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WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

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2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

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

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register
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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 326

RIN 3064–AD76

Procedures for Monitoring Bank Secrecy Act Compliance and Fair Credit Reporting: Technical Amendments; Correction

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule; correction.

SUMMARY: The FDIC is correcting a final rule that appeared in the **Federal Register** of March 18, 2011, regarding Procedures for Monitoring Bank Secrecy Act Compliance and Fair Credit Reporting: Technical Amendments. This correction clarifies that the FDIC did not intend to remove a paragraph from its regulations.

DATES: Effective May 23, 2012. This correction is applicable beginning March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Carl Gold, Counsel, Legal Division, (202) 898–8702, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: On March 18, 2011, the FDIC published a final rule, Procedures for Monitoring Bank Secrecy Act Compliance and Fair Credit Reporting: Technical Amendments (76 FR 10672). This final rule included revisions to 12 CFR 326.8(a) and (b). No revisions were being made to § 326.8(c) so it was not included in the March 18, 2011, final rule, but owing to an error in punctuation in that rule, 12 CFR 326.8(c) was removed from the Code of Federal Regulations.

For the reasons set out in the preamble, the FDIC hereby amends 12 CFR part 326 with the following correcting amendment:

PART 326—MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT COMPLIANCE

■ 1. The authority citation for part 326 continues to read as follows:

Authority: 12 U.S.C. 1813, 1815, 1817, 1818, 1819 (Tenth), 1881–1883; 31 U.S.C. 5311–5314 and 5316–5332.2.

■ 2. In § 326.8, paragraphs (a) and (b) are republished and paragraph (c) is added to read as follows:

§ 326.8 Bank Security Act compliance.

(a) *Purpose.* This subpart is issued to assure that all insured nonmember banks as defined in 12 CFR 326.1 establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR Chapter X.

(b) *Compliance procedures*—(1) *Program requirement.* Each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations issued by the Department of Treasury at 31 CFR Chapter X. The compliance program shall be written, approved by the bank's board of directors, and noted in the minutes.

(2) *Customer identification program.* Each bank is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the FDIC and the Department of the Treasury at 31 CFR 1020.220.

(c) *Contents of compliance program.* The compliance program shall, at a minimum:

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by bank personnel or by an outside party;

(3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

Dated: May 18, 2012.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2012–12495 Filed 5–22–12; 8:45 am]

BILLING CODE 6741–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1100; Directorate Identifier 2009–NE–37–AD; Amendment 39–17044; AD 2012–09–09]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines AG Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all International Aero Engines AG (IAE) V2500–A1, V2525–D5 and V2528–D5 turbofan engines, and certain serial numbers (S/Ns) of IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines. That AD currently requires initial and repetitive ultrasonic inspections (USIs) of certain high-pressure compressor (HPC) stage 3 to 8 drums, and replacement of drum attachment nuts. This new AD expands the affected population for initial and repetitive inspections of the HPC stage 3 to 8 drum, introduces an eddy current inspection (ECI) procedure, and requires additional cleaning and repetitive USI of some HPC stage 3 to 8 drums. We are issuing this AD to prevent uncontained failure of the HPC stage 3 to 8 drum, which could result in damage to the airplane.

DATES: This AD is effective June 27, 2012.

The Director of the Federal Register approved the incorporation by reference (IBR) of certain publications listed in the AD as of June 27, 2012.

ADDRESSES: For service information identified in this AD, contact International Aero Engines AG, 628 Hebron Avenue, Suite 400, Glastonbury, CT 06033; phone: 860–368–3700; fax: 860–368–4600; email:

iaeinfo@iaev2500.com; Web site: *https://www.iaeworld.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Carlos Fernandes, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7189; fax: 781–238–7199; email: *carlos.fernandes@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2010–20–07, Amendment 39–16441 (75 FR 59067, September 27, 2010). That AD applies to the specified products. The NPRM published in the **Federal Register** on December 30, 2011 (76 FR 82202). That NPRM proposed to continue to require initial and repetitive USIs of certain HPC stage 3 to 8 drums, and replacement of drum attachment nuts. That NPRM also proposed to expand the affected population for initial and repetitive inspections of the HPC stage 3 to 8 drum, introduce an ECI procedure, and require additional cleaning and repetitive USI of some HPC stage 3 to 8 drums.

Comments

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

Request To Include Entire V2500 Fleet of Engines, and Modify the Optional Terminating Action

Airbus and IAE requested that we change the applicability to include the entire V2500 fleet of engines, and to modify the optional terminating action to include partially silver plated nuts, part number (P/N) AS64367. The commenters stated that one new HPC stage 3 to 8 drum was discovered installed with partially silver plated nuts, P/N AS64367, that had some corrosion pitting.

We partially agree. We agree with making a change to the optional terminating action, because the corrosion pitting found was on the optional terminating action configuration. We changed the AD, deleting the optional terminating action from the AD. We do not agree with including the entire V2500 fleet of engines, because we do not yet have enough information to determine what actions are needed if the nuts are only partially silver plated. We did not change the AD to affect the entire V2500 engine population.

Request To Correct Paragraph Reference Errors

Seven commenters requested that in paragraph (i), Optional Terminating Action, we correct the paragraph references of (h)(1) and (h)(2) to (i)(1) and (i)(2).

We agree. However, we have deleted the Optional Terminating Action paragraph from the AD, as described previously, and redesignated the subsequent paragraphs accordingly. We did not change the AD based on this comment.

Request To Add a Section to Previous Credit

Air New Zealand requested that we add a section to paragraph (k), Previous Credit, for prior installation of a zero-time HPC stage 3 to 8 drum that has never operated with fully silver plated nuts.

We do not agree. We already state in Compliance paragraph (e) that actions are required unless the actions have already been done. We did not change the AD.

Request To Reference the AD Being Superseded

Onur Air requested that we reference the AD being superseded, as it is not mentioned in the proposed AD.

We do not agree. We already reference the superseded AD in the Discussion and in paragraph (b). We did not change the AD.

Exclude Certain HPC Stage 3 to 8 Drums

Onur Air stated that drums which were cleaned, fluorescent penetrant inspected (FPI), and installed with non-fully silver plated nuts into the engine in a previous shop visit are not addressed, and should be excluded in the mandatory terminating action of the proposed AD.

We do not agree. These drums are subject to the repetitive inspections specified in the AD. We did not change the AD.

Request To Rewrite Paragraphs (f) and (h)

Christchurch Engine Centre and United Airlines requested that we rewrite paragraph (f) and (h) because they believe those paragraphs imply that the grace period of FPI or ECI apply to the repetitive USI frequency.

We do not agree. The grace period affects the USI start, based on the type of previous inspection and not the USI re-inspection interval. As specified in paragraph (h) of the proposed AD, USI inspections are to be done every 750 cycles-since-last USI. If an FPI is done, then the USI is required within 2,500 cycles from the FPI, and then done every 750 cycles-since-last USI. The process for the ECI is the same. We did not change the AD.

Request To Use the Engine Manual (EM) Instead of the Service Bulletin (SB) for Cleaning

Christchurch Engine Centre and IAE requested that cleaning be done using the EM instead of the SB.

We partially agree. The EM or the SB may be used as the cleaning procedure. We changed the AD to include the EM and SB as guidance for the cleaning procedure.

Request To Correct a Service Bulletin No.

Christchurch Engine Centre requested that we correct an error in the SB No. in paragraph (k)(4) of the proposed AD from ''V2500–ENG–72–615'' to ''V2500–ENG–72–0615''.

We agree. We changed the AD to use the correct SB No. V2500–ENG–72–0615.

Request To Incorporate by Reference (IBR) SBs

Christchurch Engine Centre requested that we IBR the SBs into the AD, and stated that the proposed AD is missing the Material Incorporated by Reference section.

We agree. In the NPRM, we identified SBs needed for compliance. But in NPRMs, we do not set them in a separate IBR paragraph. In our final rules we do, as required by the Office of the Federal Register. In this final rule, we IBR'd SBs necessary for compliance in the AD.

Request To Reconsider the Cost of Compliance

Japan Airlines requested that we reconsider the Cost of Compliance. Based on their experience, they believe it requires at least 11 hours to perform the required work.

We do not agree. The hours are based on average times provided by the type certificate holder. Actual times may vary depending on engine configuration and number of engines inspected. We did not change the Cost of Compliance.

Request To Mandate Only Relevant Sections of the USI Procedures

Japan Airlines and United Airlines requested that the AD mandate only the relevant sections of the USI procedures in IAE Non-Modification SB (NMSB) No. V2500–ENG–72–0608, Revision 3, dated September 20, 2011, and NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011.

We agree. We changed the AD to clarify the initial inspection requirements of the AD.

Request for Previous Credit

Japan Airlines and United Airlines requested that we give previous credit for operators using earlier revisions of the USI SBs listed in the proposed AD, as some operators have already inspected using the earlier revisions.

We agree. We changed AD to give credit for commpliance to the earlier SBs listed in the AD.

Request To Allow Special Flight Permits

United Airlines and TAM Airlines requested that we allow Special Flight Permits so that the airplane can be flown to a location where the work required by the AD can be performed.

We do not agree. The AD already allows flights to a repair facility. We did not change the AD.

