documents would defeat the purpose of having an SBC template and uniform glossary, and one comment requested that any State law modifications to these documents be preempted, and that any additional content required by State law be limited to an addendum to the SBC. If States require health insurance issuers to provide information not contained in the SBC or uniform glossary, then they may require issuers to provide that information only if it is provided in a document that is separate from the SBC. This separate document can, however, be provided at the same time as the SBC.

E. Failure To Provide

PHS Act section 2715(f), incorporated into ERISA section 715 and Code section 9815, provides that a group health plan (including its administrator), and a health insurance issuer offering group or individual health insurance coverage, that ''willfully fails to provide the information required under this section shall be subject to a fine of not more than $1,000 for each such failure.'' In addition, under PHS Act section 2715(f), a separate fine may be imposed for each individual or entity for whom there is a failure to provide an SBC. Due to the different enforcement jurisdictions of the Departments, as well as their different underlying enforcement structures, the mechanisms for imposing the new penalty vary slightly, as discussed below.

1. Department of HHS

Enforcement of Part A of Title XXVII of the PHS Act, including section 2715, is generally governed by PHS Act section 2723 and corresponding regulations at 45 CFR 150.101 *et seq.* Under those provisions, a State has the discretion to enforce the provisions against health insurance issuers in the first instance, and the Secretary of HHS only enforces a provision after the Secretary determines that a State has failed to substantially enforce the provision. If a State enforces a provision such as PHS Act section 2715, it uses its own enforcement mechanisms. If the Secretary enforces, the statute provides for penalties of up to $100 per day for each affected individual.

PHS Act section 2715(f) provides that an entity that willfully fails to provide the information required under PHS Act section 2715 shall be subject to a fine of not more than $1,000 for each such failure. Such failure constitutes a separate offense with respect to each enrollee. This penalty can only be imposed by the Secretary.

Paragraph (e) of the final regulations clarifies that States have primary enforcement authority over health insurance issuers for any violations, whether willful or not, using their own remedies and that PHS Act section 2715 does not limit the Secretary's authority to impose penalties for willful violations regardless of State enforcement. However, the Secretary intends to use enforcement discretion if the Secretary determines that the State is adequately addressing willful violations.

The Secretary of HHS has direct enforcement authority for violations by non-Federal governmental plans, and will use the appropriate penalty for violations of section 2715, depending on whether the violation is willful. Paragraph (e) of the HHS final regulations cross references the enforcement regulations at 45 CFR 150.101 *et seq.,* and states that they relate to any failure, regardless of intent, by a health insurance issuer or non-Federal governmental plan, to comply with any requirement of PHS Act section 2715.

2. Departments of Labor and the Treasury

The Department of Labor enforces the requirements of part 7 of ERISA with respect to ERISA-covered group health plans (generally, plans other than church plans or plans maintained by a governmental entity) and the Department of the Treasury enforces the requirements of chapter 100 of the Code with respect to group health plans maintained by an entity that is not a governmental entity. On April 21, 1999, pursuant to section 104 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, the Secretaries entered into a memorandum of understanding [28] that, among other things, established a mechanism for coordinating enforcement and avoiding duplication of effort for shared jurisdiction. The memorandum of understanding applies, as appropriate, to health legislation enacted after April 21, 1999 over which at least two of the Departments share jurisdiction, including PHS Act section 2715 as incorporated into ERISA and the Code. Therefore, in enforcing PHS Act section 2715, the Departments of Labor and the Treasury will coordinate to avoid duplication in the case of group health plans that are not church plans and that are not maintained by a governmental entity.

[28] *See* 64 FR 70164 (December 15, 1999).

a. Department of Labor

The Department of Labor will issue separate regulations in the future describing the procedures for assessment of the civil fine provided under PHS Act section 2715(f) as incorporated by section 715 of ERISA. In accordance with ERISA section 502(b)(3), 29 U.S.C. 1132(b)(3), the Secretary of Labor is not authorized to assess this fine against a health insurance issuer.

b. Department of the Treasury

If a group health plan (other than a plan maintained by a governmental entity) fails to comply with the requirements of chapter 100 of the Code, an excise tax is imposed under section 4980D of the Code. The excise tax is generally $100 per day per individual for each day that the plan fails to comply with chapter 100 with respect to that individual. Numerous rules under section 4980D reduce the amount of the excise tax for failures due to reasonable cause and not to willful neglect. Special rules apply for church plans. Taxpayers subject to the excise tax under section 4980D are required to report the failures under chapter 100 and the amount of the excise tax on IRS Form 8928. See 26 CFR 54.4980D–1, 54.6011–2, and 54.6151–1.

Section 2715(f) of the PHS Act subjects a plan sponsor or designated administrator to a fine of not more than $1,000 for each failure to provide an SBC. Unless and until future guidance provides otherwise, group health plans subject to chapter 100 of the Code should continue to report the excise tax of section 4980D on IRS Form 8928 with respect to failures to comply with PHS Act section 2715. The Secretaries of Labor and the Treasury will coordinate to determine appropriate cases in which the fine of PHS Act section 2715(f) should be imposed on group health plans that are in the jurisdiction of both Departments.

F. Applicability

PHS Act section 2715 provides that the requirement for group health plans and health insurance issuers to provide an SBC applies not later than 24 months after the date of enactment of the Affordable Care Act (which is March 23, 2012). PHS Act section 2715 also provides that group health plans and health insurance issuers shall provide the SBC pursuant to standards developed by the Departments. The proposed regulations proposed an applicability date beginning March 23, 2012. At the same time, the Departments invited comments generally, as well as

on a range of discrete issues, including the timing of the application of the SBC requirement. On November 17, 2011, the Departments issued guidance [29] providing that, until final regulations are issued and applicable, plans and issuers are not required to comply with PHS Act section 2715.

The Departments received numerous comments on the applicability date of the regulations. Several comments stated plans and issuers would need time to make changes to their systems and workflow processes and could not come into compliance by March 23, 2012 without incurring significant cost and administrative challenges. Some comments recommend delaying applicability for 12 months, noting that PHS Act section 2715 contemplates that plans and issuers would have 12 months from the date the Secretary develops standards to begin providing the SBC, while others recommended delaying applicability for 18 to 24 months to allow sufficient time for group health plans to revise and coordinate service vendor agreements. Other comments stated the requirements should apply beginning with a plan's open enrollment period to avoid disruption during the plan year. Still others recommended phasing in the requirements by market segment, starting with the individual market initially and broadening over time to include the group market. These commenters emphasized the complexity in the group market of coordinating between the plan and the issuer (and perhaps across multiple issuers and/or service providers) and the greater need for standardized information in the individual market (where there are no other Federal requirements to provide summary information). Finally, some comments expressed support for the proposed March 23, 2012 applicability date, arguing individuals and employers should receive the consumer protections of PHS Act section 2715 no later than the date intended by statute.

Following review of the comments submitted on this issue and further consideration of the administrative and systems changes required to implement these requirements, the Departments have determined it would not be feasible to require plans and issuers to comply with the standards in the final regulations beginning March 23, 2012 and have delayed the applicability date for six months from that which was proposed to provide sufficient time for plans and issuers to come into compliance with these provisions. The Departments agree that implementing these provisions to coincide with employers' typical open enrollment processes in the group market will reduce confusion for current enrollees who typically make enrollment decisions during annual open enrollment periods and will avoid unnecessary cost to group health plan sponsors of producing these materials off-cycle. The final regulations provide that the requirements to provide an SBC, notice of modification, and uniform glossary under PHS Act section 2715 and these final regulations apply for disclosures with respect to participants and beneficiaries who enroll or re-enroll in group health coverage through an open enrollment period (including re-enrollees and late enrollees), beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For administrative simplicity, with respect to disclosures to participants and beneficiaries who enroll in group health plan coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), PHS Act section 2715 and these final regulations apply on the first day of the first plan year that begins on or after September 23, 2012. For disclosures to plans, and to individuals and dependents in the individual market, these requirements are applicable to health insurance issuers beginning September 23, 2012.

IV. Economic Impact and Paperwork Burden

A. Executive Orders 12866 and 13563—Department of Labor and Department of Health and Human Services

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As discussed below, the Departments have concluded that these final regulations would not have economic impacts of $100 million or more in any one year or otherwise meet the definition of an ''economically significant rule'' under Executive Order 12866. Nonetheless, consistent with Executive Orders 12866 and 13563, the Departments have provided an assessment of the potential benefits and the costs associated with this final regulation.

The Departments have updated the cost estimates from what was presented in the proposed regulations. Since publication of the proposed regulations, the Departments have continued to refine assumptions and estimates to take into account policy decisions made in the final regulations and to incorporate better data. The estimates presented in this rule are a result of those efforts and represent the Departments' best estimate. Discussion of the public comments and the updates to the Departments' estimates are included in the relevant sections of the impact analysis. While the Departments believe the estimates in these final regulations represent the Departments' best estimate, the Departments emphasize there is considerable uncertainty, as is common with regulations implementing new policies, and the discussion throughout the impact analysis reflects this.

1. Current Regulatory Framework

Health plan sponsors and issuers do not currently uniformly disclose information to consumers about benefits and coverage in a simple and consistent way. ERISA-covered group health plans are required to describe important plan information concerning eligibility, benefits, and participant rights and responsibilities in a summary plan description (SPD). But as these documents have increased in size and complexity—for example, due to the insertion of more legalistic language that is designed to mitigate the employer's risk of litigation—they have become more difficult for participants and beneficiaries to understand.[30] Indeed, a recent analysis of SPDs from 40 employer health plans from across the United States (varying based on geography, firm size, and industry sector) found that, on average, SPDs are generally written at a first year college reading level (with readability ranging

[29] See FAQs About Affordable Care Act Implementation Part VII and Mental Health Parity Implementation, available at *www.dol.gov/ebsa/faqs/faq-aca7.html* and *cciio.cms.gov/resources/factsheets/aca_implementation_faqs7.html.*

[30] ERISA Advisory Council. Report of the Working Group on health and Welfare Benefit Plans' Communication. November 2005. Available at: *http://www.dol.gov/ebsa/publications/AC_1105c_report.html.*

from a 9th grade reading level to nearly a college graduate reading level).[31] Moreover, the formats of existing SPDs are not standardized. For example, while these documents could be dozens of pages long, there is no requirement that they include an executive summary. Additionally, group health plans not covered by ERISA, such as plans sponsored by State and local governments, are not required to comply with such disclosure requirements.

In the individual market, health insurance issuers are subject to various, diverse State disclosure laws. For example, States like Massachusetts,[32] New York,[33] Rhode Island,[34] Utah [35] and Vermont [36] have established minimum standards for disclosure of health insurance information. However, even within such States, consumer disclosures vary widely with respect to their required content. Additionally, some State disclosure laws are limited to current enrollees, so that individuals shopping for coverage do not receive information about health insurance coverage options. Other State disclosure requirements only extend to managed care organizations, and not to other segments of the market.[37]

2. Need for Regulatory Action

Congress added new PHS Act section 2715 through the Affordable Care Act to ensure that plans and issuers provide benefits and coverage information in a more uniform format that helps consumers to better understand their coverage and better compare coverage options. These final regulations are necessary to provide standards for a summary of benefits and coverage (SBC) and a uniform glossary of terms used in health coverage. This approach is consistent with Executive Order 13563, which directs agencies to ''identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include * * * disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.''

The current patchwork of consumer disclosure requirements makes the process of shopping for coverage an inefficient, difficult, and time-consuming task. Consumers incur significant search costs while trying to locate reliable cost, coverage and benefit data.[38] Such search costs arise, in part, due to a lack of uniform information across the various coverage options, particularly in the individual and small group markets, but also in large employer plans. Although not directly comparable, in Medigap, a market with standardized benefits, the average per-beneficiary search cost was estimated at $72—far higher than in other insurance markets, such as auto insurance.[39]

In addition to individual consumers, employers, especially small business employers, also face a daunting search process when they shop for health coverage. A 2011 study of the commercial health insurance market found that many employers, especially small businesses, lack the necessary knowledge, sophistication, and information to efficiently choose appropriate health plans to purchase on behalf of their employees. This lack of knowledge, sophistication, and information requires health insurers to spend more money on marketing to target small business employers. Health insurers then pass the extra marketing costs on to employers in the form of higher premiums. The study determined that in 1997, this inefficiency cost consumers in the fully insured market $34.4 billion. Employers' lack of knowledge, sophistication, and information also produces incentives for health insurers to charge different prices for identical products to different customers, depending upon the customer's negotiating skills. This price variability causes 64 percent more turnover in plan membership, than would otherwise occur. High levels of turnover discourage health insurers from promoting healthy lifestyles and investing in the future health of their policyholders.[40]

Given this difficulty in obtaining comparable information across and within health insurance markets, consumers may not always make informed purchase decisions that best meet the health and financial needs of themselves, their families, or their employees. Similarly, workers may overestimate or underestimate the value of employer-sponsored health benefits, and thus their total compensation; and health insurance issuers and employers may face less pressure to compete on price, benefits, and quality, leading to inefficiency in the health insurance and labor markets.

Furthermore, research suggests that many consumers do not understand how health coverage works. Oftentimes, contracts and benefit descriptions are written in technical language that requires a sophisticated level of literacy that many people do not have.[41] One study found that consumers have particular difficulty understanding cost sharing and tend to underestimate their coverage for mental health, substance abuse and prescription drug benefits, while overestimating their coverage for long-term care.[42]

3. Summary of Impacts

Table 1 below depicts an accounting statement summarizing the Departments' assessment of potential benefits, costs, and transfers associated with this regulatory action. The Departments have limited the period covered by the RIA to 2012–2013. Estimates are not provided for subsequent years, because there will be significant changes in the marketplace in 2014, including those related to the offering of new individual and small group plans through the Affordable

[31] ''How Readable Are Summary Plan Descriptions For Health Care Plans?'' Employee Benefit Research Institute (EBRI) Notes. October 2006, Vol. 27, No. 10. Available at: *http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-20061.pdf*.

[32] M.G.L.A. 176Q § 5 (2010).

[33] NY Ins. Law § 3217-a (2010).

[34] Office of the Health Insurance Commissioner Regulation 5: Standards for Readability of Health Insurance Forms, State of Rhode Island and Providence Plantations, August 21, 2010.

[35] Utah Code § 31A–22–613.5 (2010).

[36] Division of Health Care Administration, Rule 10.000: Quality Assurance Standards and Consumer Protections for Managed care Plans, State of Vermont, September 20, 1997.

[37] For example, New York requires Health Maintenance Organizations to provide to prospective members, as well as policyholders, information on cost-sharing, including out-of-network costs, limitations and exclusions on benefits, prior authorization requirements, and other disclosures such as appeal rights. NY Ins. Law section 3217-a (2010). Utah requires each insurer issuing a health benefit plan to provide all enrollees, prior to enrollment in the health benefit plan, written disclosure of restrictions or limitations on prescription drugs and biologics, coverage limits under the plan, and any limitation or exclusion of coverage. Utah Code section 31A–22–613.5 (2010). Rhode Island requires all health insurance forms to meet minimum readability standards. Office of the Health Insurance Commissioner Regulation 5: Standards for Readability of Health Insurance Forms, State of Rhode Island and Providence Plantations, August 21, 2010.

[38] M. Susan Marquis *et al.,* ''Consumer Decision Making in the Individual Health Insurance Market,'' 25 Health Affairs w.226, w.231–w.232 (May 2006). Available at: *http://content.healthaffairs.org/content/25/3/w226.full.pdf+html*.

[39] Nicole Maestas *et al.,* ''Price Variation in Markets with Homogenous Goods: The Case of Medigap,'' National Bureau of Economic Research (January 2009).

[40] Cebul, Randall D., James B. Rebitzer, Lowell J. Taylor, and Mark E. Votruba. 2011. ''Unhealthy Insurance Markets: Search Frictions and the Cost and Quality of Health Insurance.'' *American Economic Review,* 101 (August 2011): 1842–1871.

[41] For example, as discussed earlier, the average Summary Plan Description is written at a first-year college reading level. See Employee Benefit Research Institute, October 2006.

[42] D.W. Garnick, A.M. Hendricks, K.E. Thorpe, J.P. Newhouse, K. Donelan and R.J. Blendon. ''How well do Americans understand their health coverage?'' Health Affairs, 12(3). 1993:204–12. Available at: *http://content.healthaffairs.org/content/12/3/204.full.pdf*.

Insurance Exchanges, and new market reforms outside of the new Exchanges, and the wide-ranging scope of these changes makes it difficult to project results for 2014 and beyond.

The direct benefits of these final regulations come from improved information, which will enable consumers, both individuals and employers, to better understand the coverage they have and allow consumers choosing coverage to more easily compare coverage options. As a result, consumers may make better coverage decisions, which more closely match their preferences with respect to benefit design, level of financial protection, and cost. The Departments believe that such improvements will result in a more efficient, competitive market. These final regulations would also benefit consumers by reducing the time they spend searching for and compiling health plan and coverage information.

Under the final regulations, group health plans and health insurance issuers would incur costs to compile and provide the summary of benefits and coverage disclosures and a uniform glossary of health coverage and medical terms. The Departments estimate that the annualized cost may be around $73 million, although there is considerable uncertainty arising from general data limitations and the degree to which economies of scale exist for disclosing this information. The Departments' annualized cost estimates for the final regulation are higher than the estimated annualized cost of $50 million, which was set forth in the proposed regulations, because, among other things, the Departments now have narrowed the cost estimate period from 2011–2013 to 2012–2013. This change reflects the fact that the Departments issued guidance on November 17, 2011 providing that, until final regulations are issued and applicable, plans and issuers are not required to comply with PHS Act section 2715, and the fact that these final regulations are being published in 2012.[43] Nonetheless, these final regulations lower overall administrative costs compared to the proposed regulations because of several policy changes, notably the omission of premium or cost of coverage information from SBCs, the provision of only two coverage examples, and provisions allowing greater flexibility for electronic disclosures prior to enrollment in coverage.

The Departments anticipate that the provisions of these final regulations will help consumers, including employers, make better health coverage choices and more easily understand their coverage. In accordance with Executive Orders 12866 and 13563, the Departments believe that the benefits of this regulatory action justify the costs.

TABLE 1—ACCOUNTING TABLE

Benefits:
Qualitative:
Improved information will enable consumers, including applicants, enrollees, and policyholders, to more easily and efficiently understand and compare coverage, and as a result, make better choices.

Costs	Estimate	Year dollar	Discount rate percent	Period covered
Annualized Monetized ($ millions/year)	$73	2012	7	2012–2013
	73	2012	3	2012–2013

4. Benefits

In developing these final regulations, the Departments carefully considered their potential effects, including costs, benefits, and transfers. Because of data limitations, the Departments did not attempt to quantify expected benefits of these final regulations. Nonetheless, the Departments were able to identify several benefits, which are discussed below.

These final regulations could generate significant economic and social welfare benefits to consumers. Under these final regulations, health insurance issuers and group health plans would provide clear and consistent information to consumers. Uniform disclosure is anticipated to benefit individuals shopping for, or enrolled in, group and individual health insurance coverage and group health plans. The direct benefits of these final regulations come from improved information, which will enable consumers to better understand the coverage they have and allow consumers choosing coverage to more easily compare options. As a result, consumers will make better coverage decisions, which more closely match their preferences with respect to benefit design, level of financial protection, and cost. The Departments believe that such improvements will result in a more efficient, competitive market.

These final regulations would also benefit consumers by reducing the time they spend searching for and compiling health plan and coverage information. As stated above, consumers in the individual market, as well as consumers in some large employer-sponsored plans, have a number of coverage options and must make a choice using disclosures and tools that vary widely in content and format. A growing body of decision-making research suggests that the abundance and complexity of information can overwhelm consumers and create a significant non-price barrier to coverage.[44] For example, a RAND study of California's individual market found that reducing barriers to information about health insurance products would lead to increases in purchase rates comparable to modest price subsidies.[45] By ensuring consumers have access to readily available, concise, and understandable information about their coverage options, these final regulations could reduce consumers' cost of obtaining information and may increase health insurance purchase rates and satisfaction with the plan purchased.

Furthermore, greater transparency in pricing and benefits information will allow consumers to make more informed purchasing decisions, resulting in cost-savings for some value-conscious consumers who today pay higher premiums because of imperfect

[43] See FAQs About Affordable Care Act Implementation Part VII and Mental Health Parity Implementation, available at *www.dol.gov/ebsa/faqs/faq-aca7.html* and *cciio.cms.gov/resources/factsheets/aca_implementation_faqs7.html.*

[44] Judith H. Hibbard and Ellen Peters, ''Supporting Informed Consumer Health Care Decisions: Data Presentation Approaches that Facilitate the Use of Information in Choice,'' 24 *Annu. Rev. Public Health* 413, 416 (2003).

[45] M. Susan Marquis et al., ''Consumer Decision Making in the Individual Health Insurance Market,'' 25 Health Affairs w.226, w.231-w.232 (May 2006). Available at: *http://content.healthaffairs.org/content/25/3/w226.full.pdf+html.*

information about benefits.[46] In particular, the use of coverage examples called for by these final regulations would better enable consumers to understand how key coverage provisions operate in the context of recognizable health care situations and more meaningfully compare the level of financial protection offered by a plan or coverage, resulting in potential cost-savings.[47] [48] The Departments therefore expect that uniform disclosures under these final regulations will enable consumers to derive more value from their health coverage and enhance the ability of plan sponsors, particularly small businesses, to purchase products that are appropriate to both their needs and the health and financial needs of their employees.

Finally, these final regulations are expected to facilitate consumers' ability to understand their coverage. As stated above, research suggests that consumers do not understand how coverage works or the terminology used in health insurance policies. Consequently, consumers may face unexpected medical expenses if they become seriously ill. They may also become confused by a coverage or payment decision made by their plan or issuer, leading to inefficiency in the operation of employee benefit plans and health insurance coverage. By making it easier for consumers to understand the key features of their coverage, these final regulations would enhance consumers' ability to use their coverage. Additionally, the uniform format will make it easier for consumers who change jobs or insurance coverage to see how their new plan or coverage benefits are similar to and different from their previous coverage.

5. Costs

Section 2715 of the PHS Act and these final regulations direct group health plans and health insurance issuers to compile and provide an SBC and a uniform glossary of health coverage and medical terms. The Departments have attempted to quantify one-time start-up costs as well as maintenance costs associated with these requirements. However, there is considerable uncertainty arising from general data limitations and the degree to which economies of scale can be realized to reduce costs for issuers and third party administrators (TPAs).

In the proposed regulations, the Departments estimated total administrative costs to be $25 million in 2011, $73 million in 2012, and $58 million in 2013. The Departments now estimate that issuers and TPAs will incur approximately $90 million in one-time costs and maintenance costs in 2012, and $55 in maintenance costs in 2013. These costs and the methodology used to estimate them are discussed below, and presented in Tables 2–6 below.

General Assumptions

In order to assess the potential administrative costs relating to these final regulations, the Departments consulted with several industry experts, including individuals at large health insurance issuers and representing a TPA association, individuals who formerly worked at health insurance companies, and insurance market researchers, to gain insight into the tasks and level of resources required. The discussions focused on estimating the costs that would be start-up versus maintenance, and determining which functions or departments of an insurance company or TPA would be involved in implementing the provision. In addition, we reviewed the analyses of other Affordable Care Act regulations that impose new requirements on health insurance issuers and TPAs, to determine appropriate work levels and categories for this regulation. Particularly, we analyzed the Medical Loss Ratio (MLR) interim final rule (75 FR 74918). Based on these discussions, the Departments estimate that there will be two categories of principal costs associated with the standards in these final regulations: one-time start-up costs and ongoing maintenance costs. The one-time start-up costs include costs to develop teams to review the new standards and costs to implement workflow and process changes, particularly the development of information technology (IT) systems interfaces that would generate SBC disclosures through data housed in a number of different systems. The maintenance costs include costs to maintain and update IT systems in compliance with the final standards; to produce, review, distribute, and update the SBC disclosures; to produce and distribute notices of modifications; and to provide the glossary in paper form upon request.

With respect to the individual market, issuers are responsible for generating, reviewing, updating, and distributing SBCs. With respect to employer-sponsored coverage, the Departments assume that fully-insured plans will rely on health insurance issuers, and self-insured plans will rely on TPAs, to perform these functions. Some commenters stated that some employers internally prepare plan materials and do not rely on TPAs. While the Departments acknowledge that some plans may internally prepare the SBC disclosures, the Departments do not have sufficient data to develop separate estimates for such plans. Therefore, the Departments continue to make this simplifying assumption because most plans appear to rely on issuers and TPAs for the purpose of administrative duties such as enrollment and claims processing.[49] Thus, the Departments have used health insurance issuers and TPAs as the units of analysis for the purposes of estimating administrative costs in this regulatory impact analysis.

As discussed in the MLR interim final rule, the Departments estimate there are about 440 firms offering comprehensive coverage in the individual, small, or large group markets, and 75 million covered lives therein.[50] The number of covered lives includes individuals in the individual market as well as those in insured group health plans.

With respect to the self-insured market, the Departments estimate there are 77 million individuals in self-insured ERISA-covered plans and approximately 14 million individuals in self-insured non-Federal governmental plans.[51] The Departments note that, according to 2007 Economic Census data, there are 2,243 TPAs providing administrative services for health and/or welfare funds. However, there is some uncertainty as to whether all of those TPAs serve self-insured plans; many

[46] A study of California's individual market found that 25 percent of consumers chose products with premiums that were more than 30 percent higher than the median price for an actuarially equivalent product for a similar person. Melinda Beeuwkes Buntin *et al.,* ''Trends and Variability In Individual Insurance Products,'' Health Affairs w3.449, w3.457 (2003), available at *http://content.healthaffairs.org/content/early/2003/09/24/hlthaff.w3.449.citation.*

[47] Shoshanna Sofaer *et al.,* ''Helping Medicare Beneficiaries Choose Health Insurance: The Illness Episode Approach, 30 The Gerontologist 308–315 (1990).

[48] Michael Schoenbaum *et al.,* ''Health Plan Choice and Information about Out-of-Pocket Costs: An Experimental Analysis,'' 38 *Inquiry* 35–48 (Spring 2001).

[49] See, for example, the Department of Labor's March 2011 report to Congress on self-insured health plans, available at *http://www.dol.gov/ebsa/pdf/ACAReportToCongress032811.pdf.*

[50] The NAIC data actually indicate 442 issuers and 74,830,101 covered lives. But the Departments have limited these values to only two significant figures given general data uncertainty. For example, the NAIC data do not include issuers regulated by California's Department of Managed Health Care (DMHC) as well as small, single-State issuers that are not required by State regulators to submit NAIC annual financial statements.

[51] U.S. Department of Labor, EBSA calculations using the March 2009 Current Population Survey Annual Social and Economic Supplement and the 2009 Medical Expenditure Panel Survey; see also interim final rule for internal claims and appeals and external review processes (75 FR 43330, 43345).

issuers, for example, have subsidiary lines of business through administrative services only (ASO) contracts through which they perform third-party administrative functions for self-insured plans.[52] Based on conversations with a national TPA association, the Departments assume that about one-third of the total number of TPAs, or about 748 TPAs, are relevant for purposes of this analysis. However, given the considerable overlap between issuers and TPAs, the Departments recognize there may be fewer affected TPAs, so these estimates should be considered an upper bound of burden estimates.

Because the SBC disclosures are closely related to disclosures that issuers and TPAs provide today as a part of their normal operations (for example, covered benefits and cost sharing), the Departments estimate that the incremental costs of compiling and providing such readily available information in the final, standardized format is estimated to be modest.[53] The regulated community has taken exception to this assumption, and it has stated in written comments, and discussions with the Departments, that information will need to be pulled from multiple sources. However, an opposite conclusion appears to have been reached by a November 2011 survey related to the regulated community's preparedness for SBCs. Particularly, the survey noted that existing communications practices and technology would allow affected entities to be in compliance even by the statutory compliance date of March 23, 2012.[54] The results of this survey are also consistent with comments indicating that timely compliance is feasible.

The per-issuer or per-TPA cost will largely be determined by size (based on annual premium revenues) and current practices—most importantly, whether the issuer or TPA maintains a robust information technology infrastructure, including a plan benefits design database. Moreover, with regard to issuers, administrative costs may be related to the number of markets in which a company operates (that is, individual, small group, or large group market); the number of policies it offers; and the number of States and licensed entities through which it offers coverage.

To account for variations among issuers, the Departments classify them by size as small, medium, and large issuers based on 2009 premium revenue for individual, small group, and large group comprehensive coverage.[55] Consistent with the assumptions that were used in the MLR interim final rule, small issuers are defined as those earning up to $50 million in annual premium revenue; medium issuers as those earning between $50 million and $1 billion in annual premium revenue; and large issuers as those earning more than $1 billion in annual premium revenue. Based on these assumptions, the Departments estimate there are 140 small, 230 medium, and 70 large issuers.

To account for variations among TPAs, the Departments applied the proportions of small, medium, and large issuers to the estimated 750 TPAs. The Departments acknowledge that issuers and TPAs are different and may not have the same size variation. Nonetheless, given general data limitations, the Departments have adopted this methodology, and, on its basis, estimate that there are 240 small, 390 medium, and 120 large TPAs. Table 2 below summarizes the estimated number of issuers and TPAs.

TABLE 2—ISSUER AND TPA SIZE CLASSIFICATION

	Small	Medium	Large
Issuers	140	230	70
TPAs	240	390	120

Staffing Assumptions

Table 5 below summarizes the Departments' staffing assumptions, including the estimated number of hours for each task for a small, medium, or large issuer/TPA as well as the percentage of time that different professionals devote to each task. The following assumptions are based on the best information available to the Departments at this time. Particularly, the following series of assumptions are based on conversations with industry experts, the Departments' understanding of the regulated community, and previous analysis in the MLR interim final rule.

IT Systems and Workflow Process Changes

In the proposed regulations, the Departments estimated that it would take a large issuer/TPA about 960 hours to implement IT systems and workflow process changes, based on discussions with a large issuer. These final regulations incorporate policy changes designed to reduce administrative burden. The Departments estimate that the administrative burden to implement IT systems and workflow process changes would be reduced, at least, by about 10 percent.[56] Accordingly, the Departments are reducing the 960 hours time burden downward, by 10 percent, to 864 hours. The Departments continue to assume that IT systems and workflow process changes would be implemented only by IT professionals. Furthermore, the Departments continue to assume that a medium issuer/TPA would need about 75 percent of a large issuer's/TPA's time, and a small issuer would need about 50 percent of a large issuer's/TPA's time, to implement IT systems and workflow process changes. These estimates are based on the assumption that medium and smaller issuers and TPA's have fewer products/clients that need to come into compliance.

In the proposed regulations, the Departments estimated that it would take a large issuer/TPA about 160 hours to develop teams to analyze the new standards in relation to their current workflow processes. These final regulations incorporate policy changes designed to reduce administrative

[52] See, for example, the Department of Labor's March 2011 report to Congress on self-insured health plans, available at *http://www.dol.gov/ebsa/pdf/ACAReportToCongress032811.pdf*.

[53] For example, issuers in the individual and small group markets already report some of the SBC information to HHS for display in the plan finder on the HealthCare.gov Web site. Issuers have been reporting data to HHS since May 2010 and have refreshed that data on a quarterly basis. These reporting entities have demonstrated that they have the capacity to report information on plan benefit design. See *http://finder.healthcare.gov/*. Further, ERISA-covered plans already report some of the SBC information in summary plan descriptions (SPDs).

[54] See December 13, 2011 news release for HighRoads Pulse Study, available at *http://newsroom.highroads.com/hr-compliance-connection/highroads-study-shows-employers-will-not-eliminate-benefits-coverage-due-to-health-care-reform*. Among other things, the study's author noted, ''SBCs have not caused a great concern among organizations. * * * This is partly a reflection of current communications practices—many employers are already providing a level of communication close to that required by the SBC regulations—and partly a reflection of HR departments embracing technology. By using automation to leverage existing data, they are better able to respond to required changes. That will enable timely compliance once the new deadline is determined.''

[55] The premium revenue data come from the 2009 NAIC financial statements, also known as ''Blanks,'' where insurers report information about their various lines of business.

[56] A 10 percent is a conservative estimate of the reduction in administrative burden. A national association of insurance companies informed the Departments that premium information alone may account for 10 percent of compliance costs. Given that the omission of premium information from SBCs is one of several policy changes in these final regulations, we conclude that there could be, at a minimum, a 10 percent reduction in administrative burden.

burden. The Departments estimate that the administrative burden to develop teams would be reduced by about 10 percent. Accordingly, the Departments are revising the 160 hours time burden downward, by 10 percent, to 144 hours. The Departments continue to assume teams would be comprised of IT professionals (45 percent), benefits/sales professionals (50 percent), and attorneys (5 percent), based on technical analysis presented in the MLR interim final rule. The Departments also continue to scale down the burden for medium and small issuers/TPAs by assuming the same relative proportion as above (that is, 75 percent and 50 percent, respectively).

In the proposed regulations, the Departments assumed that, in 2013, each issuer/TPA would incur a separate maintenance cost to maintain IT systems and address changes in regulatory provisions. The Departments assumed the maintenance cost would equal 15% of the total one-time burden noted above (for example, the Departments assumed it will take a large issuer 15% of 1008 hours, or 151 hours). The Departments further assumed that the teams to implement the maintenance tasks would be comprised of IT professionals (55%), benefits/sales professionals (40%), and attorneys (5%). The Departments maintain these assumptions in these final regulations.

The Departments continue to assume that the one-time and maintenance costs to implement IT systems changes and address regulatory requirements would be split between the costs to produce SBCs and the costs to produce the coverage examples (CEs).

Production and Review of SBCs and CEs

In the proposed regulations, the Departments estimated that each issuer/TPA would need 3 hours to produce, and 1 hour to review, SBCs (not including CEs) for all products. Some commenters thought this time burden was an underestimate. However, these commenters did not provide data that could allow the Departments to adjust their estimates. Accordingly, in these final regulations, the Departments are retaining their original estimates. The Departments also continue to assume that the 3 hours needed to produce SBCs would be equally divided between IT professionals and benefits/sales professionals. The Departments also continue to assume that the 1 hour needed to review SBCs would be equally divided between financial managers for benefits/sales professionals and attorneys, based on previous analyses related to the MLR regulation.

In the proposed regulations, the Departments estimated it would take each issuer/TPA about 90 hours to produce, and about 30 hours to review, CEs related to three benefits scenarios for all applicable products, based on the MLR regulation. However, under the guidance document published elsewhere in this issue of the **Federal Register**, issuers and TPAs will need to produce a CE related to only two benefits scenarios in 2012 and 2013. Accordingly, in these final regulations, the Departments are adjusting the time burden downward by one-third. The Departments now estimate that each issuer/TPA would need about 60 hours to produce, and about 20 hours to review, two CEs for all products. The Departments continue to assume that the 60 hours to produce the two CEs would be equally divided between IT professionals and benefits/sales professionals. The Departments also continue to assume that the 20 hours to review the two CEs would be equally divided between financial managers and attorneys.

For each individual who receives the SBC in paper form, the Departments estimate that printing and distributing the paper disclosures would take clerical staff about 1 minute (0.02 hours) in the group markets and about 2 minutes (0.03 hours) in the individual market. The Departments assume that the individual market has lower economies of scale and, thus, increased distribution costs.