Request To Include All HPC Stage 3 to 8 Drum P/N Possibilities

United Airlines requested that we include all HPC stage 3 to 8 drum P/N possibilities in the SB. The commenter believes that drum P/N 6B1404, which is manufactured from the same titanium material as drum P/N 6A8316, should be included.

We do not agree. The AD currently applies to all engines with HPC stage 3 to 8 drums that operated with fully silver plated nuts. Drum P/N 6B1404 was introduced into production with engine S/N higher than V13191 and ''Select One'' engines S/N higher than V15575, and are outside of the applicability of this AD. We did not change the AD.

Request To Clarify Piece-Part Exposure Definition

United Airlines and MTU Maintenance Hanover GmbH requested that we clarify the definition of piece-part exposure.

We agree. We changed the definition to: ''For the purpose of this AD, piece-part exposure is removal of the HPC stage 3 to 8 drum from the engine, removal of all blades from the drum, and separation of the HPC stage 3 to 8 drum from the stage 9 to 12 drum.''

Request To Remove Redundant SB Listing

IAE requested that we remove the redundant listing of NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, under Relevant Service Information in the preamble of the proposed AD.

We agree. However, we do not repeat the Relevant Service Information in the final rule. We did not change the AD.

Request To Clarify Compliance Timeframe and Establish a Calendar End-Date

IAE requested that we clarify why a compliance timeframe is required to remove all fully silver plated nuts and also establish a calendar end-date of 2021.

We do not agree. The unsafe condition results from a corrosive operating environment. The amount of corrosion varies with time and location, and we have no data to support a calendar end-date of 2021. We did not change the AD.

Request To Delay USI Start Time and Repeat Inspection Time

TAM Airlines requested that we delay the USI start time to 13,500 cycles-since-new, and increase the repeat inspection time to 1,500 cycles-since-the-last USI.

We do not agree. The initial and repetitive inspection intervals were established based on field experience, and extensive analysis and testing. We have no data that supports an increase in the compliance times. We did not change the AD.

Request for Special Increase Limit

PT GMF Aeroasia requested that we allow them a special increase limit for one of their engines that is above 13,700 cycles to allow time to receive the special tooling required for the inspections.

We do not agree. The analysis and testing does not support continued safe flight above 13,700 cycles. We did not change the AD.

Request for Changes To Make It Easier for Operators to Comply With the AD

United Airlines requested that we add specific accept/reject criteria of missing liner material in the USI inspection area. The commenter also requested that we remove the requirement for borescoping the HPC stage 7 to 8 drum ceramic liner for staining or axial cracking, or, that we specify accept/reject criteria for staining and cracking of the ceramic liner. They also requested that we delay blending limit measurements of the HPC case port and add details for material removal to allow access for the probe manipulators. These changes would make it easier for operators to comply with the AD and avoid unnecessary delays.

We partially agree. We agree with specifying accept/reject criteria for missing liner material in the USI inspection area. The borescope requirement of the HPC stage 7 to 8 drum ceramic liner for staining or axial cracking improves the probability of detection, however we agree to remove it due to lack of clear accept/reject criteria. We do not agree with including in the AD when to perform blending limits measurements and adding details for material removal to allow access for the probe manipulators because they are part of preparation. We added to the AD that any liner loss which results in lifting of the USI probe from the liner will need to be repaired to perform an acceptable inspection. Liner loss found under the intended path of the USI probe must be smaller than the head of the probe.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

We estimate that this AD will affect about 906 IAE V2500–A1, V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, and V2533–A5 turbofan engines installed on airplanes of U.S. registry. We estimate that it will take about 3 work-hours per engine to perform the USI, and about 2 work-hours per engine to perform the FPI of the HPC stage 3 to 8 drum. The average labor rate is $85 per work-hour. We also estimate that removal of silver residue from the engine will cost about $2,600

per engine, and required parts about $795 per engine. We also estimate the cost of replacing a drum if found cracked will be $189,000. We have no way of determining the number of aircraft that might need this replacement. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $4,385,040.

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) 2010–20–07, Amendment 39–16441 (75 FR 59067, September 27, 2010), and adding the following new AD:

2012–09–09 International Aero Engines AG: Amendment 39–17044; Docket No. FAA–2009–1100, Directorate Identifier 2009–NE–37–AD.

(a) Effective Date

This airworthiness directive (AD) is effective June 27, 2012.

(b) Affected ADs

This AD supersedes AD 2010–20–07, Amendment 39–16441 (75 FR 59067, September 27, 2010).

(c) Applicability

This AD applies to:

(1) All International Aero Engines AG (IAE) V2500–A1 turbofan engines; and

(2) All IAE V2525–D5 and V2528–D5 turbofan engines; and

(3) IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines with serial numbers (S/Ns) up to and including V13181, and with S/Ns from V15000 up to and including V15245.

(d) Unsafe Condition

This AD results from reports of 50 additional high-pressure compressor (HPC) stage 3 to 8 drums found cracked since AD 2010–20–07 was issued. We are issuing this AD to prevent failure of the HPC stage 3 to 8 drum, uncontained engine failure, and damage to the airplane.

(e) 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.

(f) Initial Ultrasonic Inspections (USIs) of the HPC Stage 3 to 8 Drum—''Group A''

For IAE V2500–A1, V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines with S/Ns in ''Group A'' in paragraph 1.A. in IAE Non-Modification Service Bulletin (NMSB) No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, perform an initial USI of the HPC stage 3 to 8 drum before accumulating 5,000 cycles-since-new (CSN) or within 500 cycles from the effective date of this AD, whichever occurs later, as follows:

(1) For IAE V2500–A1 turbofan engines:

(i) For on-wing inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections E, G(1) through G(5), I, and J.

(ii) For on-wing inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections L, N(1) through N(5), P(1), and Q.

(iii) For shop inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections AU, AW(1) through AW(5), AY, and AZ.

(iv) For shop inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections BB, BD(1) through BD(5), BF(1), and BG.

(v) Any liner loss which results in lifting of the USI probe from the liner will need to be repaired in order to perform an acceptable inspection. Liner loss found under the intended path of the USI probe must be smaller than the head of the probe.

(2) For V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines:

(i) For on-wing inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections Z, AB(1) through AB(5), AD, and AE.

(ii) For on-wing inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections AG, AI(1) through AI(5), AK(1), and AL.

(iii) For shop inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections BO, BQ(1) through BQ(5), BS, and BT.

(iv) For shop inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections BV, BX(1) through BX(5), BZ(1), and CA.

(v) Any liner loss which results in lifting of the USI probe from the liner will need to be repaired in order to perform an acceptable inspection. Liner loss found under the intended path of the USI probe must be smaller than the head of the probe.

(g) Initial USIs of the HPC Stage 3 to 8 Drum—''Group B''

For IAE V2500–A1, V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 Turbofan Engines with S/Ns in ''Group B'' in Paragraph 1.A. in IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, perform an initial USI of the HPC stage 3 to 8 drum before accumulating 12,500 CSN or within 500 cycles from the effective date of this AD, whichever occurs later, not to exceed 13,700 CSN, as follows:

(1) For IAE V2500–A1 turbofan engines:

(i) For on-wing inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections E, G(1) through G(5), I, and J.

(ii) For on-wing inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections L, N(1) through N(5), P(1), and Q.

(iii) For shop inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections AU, AW(1) through AW(5), AY, and AZ.

(iv) For shop inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections BB, BD(1) through BD(5), BF(1), and BG.

(v) Any liner loss which results in lifting of the USI probe from the liner will need to be repaired in order to perform an acceptable inspection. Liner loss found under the intended path of the USI probe must be smaller than the head of the probe.

(2) For V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines:

(i) For on-wing inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections Z, AB(1) through AB(5), AD, and AE.

(ii) For on-wing inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections AG, AI(1) through AI(5), AK(1), and AL.

(iii) For shop inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections BO, BQ(1) through BQ(5), BS, and BT.

(iv) For shop inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections BV, BX(1) through BX(5), BZ(1), and CA.

(v) Any liner loss which results in lifting of the USI probe from the liner will need to be repaired in order to perform an acceptable inspection. Liner loss found under the intended path of the USI probe must be smaller than the head of the probe.

(h) Initial USIs for All IAE V2525–D5 and V2528–D5 Turbofan Engines

(1) For all IAE V2525–D5 and V2528–D5 turbofan engines, perform an initial USI of the HPC stage 3 to 8 drum before accumulating 12,500 CSN or within 500 cycles from the effective date of this AD, whichever occurs later, not to exceed 13,700 CSN.

(i) For on-wing inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0608, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections E, G(1) through G(5), I, and J.

(ii) For on-wing inspections of the inner diameter, perform an initial USI using IAENMSB No. V2500–ENG–72–0608, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections L, N(1) through N(5), P(1), and Q.

(iii) For shop inspections of the outer diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0608, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections Z, AB(1) through AB(5), AD, and AE.

(iv) For shop inspections of the inner diameter, perform an initial USI using IAE NMSB No. V2500–ENG–72–0608, Revision 3, dated September 20, 2011, Accomplishment Instructions, paragraph 3, sections AG, AI(1) through AI(5), AK(1), and AL.