Labor Cost Assumptions

Table 7 below presents the Departments' hourly labor cost assumptions (stated in 2012 dollars) for each staff category based on Bureau of Labor Statistics (BLS) data. The Departments use mean hourly wage estimates from the BLS May 2010 National Occupational Employment and Wage Estimates (accessed at *http://www.bls.gov/oes/current/oes_nat.htm#00–0000*) for computer systems analysts (Occupation Code 15–1121), insurance underwriters (Occupation Code 13–2053), financial managers (Occupation Code 23–1011), executive secretaries and administrative assistants (Occupation Code 43–6011), and attorneys (Occupation Code 23–1011) as the basis for estimating labor costs for 2012 through 2013 and adjust the hourly wage rate to include a 33 percent fringe benefit estimate for private sector employees.[57]

[57] See the Technical Appendix to the MLR interim final rule, available at *http://cciio.cms.gov*.

Distribution Assumptions

The Departments make the following assumptions regarding the distribution of the SBC disclosures (including CEs).[58] These assumptions are based on the best information available to the Departments at this time. Particularly, the following series of assumptions are based on conversations with industry experts, the Departments' understanding of the regulated community, and previous analysis in the MLR interim final rule. The distribution assumptions are as follows:

- The SBCs would be limited to one per household for family members located at the same residence. According to one large issuer, there are 2.2 covered lives per family.
- The number of individuals who would receive an SBC before enrolling in the plan or coverage equals 20 percent of the number of enrollees at any point during the course of a year.[59]
- In 2012 and 2013, respectively, about 2.5 percent and 5 percent of covered individuals who receive a paper SBC would receive a paper glossary from issuers and TPAs. The Departments assume that the burden and cost of providing paper glossaries would be proportional to the burden and cost of providing papers SBCs, excluding coverage examples. The Departments also assume that individuals who do not request a paper copy of the glossary will access it electronically using the Internet address provided in the SBC. These assumptions, presented here in these final regulations, have not changed from the proposed regulations.
- In 2013, about 2 percent of covered individuals would receive a notice of modifications.[60] Further, the burden

[58] Although CEs are an integral component of SBCs, the costs associated with CEs are different from the rest of the SBC, and, thus, are separately calculated within this analysis.

[59] Based on this assumption, the Departments make the following estimate. Prior to enrollment in a given year, 180,000 individuals would receive SBCs from small issuers or TPAs; 3,700,000 individuals would receive SBCs from medium issuers or TPAs; 11,000,000 individuals would receive SBCs from large issuers or TPAs.

[60] ERISA section 104(b) requires ERISA-covered plans to furnish participants and beneficiaries with a Summary of Material Modifications (SMM) no later than 210 days after the end of the plan year in which the material change was adopted or in the case of a material reduction in covered services or benefits, no later than 60 days after adoption of the modification or change. As part of its analysis for the Department of Labor's SPD/SMM regulations (29 CFR 2520.104b-3), the Department estimated that about 20 percent of health plans would need to distribute SMM in a given year due to plan amendments. However, almost all of these modifications occur between plan years—not during a plan year; therefore, the modifications

Continued

and cost of providing such notices would be proportional to the combined burden and cost of providing the SBCs, including CEs. In 2012, the first year of implementation, the number of notices of modifications would be negligible.

• In the proposed regulations, the Departments estimated that electronic distribution would account for 38 percent of all disclosures in the group market and 70 percent of all disclosures in the individual market. The estimate for the group market was based on the methodology used to analyze the cost burden for the Department of Labor's claims procedure regulation (OMB Control Number 1210–0053).[61]

• In these final regulations, the Departments are revising upward their estimate of electronic distribution in the group market to 50 percent for pre-enrollment disclosures. This upward revision is justified, because, for participants and beneficiaries who are eligible but not enrolled for coverage, these final regulations permit the SBC to be provided electronically if the format is readily accessible and a paper copy is provided free of charge upon request.

• The estimate for the group market remains the same for post-enrollment disclosures. The estimate for the individual market also remains the same, and is based on statistics set forth by the National Telecommunications and Information Administration, which indicate that 30 percent of Americans do not use the Internet.[62]

• SBC disclosures would be distributed with usual marketing and enrollment materials, thus, costs to mail the documents will be negligible. However, paper glossaries and notices of modifications would require mailing and supply costs as follows: $0.45 postage cost per mailing and $0.05 supply cost per mailing. The postage costs have increased by $0.01 from the $0.44, as set forth in the proposed regulations, to reflect new first-class postage rates effective January 22, 2012.

• Printing costs $0.03 per side of a page. The Departments estimate that it would cost $0.18 to print a complete SBC (which is six sides of a page based on the length of the NAIC sample completed SBC) and $0.12 to print the uniform glossary (which is four sides of a page, based on the length of the NAIC recommended uniform glossary). This cost burden is in addition to the time it would take clerical staff to print and distribute the SBC or glossary.

Cost Estimate

The Tables below present costs and burden hours for issuers and TPAs associated with the final disclosure requirements of PHS Act section 2715. Tables 3–4 contain cost estimates for 2012 and 2013, derived from the labor hours presented in Table 5 and the hourly rate estimates presented in Table 6, as well as estimates of non-labor costs. Labor hour estimates were developed for each one-time and maintenance task associated with analyzing requirements, developing IT systems, and producing SBCs (that include CEs).

TABLE 3—2012 HOUR BURDEN, EQUIVALENT COST, AND COST BURDEN—2012 DOLLARS

	Number of affected entities	Hour burden	Equivalent cost	Cost burden (non-labor)	Number of disclosures
SBC Requirements—Issuers	440	570,000	$21,000,000	$2,700,000	570,000
SBC Requirements—TPAs	750	760,000	30,000,000	3,600,000	60,000
Coverage Example Requirements—Issuers	440	193,000	10,500,000	1,400,000	193,000
Coverage Example Requirements—TPAs	750	330,000	17,900,000	1,800,000	330,000
Glossary Requests—Issuers	440	10,000	310,000	350,000	10,000
Glossary Requests—TPAs	750	12,000	380,000	460,000	12,000
Subtotal	.....	1,900,000	80,000,000	10,000,000	1,900,000
Total 2012 Costs	.....	.....	90,000,000	.....	.....

TABLE 4—2013 HOUR BURDEN, EQUIVALENT COST, AND COST BURDEN—2012 DOLLARS

	Number of affected entities	Hour burden	Equivalent cost	Cost burden (non-labor)	Number of disclosures
SBC Requirements—Issuers	440	430,000	$14,000,000	$2,700,000	41,000,000
SBC Requirements—TPAs	750	540,000	18,000,000	3,600,000	49,000,000
Coverage Example Requirements—Issuers	440	59,000	3,300,000	1,400,000	41,000,000
Coverage Example Requirements—TPAs	750	100,000	5,600,000	1,800,000	49,000,000
Notice of Material Modifications—Issuers	440	8,900	290,000	310,000	820,000
Notice of Material Modifications—TPAs	750	11,000	380,000	400,000	990,000
Glossary Requests—Issuers	440	20,000	630,000	710,000	1,100,000
Glossary Requests—TPAs	750	25,000	760,000	920,000	1,500,000
Subtotal	.....	1,200,000	43,000,000	12,000,000	94,000,000
Total 2013 Costs	.....	.....	55,000,000	.....	.....

would be required to be disclosed in a SBC that is distributed upon renewal of coverage. The Departments, thus, expect that only two percent of plans will need to issue a notice of modification in the middle of a plan year, because mid-year changes that would result in an update to the SBC are very rare, based on the Department of Labor's experience with ERISA plans. For purposes of simplification, the Departments extend this assumption to the individual market as well.

[61] See the ERISA e-disclosure rule at 29 CFR 2520.104b–1.

[62] U.S. Department of Commerce, National Telecommunications and Information Administration, Digital Nation (February 2010), available at *http://www.ntia.doc.gov/reports/2010/NTIA_internet_use_report_Feb2010.pdf.*

TABLE 5—ESTIMATED STAFFING HOURS FOR SMALL, MEDIUM, AND LARGE ISSUERS AND TPAS

Staffing hour assumptions	Percent of hours by task	Hours		
		Small issuer/TPA	Medium issuer/TPA	Large issuer/TPA
IT Development and Workflow Process Change:				
One-Time Develop Teams/Analyze Requirements (IT, underwriting/sales)	.....	72	108	144
IT Professionals Benefits/Sales	45	32	49	65
Professionals	50	36	54	72
Attorneys	5	4	5	7
Implementing Systems Changes (IT and workflow)	.....	432	648	864
IT Professionals	100	432	648	864
Maintenance:				
Updating to Address Changes in Requirements	.....	76	113	151
IT Professionals	55	42	62	83
Benefits/Sales Professionals	40	30	45	60
Attorneys	5	4	6	8
SBC Requirement (maintenance):				
Producing SBCs	.....	3	3	3
IT Professionals	50	1.5	1.5	1.5
Benefits/Sales Professionals	50	1.5	1.5	1.5
Internal Review of SBCs	.....	1	1	1
Financial Managers—Benefits/Sales Professionals	50	0.5	0.5	0.5
Attorneys	50	0.5	0.5	0.5
Producing and Distributing Paper Version of SBCs (Group Markets):				
Clerical Staff	100	0.02	0.02	0.02
Producing and Distributing Paper Version of SBCs (Individual Market):				
Clerical Staff	100	0.03	0.03	0.03
CE Requirement (maintenance):				
Producing CEs	.....	60	60	60
IT Professionals	50	30	30	30
Benefits/Sales Professionals	50	30	30	30
Internal Review of CEs	.....	20	20	20
Financial Managers—Benefits/Sales Professionals	50	10	10	10
Attorneys	50	10	10	10

TABLE 6—ESTIMATED LOADED HOURLY WAGES FOR STAFF CATEGORIES

Staff category	BLS Code	Loaded hourly wage (2012 dollars)
IT Professionals	Computer Systems Analysts (Occupation Code 15–1121)	$54.52
Financial Professionals—Benefits/Sales	Insurance Underwriters (Occupation Code 13–2053)	43.76
Financial Manager	Financial Managers (Occupation Code 11–3031)	78.50
Attorneys	Lawyers (Occupation Code 23–1011)	86.86
Clerical Staff	Executive Secretaries and Administrative Assistants (Occupation Code 43–6011)	30.78

The Departments received many comments stating that the preliminary cost analysis underestimated the one-time start-up costs as well as maintenance costs. For example, one commenter did a survey of its members (hereinafter ''regulated community survey''), wherein 36 member companies responded to questions regarding implementation and maintenance costs. The commenter extrapolated the survey results to all enrollees with coverage in the United States. Accordingly, the commenter projected that one-time implementation costs would be $188 million and maintenance costs would be $194 million per year. The commenter stated that a significant cost driver was the March 23, 2012 deadline to switch from current benefit descriptions to the new uniform SBCs. Accordingly, the commenter estimated that there could be a savings of 23 percent with an 18-month extension of the implementation timeline. The commenter also stated that additional factors affecting costs were, among other things, the proposed regulations' requirement to provide premium information; the number and complexity of coverage examples; the renewal process and timeframe to provide SBCs; the number of variations of SBCs to be delivered to each applicant or enrollee; paper delivery of SBCs to most group enrollees; and insufficient flexibility in the SBC template. As discussed elsewhere in this preamble, the Departments have taken steps to ease administrative burden related to most of these factors, and therefore believe that these estimates do not reflect the policies in the final rule.

Because the regulated community survey, as well other commenters' cost estimates, did not provide specific, detailed cost information, it is difficult for the Department to acquire more than a general understanding of the differences between the Departments' cost estimates and the commenters' cost estimates. Accordingly, the Departments continue to believe that there is considerable uncertainty arising from general data limitations and the degree to which economies of scale are achievable.

Even if the Departments were to utilize the regulated community survey, or other commenters' cost estimates, it

would be necessary for the Departments to discount those projected costs to account for policy changes in these final regulations. Particularly, these final regulations now omit premium or cost of coverage information from SBCs, provide for only two coverage examples, and allow greater flexibility for electronic disclosures prior to enrollment in coverage.

6. Regulatory Alternatives

Several provisions in these final regulations involved policy choices. A first policy choice involved the applicability date of these final regulations. The Departments received many comments indicating that the proposed March 23, 2012 applicability date was not practical for compliance. Accordingly, in these final regulations, the Departments are delaying the applicability of these provisions by six months to provide plans and issuers additional time to comply. As discussed elsewhere in this preamble, for disclosures to plans, and to individuals and dependents in the individual market, these final regulations apply to health insurance issuers beginning September 23, 2012. Similarly, for the group market, for disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), these final regulations apply beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures with respect to participants and beneficiaries who enroll other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), these final regulations apply on the first day of the first plan year that begins on or after September 23, 2012. This approach to implementation should lessen administrative burden on the regulated community.

A second policy choice involved whether to include premium or cost of coverage information in the SBC. The Departments received many comments that expressed concerns about the complexity of conveying such information in both the individual and group markets. As noted above in the preamble to these final regulations, the Departments believe that premium information can be more efficiently and effectively provided in documentation other than the SBC. Therefore, the Departments are not requiring plans and issuers to include premium or cost of coverage information in the SBC. Accordingly, this policy choice should also lessen administrative burden on the regulated community.

A third policy choice involved the number of coverage examples that plans issuers must provide in the SBC. The Departments received a number of comments about the potential cost and burden associated with providing coverage examples. To address these concerns, the guidance document published elsewhere in this issue of the **Federal Register** clarifies that for the first year of applicability, the SBC will include only two coverage examples—having a baby (normal delivery) and routine maintenance of well-controlled type 2 diabetes. Additional coverage examples will be added in later years. This policy choice should also lessen administrative burden on the regulated community.

A fourth policy choice involved determining how to minimize the burden of providing the SBC to individuals shopping for health insurance coverage. The Departments recognize it may be difficult for issuers to provide accurate information about the terms of coverage prior to underwriting. Accordingly, these final regulations provide that if individual health insurance issuers provide the information required by these final regulations and as specified in guidance published by the Secretary to the HHS Secretary's Web portal (HealthCare.gov), as established by 45 CFR 159.120, then they will be deemed to have satisfied the requirement to provide an SBC to individuals who request summary information about coverage prior to submitting an application. The Departments determined this approach promotes regulatory efficiency, minimizing the administrative burden on health insurance issuers without significantly lessening the protections under PHS Act section 2715.

A fifth policy choice related to electronic distribution of SBCs. The Departments received comments about the electronic transmission of SBCs to participants and beneficiaries in the group market. Specifically, some comments requested that plans and issuers be permitted to provide SBCs to participants and beneficiaries in a manner other than those set forth by the Department of Labor's electronic disclosure safe harbor requirements at 29 CFR 2520.104b-1(c). These final regulations retain the proposed requirements, but make a distinction between a participant or beneficiary who is already covered under the group health plan, and a participant or beneficiary who is eligible for coverage but not enrolled in a group health plan. This distinction should provide new flexibility in some circumstances, while also ensuring adequate consumer protections where necessary, and will help reduce the burden of providing the SBC to participants and beneficiaries prior to enrollment.

A sixth policy choice related to whether, in the case of covered individuals residing at the same address, one SBC would satisfy the disclosure requirement with respect to all such individuals, or whether multiple SBCs would be required to be provided. Under these final regulations, a single SBC may be provided to a family unless any individuals are known to reside at a different address. Separate SBCs will therefore need to be provided only in limited circumstances.

A seventh policy choice related to how many SBCs a participant or beneficiary would automatically receive from a group health plan at renewal. The final regulations would further limit burden by requiring a plan or issuer to provide, at renewal, a new SBC for only the benefit package in which a participant or beneficiary is enrolled. That is, if the plan offers multiple benefits packages, an SBC is not required for each benefit package offered under the group health plan, which the Departments believe would otherwise create an undue burden during open season. Participants and beneficiaries would be able to receive upon request an SBC for any benefits package for which they are eligible. The Departments believe this balanced approach addresses the needs of plans, issuers, and consumers, at renewal.

An eighth policy choice related to the interpretation of the PHS Act section 2715(d)(4), which requires notice of any material modification in any of the terms of the plan or coverage that is not reflected in the most recently provided SBC. The Departments note that a material modification, within the meaning of section 102 of ERISA and its implementing regulations at 29 CFR 2520.104b-3, is broadly defined to include any modification to the coverage offered under the plan or policy, that independently, or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important change in covered benefits or other terms of coverage under the plan or policy. The final regulations interpret this provision as requiring notice only for a material modification that would affect the content of the SBC; that is not reflected in the most recently provided SBC; and that occurs other than in connection with renewal or reissuance of coverage (that is, a mid-plan or

policy-year change). This approach is consistent with the language of PHS Act section 2715(d)(4) and is more narrowly focused on what we interpret to be the purpose of that provision.

B. Regulatory Flexibility Act—Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a final rule has a significant impact on a substantial number of small entities. The RFA generally defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. (States and individuals are not included in the definition of ''small entity.'') The Departments use as their measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

As discussed in the Web Portal interim final rule (75 FR 24481), HHS examined the health insurance industry in depth in the Regulatory Impact Analysis that HHS prepared for the final rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis, HHS determined that there were few if any insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for ''small'' business established by the SBA. Currently, the SBA size threshold is $7 million in annual receipts for both health insurers (North American Industry Classification System, or NAICS, Code 524114) and TPAs (NAICS Code 524292).

Additionally, as discussed in the Medical Loss Ratio interim final rule (75 FR 74918), HHS used a data set created from 2009 National Association of Insurance Commissioners (NAIC) Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and group markets. For purposes of that analysis, HHS used total Accident and Health (A&H) earned premiums as a proxy for annual receipts. HHS estimated that there were 28 small entities with less than $7 million in A&H earned premiums offering individual or group comprehensive major medical coverage; however, this estimate may overstate the actual number of small health insurance issuers offering such coverage, since it does not include receipts from these companies' other lines of business. These 28 small entities represent about 6.4 percent of the approximately 440 health insurers that are accounted for in this RIA. Based on this calculation, the Departments assume that there are an equal percentage of TPAs that are small entities. That is, 48 small entities represent about 6.4 percent of the approximately 750 TPAs that are accounted for in this RIA.

The Departments estimate that issuers and TPAs earning less than $50 million in annual premium revenue, including the 76 small entities mentioned above, would incur costs of approximately $33,000 and $10,000 per issuer/TPA in 2012 and 2013, respectively. Numbers of this magnitude do not approach the amounts necessary to be considered a ''significant economic impact'' on firms with revenues in the order of millions of dollars. Additionally, as discussed earlier, the Departments believe that these estimates overstate the number of small entities that will be affected by the requirements in this final regulation, as well as the relative impact of these requirements on these entities, because the Departments have based their analysis on the affected entities' total A&H earned premiums (rather than their total annual receipts). Accordingly, the Departments have determined and certify that these final regulations will not have a significant economic impact on a substantial number of small entities, and that a regulatory flexibility analysis is not required.

C. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury it has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations. It is hereby certified that the collections of information contained in this Treasury decision will not have a significant impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Section 54.9815–2715 of the final regulations requires both group health insurance issuers and group health plans to distribute an SBC and notice of any material modifications to the plan that affect the information required in the SBC. Under these final regulations, if a health insurance issuer satisfies the obligations to distribute an SBC and a notice of modifications, those obligations are satisfied not just for the issuer but also for the group health plan. For group health plans maintained by small entities, it is anticipated that the health insurance issuer will satisfy these obligations for both the plan and the issuer in almost all cases. For this reason, these information collection requirements will not impose a significant impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

D. Unfunded Mandates Reform Act—Department of Labor and Department of Health and Human Services

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 that agencies assess anticipated costs and benefits before issuing any final rule that includes a Federal mandate that could result in expenditure in any one year by State, local or Tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars updated annually for inflation. In 2011, that threshold level is approximately $136 million. These final regulations include no mandates on State, local, or Tribal governments. These final regulations include directions to produce standardized consumer disclosures that will affect private sector firms (for example, health insurance issuers offering coverage in the individual and group markets, and third-party administrators providing administrative services to group health plans), but we conclude that these costs will not exceed the $136 million threshold. Thus, we conclude that these final regulations do not impose an unfunded mandate on State, local or Tribal governments or the private sector. Regardless, consistent with policy embodied in UMRA, this notice of final rulemaking has been designed to be the least burdensome alternative for State, local and Tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

E. Paperwork Reduction Act

1. Department of Labor and Department of the Treasury

Section 2715 of the PHS Act directs the Departments, in consultation with the National Association of Insurance Commissioners (NAIC) and a working group comprised of stakeholders, to

''develop standards for use by a group health plan and a health insurance issuer in compiling and providing to applicants, enrollees, and policyholders and certificate holders a summary of benefits and coverage explanation that accurately describes the benefits and coverage under the applicable plan or coverage.'' For disclosures to plans, and to individuals and dependents in the individual market, these final regulations apply to health insurance issuers beginning September 23, 2012. Similarly, for the group market, for disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), these final regulations apply beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures with respect to participants and beneficiaries who enroll other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), these final regulations apply on the first day of the first plan year that begins on or after September 23, 2012.

To implement this provision, collection of information requirements relate to the provision of the following:

- Summary of benefits and coverage.
- Coverage examples (as components of each SBC).
- A uniform glossary of health coverage and medical terms (uniform glossary).
- Notice of modifications.

A copy of the ICR may be obtained by contacting the PRA addressee: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers. Email: *ebsa.opr@dol.gov.* ICRs submitted to OMB also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

The Departments estimate 858 respondents each year from 2012–2013. This estimate reflects approximately 220 issuers offering comprehensive major medical coverage in the small and large group markets, and approximately 638 third-party administrators (TPAs).[63]

To account for variation in firm size, the Departments estimate a weighted burden on the basis of issuer's 2009 total earned premiums for comprehensive major medical coverage.[64] The Departments define small issuers as those with total earned premiums less than $50 million; medium issuers as those with total earned premiums between $50 million and $999 million; and large issuers as those with total earned premiums of $1 billion or more. Accordingly, the Departments estimate approximately 70 small, 115 medium, and 35 large issuers. Similarly, the Departments estimate approximately 204 small, 332 medium, and 102 large TPAs.

2012 Burden Estimate

In 2012, the Departments estimate a one-time administrative burden of about 620,000 hours with an equivalent cost of about $34,000,000 across the industry to prepare for the provisions of these final regulations. This calculation is made assuming issuers and TPAs will need to implement two principal tasks: (1) develop teams to analyze current workflow processes against the new rules and (2) make appropriate changes to IT systems and processes. With respect to task (1), the Departments estimate about 88,000 burden hours with an equivalent cost of about $4,500,000. The Departments calculate these estimates as follows: [65]

TASK 1—ANALYZE CURRENT WORKFLOW AND NEW RULES

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	32	$1,800	49	$2,600	65	$3,500
Benefits/Sales Professionals	43.76	36	1,600	54	2,400	72	3,200
Attorneys	86.86	4	310	5	500	7	630
Total per issuer/TPA		72	3,700	108	5,500	144	7,300
Total for all issuers/TPAs		20,000	1,000,000	48,000	2,500,000	20,000	1,000,000

With respect to task (2), the Departments estimate about 530,000 burden hours with an equivalent cost of about $29,000,000. The Departments calculate these estimates as follows:

TASK 2—IT CHANGES

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	432	$24,000	648	$35,000	864	$47,000

[63] The Departments estimate that there are 440 issuers and 750 TPAs. Because the Department of Labor and the Department of the Treasury share the hour and cost burden for issuers and TPAs with the Department of Health and Human Services, the burden to produce the SBCs including Coverage Examples for group health plans is calculated using half the number of issuers (220) and 85 percent of the TPAs (638). While the group health plans could prepare their own SBCs, the Departments assume that SBCs would be prepared by service providers, *i.e.,* issuers and TPAs.

[64] The premium revenue data come from the 2009 NAIC financial statements, also known as ''Blanks,'' where insurers report information about their various lines of business.

[65] For the purposes of these and other estimates in this section IV.E, the Departments again use the assumptions outlined above in section IV.A.5.

TASK 2—IT CHANGES—Continued

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
Total per issuer/TPA		432	24,000	648	35,000	864	47,000
Total for all issuers/TPAs		120,000	6,600,000	290,000	16,000,000	120,000	6,400,000

In addition to the one-time administrative costs mentioned above, the Departments assume that plans and issuers will incur additional administrative burden. With regard to this administrative burden, the estimated hour and cost burden for the collections of information in 2012 are as follows:

• The Departments estimate that there will be about 77,000,000 SBCs.

• The Departments assume 50 percent of the total number of SBCs would be sent electronically prior to enrollment, and 38 percent would be sent electronically after enrollment, in the small and large group markets. Accordingly, the Departments estimate that about 31,000,000 SBCs would be electronically distributed, and about 46,000,000 SBCs would be distributed in paper form. The Departments assume there are costs only for paper disclosures, but no costs for electronic disclosures.

Task 3: SBCs—The estimated hour burden for preparing the SBCs is about 780,000 hours with an equivalent cost of about $24,000,000, and a cost burden of about $5,500,000. The Departments calculate these estimates as follows:

TASK 3: EQUIVALENT COSTS FOR PRODUCING SBCS

[Except coverage examples]

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	1.5	$82	1.5	$82	1.5	$82
Benefits/Sales Professionals	43.76	1.5	66	1.5	66	1.5	66
Financial Managers	78.50	0.5	39	0.5	39	0.5	39
Attorneys	86.86	0.5	43	0.5	43	0.5	43
Total per issuer/TPA		4	230	4	230	4	230
Total for all issuers/TPAs		1,100	63,000	1,800	100,000	500	32,000

TASK 3: EQUIVALENT COSTS FOR DISTRIBUTING SBCS

	Hourly wage rate	Hours per SBC	Total number of SBCs	Total hours	Total equivalent cost
Clerical staff	$30.78	0.017	46,000,000	780,000	$24,000,000

TASK 3: COST BURDEN FOR PRINTING SBCS

	Cost per SBCs	Total number of SBCs	Total cost burden
Printing Costs	$0.12	46,000,000	$5,500,000

Task 4: Two Coverage Examples—The estimated hour burden for producing and printing coverage examples is about 69,000 hours with an equivalent cost of about $4 million, and a cost burden of about $2,800,000. The Departments calculate these estimates as follows:

TASK 4: EQUIVALENT COSTS FOR PRODUCING COVERAGE EXAMPLES

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	30	$1,640	30	$1,640	30	$1,640
Benefits/Sales Professionals	43.76	30	1,310	30	1,310	30	1,310
Financial Managers	78.50	10	780	10	780	10	780
Attorneys	86.86	10	870	10	870	10	870

TASK 4: EQUIVALENT COSTS FOR PRODUCING COVERAGE EXAMPLES—Continued

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
Total per issuer/TPA		80	4,600	80	4,600	80	4,600
Total for all issuers/TPAs		21,900	1,260,000	36,000	2,100,000	11,000	630,000

TASK 4: COST BURDEN FOR PRINTING COVERAGE EXAMPLES

	Printing cost per CE set	Total CE sets printed	Total cost burden
Printing Costs	$0.06	46,000,000	$2,800,000

Task 5: Glossary Requests—The Departments assume that, in 2012, issuers and TPAs will begin responding to glossary requests from covered individuals, and that 2.5 percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Departments estimate that the hour and cost burden of providing the notices to be 2.5 percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden of $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2012, the Departments estimate an hour burden of about 24,000 hours with an equivalent cost of about $740,000 and a cost burden of about $740,000 associated with about 1,200,000 glossary requests.

The total 2012 burden estimate is about 1,500,000 hours with an equivalent cost of about $63,000,000 and cost burden of about $9,000,000.

2013 Burden Estimate

Task 1: SBCs—The number of disclosures is assumed to remain constant at about 77,000,000. Accordingly, in 2013, the Departments again estimate a burden of about 780,000 hours with an equivalent cost of about $5,500,000 and a cost burden of about $24,000,000 for preparing and distributing SBCs.

Task 2: Two Coverage Examples—The Departments again estimate about 69,000 hours with an equivalent cost of about $4,000,000 and a cost burden of about $2,800,000 for producing and printing coverage examples.

Task 3: Notices of Modifications—The Departments assume that, in 2013, issuers and TPAs would send notices of modifications to covered individuals, and that two percent of covered individuals would receive such notice. The Departments estimate that the hour and cost burden of providing the notices to be two percent of the combined hour and cost burden of providing the SBCs including the coverage examples, plus an additional cost burden of $0.50 for each paper notice (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Departments estimate an hour burden of about 17,000 hours with an equivalent cost of $570,000 and a cost burden of about $630,000 associated with preparing and distributing about 1,500,000 notices of modification.

Task 4: Glossary Requests—The Departments assume that, in 2013, issuers and TPAs will again respond to glossary requests from covered individuals, and that five percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Departments estimate that the burden and cost of providing the glossaries to be five percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden for $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Departments estimate an hour burden of about 39,000 hours with an equivalent cost of about $1,200,000 and a cost burden of about $1,400,000 associated with 2,300,000 glossary requests.

Task 5: Maintenance Administrative Costs—In 2013, the Departments assume that issuers and TPAs will need to make updates to address changes in standards, and, thus, incur 15 percent of the one-time administrative burden. Accordingly, the estimated hour burden is about 93,000 hours, with an equivalent cost of about $4,800,000. The Departments calculate these estimates as follows:

	Hourly wage rate	Small Issuer/TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	42	$2,300	62	$3,400	83	$4,500
Benefits/Sales Professionals	43.76	30	1,300	45	2,000	60	2,600
Attorneys	86.86	4	350	6	520	8	690
Total per issuer/TPA		76	4,000	113	5,900	151	7,800
Total for all issuers/TPAs		21,000	1,100,000	51,000	2,600,000	21,000	1,100,000

The total 2013 burden estimate is about 1,000,000 hours with an equivalent cost of nearly $35,000,000 and a cost burden of $10,000,000.

Estimates are not provided for subsequent years, because there will be significant changes in the marketplace in 2014, including those related to the offering of new individual and small group plans through the Affordable Insurance Exchanges, and new market reforms outside of the new Exchanges, and the wide-ranging scope of these

changes makes it difficult to project results for 2014 and beyond.

The Departments note that persons are not required to respond to, and generally are not subject to any penalty for failing to comply with, an ICR unless the ICR has a valid OMB control number.

The 2012–2013 paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agencies: Employee Benefits Security Administration, Department of Labor; Internal Revenue Service, U.S. Department of the Treasury.

Title: Affordable Care Act Uniform Explanation of Coverage Documents

OMB Number: 1210–0147; 1545–2229.

Affected Public: Business or other for profit; not-for-profit institutions.

Total Respondents: 858.

Total Responses: 79,500,000.

Frequency of Response: On-going.

Estimated Total Annual Burden Hours (two year average): 620,000 hours (Employee Benefits Security Administration); 620,000 hours (Internal Revenue Service).

Estimated Total Annual Cost Burden (two year average): $4,800,000 (Employee Benefits Security Administration); $4,800,000 (Internal Revenue Service).

2. Department of Health and Human Services

ICRs Related to the Summary of Benefits and Uniform Glossary (45 CFR 147.200)

The Department estimates 333 respondents each year from 2012–2013. This estimate reflects the approximately 220 issuers offering comprehensive major medical coverage in the individual market and to fully-insured non-federal governmental plans, and 113 TPAs acting as service providers for self-insured non-federal governmental plans.[66]

To account for variation in firm size, the Department estimates a weighted burden on the basis of issuers' 2009 total earned premiums for comprehensive major medical coverage.[67] The Department defines small issuers as those with total earned premiums less than $50 million; medium issuers as those with total earned premiums between $50 million and $999 million; and large issuers as those with total earned premiums of $1 billion or more. Accordingly, the Department estimates approximately 70 small, 115 medium, and 35 large issuers. Similarly, the Department estimates approximately 36 small, 59 medium, and 18 large TPAs.

2012 Burden Estimate

In 2012, the Department estimates a one-time administrative burden of about 230,000 hours with an equivalent cost of about $13,000,000 across the industry to prepare for the provisions of these final regulations. This calculation is made assuming issuers and TPAs will need to implement two principal tasks: (1) develop teams to analyze current workflow processes against the new standards and (2) make appropriate changes to IT systems and processes.

With respect to task (1), the Department estimates about 34,000 burden hours with an equivalent cost of about $1,800,000. The Department calculates these estimates as follows:[68]

TASK 1: ANALYZE CURRENT WORKFLOW AND NEW RULES

	Hourly Wage Rate	Small Issuer/TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	32	$1,800	49	$2,600	65	$3,500
Benefits/Sales Professionals	43.76	36	1,600	54	2,400	72	3,200
Attorneys	86.86	4	310	5	500	7	600
Total per issuer/TPA	.....	72	3,700	108	6,000	144	7,000
Total for all issuers/TPAs	.....	7,600	390,000	19,000	1,000,000	7,600	370,000

With respect to task (2), the Department estimates about 200,000 burden hours with an equivalent cost of about $11,000,000. The Department calculates these estimates as follows:

TASK 2: IT CHANGES

	Hourly Wage Rate	Small Issuer/TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	432	$24,000	648	$35,000	864	$50,000
Total per issuer/TPA	.....	432	24,000	648	35,000	864	50,000
Total for all issuers/TPAs	.....	46,000	2,500,000	110,000	6,100,000	46,000	2,700,000

[66] The Department estimates that there are 440 issuers and 750 TPAs. Because the Department shares the hour and cost burden for issuers with the Department of Labor and the Department of the Treasury, the burden to produce the SBCs including coverage examples for non-federal governmental plans and issuers in the individual market is calculated using half the number of issuers (221) and 15% of TPAs (113). While non-federal governmental plans could prepare their own SBCs, the Department assumes that SBCs would be prepared by service providers, *i.e.,* issuers and TPAs.

[67] The premium revenue data come from the 2009 NAIC financial statements, also known as ''Blanks,'' where insurers report information about their various lines of business

[68] For the purposes of these and other estimates in this section IV.E, the Department again use the assumptions outlined above in section IV.A.5.

In addition to the one-time administrative costs mentioned above, the Department assumes that plans and issuers will incur additional administrative burden. With regard to this administrative burden, the estimated hour and cost burden for the collections of information in 2012 are as follows:

• The Department estimates that there will be about 13,000,000 SBCs.