(v) Any liner loss which results in lifting of the USI probe from the liner will need to be repaired in order to perform an acceptable inspection. Liner loss found under the intended path of the USI probe must be smaller than the head of the probe.

(i) Removal of All Fully Silver Plated Nuts

(1) At the next piece part exposure of the HPC stage 3 to 8 drum after the effective date of this AD, but no later than 8 years from the effective date of this AD, do the following before returning any HPC stage 3 to 8 drum to service:

(i) Remove from service all fully silver plated nuts, part number AS44862 or equivalent that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum.

(ii) Remove the silver residue from the HPC stage 3 to 8 drum. You can find guidance to remove the silver residue of the HPC stage 3 to 8 drum in IAE NMSB No. V2500–ENG–72–0601, Revision 2, dated April 12, 2010, or in IAE engine manual task 72–41–11–110–001.

(2) Perform an inspection using one of the following methods:

(i) Fluorescent penetrant inspect (FPI) the HPC stage 3 to 8 drum for cracks, and remove from service any drum found cracked. You can find guidance on performing an FPI of the HPC stage 3 to 8 drum in IAE engine manual task 72–41–11–200–001.

(ii) Eddy current inspect (ECI) the HPC stage 3 to 8 drum for cracks, using IAE NMSB No. V2500–ENG–72–0625, dated September 20, 2011, and remove from service any drum found cracked.

(3) If cracks or crack indications are identified, remove the drum from service before further flight.

(4) Accomplishing paragraphs (i)(1) and (i)(2) of this AD before the inspection criteria requirements of paragraphs (f), (g) or (h) of this AD, may be substituted for the initial USI requirement of paragraphs (f), (g) or (h) of this AD.

(j) Repetitive USIs of the HPC Stage 3 to 8 Drum

Perform repetitive USIs of the HPC stage 3 to 8 drum for cracks in accordance with paragraphs (f)(1), (f)(2), (g)(1), (g)(2), or (h)(1) of this AD as applicable, as follows:

(1) Within every 750 cycles-since-last USI; or

(2) Within 2,500 cycles-since-last FPI; or

(3) Within 13,000 cycles-since-last ECI, whichever occurs latest.

(k) Definition

For the purpose of this AD, piece-part exposure is removal of the HPC stage 3 to 8 drum from the engine, removal of all blades from the drum, and separation of the HPC stage 3 to 8 drum from the stage 9 to 12 drum.

(l) Credit for Previous Actions

(1) If you performed a USI before the effective date of this AD using the following IAE NMSB's, you met the requirements of this AD:

(i) IAE NMSB No. V2500–ENG–72–0594, Revision 3, dated August 7, 2009, or Revision 4, dated October 13, 2009; or Revision 5, dated November 23, 2009; or Revision 6, dated April 12, 2010.

(ii) IAE NMSB No. V2500–ENG–72–0603, Initial Issue, dated November 24 2009; or Revision 1, dated December 18, 2009; or Revision 2, dated March 17, 2010.

(iii) IAE NMSB No. V2500–ENG–72–0608, Initial Issue, dated May 5, 2010; Revision 1, dated August 6, 2010; or Revision 2, dated January 4, 2011.

(iv) IAE NMSB No. V2500–ENG–72–0615, Initial Issue, dated July 19, 2010; Revision 1, dated August 2, 2010; or Revision 2, dated November 24, 2010.

(m) 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.

(n) Related Information

(1) For more information about this AD, contact Carlos Fernandes, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7189; fax: 781–238–7199; email: *carlos.fernandes@faa.gov*.

(2) Guidance on removing the silver residue of the HPC stage 3 to 8 drum may be found in International Aero Engines Service Bulletin No. V2500–ENG–72–0601, Revision 2, dated April 12, 2010, and in IAE engine manual task 72–41–11–110–001.

(o) Material Incorporated by Reference

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

(2) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise.

(i) International Aero Engines Non-Modification Service Bulletin No. V2500–ENG–72–0608, Revision 3, dated September 20, 2011.

(ii) International Aero Engines Non-Modification Service Bulletin No. V2500–ENG–72–0615, Revision 3, dated September 20, 2011.

(iii) International Aero Engines Non-Modification Service Bulletin No. V2500–ENG–72–0625, dated September 20, 2011.

(3) For service information identified in this AD, contact International Aero Engines AG, 628 Hebron Avenue, Suite 400, Glastonbury, CT 06033; phone: 860–368–3700; fax: 860–368–4600; email: *iaeinfo@iaev2500.com;* Web site: *https://www.iaeworld.com.*

(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 May 2, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–12329 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2012–0510; Airspace Docket No. 12–ASO–17]

RIN 2120–AA66

Amendment of Restricted Area R–2101; Anniston Army Depot, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the description of restricted area R–2101, Anniston Army Depot, AL, by removing the abbreviation ''CST'' from the time of designation, and by including a controlling agency for the restricted area. This amendment does not change the dimensions of, or activities conducted within, R–2101.

DATES: Effective date 0901 UTC, July 26, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace, Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

The time of designation for R–2101 currently reads ''0700 to 1800 CST, Monday–Friday.'' Since the restricted area lies completely within the central time zone, it is unnecessary to specify ''CST'' in the description. The use of ''CST'' has led to confusion about the time of designation during that part of the year when daylight saving time is in effect. The intended time of designation for the restricted areas is 0700–1800 local time, Monday–Friday, during both standard time and daylight saving time periods.

Currently, R–2101 does not have a designated controlling agency. A controlling agency is the air traffic control facility that exercises control of the airspace when it is not in use by the using agency for its designated purpose. Since the using agency releases R–2101 during periods when it is not scheduled for use, the FAA is designating a controlling agency to enable joint use of the airspace during such periods.

The Rule

This action amends Title 14, Code of Federal Regulations (14 CFR) part 73 by removing ''CST'' from the time of designation for restricted area R–2101, Anniston Army Depot, AL, and inserting the words ''local time'' in its place. The time of designation is amended to read ''0700 to 1800 local time, Monday-Friday.'' In addition, the FAA, Atlanta Air Route Traffic Control Center (ARTCC) is designated as the controlling agency for the restricted area. A controlling agency enables joint use of the airspace during periods when it is not required by the military using agency. These changes do not alter the current dimensions or usage of the restricted area.

Because this action is a minor editorial change that does not alter the physical location or utilization of the restricted areas, I find that notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

Section 73.21 of Title 14 CFR part 73 was republished in FAA Order 7400.8T, effective February 16, 2011.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends airspace descriptions to keep them current.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, paragraph 311d. This action updates the technical description of special use airspace that does not alter the dimensions, altitudes, or use of the airspace. It is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

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

■ 2. § 73.21 is amended as follows:

§ 73.21 [Amended]

* * * * *

R–2101 Anniston Army Depot, AL [Amended]

By replacing the current time of designation and adding a controlling agency as follows:

Time of designation. 0700 to 1800 local time, Monday–Friday.

Controlling agency. FAA, Atlanta ARTCC.

Issued in Washington, DC, on May 17, 2012.

Ellen Crum,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2012–12576 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9590]

RIN 1545–BJ82

Health Insurance Premium Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the health insurance premium tax credit enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, as amended by the Medicare and Medicaid Extenders Act of 2010, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, and the 3% Withholding Repeal and Job Creation Act. These final regulations provide guidance to individuals who enroll in qualified health plans through Affordable Insurance Exchanges (Exchanges) and claim the premium tax credit, and to Exchanges that make qualified health plans available to individuals and employers.

DATES: *Effective Date:* These regulations are effective on May 23, 2012.

Comment date: Comments will be accepted until August 21, 2012.

Applicability Date: For date of applicability, see § 1.36B–1(o).

ADDRESSES: Comments should be submitted to Internal Revenue Service, CC:PA:LPD:PR (REG–131491–10), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to *www.regulations.gov* (IRS REG–131491–10). Alternatively, comments may be hand delivered between the hours of 8 a.m. and 4 p.m. Monday to Friday to CC:PA:LPD:PR (REG–131491–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. All comments will be available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: Shareen S. Pflanz, (202) 622–4920, or Andrew S. Braden, (202) 622–4960 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork and Reduction Act (44 U.S.C. 3507(d)) under control number 1545–2232.

The collection of information in these final regulations is in § 1.36B–5. The information will help the IRS properly reconcile the amount of the premium tax credit with advance credit payments made under section 1412 of the Patient Protection and Affordable Care Act (42 U.S.C. 18082). The collection of information is required to comply with the provisions of section 36B(f)(3) of the Internal Revenue Code (Code). 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 control number assigned by the Office of Management and Budget.

The estimated total annual reporting burden is 250,000 hours. The estimated annual burden per respondent is 5,000 hours. The estimated number of respondents is 50.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

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

Background

This document contains final regulations that amend the Income Tax Regulations (26 CFR part 1) under section 36B relating to the premium tax credit. Section 36B was enacted by the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act). On August 17, 2011, a notice of proposed rulemaking (REG–131491–10) was published in the **Federal Register** (76 FR 50931). Written comments responding to the notice of proposed rulemaking were received. The comments are available for public inspection at *www.regulations.gov* or on request. A public hearing was held on November 17, 2011. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and revisions are discussed in the preamble.

Explanation of Provisions and Summary of Comments

1. Premium Tax Credit Definitions

a. Family Size

The proposed regulations define a taxpayer's family as the individuals for whom a taxpayer claims a deduction for a personal exemption under section 151 for the taxable year, which may include the taxpayer, the taxpayer's spouse, and dependents. The proposed regulations also clarify that the family includes individuals who are not applicable individuals under section 5000A(d) and thus are not subject to the penalty for failing to maintain minimum essential coverage.

Commentators recommended clarifying that the family also includes individuals who are exempt under section 5000A(e) from the requirement to maintain minimum essential coverage. Accordingly, the final regulations clarify that a family may include all individuals not subject to the section 5000A penalty.

Some commentators disagreed with the rule in the proposed regulations that a taxpayer's family includes a child only if the taxpayer is allowed a dependency exemption deduction for the child. Commentators suggested that taxpayers should be able to compute a premium tax credit based on premiums for a child for whom the person is not allowed a dependency exemption deduction. Section 36B(d)(1) defines the family as the individuals for whom the taxpayer is allowed a personal exemption deduction under section 151. Accordingly, the final regulations do not adopt these comments. We note however, that the non-dependent child may be able to claim a premium tax credit if otherwise eligible. See § 1.36B–3(h).

b. Requirement To File a Return for Purposes of Household Income

Under section 36B, household income includes the modified adjusted gross income of a dependent who is required to file a return of tax imposed by section

1. The final regulations conform to this statutory language, thus clarifying that household income does not include the modified adjusted gross income of a family member who is required to file a tax return solely to report tax imposed under Code sections other than section 1 (for example, the early distribution penalty imposed under section 72(q) or self-employment tax under section 1401).

c. Modified Adjusted Gross Income

Under the proposed regulations, modified adjusted gross income is adjusted gross income increased by amounts excluded from gross income under section 911 and tax-exempt interest a taxpayer receives or accrues during the taxable year. The 3% Withholding Repeal and Job Creation Act, Public Law 112–56 (125 Stat. 711 (2011)), which was enacted after the proposed regulations were published, amended the definition of modified adjusted gross income to include Social Security benefits (as defined in section 86(d)) not included in gross income under section 86. The final regulations reflect this amendment.

d. Lawfully Present

Under section 36B(c)(1)(B) and the proposed regulations, a taxpayer who is an individual lawfully present in the United States may be treated as an applicable taxpayer if the taxpayer's household income is under 100 percent of the Federal poverty line (FPL) and the taxpayer is not eligible for Medicaid. Under section 1321(f)(3) of the Affordable Care Act, an individual who is not lawfully present in the United States may not enroll in a qualified health plan through an Exchange. The proposed regulations define *lawfully present* by referencing 45 CFR 152.2, which also is referenced in defining *lawfully present* in proposed regulations on Exchanges under 45 CFR 155.20 issued by the Department of Health and Human Services (HHS).

Commentators requested that the final regulations expand the definition of lawfully present to include the categories of immigrants described in the Children's Health Insurance Program Reauthorization Act. One commentator stated that the final regulations should allow States to use existing administrative mechanisms to determine eligibility if those mechanisms are not more restrictive than Federal law.

To maintain consistency with the HHS Exchange final regulations, the final regulations define *lawfully present* by referencing 45 CFR 155.20, the definition in the HHS Exchange final regulations.

e. Federal Poverty Line

The proposed regulations define *federal poverty line* by reference to the Federal poverty guidelines published annually by HHS. The Federal poverty guidelines for Alaska and Hawaii differ from the guidelines for the 48 contiguous states and the District of Columbia. The final regulations clarify that, if married taxpayers reside in separate States with different Federal poverty guidelines, or if a taxpayer resides in States with different Federal poverty guidelines during the year, the Federal poverty line that applies for purposes of section 36B and the associated regulations is the higher Federal poverty line (resulting in a lower percentage of the Federal poverty line for the taxpayers' household income and family size).

f. Federally-Facilitated Exchange

Under the proposed regulations, the term *Exchange* has the same meaning as in 45 CFR 155.20, which provides that the term *Exchange* refers to a State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange.

Commentators disagreed on whether the language in section 36B(b)(2)(A) limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges.

The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

g. Rating Area

The proposed regulations define *rating area* as an Exchange service area, as described in 45 CFR 155.20. Commentators suggested that an Exchange service area is different than a rating area as that term is used in section 36B(b)(3) for determining the applicable benchmark plan. The final regulations reserve the definition of rating area.

2. Eligibility for the Premium Tax Credit

a. Applicable Taxpayer

Under section 36B(c)(1) and the proposed regulations, in general a taxpayer is an applicable taxpayer for a taxable year only if the taxpayer's household income for the taxable year is at least 100 percent but not more than 400 percent of the FPL for the taxpayer's family size. Commentators requested that the final regulations treat a taxpayer whose household income exceeds 400 percent of the FPL for the taxpayer's family size as an applicable taxpayer if, at enrollment, the Exchange estimates that the taxpayer's household income will be between 100 and 400 percent of the FPL for the taxpayer's family size and approves advance credit payments. Other commentators advocated allowing taxpayers with household income above 400 percent of the FPL for their family size to be treated as eligible for a premium tax credit for the months before a change in circumstances affecting household income occurs or for the months for which the taxpayer receives advance payments.

The final regulations do not adopt these comments because they are contrary to the language of section 36B limiting the premium tax credit to taxpayers with household income for the taxable year at or below 400 percent of the FPL for the taxpayer's family size.

Commentators requested that the final regulations clarify that a taxpayer who has household income between 100 percent and 133 percent of the FPL but is not eligible for Medicaid qualifies for the premium tax credit. Under section 36B(c)(1)(A) and the proposed regulations, an applicable taxpayer who may claim the premium tax credit is a taxpayer with household income between 100 and 400 percent of the FPL for the family size. Thus, it is clear that a taxpayer with household income between 100 percent and 133 percent of the FPL for the taxpayer's family size may be an applicable taxpayer.

Commentators requested that the final regulations allow an individual who may be claimed as a dependent by another taxpayer to qualify as an applicable taxpayer for a taxable year if, for the taxable year, another taxpayer does not claim the individual as a dependent. The final regulations do not adopt this comment because it is inconsistent with section 36B(c)(1)(D), which provides that a premium tax credit is not allowed to any individual for whom a deduction under section 151 is ''allowable to another taxpayer'' for the taxable year.

b. Incarceration

Under section 1312(f) of the Affordable Care Act, individuals who are incarcerated (other than pending disposition of charges) may not enroll in a qualified health plan through an Exchange. The proposed regulations provide, however, that an individual who is incarcerated may be allowed a premium tax credit if a family member is enrolled in a qualified health plan.

A commentator suggested that the rules relating to incarcerated individuals should apply to individuals incarcerated pending disposition of charges, as is the case under the Medicaid program. The comment addresses an issue beyond the scope of the premium tax credit regulations. Standards for enrollment in a qualified health plan fall under rules within the jurisdiction of HHS.

c. Minimum Essential Coverage

i. Government-Sponsored Coverage

A. Time of Eligibility

The proposed regulations provide that an individual generally is treated as eligible for a government-sponsored program on the first day of the first full month in which the individual may receive benefits under the program. The proposed regulations further provide that an individual who fails to complete the requirements necessary to receive benefits available under a government-sponsored program (other than a veteran's health care program) reasonably promptly is treated as eligible for the coverage on the first day of the second calendar month following the event that establishes eligibility.

Commentators asked that the final regulations allow individuals a certain amount of time to complete the requirements (such as submitting an application) necessary to obtain government-sponsored minimum essential coverage. Some commentators suggested that the final regulations could provide this period by defining ''reasonably promptly'' as 90 days after the event that establishes eligibility. Commentators requested that the final regulations allow exemptions from the 90-day period, however, when additional delay in receiving benefits occurs despite the good faith efforts of the taxpayer, for example as a result of inaction of a government agency or official.

To provide greater clarity, the final regulations delete the language ''reasonably promptly'' and extend this time period. Under the final regulations, an individual who fails to complete the requirements necessary to receive benefits available under a government-sponsored program by the last day of the third full calendar month following the event that establishes eligibility is treated as eligible for the coverage on the first day of the fourth calendar month. Because an individual who timely completes the necessary requirements is treated as eligible for government-sponsored minimum essential coverage no earlier than the first month that the individual may receive benefits, this 3-month time period does not include the time needed for a government agency to process an application.

The proposed regulations request comments on whether rules should provide flexibility if operational challenges prevent timely transition from coverage under a qualified health plan to coverage under a government-sponsored program. Commentators stated that the final regulations should provide that an individual transitioning from a qualified health plan to coverage under a government-sponsored program should not be treated as eligible for government-sponsored minimum essential coverage until the individual is able to effectively terminate his or her qualified health plan coverage. They expressed concern that an individual may be unable to discontinue advance credit payments by the beginning of a month for which the individual is eligible for government-sponsored coverage and could be responsible for an excess advance payment for that month.