• The Department assumes 50 percent of the total number of SBCs would be sent electronically prior to enrollment, and 38 percent would be sent electronically after enrollment, in the small and large group markets. The Department further assumes 70 percent of SBCs would be sent electronically in the individual market. Accordingly, the Department estimates that about 7,100,000 disclosures would be electronically distributed, and about 6,200,000 disclosures would be distributed in paper form. The Department assumes there are costs only for paper disclosures, but no costs for electronic disclosures

Task 3: SBCs—The estimated hour burden is about 130,000 hours with an equivalent cost of about $4,200,000, and a cost burden of about $740,000. The Department calculates these estimates as follows:

TASK 3—EQUIVALENT COSTS FOR PRODUCING SBCS (EXCEPT COVERAGE EXAMPLES)

	Hourly wage rate	Small Issuer		Medium Issuer		Large Issuer	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	1.5	$82	1.5	$82	1.5	$82
Benefits/Sales Professionals	43.76	1.5	66	1.5	66	1.5	66
Financial Managers	78.50	0.5	39	0.5	39	0.5	39
Attorneys	86.86	0.5	43	0.5	43	0.5	43
Total per issuer		4	230	4	230	4	230
Total for all issuers		420	24,000	700	40,000	210	12,000

TASK 3—EQUIVALENT COSTS FOR DISTRIBUTING SBCS (INCLUDING COVERAGE EXAMPLES)

	Hourly wage rate	Hours per SBC	Total number of SBCs	Total hours	Total equivalent cost
Clerical Staff, Individual Market	$30.78	0.033	1,700,000	56,000	$1,700,000
Clerical Staff, Group Market	30.78	0.017	4,500,000	77,000	2,400,000
Total			6,200,000	130,000	4,100,000

TASK 3—COST BURDEN FOR PRINTING SBCS (EXCEPT COVERAGE EXAMPLES)

	Cost per SBC	Total SBCs	Cost burden
Printing Costs	$0.12	6,200,000	$740,000

Task 4: Two Coverage Examples—The estimated hour burden for producing and printing coverage examples is about 27,000 hours with an equivalent cost of about $1,500,000, and a cost burden of about $370,000. The Department calculates these estimates as follows:

TASK 4—EQUIVALENT COSTS FOR PRODUCING COVERAGE EXAMPLES

	Hourly wage rate	Small Issuer/TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	30	$1,640	30	$1,640	30	$1,640
Benefits/Sales Professionals	43.76	30	1,310	30	1,310	30	1,310
Financial Managers	78.50	10	780	10	780	10	780
Attorneys	86.86	10	870	10	870	10	870
Total per issuer/TPA		80	4,600	80	4,600	80	4,600
Total for all issuers/TPAs		8,500	490,000	14,000	800,000	4,200	240,000

TASK 4—COST BURDEN FOR PRINTING COVERAGE EXAMPLES

	Printing cost per CE set	Total CE sets printed	Total cost burden
Printing Costs	$0.06	6,200,000	$370,000

Task 5: Glossary Requests—The Department assumes that, in 2012, issuers and TPAs will begin responding to glossary requests from covered individuals, and that 2.5 percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Department assumes that the hour and cost burden of providing the glossaries to be 2.5 percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden of $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2012, the Department estimates an hour burden of about 2,700 hours with an equivalent cost of about $82,000 and a cost burden of about $99,000 associated with about 160,000 glossary requests.

The total 2012 burden estimate is about 390,000 hours, or 1,200 hours per respondent, with an equivalent cost of about $19,000,000, or $57,000 per respondent, and cost burden of about $1,200,000, or $3,600 per respondent.

2013 Burden Estimate

Task 1: SBCs—The number of disclosures is assumed to remain constant at 13,000,000. Thus, in 2013, the Department again estimates an hour burden of about 130,000 hours with an equivalent cost of about $4,200,000 and cost burden of about $740,000.

Task 2: Two Coverage Examples—The Department again estimates an hour burden of about 27,000 hours with an equivalent cost of about $1,500,000 and cost burden of about $370,000 for producing and printing coverage examples.

Task 3: Notices of Modifications—The Department assumes that, in 2013, issuers will begin sending notices of modifications to covered individuals, and that two percent of covered individuals would receive such notice. The Department estimates that the hour and cost burden of providing the notices to be two percent of the combined hour and cost burden of providing the SBCs including the coverage examples, plus an additional cost burden of $0.50 for each paper notice (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Department estimates an hour burden of about 3,100 hours with an equivalent cost of about $118,000 and a cost burden of about $22,000 associated with about 260,000 notices of modification.

Task 4: Glossary Requests—The Department assumes that, in 2013, issuers and TPAs will again respond to glossary requests from covered individuals, and that five percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Department estimates that the hour and cost burden of providing the glossaries to be 5 percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden of $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Department estimates an hour burden of about 5,300 hours with an equivalent cost of $160,000 and a cost burden of about $190,000 associated with 310,000 glossary requests.

Task 5: Maintenance Administrative Costs—In 2013, the Department assumes that issuers and TPAs will need to make updates to address changes in standards, and, thus, incur 15 percent of the one-time administrative burden. Accordingly, the estimated hour burden is about 36,000 hours with an equivalent cost of about $1,800,000. The Department calculates these estimates as follows:

	Hourly wage rate	Small issuer/TPA		Medium issuer/TPA		Large issuer/TPA	
		Hours	Equivalent cost	Hours	Equivalent cost	Hours	Equivalent cost
IT Professionals	$54.52	42	$2,300	62	$3,400	83	$4,500
Benefits/Sales Professionals	43.76	30	1,300	45	2,000	60	2,600
Attorneys	86.86	4	350	6	520	8	690
Total per issuer/TPA	.....	76	4,000	113	5,900	151	7,800
Total for all issuers/TPAs	.....	8,100	420,000	20,000	1,000,000	8,000	410,000

The total 2013 burden estimate is about 200,000 hours, or about 600 hours per respondent, with an equivalent cost of about $7,800,000, or $23,000 per respondent, and cost burden of about $1,400,000, or $4,200 per respondent.

Estimates are not provided for subsequent years, because there will be significant changes in the marketplace in 2014, including those related to the offering of new individual and small group plans through the Affordable Insurance Exchanges, and new market reforms outside of the new Exchanges, and the wide-ranging scope of these changes makes it difficult to project results for 2014 and beyond.

The Department notes that persons are not required to respond to, and generally are not subject to any penalty for failing to comply with, an ICR unless the ICR has a valid OMB control number.

The 2012–2013 paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for a new OMB Control Number).

Agency: Department of Health and Human Services.

Title: Affordable Care Act Uniform Explanation of Coverage Documents

CMS Identifier (OMB Control Number): CMS–10407 (0938–1146).

Affected Public: Business; State, Local, or Tribal Governments.

Total Respondents: 333.

Total Responses: 13,000,000.

Frequency of Response: On-going.

Estimated Total Annual Burden Hours (two year average): 300,000 hours.

Estimated Total Annual Cost Burden (two year average): $1,300,000.

ICRs Related to Deemed Compliance Reporting (45 CFR 147.200(a)(4)(iii)(C))

Under 45 CFR 147.200(a)(4)(iii)(C), if individual health insurance issuers provide information required by these final regulations to the HHS Secretary's Web portal (HealthCare.gov), as established by 45 CFR 159.120, then they will be deemed to have satisfied the requirement to provide an SBC to individuals who request information about coverage prior to submitting an application for coverage. Individual health insurance issuers already provide most SBC content elements to HealthCare.gov, except for five data elements related to patient responsibility for each coverage example: deductibles, co-payments, co-insurance, limits or exclusions, and the total of all four cost-sharing amounts.

Accordingly, the additional burden associated with the requirements under § 147.200(a)(4)(iii)(C) is the time and effort it would take each of the 220 issuers in the individual market to enter the five additional data elements into an Excel spreadsheet. We estimate that it will take these issuers about 110 hours, at a total estimated cost of about $3,300, for each coverage example. For two coverage examples, the burden and cost would be about 220 hours at a cost of about $6,600.

In deriving these figures, we used the following hourly labor rates and estimated the time to complete each task: $ 30.78/hr and 0.5 hr/issuer for clerical staff to enter data into an Excel spreadsheet, or about $15 per respondent per coverage example.

This information collection requirement reflects the clarification in these final regulations that issuers must provide all content required in the SBC, including the information necessary for coverage examples, to Healthcare.gov to be deemed compliant. The aforementioned burden estimates will be submitted for OMB review and approval as a revision to the information collection request currently approved under OMB control number 0938–1086.

To obtain copies of the supporting statement and any related forms for the final paperwork collections referenced above, access CMS' Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office at 410–786–1326.

F. Federalism Statement—Department of Labor and Department of Health and Human Services

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Departments' view, these final rules have federalism implications, because it would have direct effects on the States, the relationship between national governments and States, or on the distribution of power and responsibilities among various levels of government relating to the disclosure of health insurance coverage information to consumers. Under these final rules, all group health plans and health insurance issuers offering group or individual health insurance coverage, including self-funded non-federal governmental plans as defined in section 2791 of the PHS Act, would be required to follow uniform standards for compiling and providing a summary of benefits and coverage to consumers. Such Federal standards developed under PHS Act section 2715(a) would preempt any related State standards that require a summary of benefits and coverage that provides less information to consumers than that required to be provided under PHS Act section 2715(a).

In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, and preserves State laws that regulate insurance, banking, or securities. While ERISA prohibits States from regulating a plan as an insurance or investment company or bank, the preemption provisions of section 731 of ERISA and section 2724 of the PHS Act (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of the Affordable Care Act) are not to be ''construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement'' of a Federal standard. The conference report accompanying HIPAA indicates that this is intended to be the ''narrowest'' preemption of State laws (See House Conf. Rep. No. 104–736, at 205, reprinted in 1996 U.S. Code Cong. & Admin. News 2018). States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. Accordingly, States have significant latitude to impose requirements on health insurance issuers that are more restrictive than the Federal law. However, under these final rules, a State would not be allowed to impose a requirement that modifies the summary of benefits and coverage required to be provided under PHS Act section 2715(a), because it would prevent the application of this final rule's uniform disclosure requirement.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected States, including consulting with, and attending conferences of, the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis. It is expected that the Departments will act in a similar fashion in enforcing the Affordable Care Act, including the provisions of section 2715 of the PHS Act. Throughout the process of developing these final regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this final rule, the Departments certify that the Employee Benefits Security Administration and the Centers for Medicare & Medicaid Services have complied with the requirements of Executive Order 13132 for the attached final rule in a meaningful and timely manner.

G. Congressional Review Act

This regulation is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.), which specifies that before a rule can take effect, the Federal agency promulgating the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information, and has been transmitted to Congress and the Comptroller General for review.

V. Statutory Authority

The Department of the Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved: February 7, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

Signed this *7th* day of *February,* 2012.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: *February 6, 2012.*

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: *February 6, 2012.*

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

Department of the Treasury

Internal Revenue Service

26 CFR Chapter 1

Accordingly, the Internal Revenue Service amends 26 CFR parts 54 and 602 as follows:

PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for Part 54 is amended by adding an entry for § 54.9815–2715 in numerical order to read in part as follows:

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

Section 54.9815–2715 also issued under 26 U.S.C. 9833.

■ **Par. 2.** Section 54.9815–2715 is added to read as follows:

§ 54.9815–2715 Summary of benefits and coverage and uniform glossary.

(a) *Summary of benefits and coverage*—(1) *In general.* A group health plan (and its administrator as defined in section 3(16)(A) of ERISA), and a health insurance issuer offering group health insurance coverage, is required to provide a written summary of benefits and coverage (SBC) for each benefit package without charge to entities and individuals described in this paragraph (a)(1) in accordance with the rules of this section.

(i) *SBC provided by a group health insurance issuer to a group health plan*—(A) *Upon application.* A health insurance issuer offering group health insurance coverage must provide the SBC to a group health plan (or its sponsor) upon application for health coverage, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application.

(B) *By first day of coverage (if there are changes).* If there is any change in the information required to be in the SBC that was provided upon application and before the first day of coverage, the issuer must update and provide a current SBC to the plan (or its sponsor) no later than the first day of coverage.

(C) *Upon renewal.* If the issuer renews or reissues the policy, certificate, or contract of insurance (for example, for a succeeding policy year), the issuer must provide a new SBC as follows:

(*1*) If written application is required (in either paper or electronic form) for renewal or reissuance, the SBC must be provided no later than the date the written application materials are distributed.

(*2*) If renewal or reissuance is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(D) *Upon request.* If a group health plan (or its sponsor) requests an SBC or summary information about a health insurance product from a health insurance issuer offering group health insurance coverage, an SBC must be provided as soon as practicable, but in no event later than seven business days following receipt of the request.

(ii) *SBC provided by a group health insurance issuer and a group health plan to participants and beneficiaries*—(A) *In general.* A group health plan (including its administrator, as defined under section 3(16) of ERISA), and a health insurance issuer offering group health insurance coverage, must provide an SBC to a participant or beneficiary (as defined under sections 3(7) and 3(8) of ERISA), and consistent with paragraph (a)(1)(iii) of this section, with respect to each benefit package offered by the plan or issuer for which the participant or beneficiary is eligible.

(B) *Upon application.* The SBC must be provided as part of any written application materials that are distributed by the plan or issuer for enrollment. If the plan or issuer does not distribute written application materials for enrollment, the SBC must be distributed no later than the first date on which the participant is eligible to

enroll in coverage for the participant or any beneficiaries.

(C) *By first day of coverage (if there are changes).* If there is any change to the information required to be in the SBC that was provided upon application and before the first day of coverage, the plan or issuer must update and provide a current SBC to a participant or beneficiary no later than the first day of coverage.

(D) *Special enrollees.* The plan or issuer must provide the SBC to special enrollees (as described in § 54.9801–6) no later than the date by which a summary plan description is required to be provided under the timeframe set forth in ERISA section 104(b)(1)(A) and its implementing regulations, which is 90 days from enrollment.

(E) *Upon renewal.* If the plan or issuer requires participants or beneficiaries to renew in order to maintain coverage (for example, for a succeeding plan year), the plan or issuer must provide a new SBC when the coverage is renewed, as follows:

(*1*) If written application is required for renewal (in either paper or electronic form), the SBC must be provided no later than the date on which the written application materials are distributed.

(*2*) If renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(F) *Upon request.* A plan or issuer must provide the SBC to participants or beneficiaries upon request for an SBC or summary information about the health coverage, as soon as practicable, but in no event later than seven business days following receipt of the request.

(iii) *Special rules to prevent unnecessary duplication with respect to group health coverage*—(A) An entity required to provide an SBC under this paragraph (a)(1) with respect to an individual satisfies that requirement if another party provides the SBC, but only to the extent that the SBC is timely and complete in accordance with the other rules of this section. Therefore, for example, in the case of a group health plan funded through an insurance policy, the plan satisfies the requirement to provide an SBC with respect to an individual if the issuer provides a timely and complete SBC to the individual.

(B) If a single SBC is provided to a participant and any beneficiaries at the participant's last known address, then the requirement to provide the SBC to the participant and any beneficiaries is generally satisfied. However, if a beneficiary's last known address is different than the participant's last known address, a separate SBC is required to be provided to the beneficiary at the beneficiary's last known address.

(C) With respect to a group health plan that offers multiple benefit packages, the plan or issuer is required to provide a new SBC automatically upon renewal only with respect to the benefit package in which a participant or beneficiary is enrolled; SBCs are not required to be provided automatically upon renewal with respect to benefit packages in which the participant or beneficiary is not enrolled. However, if a participant or beneficiary requests an SBC with respect to another benefit package (or more than one other benefit package) for which the participant or beneficiary is eligible, the SBC (or SBCs, in the case of a request for SBCs relating to more than one benefit package) must be provided upon request as soon as practicable, but in no event later than seven business days following receipt of the request.

(2) *Content*—(i) *In general.* Subject to paragraph (a)(2)(iii) of this section, the SBC must include the following:

(A) Uniform definitions of standard insurance terms and medical terms so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage, in accordance with guidance as specified by the Secretary;

(B) A description of the coverage, including cost sharing, for each category of benefits identified by the Secretary in guidance;

(C) The exceptions, reductions, and limitations of the coverage;

(D) The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations;

(E) The renewability and continuation of coverage provisions;

(F) Coverage examples, in accordance with paragraph (a)(2)(ii) of this section;

(G) With respect to coverage beginning on or after January 1, 2014, a statement about whether the plan or coverage provides minimum essential coverage as defined under section 5000A(f) and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable requirements;

(H) A statement that the SBC is only a summary and that the plan document, policy, certificate, or contract of insurance should be consulted to determine the governing contractual provisions of the coverage;

(I) Contact information for questions and obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance (such as a telephone number for customer service and an Internet address for obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance);

(J) For plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of network providers;

(K) For plans and issuers that use a formulary in providing prescription drug coverage, an Internet address (or similar contact information) for obtaining information on prescription drug coverage; and

(L) An Internet address for obtaining the uniform glossary, as described in paragraph (c) of this section, as well as a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available.

(ii) *Coverage examples.* The SBC must include coverage examples specified by the Secretary in guidance that illustrate benefits provided under the plan or coverage for common benefits scenarios (including pregnancy and serious or chronic medical conditions) in accordance with this paragraph (a)(2)(ii).

(A) *Number of examples.* The Secretary may identify up to six coverage examples that may be required in an SBC.

(B) *Benefits scenarios.* For purposes of this paragraph (a)(2)(ii), a benefits scenario is a hypothetical situation, consisting of a sample treatment plan for a specified medical condition during a specific period of time, based on recognized clinical practice guidelines as defined by the National Guideline Clearinghouse, Agency for Healthcare Research and Quality. The Secretary will specify, in guidance, the assumptions, including the relevant items and services and reimbursement information, for each claim in the benefits scenario.

(C) *Illustration of benefit provided.* For purposes of this paragraph (a)(2)(ii), to illustrate benefits provided under the plan or coverage for a particular benefits scenario, a plan or issuer simulates claims processing in accordance with

guidance issued by the Secretary to generate an estimate of what an individual might expect to pay under the plan, policy, or benefit package. The illustration of benefits provided will take into account any cost sharing, excluded benefits, and other limitations on coverage, as specified by the Secretary in guidance.

(iii) *Coverage provided outside the United States.* In lieu of summarizing coverage for items and services provided outside the United States, a plan or issuer may provide an Internet address (or similar contact information) for obtaining information about benefits and coverage provided outside the United States. In any case, the plan or issuer must provide an SBC in accordance with this section that accurately summarizes benefits and coverage available under the plan or coverage within the United States.

(3) *Appearance.* A group health plan and a health insurance issuer must provide an SBC in the form, and in accordance with the instructions for completing the SBC, that are specified by the Secretary in guidance. The SBC must be presented in a uniform format, use terminology understandable by the average plan enrollee, not exceed four double-sided pages in length, and not include print smaller than 12-point font.

(4) *Form*—(i) An SBC provided by an issuer offering group health insurance coverage to a plan (or its sponsor), may be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the following three conditions are satisfied—

(A) The format is readily accessible by the plan (or its sponsor);

(B) The SBC is provided in paper form free of charge upon request; and

(C) If the electronic form is an Internet posting, the issuer timely advises the plan (or its sponsor) in paper form or email that the documents are available on the Internet and provides the Internet address.

(ii) An SBC provided by a group health plan or health insurance issuer to a participant or beneficiary may be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the requirements of this paragraph (a)(4)(ii) are met.

(A) With respect to participants and beneficiaries covered under the plan, the SBC may be provided electronically if the requirements of 29 CFR 2520.104b–1 are met.

(B) With respect to participants and beneficiaries who are eligible but not enrolled for coverage, the SBC may be provided electronically if—

(*1*) The format is readily accessible;

(*2*) The SBC is provided in paper form free of charge upon request; and

(*3*) In a case in which the electronic form is an Internet posting, the plan or issuer timely notifies the individual in paper form (such as a postcard) or email that the documents are available on the Internet, provides the Internet address, and notifies the individual that the documents are available in paper form upon request.

(5) *Language.* A group health plan or health insurance issuer must provide the SBC in a culturally and linguistically appropriate manner. For purposes of this paragraph (a)(5), a plan or issuer is considered to provide the SBC in a culturally and linguistically appropriate manner if the thresholds and standards of § 54.9815–2719T(e) are met as applied to the SBC.

(b) *Notice of modification.* If a group health plan, or health insurance issuer offering group health insurance coverage, makes any material modification (as defined under section 102 of ERISA) in any of the terms of the plan or coverage that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification to enrollees not later than 60 days prior to the date on which the modification will become effective. The notice of modification must be provided in a form that is consistent with paragraph (a)(4) of this section.

(c) *Uniform glossary*—(1) *In general.* A group health plan, and a health insurance issuer offering group health insurance coverage, must make available to participants and beneficiaries the uniform glossary described in paragraph (c)(2) of this section in accordance with the appearance and the form and manner requirements of paragraphs (c)(3) and (4) of this section.

(2) *Health-coverage-related terms and medical terms.* The uniform glossary must provide uniform definitions, specified by the Secretary in guidance, of the following health-coverage-related terms and medical terms:

(i) Allowed amount, appeal, balance billing, co-insurance, complications of pregnancy, co-payment, deductible, durable medical equipment, emergency medical condition, emergency medical transportation, emergency room care, emergency services, excluded services, grievance, habilitation services, health insurance, home health care, hospice services, hospitalization, hospital outpatient care, in-network co-insurance, in-network co-payment, medically necessary, network, non-preferred provider, out-of-network co-insurance, out-of-network co-payment, out-of-pocket limit, physician services, plan, preauthorization, preferred provider, premium, prescription drug coverage, prescription drugs, primary care physician, primary care provider, provider, reconstructive surgery, rehabilitation services, skilled nursing care, specialist, usual customary and reasonable (UCR), and urgent care; and

(ii) Such other terms as the Secretary determines are important to define so that individuals and employers may compare and understand the terms of coverage and medical benefits (including any exceptions to those benefits), as specified in guidance.

(3) *Appearance.* A group health plan, and a health insurance issuer, must provide the uniform glossary with the appearance specified by the Secretary in guidance to ensure the uniform glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee.

(4) *Form and manner.* A plan or issuer must make the uniform glossary described in this paragraph (c) available upon request, in either paper or electronic form (as requested), within seven business days after receipt of the request.

(d) *Preemption.* State laws that require a health insurance issuer to provide an SBC that supplies less information than required under paragraph (a) of this section are preempted.

(e) *Failure to provide.* A group health plan or health insurance issuer that willfully fails to provide information required under this section to a participant or beneficiary is subject to a fine of not more than $1,000 for each such failure. A failure with respect to each participant or beneficiary constitutes a separate offense for purposes of this paragraph (e).

(f) *Effective/Applicability date*—(1) This section is applicable to group health plans and group health insurance issuers in accordance with this paragraph (f). (*See* § 54.9815–1251T(d), providing that this section applies to grandfathered health plans.)

(i) For disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), this section applies beginning on the first day of the first open enrollment period that begins on or after September 23, 2012; and

(ii) For disclosures with respect to participants and beneficiaries who

enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), this section applies beginning on the first day of the first plan year that begins on or after September 23, 2012.

(2) For disclosures with respect to plans, this section is applicable to health insurance issuers beginning September 23, 2012.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 3.** The authority citation for part 602 continues to read in part as follows:

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

■ **Par. 4.** Section 602.101(b) is amended by adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
54.9815–2715	1545–2229
* * * * *	

Department of Labor

Employee Benefits Security Administration

29 CFR Chapter XXV

For the reasons stated in the preamble, the Employee Benefits Security Administration amends 29 CFR part 2590 as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 1. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

Subpart C—Other Requirements

■ 2. Section 2590.715–2715 is added to subpart C to read as follows:

§ 2590.715–2715 Summary of benefits and coverage and uniform glossary.

(a) *Summary of benefits and coverage*—(1) *In general.* A group health plan (and its administrator as defined in section 3(16)(A) of ERISA), and a health insurance issuer offering group health insurance coverage, is required to provide a written summary of benefits and coverage (SBC) for each benefit package without charge to entities and individuals described in this paragraph (a)(1) in accordance with the rules of this section.

(i) *SBC provided by a group health insurance issuer to a group health plan*—(A) *Upon application.* A health insurance issuer offering group health insurance coverage must provide the SBC to a group health plan (or its sponsor) upon application for health coverage, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application.

(B) *By first day of coverage (if there are changes).* If there is any change in the information required to be in the SBC that was provided upon application and before the first day of coverage, the issuer must update and provide a current SBC to the plan (or its sponsor) no later than the first day of coverage.

(C) *Upon renewal.* If the issuer renews or reissues the policy, certificate, or contract of insurance (for example, for a succeeding policy year), the issuer must provide a new SBC as follows:

(*1*) If written application is required (in either paper or electronic form) for renewal or reissuance, the SBC must be provided no later than the date the written application materials are distributed.

(*2*) If renewal or reissuance is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(D) *Upon request.* If a group health plan (or its sponsor) requests an SBC or summary information about a health insurance product from a health insurance issuer offering group health insurance coverage, an SBC must be provided as soon as practicable, but in no event later than seven business days following receipt of the request.

(ii) *SBC provided by a group health insurance issuer and a group health plan to participants and beneficiaries*—(A) *In general.* A group health plan (including its administrator, as defined under section 3(16) of ERISA), and a health insurance issuer offering group health insurance coverage, must provide an SBC to a participant or beneficiary (as defined under sections 3(7) and 3(8) of ERISA), and consistent with paragraph (a)(1)(iii) of this section, with respect to each benefit package offered by the plan or issuer for which the participant or beneficiary is eligible.

(B) *Upon application.* The SBC must be provided as part of any written application materials that are distributed by the plan or issuer for enrollment. If the plan or issuer does not distribute written application materials for enrollment, the SBC must be distributed no later than the first date on which the participant is eligible to enroll in coverage for the participant or any beneficiaries.

(C) *By first day of coverage (if there are changes).* If there is any change to the information required to be in the SBC that was provided upon application and before the first day of coverage, the plan or issuer must update and provide a current SBC to a participant or beneficiary no later than the first day of coverage.

(D) *Special enrollees.* The plan or issuer must provide the SBC to special enrollees (as described in § 2590.701–6 of this Part) no later than the date by which a summary plan description is required to be provided under the timeframe set forth in ERISA section 104(b)(1)(A) and its implementing regulations, which is 90 days from enrollment.

(E) *Upon renewal.* If the plan or issuer requires participants or beneficiaries to renew in order to maintain coverage (for example, for a succeeding plan year), the plan or issuer must provide a new SBC when the coverage is renewed, as follows:

(*1*) If written application is required for renewal (in either paper or electronic form), the SBC must be provided no later than the date on which the written application materials are distributed.

(*2*) If renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written

confirmation of intent to renew, whichever is earlier.

(F) *Upon request.* A plan or issuer must provide the SBC to participants or beneficiaries upon request for an SBC or summary information about the health coverage, as soon as practicable, but in no event later than seven business days following receipt of the request.

(iii) *Special rules to prevent unnecessary duplication with respect to group health coverage*—(A) An entity required to provide an SBC under this paragraph (a)(1) with respect to an individual satisfies that requirement if another party provides the SBC, but only to the extent that the SBC is timely and complete in accordance with the other rules of this section. Therefore, for example, in the case of a group health plan funded through an insurance policy, the plan satisfies the requirement to provide an SBC with respect to an individual if the issuer provides a timely and complete SBC to the individual.

(B) If a single SBC is provided to a participant and any beneficiaries at the participant's last known address, then the requirement to provide the SBC to the participant and any beneficiaries is generally satisfied. However, if a beneficiary's last known address is different than the participant's last known address, a separate SBC is required to be provided to the beneficiary at the beneficiary's last known address.

(C) With respect to a group health plan that offers multiple benefit packages, the plan or issuer is required to provide a new SBC automatically upon renewal only with respect to the benefit package in which a participant or beneficiary is enrolled; SBCs are not required to be provided automatically upon renewal with respect to benefit packages in which the participant or beneficiary is not enrolled. However, if a participant or beneficiary requests an SBC with respect to another benefit package (or more than one other benefit package) for which the participant or beneficiary is eligible, the SBC (or SBCs, in the case of a request for SBCs relating to more than one benefit package) must be provided upon request as soon as practicable, but in no event later than seven business days following receipt of the request.

(2) *Content*—(i) *In general.* Subject to paragraph (a)(2)(iii) of this section, the SBC must include the following:

(A) Uniform definitions of standard insurance terms and medical terms so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage, in accordance with guidance as specified by the Secretary;

(B) A description of the coverage, including cost sharing, for each category of benefits identified by the Secretary in guidance;

(C) The exceptions, reductions, and limitations of the coverage;

(D) The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations;

(E) The renewability and continuation of coverage provisions;

(F) Coverage examples, in accordance with paragraph (a)(2)(ii) of this section;

(G) With respect to coverage beginning on or after January 1, 2014, a statement about whether the plan or coverage provides minimum essential coverage as defined under section 5000A(f) of the Internal Revenue Code and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable requirements;

(H) A statement that the SBC is only a summary and that the plan document, policy, certificate, or contract of insurance should be consulted to determine the governing contractual provisions of the coverage;

(I) Contact information for questions and obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance (such as a telephone number for customer service and an Internet address for obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance);

(J) For plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of network providers;

(K) For plans and issuers that use a formulary in providing prescription drug coverage, an Internet address (or similar contact information) for obtaining information on prescription drug coverage; and

(L) An Internet address for obtaining the uniform glossary, as described in paragraph (c) of this section, as well as a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available.

(ii) *Coverage examples.* The SBC must include coverage examples specified by the Secretary in guidance that illustrate benefits provided under the plan or coverage for common benefits scenarios (including pregnancy and serious or chronic medical conditions) in accordance with this paragraph (a)(2)(ii).

(A) *Number of examples.* The Secretary may identify up to six coverage examples that may be required in an SBC.

(B) *Benefits scenarios.* For purposes of this paragraph (a)(2)(ii), a benefits scenario is a hypothetical situation, consisting of a sample treatment plan for a specified medical condition during a specific period of time, based on recognized clinical practice guidelines as defined by the National Guideline Clearinghouse, Agency for Healthcare Research and Quality. The Secretary will specify, in guidance, the assumptions, including the relevant items and services and reimbursement information, for each claim in the benefits scenario.

(C) *Illustration of benefit provided.* For purposes of this paragraph (a)(2)(ii), to illustrate benefits provided under the plan or coverage for a particular benefits scenario, a plan or issuer simulates claims processing in accordance with guidance issued by the Secretary to generate an estimate of what an individual might expect to pay under the plan, policy, or benefit package. The illustration of benefits provided will take into account any cost sharing, excluded benefits, and other limitations on coverage, as specified by the Secretary in guidance.

(iii) *Coverage provided outside the United States.* In lieu of summarizing coverage for items and services provided outside the United States, a plan or issuer may provide an Internet address (or similar contact information) for obtaining information about benefits and coverage provided outside the United States. In any case, the plan or issuer must provide an SBC in accordance with this section that accurately summarizes benefits and coverage available under the plan or coverage within the United States.

(3) *Appearance.* A group health plan and a health insurance issuer must provide an SBC in the form, and in accordance with the instructions for completing the SBC, that are specified by the Secretary in guidance. The SBC must be presented in a uniform format, use terminology understandable by the average plan enrollee, not exceed four double-sided pages in length, and not include print smaller than 12-point font.

(4) *Form*—(i) An SBC provided by an issuer offering group health insurance coverage to a plan (or its sponsor), may be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the following three conditions are satisfied—

(A) The format is readily accessible by the plan (or its sponsor);

(B) The SBC is provided in paper form free of charge upon request; and

(C) If the electronic form is an Internet posting, the issuer timely advises the plan (or its sponsor) in paper form or email that the documents are available on the Internet and provides the Internet address.

(ii) An SBC provided by a group health plan or health insurance issuer to a participant or beneficiary may be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the requirements of this paragraph (a)(4)(ii) are met.

(A) With respect to participants and beneficiaries covered under the plan, the SBC may be provided electronically if the requirements of 29 CFR 2520.104b–1 are met.

(B) With respect to participants and beneficiaries who are eligible but not enrolled for coverage, the SBC may be provided electronically if:

(*1*) The format is readily accessible;

(*2*) The SBC is provided in paper form free of charge upon request; and

(*3*) In a case in which the electronic form is an Internet posting, the plan or issuer timely notifies the individual in paper form (such as a postcard) or email that the documents are available on the Internet, provides the Internet address, and notifies the individual that the documents are available in paper form upon request.

(5) *Language.* A group health plan or health insurance issuer must provide the SBC in a culturally and linguistically appropriate manner. For purposes of this paragraph (a)(5), a plan or issuer is considered to provide the SBC in a culturally and linguistically appropriate manner if the thresholds and standards of § 2590.715–2719(e) of this Part are met as applied to the SBC.

(b) *Notice of modification.* If a group health plan, or health insurance issuer offering group health insurance coverage, makes any material modification (as defined under section 102 of ERISA) in any of the terms of the plan or coverage that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification to enrollees not later than 60 days prior to the date on which the modification will become effective. The notice of modification must be provided in a form that is consistent with paragraph (a)(4) of this section.

(c) *Uniform glossary*—(1) *In general.* A group health plan, and a health insurance issuer offering group health insurance coverage, must make available to participants and beneficiaries the uniform glossary described in paragraph (c)(2) of this section in accordance with the appearance and form and manner requirements of paragraphs (c)(3) and (4) of this section.

(2) *Health-coverage-related terms and medical terms.* The uniform glossary must provide uniform definitions, specified by the Secretary in guidance, of the following health-coverage-related terms and medical terms:

(i) Allowed amount, appeal, balance billing, co-insurance, complications of pregnancy, co-payment, deductible, durable medical equipment, emergency medical condition, emergency medical transportation, emergency room care, emergency services, excluded services, grievance, habilitation services, health insurance, home health care, hospice services, hospitalization, hospital outpatient care, in-network co-insurance, in-network co-payment, medically necessary, network, non-preferred provider, out-of-network co-insurance, out-of-network co-payment, out-of-pocket limit, physician services, plan, preauthorization, preferred provider, premium, prescription drug coverage, prescription drugs, primary care physician, primary care provider, provider, reconstructive surgery, rehabilitation services, skilled nursing care, specialist, usual customary and reasonable (UCR), and urgent care; and

(ii) Such other terms as the Secretary determines are important to define so that individuals and employers may compare and understand the terms of coverage and medical benefits (including any exceptions to those benefits), as specified in guidance.

(3) *Appearance.* A group health plan, and a health insurance issuer, must provide the uniform glossary with the appearance specified by the Secretary in guidance to ensure the uniform glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee.

(4) *Form and manner.* A plan or issuer must make the uniform glossary described in this paragraph (c) available upon request, in either paper or electronic form (as requested), within seven business days after receipt of the request.

(d) *Preemption.* See § 2590.731 of this part. In addition, State laws that require a health insurance issuer to provide an SBC that supplies less information than required under paragraph (a) of this section are preempted.

(e) *Failure to provide.* A group health plan that willfully fails to provide information required under this section to a participant or beneficiary is subject to a fine of not more than $1,000 for each such failure. A failure with respect to each participant or beneficiary constitutes a separate offense for purposes of this paragraph (e).

(f) *Applicability date*—(1) This section is applicable to group health plans and group health insurance issuers in accordance with this paragraph (f). (*See* § 2590.715–1251(d), providing that this section applies to grandfathered health plans.)

(i) For disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), this section applies beginning on the first day of the first open enrollment period that begins on or after September 23, 2012; and

(ii) For disclosures with respect to participants and beneficiaries who enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), this section applies beginning on the first day of the first plan year that begins on or after September 23, 2012.

(2) For disclosures with respect to plans, this section is applicable to health insurance issuers beginning September 23, 2012.

Department of Health and Human Services

45 CFR Subtitle A

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 147 as follows:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 2. The authority citation for part 147 continues to read as follows:

Authority: Sections 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 3. Add § 147.200 to read as follows:

§ 147.200 Summary of benefits and coverage and uniform glossary.

(a) *Summary of benefits and coverage*– (1) *In general.* A group health plan (and its administrator as defined in section 3(16)(A) of ERISA), and a health insurance issuer offering group or individual health insurance coverage, is required to provide a written summary of benefits and coverage (SBC) for each benefit package without charge to

entities and individuals described in this paragraph (a)(1) in accordance with the rules of this section.

(i) *SBC provided by a group health insurance issuer to a group health plan*—(A) *Upon application.* A health insurance issuer offering group health insurance coverage must provide the SBC to a group health plan (or its sponsor) upon application for health coverage, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application.