The concerns expressed in these comments are addressed in the HHS final regulations on Exchanges. Under 45 CFR 155.430, an Exchange must permit an enrollee to terminate coverage in a qualified health plan no later than 14 days after the enrollee requests termination. For an enrollee who is newly eligible for Medicaid or the Children's Health Insurance Program (CHIP), 45 CFR 155.430(d)(2)(iv) provides that qualified health plan coverage terminates on the last day before Medicaid or CHIP coverage begins. These termination rules enable individuals transitioning to coverage under a government-sponsored program to effectively terminate qualified health plan coverage (and liability for advance credit payments) before they are eligible for government-sponsored minimum essential coverage.

B. Definition of ''Eligible''

The proposed regulations provide that an individual is eligible for government-sponsored minimum essential coverage when an individual meets the requirements for coverage under the program. For administrative convenience, however, because the standards for eligibility in veterans' programs do not allow Exchanges to identify everyone who may be eligible for veterans' coverage at the time he or she is seeking an eligibility determination for advance payments of the premium tax credit, the proposed regulations provide that an individual is eligible for minimum essential coverage under the veteran's health care program authorized under chapter 17 or 18 of Title 38, U.S.C. only if the individual is enrolled in a veteran's health care program identified as minimum essential coverage in regulations issued under section 5000A.

The final regulations conform the rules to amendments to section 5000A that delete the word ''veteran's'' in describing health care programs under chapter 17 or 18 of Title 38. Thus, the special rule for veterans' coverage may apply to individuals who are not veterans but are eligible for the Civilian Health and Medical Program of the Department of Veterans Affairs (VA) or the VA's spina bifida program.

Commentators requested that the final regulations define eligibility for government-sponsored programs as actual enrollment for individuals suffering from end stage renal disease who become eligible for Medicare as a result of their diagnosis. Other commentators requested this treatment for any individual suffering from an acute illness who becomes eligible for a government-sponsored program. The commentators asserted that these seriously-ill individuals should be able to choose to remain enrolled in a qualified health plan with the benefit of a premium tax credit to maintain continuity of medical care, which may be disrupted if the individual loses eligibility for the premium tax credit and is required to move to a government-sponsored program in which the individual's medical provider does not participate.

Section 36B(c)(2)(B) establishes a clear structure under which eligibility for government-sponsored minimum essential coverage in a given month precludes including an individual in a taxpayer's coverage family for purposes of computing the premium assistance amount for that month. In keeping with the statutory scheme, the final regulations do not adopt these comments. However, the IRS and the Treasury Department expect to publish additional guidance, see § 601.601(d)(2), clarifying when or if an individual becomes ''eligible for government-sponsored minimum essential coverage'' when the eligibility for that coverage is a result of a particular illness or

condition. For example, as the preamble to the proposed regulations notes, the additional guidance would clarify the rules in the case of eligibility for Medicaid on the basis of blindness or disability.

C. Eligibility for Limited Benefits

Commentators requested that the final regulations address whether eligibility for benefits with a limited scope under government programs (for example, eligibility only for family planning services under Medicaid) constitutes eligibility for minimum essential coverage. The final regulations do not address these comments because minimum essential coverage is defined in section 5000A(f). It is anticipated that regulations under section 5000A will provide that government-sponsored health benefit programs that offer only very limited benefits are not minimum essential coverage.

D. Medicare Eligibility

A commentator noted that the dates in some of the examples in the proposed regulations concerning eligibility for Medicare inaccurately describe when an individual's Medicare coverage begins. The commentator also asked that the final regulations create a safe harbor for taxpayers whose Medicare coverage is delayed because they enroll during the later months of their Medicare initial enrollment period.

The final regulations revise the examples in response to this comment. The final regulations do not include the suggested Medicare safe harbor because the commentator's concerns are addressed by the general rule that an individual is eligible for minimum essential coverage on the first day of the first full month the individual may receive benefits. Additionally, as discussed earlier in this preamble, the final regulations revise the rule that an individual who fails to complete the requirements to obtain coverage is treated as eligible on the first day of the fourth month after the event establishing eligibility. Thus, individuals enrolling during the later months of their initial Medicare enrollment period will not be deemed eligible for Medicare before the expiration of the enrollment period.

E. Indian Health Service

Commentators requested that the final regulations provide that individuals eligible to receive health care from the Indian Health Service (IHS) are not eligible for government-sponsored minimum essential coverage. Section 5000A(f) defines minimum essential coverage. It does not designate the IHS as providing minimum essential coverage. Section 5000A(f)(1)(E) authorizes HHS to designate other coverage as minimum essential coverage. HHS has advised the IRS and the Treasury Department that it does not intend to designate access to the IHS as minimum essential coverage. Thus, individuals who are eligible to receive health care from the IHS will not be barred by IHS access alone from eligibility for the premium tax credit or from access to the special cost-sharing reduction for tribal members under section 1402(d) of the Affordable Care Act.

ii. Employer-Sponsored Coverage

A. Affordability

The proposed regulations provide that an eligible employer-sponsored plan is affordable for an employee and related individuals if the portion of the annual premium the employee must pay for self-only coverage does not exceed the required contribution percentage (9.5 percent for taxable years beginning before January 1, 2015) of the taxpayer's household income. Commentators suggested that the affordability of coverage for related individuals should be based on the portion of the annual premium the employee must pay for family coverage.

Under section 36B(c)(2)(C), an individual who may enroll in an eligible employer-sponsored plan may nonetheless be eligible for a premium tax credit if the employer-sponsored coverage either is unaffordable or fails to provide minimum value. Future regulations concerning employer-sponsored coverage will provide final rules on determining affordability for related individuals and proposed rules on determining minimum value.

Some commentators asked that the final rules clarify how employer contributions to health savings accounts (HSAs), and amounts made available under health reimbursement arrangements (HRAs) are treated in determining affordability. Employer contributions to an HSA would not affect the affordability of employer-sponsored coverage because HSA contributions may not be used to pay for premiums for health insurance coverage (except in limited circumstances not applicable in the context of employer-sponsored coverage). Amounts available under an HRA that may be used only to reimburse medical expenses other than the employee's required share of the cost of employer-sponsored coverage also would not affect the affordability of employer-sponsored coverage. These final regulations do not address how other HRAs are treated for purposes of determining the affordability of an employer-sponsored plan, which may be addressed further in additional published guidance, see § 601.601(d)(2).

Some commentators also asked for clarification on how wellness incentive programs affect the premium affordability determination. The final regulations authorize the Commissioner to publish additional guidance, see § 601.601(d)(2), to address the effect on affordability of wellness incentives that increase or decrease an employee's share of premiums. Comments are requested on types of wellness incentives, how these programs affect the affordability of eligible employer-sponsored coverage for employees and related individuals, and how incentives are earned and applied. The administrability of any rule on wellness incentives must consider the extent to which employees can be certain they will qualify for the incentives at the time they otherwise would be evaluated for eligibility for advance credit payments.

B. Affordability Safe Harbor

Under the proposed regulations, an employer-sponsored plan is not affordable for an employee or family member for a plan year if, when the employee or family member enrolls in a qualified health plan, an Exchange determines that the eligible employer-sponsored plan is not affordable. Individuals applying for advance credit payments are required to provide the Exchange with information on whether employer-sponsored coverage is available to them. Because an Exchange will make an affordability determination only when an individual represents that employer-sponsored coverage is available, the affordability safe harbor will not be available to a taxpayer who misrepresents to an Exchange the availability of employer-sponsored coverage. The final regulations provide that the affordability safe harbor does not apply if a taxpayer, with reckless disregard for the facts, provides incorrect information to an Exchange concerning an employee's portion of the annual premium for employer coverage. The final regulations clarify that the affordability safe harbor applies only until such time as the availability of employer-sponsored coverage changes. If new or different employer-sponsored coverage becomes available after an individual enrolls in a qualified health plan, the individual must notify the Exchange and get a new affordability determination to extend the safe harbor. As the preamble to the proposed regulation notes, regulations under

section 4980H are expected to provide that an employer is not subject to a penalty merely because an employee receives a premium tax credit under this affordability safe harbor if the employer offers to its full-time employees affordable coverage that provides minimum value.

Under 45 CFR 155.335, Exchanges generally will conduct an annual redetermination process that will allow individuals who enroll in a qualified health plan to maintain their eligibility and enrollment for subsequent years with limited burden. This process involves notifying the individual of the information the Exchange intends to use to make a new determination of eligibility for advance credit payments and soliciting the individual to report changes. The final regulations clarify that the affordability safe harbor does not carry over to later plan years automatically as part of the redetermination process. The affordability safe harbor applies only to a plan year for which a taxpayer responds to the notification and affirmatively provides information relating to the affordability in the upcoming year of available employer-sponsored coverage, allowing an Exchange to determine that employer-sponsored coverage available to the taxpayer for that plan year is unaffordable.

C. Eligibility During a Waiting Period

Under section 2708 of the Public Health Service Act, employers are permitted to apply a waiting period of up to 90 days beginning when the employee is otherwise eligible for coverage under a group health plan. See Notice 2012–17 (2012–9 IRB 430). The final regulations clarify that an employee or related individual is treated as not eligible for coverage under the employer's plan during a waiting period.

D. Minimum Value

The proposed regulations provide that an eligible employer-sponsored plan provides minimum value only if the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent. Commentators provided various recommendations for determining minimum value. Some commentators requested transition relief. Notice 2012–31 (2012–20 IRB 906) solicits additional comments on potential approaches for determining minimum value. All comments will be considered in separate guidance on determining minimum value.

E. Individuals Enrolled in Coverage

Section 36B(c)(2)(C)(iii) and the proposed regulations provide that an individual who enrolls in an eligible employer-sponsored plan is not eligible for the premium tax credit even if the plan is unaffordable or fails to offer minimum value. Commentators asked whether an individual who enrolls in an eligible employer-sponsored plan and then terminates coverage during the plan year is treated as eligible for minimum essential coverage under the plan for the entire plan year under this rule, even though the coverage is unaffordable or does not provide minimum value. Commentators similarly asked if individuals who enroll in continuation coverage and then disenroll from it later during the year are treated as eligible for minimum essential coverage for the entire year. In response to these comments, the final regulations clarify that an individual is treated as eligible for minimum essential coverage under an eligible employer-sponsored plan by reason of enrolling in the plan or in continuation coverage only for months the individual is enrolled in the coverage.

Commentators expressed concern that an employee may be enrolled automatically in employer-sponsored coverage and would be treated as eligible for minimum essential coverage under an employer-sponsored plan by reason of the automatic enrollment even though the plan is not affordable or does not provide minimum value. The commentators were specifically concerned about the automatic enrollment provision in section 18A of the Fair Labor Standards Act (added by section 1511 of the Affordable Care Act), which is applicable to employers with more than 200 full-time employees. (The Department of Labor, which has jurisdiction over the automatic enrollment provisions under section 18A of the Fair Labor Standards Act, does not intend to require employers to comply with the automatic enrollment provisions until after it publishes regulations and those regulations become applicable, and has indicated that the regulations will not take effect by 2014. See Notice 2012–17, Q&A–1.)

Commentators also raised concerns about the automatic enrollment of an employee in an employer-sponsored plan for other reasons, which could include automatic enrollment that a plan might provide for without regard to the automatic enrollment requirements of the Affordable Care Act, automatic enrollment that might occur because of administrative error, or automatic re-enrollment in the plan in a subsequent year. The commentators recommended allowing an employee to opt out of the employer-sponsored coverage following automatic enrollment.

In response to these comments, the final regulations provide that an employee or related individual is treated as not enrolled in an eligible employer-sponsored plan for a month in a plan year or other period if (1) the employee or related individual is automatically enrolled in the plan for that plan year or other period, and (2) terminates the coverage before the later of the first day of the second full calendar month of the plan year or other period or the last day of any permissible opt-out period provided by the employer-sponsored plan or in regulations to be issued by the Department of Labor. Thus, an individual who is automatically enrolled for a plan year or other period in coverage that is unaffordable or that does not provide minimum value and who terminates that coverage by the date specified in the preceding sentence will not be treated as eligible for minimum essential coverage under the employer-sponsored plan for the months in which the individual was automatically enrolled in the plan that are within that plan year or period. Accordingly, the individual will not be precluded by the automatic enrollment from inclusion in the taxpayer's coverage family for computing the amount of the premium tax credit for those months.

iii. Nondependent Eligibility for Minimum Essential Coverage

Commentators asked whether individuals who may enroll in an eligible employer-sponsored plan based on their relationship to an employee but who are not tax dependents (for example, a 25-year old child or a domestic partner of the employee) are treated as eligible for minimum essential coverage under the plan. In response to these comments, the final regulations provide that an individual who may enroll in minimum essential coverage because of a relationship to another person eligible for the coverage, but for whom the other eligible person does not claim a personal exemption deduction under section 151, is treated as eligible for minimum essential coverage under the coverage only for months that the related individual is enrolled in the coverage. This change reflects the fact that the related individual is a member of a different family with different household income for purposes of the premium tax credit. Furthermore, a person who may not claim a related individual as a

dependent is not responsible for the section 5000A penalty for the related individual who does not receive coverage. Thus, the final regulations ensure that coverage available through another person does not create an obstacle to a related individual claiming a premium tax credit.

3. Computing the Premium Tax Credit

a. Definition of Coverage Month

Section 36B(c)(2)(A)(ii) and the proposed regulations provide that a month is a coverage month for an individual only if the individual is enrolled in a qualified health plan and is not eligible for other minimum essential coverage on the first day of the month, and the premiums are paid by the taxpayer or through advance credit payments.

Consistent with the proposed regulations, the final regulations provide that an individual must be enrolled in a qualified health plan as of the first day of the month for a month to be a coverage month. However, instead of testing whether the individual is eligible for other minimum essential coverage as of the first day of the month, the final regulations provide that an individual may have a coverage month as long as there is at least one day of the month when the individual is not eligible for other minimum essential coverage. The final regulations also clarify that a month is not a coverage month for a taxpayer if the taxpayer's share of premiums is not paid in full by the unextended due date for filing the taxpayer's income tax return for the taxable year.

b. Third-Party Payments

Under the proposed regulations, premiums another person pays for coverage of the taxpayer or a member of the taxpayer's family for a month are treated as paid by the taxpayer solely for purposes of the month qualifying as a coverage month. Commentators asked for confirmation that an Indian tribe may pay premiums on behalf of a tribal member. The final regulations add an example illustrating that premiums paid for a taxpayer by an Indian tribe are treated as paid by the taxpayer under the coverage month rule.

c. Adjusted Monthly Premium

Under section 36B(b)(3)(C), the adjusted monthly premium is the premium an issuer would charge to cover all members of a taxpayer's coverage family, adjusted only for age. A commentator noted that the definition of adjusted monthly premium in the proposed regulations does not include the statutory qualification that, in the case of a State participating in the wellness discount demonstration project under section 2705(d) of the Public Health Service Act, the adjusted monthly premium is determined without regard to any premium discount or rebate under the project. The final regulations revise the definition of adjusted monthly premium in accordance with this comment and clarify that the premium may not be adjusted for tobacco use, see section 36B(b)(3)(C).

d. Applicable Benchmark Plan

i. In General

Under section 36B(b)(3)(B), a taxpayer's premium tax credit is computed based on the premium for the applicable second lowest cost silver plan in the rating area where the taxpayer resides and offered by the Exchange where the taxpayer enrolls in a qualified health plan. For simplicity, the proposed regulations refer to this plan as the applicable benchmark plan.

Section 36B(b)(3)(B)(ii) describes the ''applicable'' benchmark plan as providing self-only or family coverage. The proposed regulations define family coverage as insurance that covers more than one individual. The proposed regulations further provide that a taxpayer's ''applicable'' benchmark plan is the benchmark plan that ''applies'' to the members of the taxpayer's coverage family. The proposed regulations define the coverage family, in general, as the members of the taxpayer's family (the individuals for whom the taxpayer properly claims a personal exemption deduction under section 151) who are not eligible for other minimum essential coverage. The final regulations clarify that the coverage family includes only those individuals in the taxpayer's family who are not eligible for other minimum essential coverage and enroll in a qualified health plan.

For purposes of determining the benchmark plan that ''applies'' to a coverage family, the proposed regulations provide that if an Exchange offers categories of family coverage (such as coverage for two adults or coverage for one adult plus children), the applicable benchmark plan for family coverage is the coverage category that applies to the members of the taxpayer's coverage family who enroll in a qualified health plan. The final regulations delete the reference to coverage categories. The final Exchange rules promulgated by HHS removed references to rating categories, which are a parallel concept to coverage categories. The final regulations provide that the applicable benchmark plan for family coverage is the plan that applies to the members of the taxpayer's coverage family.

Commentators requested clarification on how the applicable benchmark plan would be determined for a qualified health plan that covers children only. The final regulations provide an example in response to this comment.

ii. Families Not Covered by One Applicable Benchmark Plan

The proposed regulations provide that the premium for the applicable benchmark plan is the sum of the premiums for the applicable benchmark plans that cover components of the taxpayer's coverage family if a single benchmark plan would not cover the family, for example because members live in different rating areas. The final regulations provide that, if there is at least one silver level plan offered on an Exchange that does not cover all members of a taxpayer's coverage family under one policy and premium, for example because of nontraditional relationships within the family, the premium for the applicable benchmark plan is the single premium or the combination of premiums that is the second lowest cost silver option for covering the entire family. The final regulations reserve rules for determining the applicable benchmark plan for families with members residing in different locations.

Commentators stated that the final regulations should allow domestic partners and other two-adult groups to use a family benchmark plan to compute their premium tax credit if the Exchange allows both adults to be covered by the same qualified health plan. The final regulations do not adopt this suggestion. If the adults constitute two separate households for Federal tax purposes, section 36B requires a separate credit computation for each household that includes only those individuals for whom each taxpayer claims a personal exemption deduction under section 151.

iii. Plans Closed to Enrollment

The proposed regulations provide that, in general, an applicable benchmark plan is the second lowest cost silver plan offered through the Exchange at the time a taxpayer or family member enrolls. However, a plan does not cease to be a taxpayer's applicable benchmark plan for that enrollment period because the plan or a lower cost plan closes to enrollment during the taxable year. Thus, a plan may continue to be an applicable benchmark plan if it closes to

enrollment after a taxpayer enrolls in a qualified health plan, but it is disregarded in determining the applicable benchmark plan if it is closed to enrollment at the time the taxpayer enrolls.