(B) *By first day of coverage (if there are changes).* If there is any change in the information required to be in the SBC that was provided upon application and before the first day of coverage, the issuer must update and provide a current SBC to the plan (or its sponsor) no later than the first day of coverage.

(C) *Upon renewal.* If the issuer renews or reissues the policy, certificate, or contract of insurance (for example, for a succeeding policy year), the issuer must provide a new SBC as follows:

(*1*) If written application is required (in either paper or electronic form) for renewal or reissuance, the SBC must be provided no later than the date the written application materials are distributed.

(*2*) If renewal or reissuance is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(D) *Upon request.* If a group health plan (or its sponsor) requests an SBC or summary information about a health insurance product from a health insurance issuer offering group health insurance coverage, an SBC must be provided as soon as practicable, but in no event later than seven business days following receipt of the request.

(ii) *SBC provided by a group health insurance issuer and a group health plan to participants and beneficiaries*—(A) *In general.* A group health plan (including its administrator, as defined under section 3(16) of ERISA), and a health insurance issuer offering group health insurance coverage, must provide an SBC to a participant or beneficiary (as defined under sections 3(7) and 3(8) of ERISA), and consistent with paragraph (a)(1)(iii) of this section, with respect to each benefit package offered by the plan or issuer for which the participant or beneficiary is eligible.

(B) *Upon application.* The SBC must be provided as part of any written application materials that are distributed by the plan or issuer for enrollment. If the plan or issuer does not distribute written application materials for enrollment, the SBC must be distributed no later than the first date on which the participant is eligible to enroll in coverage for the participant or any beneficiaries.

(C) *By first day of coverage (if there are changes).* If there is any change to the information required to be in the SBC that was provided upon application and before the first day of coverage, the plan or issuer must update and provide a current SBC to a participant or beneficiary no later than the first day of coverage.

(D) *Special enrollees.* The plan or issuer must provide the SBC to special enrollees (as described in 45 CFR 146.117) no later than the date by which a summary plan description is required to be provided under the timeframe set forth in ERISA section 104(b)(1)(A) and its implementing regulations, which is 90 days from enrollment.

(E) *Upon renewal.* If the plan or issuer requires participants or beneficiaries to renew in order to maintain coverage (for example, for a succeeding plan year), the plan or issuer must provide a new SBC when the coverage is renewed, as follows:

(*1*) If written application is required for renewal (in either paper or electronic form), the SBC must be provided no later than the date on which the written application materials are distributed.

(*2*) If renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(F) *Upon request.* A plan or issuer must provide the SBC to participants or beneficiaries upon request for an SBC or summary information about the health coverage, as soon as practicable, but in no event later than seven business days following receipt of the request.

(iii) *Special rules to prevent unnecessary duplication with respect to group health coverage*—(A) An entity required to provide an SBC under this paragraph (a)(1) with respect to an individual satisfies that requirement if another party provides the SBC, but only to the extent that the SBC is timely and complete in accordance with the other rules of this section. Therefore, for example, in the case of a group health plan funded through an insurance policy, the plan satisfies the requirement to provide an SBC with respect to an individual if the issuer provides a timely and complete SBC to the individual.

(B) If a single SBC is provided to a participant and any beneficiaries at the participant's last known address then the requirement to provide the SBC to the participant and any beneficiaries is generally satisfied. However, if a beneficiary's last known address is different than the participant's last known address, a separate SBC is required to be provided to the beneficiary at the beneficiary's last known address.

(C) With respect to a group health plan that offers multiple benefit packages, the plan or issuer is required to provide a new SBC automatically upon renewal only with respect to the benefit package in which a participant or beneficiary is enrolled; SBCs are not required to be provided automatically upon renewal with respect to benefit packages in which the participant or beneficiary is not enrolled. However, if a participant or beneficiary requests an SBC with respect to another benefit package (or more than one other benefit package) for which the participant or beneficiary is eligible, the SBC (or SBCs, in the case of a request for SBCs relating to more than one benefit package) must be provided upon request as soon as practicable, but in no event later than seven business days following receipt of the request.

(iv) *SBC provided by a health insurance issuer offering individual health insurance coverage*—(A) *Upon application.* A health insurance issuer offering individual health insurance coverage must provide an SBC to an individual covered under the policy (including every dependent) upon receiving an application for any health insurance policy, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application.

(B) *By first day of coverage (if there are changes).* If there is any change in the information required to be in the SBC that was provided upon application and before the first day of coverage, the issuer must update and provide a

current SBC to the individual no later than the first day of coverage.

(C) *Upon renewal.* The issuer must provide the SBC to policyholders annually at renewal. The SBC must reflect any modified policy terms that would be effective on the first day of the new policy year. The SBC must be provided as follows:

(*1*) If written application is required (in either paper or electronic form) for renewal or reissuance, the SBC must be provided no later than the date on which the written application materials are distributed.

(*2*) If renewal or reissuance is automatic, the SBC must be provided no later than 30 days prior to the first day of the new policy year; however, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(D) *Upon request.* A health insurance issuer offering individual health insurance coverage must provide an SBC to any individual or dependent anytime an individual requests an SBC or summary information about a health insurance product as soon as practicable, but in no event later than seven business days following receipt of the request. For purposes of this paragraph (a)(1)(iv)(D), a request for an SBC or summary information about a health insurance product includes a request made both before and after an individual submits an application for coverage.

(v) *Special rule to prevent unnecessary duplication with respect to individual health insurance coverage.* If a single SBC is provided to an individual and any dependents at the individual's last known address, then the requirement to provide the SBC to the individual and any dependents is generally satisfied. However, if a dependent's last known address is different than the individual's last known address, a separate SBC is required to be provided to the dependent at the dependents' last known address.

(2) *Content*—(i) *In general.* Subject to paragraph (a)(2)(iii) of this section, the SBC must include the following:

(A) Uniform definitions of standard insurance terms and medical terms so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage, in accordance with guidance as specified by the Secretary;

(B) A description of the coverage, including cost sharing, for each category of benefits identified by the Secretary in guidance;

(C) The exceptions, reductions, and limitations of the coverage;

(D) The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations;

(E) The renewability and continuation of coverage provisions;

(F) Coverage examples, in accordance with paragraph (a)(2)(ii) of this section;

(G) With respect to coverage beginning on or after January 1, 2014, a statement about whether the plan or coverage provides minimum essential coverage as defined under section 5000A(f) of the Internal Revenue Code and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable requirements;

(H) A statement that the SBC is only a summary and that the plan document, policy, certificate, or contract of insurance should be consulted to determine the governing contractual provisions of the coverage;

(I) Contact information for questions and obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance (such as a telephone number for customer service and an Internet address for obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance);

(J) For plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of network providers;

(K) For plans and issuers that use a formulary in providing prescription drug coverage, an Internet address (or similar contact information) for obtaining information on prescription drug coverage; and

(L) An Internet address for obtaining the uniform glossary, as described in paragraph (c) of this section, as well as a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available.

(ii) *Coverage examples.* The SBC must include coverage examples specified by the Secretary in guidance that illustrate benefits provided under the plan or coverage for common benefits scenarios (including pregnancy and serious or chronic medical conditions) in accordance with this paragraph (a)(2)(ii).

(A) *Number of examples.* The Secretary may identify up to six coverage examples that may be required in an SBC.

(B) *Benefits scenarios.* For purposes of this paragraph (a)(2)(ii), a benefits scenario is a hypothetical situation, consisting of a sample treatment plan for a specified medical condition during a specific period of time, based on recognized clinical practice guidelines as defined by the National Guideline Clearinghouse, Agency for Healthcare Research and Quality. The Secretary will specify, in guidance, the assumptions, including the relevant items and services and reimbursement information, for each claim in the benefits scenario.

(C) *Illustration of benefit provided.* For purposes of this paragraph (a)(2)(ii), to illustrate benefits provided under the plan or coverage for a particular benefits scenario, a plan or issuer simulates claims processing in accordance with guidance issued by the Secretary to generate an estimate of what an individual might expect to pay under the plan, policy, or benefit package. The illustration of benefits provided will take into account any cost sharing, excluded benefits, and other limitations on coverage, as specified by the Secretary in guidance.

(iii) *Coverage provided outside the United States.* In lieu of summarizing coverage for items and services provided outside the United States, a plan or issuer may provide an Internet address (or similar contact information) for obtaining information about benefits and coverage provided outside the United States. In any case, the plan or issuer must provide an SBC in accordance with this section that accurately summarizes benefits and coverage available under the plan or coverage within the United States.

(3) *Appearance.* A group health plan and a health insurance issuer must provide an SBC in the form, and in accordance with the instructions for completing the SBC, that are specified by the Secretary in guidance. The SBC must be presented in a uniform format, use terminology understandable by the average plan enrollee (or, in the case of individual market coverage, the average individual covered under a health insurance policy), not exceed four double-sided pages in length, and not include print smaller than 12-point font. A health insurance issuer offering individual health insurance coverage must provide the SBC as a stand-alone document.

(4) *Form*—(i) An SBC provided by an issuer offering group health insurance coverage to a plan (or its sponsor), may

be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the following three conditions are satisfied—

(A) The format is readily accessible by the plan (or its sponsor);

(B) The SBC is provided in paper form free of charge upon request; and

(C) If the electronic form is an Internet posting, the issuer timely advises the plan (or its sponsor) in paper form or email that the documents are available on the Internet and provides the Internet address.

(ii) An SBC provided by a group health plan or health insurance issuer to a participant or beneficiary may be provided in paper form. Alternatively, for non-Federal governmental plans, the SBC may be provided electronically if the plan conforms to either the substance of the ERISA provisions at 29 CFR 2590.715–2715(a)(4)(ii), or the provisions governing electronic disclosure for individual health insurance issuers set forth in paragraph (a)(4)(iii) of this section.

(iii) An issuer offering individual health insurance coverage must provide an SBC in a manner that can reasonably be expected to provide actual notice in paper or electronic form.

(A) An issuer satisfies the requirements of this paragraph (a)(4)(iii) if the issuer:

(*1*) Hand-delivers a printed copy of the SBC to the individual or dependent;

(*2*) Mails a printed copy of the SBC to the mailing address provided to the issuer by the individual or dependent;

(*3*) Provides the SBC by email after obtaining the individual's or dependent's agreement to receive the SBC or other electronic disclosures by email;

(*4*) Posts the SBC on the Internet and advises the individual or dependent in paper or electronic form, in a manner compliant with paragraphs (a)(4)(iii)(A)(*1*) through (*3*), that the SBC is available on the Internet and includes the applicable Internet address; or

(*5*) Provides the SBC by any other method that can reasonably be expected to provide actual notice.

(B) An SBC may not be provided electronically unless:

(*1*) The format is readily accessible;

(*2*) The SBC is placed in a location that is prominent and readily accessible;

(*3*) The SBC is provided in an electronic form which can be electronically retained and printed;

(4) The SBC is consistent with the appearance, content, and language requirements of this section;

(*5*) The issuer notifies the individual or dependent that the SBC is available in paper form without charge upon request and provides it upon request.

(C) *Deemed compliance.* A health insurance issuer offering individual health insurance coverage that provides the content required under paragraph (a)(2) of this section, as specified in guidance published by the Secretary, to the federal health reform Web portal described in 45 CFR 159.120 will be deemed to satisfy the requirements of paragraph (a)(1)(iv)(D) of this section with respect to a request for summary information about a health insurance product made prior to an application for coverage. However, nothing in this paragraph should be construed as otherwise limiting such issuer's obligations under this section.

(5) *Language.* A group health plan or health insurance issuer must provide the SBC in a culturally and linguistically appropriate manner. For purposes of this paragraph (a)(5), a plan or issuer is considered to provide the SBC in a culturally and linguistically appropriate manner if the thresholds and standards of § 147.136(e) of this chapter are met as applied to the SBC.

(b) *Notice of modification.* If a group health plan, or health insurance issuer offering group or individual health insurance coverage, makes any material modification (as defined under section 102 of ERISA) in any of the terms of the plan or coverage that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification to enrollees (or, in the case of individual market coverage, an individual covered under a health insurance policy) not later than 60 days prior to the date on which the modification will become effective. The notice of modification must be provided in a form that is consistent with paragraph (a)(4) of this section.

(c) *Uniform glossary*—(1) *In general.* A group health plan, and a health insurance issuer offering group health insurance coverage, must make available to participants and beneficiaries, and a health insurance issuer offering individual health insurance coverage must make available to applicants, policyholders, and covered dependents, the uniform glossary described in paragraph (c)(2) of this section in accordance with the appearance and form and manner requirements of paragraphs (c)(3) and (4) of this section.

(2) *Health-coverage-related terms and medical terms.* The uniform glossary must provide uniform definitions, specified by the Secretary in guidance, of the following health-coverage-related terms and medical terms:

(i) Allowed amount, appeal, balance billing, co-insurance, complications of pregnancy, co-payment, deductible, durable medical equipment, emergency medical condition, emergency medical transportation, emergency room care, emergency services, excluded services, grievance, habilitation services, health insurance, home health care, hospice services, hospitalization, hospital outpatient care, in-network co-insurance, in-network co-payment, medically necessary, network, non-preferred provider, out-of-network co-insurance, out-of-network co-payment, out-of-pocket limit, physician services, plan, preauthorization, preferred provider, premium, prescription drug coverage, prescription drugs, primary care physician, primary care provider, provider, reconstructive surgery, rehabilitation services, skilled nursing care, specialist, usual customary and reasonable (UCR), and urgent care; and

(ii) Such other terms as the Secretary determines are important to define so that individuals and employers may compare and understand the terms of coverage and medical benefits (including any exceptions to those benefits), as specified in guidance.

(3) *Appearance.* A group health plan, and a health insurance issuer, must provide the uniform glossary with the appearance specified by the Secretary in guidance to ensure the uniform glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee (or, in the case of individual market coverage, an average individual covered under a health insurance policy).

(4) *Form and manner.* A plan or issuer must make the uniform glossary described in this paragraph (c) available upon request, in either paper or electronic form (as requested), within seven business days after receipt of the request.

(d) *Preemption.* For purposes of this section, the provisions of section 2724 of the PHS Act continue to apply with respect to preemption of State law. In addition, State laws that require a health insurance issuer to provide an SBC that supplies less information than required under paragraph (a) of this section are preempted.

(e) *Failure to provide.* A health insurance issuer or a non-federal governmental health plan that willfully fails to provide information required under this section is subject to a fine of not more than $1,000 for each such failure. A failure with respect to each covered individual constitutes a

separate offense for purposes of this paragraph (e). HHS will enforce these provisions in a manner consistent with 45 CFR 150.101 through 150.465.

(f) *Applicability date*—(1) This section is applicable to group health plans and group health insurance issuers in accordance with this paragraph (f). (*See* § 147.140(d), providing that this section applies to grandfathered health plans.)

(i) For disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), this section applies beginning on the first day of the first open enrollment period that begins on or after September 23, 2012; and

(ii) For disclosures with respect to participants and beneficiaries who enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), this section applies beginning on the first day of the first plan year that begins on or after September 23, 2012.

(2) For disclosures with respect to plans, and to individuals and dependents in the individual market, this section is applicable to health insurance issuers beginning September 23, 2012.

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BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[CMS–9982–FN]

45 CFR Part 147

Summary of Benefits and Coverage and Uniform Glossary—Templates, Instructions, and Related Materials; and Guidance for Compliance

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Guidance for compliance and notice of availability of templates, instructions, and related materials.

SUMMARY: The Departments of Health and Human Services, Labor, and the Treasury are simultaneously publishing in the **Federal Register** this guidance document and final regulations under the Patient Protection and Affordable Care Act to implement the disclosure for group health plans and health insurance issuers of the summary of benefits and coverage (SBC), notice of modifications, and the uniform glossary. This guidance document provides guidance for compliance with section 2715 of the Public Health Service Act and the Departments' final regulations, including a template for the SBC, instructions, sample language, a guide for coverage example calculations, and the uniform glossary.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Heather Raeburn, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Jennifer Libster or Padma Shah, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (301) 492–4222.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's Web site (*http://www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (*http://www.cms.hhs.gov/HealthInsReformforConsume/01_Overview.asp*) and information on health reform can be found at *http://www.healthcare.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Departments of Health and Human Services (HHS), Labor, and the Treasury (the Departments) are taking a phased approach to issuing regulations and guidance implementing the revised Public Health Service Act (PHS Act) sections 2701 through 2719A and related provisions of the Patient Protection and Affordable Care Act (Affordable Care Act).[1] Section 2715 of the PHS Act directs the Departments to develop standards for use by a group health plan and a health insurance issuer in compiling and providing a summary of benefits and coverage (SBC) that ''accurately describes the benefits and coverage under the applicable plan or coverage.'' Section 2715 of the PHS Act also directs the Departments to provide for the development of ''standards for the definitions of terms used in health insurance coverage.'' The statute directs the Departments, in developing such standards, to ''consult with the National Association of Insurance Commissioners'' (referred to in this guidance document as the ''NAIC''), ''a working group composed of representatives of health insurance-related consumer advocacy organizations, health insurance issuers, health care professionals, patient advocates including those representing individuals with limited English proficiency, and other qualified individuals.''

After consultation with the NAIC,[2] on August 22, 2011, the Departments published proposed regulations to implement PHS Act section 2715,[3] as well as a companion document that proposed an SBC template (with instructions, sample language, and a guide for coverage examples calculations to be used in completing the SBC template) and a uniform glossary.[4] HHS also published on its Web site (at *http://cciio.cms.gov*, and accessible via hyperlink from *www.dol.gov/ebsa/healthreform*) the coding and pricing information necessary to perform calculations for the three proposed coverage examples. Comments were solicited on these materials.