A commentator requested that the final regulations exclude certain qualified health plans open to enrollment only to certain individuals when determining which plan constitutes a taxpayer's applicable benchmark plan. The final regulations clarify that a plan is taken into account in determining the taxpayer's applicable benchmark plan only if it is open to enrollment to one or more members of a taxpayer's coverage family.

iv. Changes Affecting Applicable Benchmark Plan

Commentators asked whether a taxpayer's applicable benchmark plan is locked in at enrollment and whether the benchmark plan could change during the year if a plan is decertified or if members of the taxpayer's family leave the plan. The proposed regulations provide that a taxpayer's applicable benchmark plan may change from month to month if changes in the taxpayer's coverage family occur (for example, if a family member becomes eligible or ineligible for minimum essential coverage during the taxable year). The proposed regulations also provide that a taxpayer's applicable benchmark plan does not cease to be the applicable benchmark plan solely because the plan, or a lower cost plan, terminates or closes to enrollment during the year. The final regulations adopt the proposed regulations without change.

e. Combining Qualified Health Plan Premiums With Premiums for Other Coverage

Section 36B(b) and the proposed regulations provide that the premium tax credit is the lesser of (1) the premiums for the qualified health plan or plans in which a taxpayer or family member enrolls, or (2) the difference between the premium for a benchmark qualified health plan and the amount of the premium that the taxpayer would be required to pay if the taxpayer purchased the benchmark plan (the taxpayer's contribution amount). Commentators suggested that the final regulations allow taxpayers to determine the premium tax credit by combining the premiums for one or more qualified health plans with premiums a taxpayer pays for other minimum essential coverage (particularly premiums for coverage under CHIP). Under the rule suggested by the commentators, the taxpayer's contribution amount would be reduced by the amount of the family's other premiums to ensure that a family could afford the combined premiums for qualified health plan coverage and CHIP or other coverage.

Under section 36B(b)(2), the premium tax credit is computed by taking into account only the premiums for qualified health plans. Thus, the credit may not be increased for premiums for other minimum essential coverage.

f. Pediatric Dental Coverage

Under section 36B(b)(3)(E), if an individual enrolls in both a qualified health plan and a dental plan, the portion of the premium for the dental plan properly allocable to pediatric dental benefits that are essential health benefits is treated as premiums payable for a qualified health plan for purposes of determining the monthly premium. The proposed regulations requested comments on methods for determining the amount of the premium properly allocable to pediatric dental benefits.

Commentators requested that the final regulations use a methodology that reflects the true costs of medical and dental care for children. Other commentators recommended that the Federal government split the value of the premium tax credit on a basis proportionate to the premium for the pediatric service in the dental plan and the qualified health plan premium. Some commentators requested a simple formula for allocating a taxpayer's dental benefits premium to pediatric dental care. A commentator requested a safe harbor permitting dental insurance carriers to use a reasonable method based on sound actuarial practice.

The final regulations provide that the portion of the premium for a stand-alone dental plan properly allocable to pediatric dental benefits is determined under guidance issued by HHS. Under the final HHS Exchange regulations at 45 CFR 156.210, a qualified health plan issuer that offers a standalone dental plan is required to provide information on the plan's rates to the Exchange each year. It is anticipated that future HHS guidance will address how this required reporting on rates will include reporting on the portion of the premium allocable to pediatric dental coverage.

g. Families With Individuals Not Lawfully Present

Section 36B(e)(1)(B) describes a method for determining the FPL percentage for families that include an individual not lawfully present (the statutory method) and allows a comparable method that reaches the same results to be prescribed by regulations. Commentators suggested that the final regulations provide a comparable method based on the Medicaid rules for income and family size determinations.

The commentators' suggested method may not reach the same result as the statutory method. Thus, the final regulations do not adopt this suggestion. The final regulations provide that the Commissioner may provide a comparable method in additional published guidance, see § 601.601(d)(2).

4. Reconciling the Credit and Advance Credit Payments

a. Months for Which an Issuer Does Not Provide Coverage

Section 1412(c)(2)(B) of the Affordable Care Act provides that an issuer receiving an advance credit payment must reduce the premiums charged to the insured for the period covered by the advance payment but may terminate coverage if the insured fails to pay premiums for a 3-month period. The final HHS Exchange regulations describe the operation of this grace period in more detail. Under the retroactive termination rule, if a taxpayer does not pay premiums in full for 3 months, the issuer must terminate coverage retroactive to the end of the first of those months and will be required to return any advance payments received for any terminated coverage months. These final regulations clarify that a taxpayer does not have an advance credit payment for a month in which the issuer of the qualified health plan does not provide coverage and will not be required to reconcile payments for those months. The taxpayer will, however, have to reconcile the payment for the first month of the grace period. If the taxpayer has not paid the taxpayer's share of the premium for that month by the unextended due date for filing the return, the first month is not a coverage month, and the taxpayer is not eligible for the premium tax credit for that month.

b. Changes in Circumstances

Section 36B(f) provides that a taxpayer must reconcile on the taxpayer's income tax return for the taxable year the premium tax credit allowed under section 36B with the advance payments paid during the course of the taxable year and must pay the amount of any excess advance payments as additional tax. For taxpayers with household income below 400 percent of the FPL, the amount of

additional tax liability the taxpayer must repay is capped.

Commentators requested that the final regulations include rules to mitigate the effects of the requirement to repay excess advance payments. Commentators suggested that the final regulations adopt a safe harbor for individuals and families who can demonstrate that they accurately reported any changes in income or family size to the Exchange and that their advance payments were properly computed based on the information available at the time the payments were made. Commentators suggested that taxpayers who experience changes in circumstances during the year, including taxpayers whose household income for the taxable year exceeds 400 percent of the FPL, should be allowed to prorate the repayment limitations based on the portion of the year the taxpayer receives advance payments. Other commentators asked that taxpayers who would experience a hardship as a result of repaying excess advance payments be exempt from the repayment requirement or that the IRS should disregard changes that cause income to slightly exceed 400 percent of the FPL. Commentators also suggested that taxpayers be allowed to compute their premium tax credit using the largest family size of the household during the year rather than the family size reported on the tax return.

The statute sets forth clear rules for reconciling advance credit payments, which are not consistent with the suggestions made by the commentators. Accordingly, the final regulations do not adopt these comments.

Commentators suggested that the IRS should offer automatic payment plans for taxpayers who have an additional tax liability and should not impose interest or penalties on this additional tax liability repaid through the payment plan. Although these comments are beyond the scope of these final regulations, the IRS will consider possible avenues of administrative relief in appropriate cases for taxpayers who have additional tax liability as a result of excess advance payments.

c. Changes in Filing Status

i. Taxpayers Who Marry During the Taxable Year

The proposed regulations provide that, like other taxpayers, newly-married taxpayers compute their premium tax credit using family size and household income as reported on their tax return and the appropriate applicable benchmark plan for each coverage month regardless of whether the taxpayers were married or single during the month. The proposed regulations request comments on alternative credit computations for taxpayers who receive advance payments, marry during the year, and owe additional tax, even if the Exchange accurately projects each spouse's separate income.

Some commentators suggested an alternative computation that computes the credit for the single months separately for each spouse as if each taxpayer's annual income was one-half of the actual household income for the year. For the married months, the credit would be computed using actual household income for the year. The premium tax credit would be the sum of the credits computed for the single months and the married months. This computation generally results in a smaller amount of excess advance payments compared to the amount computed under the proposed regulations.

The final regulations adopt the alternative credit computation suggested by the commentators as an option for taxpayers who marry during the taxable year. Under this alternative method, the credit for the single months is computed separately for each spouse as if each taxpayer's annual income was one-half of the actual household income for the year, the credit for the married months is computed using actual household income for the year, and the premium tax credit is the sum of the credits computed for the single months and the married months. However, to avoid allowing taxpayers an increased amount of additional premium tax credit resulting from marriage, the final regulations cap any additional premium tax credit allowed to a taxpayer under this alternative computation method at the amount of additional credit that results from computing the credit under the general rule.

Commentators requested that the final regulations allow a year-of-marriage waiver on repaying excess advance payments. The final regulations do not adopt these comments as these rules would create unwarranted benefits, for example in cases of taxpayers who marry during the year and owe additional tax because their income is significantly higher than what the Exchange projected.

ii. Taxpayers Whose Marital Status Changes From Married to Single During the Taxable Year

The proposed regulations provide that taxpayers who are married to each other at the beginning but not at the end of the taxable year must allocate the premium for the applicable benchmark plan, the premium for the plan in which the taxpayers enroll, and the advance credit payments for the period the taxpayers are married. The proposed regulations permit the allocation to be made in any proportion, but if the taxpayers cannot agree on a proportion, these items are allocated 50 percent to each taxpayer.