Final regulations under PHS Act section 2715 are being published elsewhere in this issue of the **Federal Register** (final regulations). This guidance document provides guidance for compliance with PHS Act section 2715 and the final regulations, including information on how to obtain the SBC template (with instructions and sample language for completing the template) and the uniform glossary. These items are displayed at *www.dol.gov/ebsa/healthreform* and *www.cciio.cms.gov.*

[1] The Affordable Care Act also adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans.

[2] A summary of the NAIC's work can be found at 76 FR 52476–77, August 22, 2011.

[3] 76 FR 52442, August 22, 2011.

[4] 76 FR 52475, August 22, 2011.

II. Guidance

A. Documents Authorized for the First Year of Applicability

This guidance document authorizes an SBC template (with instructions, samples, and a guide for coverage example calculations to be used in completing the SBC template), and the uniform glossary, to comply with the disclosure requirements of PHS Act section 2715, pursuant to paragraph (a)(3) of the final regulations.[5] These documents are authorized with respect to group health plan coverage and group and individual health insurance coverage for SBCs and uniform glossaries provided with respect to coverage beginning before January 1, 2014 (referred to in this guidance document as ''the first year of applicability'').

The materials described in this guidance document are authorized by the Departments for the first year of applicability only; the Departments intend to issue updated materials for later years. Specifically, these documents do not provide language to comply with paragraph (a)(2)(i)(G) of the final regulations, requiring a statement in the SBC about whether a plan or coverage provides minimum essential coverage and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable minimum value requirements, because the final regulations do not require this material to be included in the first year of applicability. In addition, the Departments recognize that, beginning January 1, 2014, new market reforms[6] will take effect, which are expected to prompt additional changes to the SBC (for example, annual limits will no longer be permissible).

Finally, the documents described in this guidance document contain information for two coverage examples—having a baby (normal delivery) and managing type 2 diabetes (routine maintenance of a well-controlled condition). This approach differs from the documents published in connection with the proposed regulations, which included three coverage examples (relating to having a baby (normal delivery), breast cancer, and diabetes). The Departments received many comments asserting that the necessary calculations for the coverage examples would be costly and complicated. Commenters asked the Departments to add flexibility in use of the coverage examples and expressed concerns about misleading consumers about the costs of the health care services associated with the coverage examples. The Departments also received a number of comments that expressed concern about the high variability in treatment plans for patients with breast cancer and diabetes. Therefore, the Departments have modified the coverage examples requirements and will continue to evaluate these coverage examples, as well as others suggested by commenters.[7] Consumer testing performed on behalf of the NAIC[8] demonstrated that the coverage examples facilitated individuals' understanding of the benefits and limitations of a plan or policy and helped them make more informed choices about their options. Such testing also showed that individuals were able to comprehend that the examples were only illustrative. Additionally, while some plans provide useful coverage calculators to their enrollees to help them make health care decisions, they are not uniform across all plans and most are not available to shoppers, making it difficult for consumers to make coverage comparisons. Future guidance will add coverage examples and make other changes (including those described above) for SBCs required to be provided after the first year of applicability.

In addition to the materials described in this guidance document, HHS is providing (at *http://cciio.cms.gov,* also accessible via hyperlink from www.dol.gov/ebsa/healthreform) the specific information necessary to simulate benefits covered under the plan or policy for the coverage example portion of the SBC (including relevant medical items and services, dates of service, billing codes, and allowed charges), pursuant to paragraph (a)(2)(ii) of the final regulations. This information must be used for SBCs provided during the first year of applicability. Future guidance will make changes to this information for SBCs required to be provided after the first year of applicability.

B. Appearance

The Departments' 2011 proposed regulations would have required that a group health plan and a health insurance issuer provide an SBC as a stand-alone document. This requirement was eliminated with respect to group health plan coverage in the final regulations (as discussed more fully in the preamble to the final regulations). Instead, the final regulations provide for the Secretaries to issue guidance for the form of the SBC. Consistent with the authority set forth in paragraph (a)(3) of the final regulations, with respect to group health plan coverage, the Departments authorize the SBC to be provided either as a stand-alone document or in combination with other summary materials (for example, a summary plan description), if the SBC information is intact and prominently displayed at the beginning of the materials (such as immediately after the Table of Contents in a summary plan description). For health insurance coverage provided in the individual market, the SBC must be provided as a stand-alone document. The Departments will review and monitor SBCs provided as part of other plan materials and may modify their guidance as to appearance for SBCs required to be provided after the first year of applicability in response to plan and issuer practices.

The NAIC stated in its December 2010 transmittal letter that the NAIC working group intentionally designed the layout and color of the SBC template. The Departments noted in the document published contemporaneously with the proposed regulations, however, that color printing may be costly and proposed that a plan or issuer would be compliant with the requirement to provide the SBC if it used either the color version as recommended by the NAIC or the grayscale version. The Departments are retaining that approach in this guidance document, and will allow the SBC to be provided either in color or grayscale.

C. Special Rule

For group health plans and health insurance issuers in the group and individual markets, use of the full SBC template authorized by this guidance document is required, including for the first year of applicability. To the extent a plan's terms that are required to be described in the SBC template cannot

[5] This guidance makes references to various paragraphs of the final regulations. The final regulations are codified at 26 CFR 54.9815–2715, 29 CFR 2590.715–2715, and 45 CFR 147.200. However, for simplicity, this guidance refers only to the relevant paragraph of the three regulations instead of using three parallel, full citations.

[6] See Subpart I of Part A of Title XXVII of the PHS Act.

[7] Examples suggested by comments included prostate cancer, colorectal cancer, hypertension, heart attack, stroke, major depression, and chronic kidney disease, among others.

[8] A summary of the focus group testing done by America's Health Insurance Plans is available at: *http://www.naic.org/documents/committees_b_consumer_information_101012_ahip_focus_group_summary.pdf,* a summary of the focus group testing done by Consumers Union on the coverage examples is available at: *http://prescriptionforchange.org/wordpress/wp-content/uploads/2011/08/A_New_Way_of_Comparing_Health_Insurance.pdf.*

reasonably be described in a manner consistent with the template and instructions, the plan or issuer must accurately describe the relevant plan terms while using its best efforts to do so in a manner that is still consistent with the instructions and template format as reasonably possible. Such situations may occur, for example, if a plan provides a different structure for provider network tiers or drug tiers than is contemplated by the template and these instructions, if a plan provides different benefits based on facility type (such as hospital inpatient versus non-hospital inpatient), in a case where a plan is denoting the effects of a related health flexible spending arrangement or a health reimbursement arrangement, or if a plan provides different cost sharing based on participation in a wellness program. The Departments intend to update the template instructions for SBCs required to be provided after the first year of applicability. Whether the need for a special rule becomes moot in light of additional instructions, or whether the need continues to exist, will be addressed in future guidance.

D. Language

PHS Act section 2715 requires group health plans and health insurance issuers to provide the SBC in a culturally and linguistically appropriate manner. Paragraph (a)(5) of the final regulations provides that a plan or issuer satisfies this requirement by following the rules for providing claims and appeals notices in a culturally and linguistically appropriate manner under PHS Act section 2719, and paragraph (e) of its implementing regulations, as applied to the SBC.[9] Under those rules, plans and issuers must provide notices in a culturally and linguistically appropriate manner when 10 percent or more of the population residing in the claimant's county are literate only in the same non-English language, as determined based on American Community Survey data published by the United States Census Bureau. At the time of publication of this guidance document, 255 U.S. counties (78 of which are in Puerto Rico) meet this threshold. The overwhelming majority of these are Spanish; however, Chinese, Tagalog, and Navajo are present in a few counties, affecting five states (specifically, Alaska, Arizona, California, New Mexico, and Utah).[10]

To help plans and issuers meet the language requirements of paragraph (a)(5) of the final regulations, as requested by commenters, HHS will provide (at *http://cciio.cms.gov,* also accessible via hyperlink from *www.dol.gov/ebsa/healthreform*) written translations of the SBC template, sample language, and uniform glossary in Spanish, Tagalog, Chinese, and Navajo. HHS may also make these materials available in other languages to facilitate voluntary distribution of SBCs to other individuals with limited English proficiency.

III. Templates, Instructions, and Related Materials

As stated above, this guidance document authorizes documents to comply with the disclosure requirements of PHS Act section 2715, pursuant to paragraph (a)(3) of the final regulations. The Departments received comments in response to the previous guidance and proposed templates, instructions, and related materials.[11] These comments addressed specific issues related to the SBC template, instructions, samples, and the uniform glossary. After consideration of these comments, the Departments are announcing the availability of the following documents, available at *http://cciio.cms.gov* and *www.dol.gov/ebsa/healthreform:*

1. *SBC template.* The document is available in modifiable format (MS Word), as suggested by commenters for ease of use.

2. *Sample completed SBC.* This document was completed using information for sample health coverage and provides a general illustration of a completed SBC.

3. *Instructions.* For assistance in completing the SBC template, separate instructions are available for group health coverage and for individual health insurance coverage.

4. *Why This Matters language.* The SBC instructions include language that must be used when completing the ''Why This Matters'' column on the first page of the SBC template. Two language options are provided depending on whether the answer in the applicable row is ''yes'' or ''no'', according to the terms of the plan or coverage.

5. *Coverage examples.* This guidance document, together with information provided in Microsoft Excel format by HHS at *http://cciio.cms.gov* and accessible via hyperlink from *www.dol.gov/ebsa/healthreform*), provides all the information necessary to perform the coverage example calculations.

6. *Uniform glossary.* The uniform glossary of health coverage and medical terms may not be modified by plans or issuers.

In revising the proposed template, instructions, and other materials, the Departments made several changes that were suggested in comments. Some of these changes were made at the request of self-insured plans, which commented that terminology in the SBC template was appropriate only for insured coverage. For example, terms such as ''policy'' and ''insurer'' have been changed to ''coverage'' and ''plan'', respectively. In addition, because rights to continue coverage vary based on many factors (including plan size, whether the plan is insured or self-insured, and State law), the description of rights to continue coverage has been modified to reference Federal and State protections more generally and include contact information for questions. Additionally, the data element in the proposed template labeled as ''Policy Period'' has been revised to be labeled as ''Coverage Period.'' The instructions for this data element have also been updated, to allow for situations in which there is no known end date to the coverage period when the SBC is prepared, and for situations in which an updated SBC is being provided to satisfy the requirements of paragraph (b) of the final regulations, relating to notice of a modification. The Departments also revised the disclaimer language at the beginning of the uniform glossary, to make clear that the glossary is intended to be educational in nature and that the definitions contained in the glossary may not be the same as the definitions used by a particular plan or issuer.

Certain changes were also made to the SBC template and instructions for completing the template to conform to changes made in the final regulations. The final regulations eliminated premiums from the required content for the SBC document. Therefore, the row for communicating premium information has been removed from the SBC template document and the instructions for completing this section have also been removed. Additionally, language was added to the instructions to address expatriate plans and policies. Specifically, the new instruction allows an expatriate plan or policy to include a reference on the SBC template in the ''Other Covered Services'' box regarding where to find information about coverage provided outside of the United States.

Additional flexibility was also added to the instructions for completing the

[9] *See* 75 FR 43330 (July 23, 2010), as amended by 76 FR 37208 (June 24, 2011).

[10] The Departments publish guidance on their Web site with a list of the counties that meet this threshold. This information is available at *www.dol.gov/ebsa/healthreform* and *http://cciio.cms.gov/.*

[11] 76 FR 52475 (August 22, 2011).

SBC template. The instructions specify that, to the extent a plan's terms that are required to be described in the SBC template cannot reasonably be described in a manner consistent with the template and instructions, the plan or issuer must accurately describe the relevant plan terms while using its best efforts to do so in a manner that is still as consistent with the instructions and template format as reasonably possible.

The Departments also reduced the number of coverage examples required for SBCs issued during the first year of applicability to two examples, having a baby (normal delivery) and managing type 2 diabetes (routine maintenance of a well-controlled condition). The breast cancer example has been removed from the template and HHS will be providing treatment and reimbursement information only to complete the coverage examples relating to having a baby and managing diabetes. Additionally, the Departments modified some of the language to clarify that the coverage examples are not intended to demonstrate costs for an actual, specific person (for example the ''You Pay'' language was changed to ''Patient Pays'').

Modifications were also made to the benefits scenarios. First, the underlying benefits scenarios were modified to more accurately reflect current accepted standards of care. For example, the proposed maternity scenario included two ultrasounds during the early stages of pregnancy, which is not necessary for a routine pregnancy, so the final scenario includes one ultrasound at 20 weeks. In addition, the final maternity scenario no longer includes some services that are clinically appropriate, but not clinically required, such as circumcision. In the proposed diabetes scenario, the metformin dosage was 1000 mg twice daily, which may not be appropriate for well-controlled type 2 diabetes. The final scenario now states that metformin dosage is 500 mg twice daily. In addition, the proposed diabetes scenario included two podiatrist office visits, which has been reduced to one annual visit, which is clinically appropriate for well-controlled type 2 diabetes. The pricing data in both scenarios (allowed amounts) has been refined to more closely reflect reimbursement rates in the private health insurance markets. The benefits scenario has also been updated to reflect correct coding practices, and HHS is now providing both ICD–9 and ICD–10 codes for the maternity scenario, in anticipation of the October 1, 2013 transition to ICD–10.

IV. Paperwork Reduction Act

According to the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The Departments note that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. *See* 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 44 U.S.C. 3512.

This document relates to the information collection request (ICR) contained in final regulations titled ''Summary of Benefits and Coverage and the Uniform Glossary,'' which is published elsewhere in this issue of the **Federal Register**. For a discussion of the hour and cost burden associated with the ICR, please see those final regulations.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Signed this 7th day of February 2012.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: February 6, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: February 6, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

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Part VIII

The President

Executive Order 13600—Establishing the President's Global Development Council

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Presidential Documents

Title 3—

The President

Executive Order 13600 of February 9, 2012

Establishing the President's Global Development Council

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* To help protect national security and further American economic, humanitarian, and strategic interests in the world, it is the policy of the Federal Government to promote and elevate development as a core pillar of American power and chart a course for development, diplomacy, and defense to reinforce and complement one another. As stated in the 2010 National Security Strategy and the Presidential Policy Directive on Global Development, the successful pursuit of development is essential to advancing our national security objectives: security, prosperity, respect for universal values, and a just and sustainable international order. The effectiveness of this development policy will depend in large measure on how we engage with partners, beneficiaries of our development assistance, and stakeholders. We will use evidence-based decision-making in all areas of U.S. development policy and programs, and we commit to foster development expertise and learning worldwide.

Sec. 2. *Establishment.* There is established the President's Global Development Council (Council). The Council shall be established for administrative purposes within the United States Agency for International Development (USAID) subject to the foreign policy and budgetary guidance of the Secretary of State.

Sec. 3. *Membership.* The membership of the Council shall be as follows:

(a) The Council shall be composed of the officials described in paragraph (b) of this section and not more than 12 individuals from outside the Federal Government appointed by the President. Appointed members of the Council may serve as representatives of a variety of sectors, including, among others, institutions of higher education, non-profit and philanthropic organizations, civil society, and private industry.

(b) The Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the USAID Administrator, and the Chief Executive Officer of the Millennium Challenge Corporation shall serve as non-voting members of the Council and may designate, to perform the Council functions of the member, a senior-level official who is part of the member's department, agency, or office, and who is a full-time officer or employee of the Federal Government.

(c) The President shall designate a member of the Council to serve as Chair and another member to serve as Vice Chair. The Chair shall convene and preside at meetings of the Council, determine meeting agendas, and direct its work. The Vice Chair shall perform the duties of the Chair in the absence of the Chair and shall perform such other functions as the Chair may assign.

(d) The term of office of members appointed by the President from outside the Federal Government shall be 2 years, and such members shall be eligible for reappointment and may continue to serve after the expiration of their terms until the President appoints a successor. A member appointed to fill a vacancy shall serve only for the unexpired term of such vacancy.

Sec. 4. *Mission and Functions.* The Council shall advise and support the President, through the National Security Staff and the National Economic

Council staff, in furtherance of the policy set forth in section 1 of this order. The Council shall meet regularly and shall:

(a) inform the policy and practice of U.S. global development policy and programs by providing advice to the President and other senior officials on issues including:

(i) innovative, scalable approaches to development with proven demonstrable impact, particularly on sustainable economic growth and good governance;

(ii) areas for enhanced collaboration between the Federal Government and public and private sectors to advance development policy;

(iii) best practices for and effectiveness of research and development in low and middle income economies; and

(iv) long-term solutions to issues central to strategic planning for U.S. development efforts;

(b) support new and existing public-private partnerships by:

(i) identifying key areas for enhanced collaboration and any barriers to collaboration; and

(ii) recommending concrete efforts that the private and public sectors together can take to promote economic development priorities and initiatives; and

(c) increase awareness and action in support of development by soliciting public input on current and emerging issues in the field of global development as well as bringing to the President's attention concerns and ideas that would inform policy options.

Sec. 5. *Administration of the Council.* (a) The heads of executive departments and agencies shall assist and provide information to the Council, consistent with applicable law, as may be necessary to carry out the functions of the Council.

(b) Funding and administrative support for the Council shall be provided by USAID to the extent permitted by law and within existing appropriations.

(c) The USAID Administrator shall appoint an Executive Director who shall be a Federal officer or employee of USAID and serve as a liaison to the Administrator and the Executive Office of the President and consult with relevant executive departments, agencies, and offices on matters and activities pertaining to the Council.

(d) The members of the Council who are appointed from outside the Federal Government shall serve without compensation for their work on the Council. Members of the Council may, however, receive travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).

(e) Insofar as the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App.), may apply to the Council, any functions of the President under FACA, except that of reporting to the Congress, shall be performed by the USAID Administrator in accordance with the guidelines issued by the Administrator of General Services.

Sec. 6. *Termination.* The Council shall terminate 2 years after the date of this order, unless renewed by the President.

Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 9, 2012.

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