Commentators opined that the final regulations should provide for allocating these items to each taxpayer in proportion to each taxpayer's household income. The final regulations do not adopt this suggestion as it would require divorced taxpayers to exchange income information or require the IRS to associate each taxpayer's return with the other. Divorced taxpayers may allocate the premium for the applicable benchmark plan, the premium for the plan in which the taxpayers enroll, and the advance credit payments in proportion to household income under the final regulations if they choose.

iii. Married Taxpayers Filing Separately

Section 36B(c)(1)(C) provides that married taxpayers who do not file a joint return are not applicable taxpayers and are not allowed a premium tax credit. Accordingly, married taxpayers who receive advance credit payments but do not file a joint return must repay the advance credit payments. The advance credit payments must be allocated equally to each taxpayer for purposes of determining the amount of excess advance payments. The final regulations clarify that this equal allocation also applies if one spouse is treated as unmarried under section 7703(b) (and may, for example, properly claim the premium tax credit on a return filed as head of household).

The proposed regulations requested comments on special rules for taxpayers who receive advance payments but face challenges in meeting the joint return requirement, for example because of the incarceration of a spouse, domestic abuse, or a pending divorce.

Numerous commentators stated that the final regulations should provide special rules allowing these spouses to file separate returns and claim the premium tax credit. Commentators suggested that abandoned spouses also warrant an exception. Other commentators noted that other married taxpayers may face challenges in filing a joint return and asked for a hardship exemption from the joint filing requirement.

Commentators suggested that taxpayers should be able to certify on the premium tax credit form that they meet the criteria for an exemption from the joint filing requirement. One

commentator suggested granting an exception in case of domestic violence for a taxpayer who has or during the taxable year had an order of protection.

Some commentators, noting that many of these situations are not resolved in a single taxable year, requested a three-year exception to the joint filing requirement.

The final regulations do not provide special rules allowing married taxpayers to claim the premium tax credit on separate returns. However, the IRS and the Treasury Department intend to propose additional regulations regarding eligibility for the premium tax credit to address circumstances in which domestic abuse, abandonment, or similar circumstances create obstacles to the ability of taxpayers to file joint returns. Comments are requested on the documentation that a taxpayer could provide to establish that he or she cannot file a joint return because of the domestic abuse, abandonment, or other similar circumstances, on what treatment should be accorded the other spouse if he or she does not file with documentation supporting an exception, and the need for anti-abuse rules.

5. Information Reporting

Commentators requested that the final regulations require an Exchange, in reporting information under section 36B(f)(3), to strictly define and limit the use and disclosure of immigration status information for any purpose other than ensuring efficient operation of the Exchange and prohibit the transfer of immigration status information from the Exchange to the IRS. The final regulations do not include a rule responding to these comments because the IRS does not require information on immigration status of any individual in order to administer the premium tax credit and will not obtain this information. The Exchange will verify that an individual is a citizen or lawfully present and eligible to enroll in coverage through the Exchange.

The proposed regulations provide that the IRS will provide rules on the time and manner of information reporting by Exchanges in additional published guidance, see § 601.601(d)(2). Commentators requested that the final regulations provide information on the time and manner of information reporting by Exchanges. A commentator suggested that the information returns should be provided to taxpayers by December 31. Another commentator suggested that the annual information return should report the cost of the applicable benchmark plan on the first day of each month. The final regulations defer rules on the time for information reporting by Exchanges to additional regulations, which are expected to provide for monthly reporting by Exchanges to the IRS and an annual report to the IRS and the taxpayer due by January 31.

6. American Indians/Alaska Natives

Commentators asked that the final regulations provide special provisions for American Indians and Alaska Natives, for example that they be treated as eligible for employer-sponsored minimum essential coverage only if they are enrolled in the coverage, that they should not be required to pay any premiums for a qualified health plan, and that they be exempted from reconciliation. The IRS and HHS have conducted several tribal consultations on these and other issues under the proposed regulations. The final regulations do not adopt these suggestions, as they are inconsistent with the statute.

7. Effective/Applicability Date

These final regulations apply to taxable years ending after December 31, 2013.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. 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 requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Comments

Written (including electronic) comments must be received by *August 21, 2012.* Comments should be submitted to Internal Revenue Service, CC:PA:LPD:PR (REG–131491–10), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to *www.regulations.gov* (IRS REG–131491–10). Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (REG–131491–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC All comments will be available for public inspection and copying.

Drafting Information

The principal authors of these final regulations are Shareen S. Pflanz, Frank W. Dunham III, Andrew S. Braden, and Stephen J. Toomey of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Section 1.36B–4 also issued under 26 U.S.C. 36B(g).

* * * * *

■ **Par. 2.** Sections 1.36B–0, 1.36B–1, 1.36B–2, 1.36B–3, 1.36B–4, and 1.36B–5 are added to read as follows:

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§ 1.36B–1 Premium tax credit definitions.

(a) *In general.* Section 36B allows a refundable premium tax credit for taxable years ending after December 31, 2013. The definitions in this section apply to this section and §§ 1.36B–2 through 1.36B–5.

(b) *Affordable Care Act.* The term *Affordable Care Act* refers to the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)), as amended by the Medicare and Medicaid Extenders Act of 2010, Public Law 111–309 (124 Stat. 3285 (2010)), the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Public Law 112–9 (125 Stat. 36 (2011)), the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10 (125 Stat. 38 (2011)), and the 3% Withholding Repeal and Job Creation Act, Public Law 112–56 (125 Stat. 711 (2011)).

(c) *Qualified health plan.* The term *qualified health plan* has the same meaning as in section 1301(a) of the Affordable Care Act (42 U.S.C. 18021(a)) but does not include a catastrophic plan described in section 1302(e) of the Affordable Care Act (42 U.S.C. 18022(e)).

(d) *Family and family size.* A taxpayer's family means the individuals for whom a taxpayer properly claims a deduction for a personal exemption under section 151 for the taxable year. Family size means the number of individuals in the family. Family and family size may include individuals who are not subject to or are exempt from the penalty under section 5000A for failing to maintain minimum essential coverage.

(e) *Household income*—(1) *In general.* Household income means the sum of—

(i) A taxpayer's modified adjusted gross income; plus

(ii) The aggregate modified adjusted gross income of all other individuals who—

(A) Are included in the taxpayer's family under paragraph (d) of this section; and

(B) Are required to file a return of tax imposed by section 1 for the taxable year (determined without regard to the exception under section (1)(g)(7) to the requirement to file a return).

(2) *Modified adjusted gross income.* Modified adjusted gross income means adjusted gross income (within the meaning of section 62) increased by—

(i) Amounts excluded from gross income under section 911;

(ii) Tax-exempt interest the taxpayer receives or accrues during the taxable year; and

(iii) Social security benefits (within the meaning of section 86(d)) not included in gross income under section 86.

(f) *Dependent.* Dependent has the same meaning as in section 152.

(g) *Lawfully present.* Lawfully present has the same meaning as in 45 CFR 155.20.

(h) *Federal poverty line.* The Federal poverty line means the most recently published poverty guidelines (updated periodically in the **Federal Register** by the Secretary of Health and Human Services under the authority of 42 U.S.C. 9902(2)) as of the first day of the regular enrollment period for coverage by a qualified health plan offered through an Exchange for a calendar year. Thus, the Federal poverty line for computing the premium tax credit for a taxable year is the Federal poverty line in effect on the first day of the initial or annual open enrollment period preceding that taxable year. See 45 CFR 155.410. If a taxpayer's primary residence changes during a taxable year from one state to a state with different Federal poverty guidelines or married taxpayers reside in separate states with different Federal poverty guidelines (for example, Alaska or Hawaii and another state), the Federal poverty line that applies for purposes of section 36B and the associated regulations is the higher Federal poverty guideline (resulting in a lower percentage of the Federal poverty line for the taxpayers' household income and family size).

(i) [Reserved]

(j) *Advance credit payment.* Advance credit payment means an advance payment of the premium tax credit as provided in section 1412 of the Affordable Care Act (42 U.S.C. 18082).

(k) *Exchange.* Exchange has the same meaning as in 45 CFR 155.20.

(l) *Self-only coverage.* Self-only coverage means health insurance that covers one individual.

(m) *Family coverage.* Family coverage means health insurance that covers more than one individual.

(n) *Rating area.* [Reserved]

(o) *Effective/applicability date.* This section and §§ 1.36B–2 through 1.36B–5 apply for taxable years ending after December 31, 2013.

§ 1.36B–2 Eligibility for premium tax credit.

(a) *In general.* An applicable taxpayer (within the meaning of paragraph (b) of this section) is allowed a premium assistance amount only for any month that one or more members of the applicable taxpayer's family (the applicable taxpayer or the applicable taxpayer's spouse or dependent)—

(1) Is enrolled in one or more qualified health plans through an Exchange; and

(2) Is not eligible for minimum essential coverage (within the meaning of paragraph (c) of this section) other than coverage described in section 5000A(f)(1)(C) (relating to coverage in the individual market).

(b) *Applicable taxpayer*—(1) *In general.* Except as otherwise provided in this paragraph (b), an applicable taxpayer is a taxpayer whose household income is at least 100 percent but not more than 400 percent of the Federal poverty line for the taxpayer's family size for the taxable year.

(2) *Married taxpayers must file joint return.* A taxpayer who is married (within the meaning of section 7703) at the close of the taxable year is an applicable taxpayer only if the taxpayer and the taxpayer's spouse file a joint return for the taxable year.

(3) *Dependents.* An individual is not an applicable taxpayer if another taxpayer may claim a deduction under section 151 for the individual for a taxable year beginning in the calendar year in which the individual's taxable year begins.

(4) *Individuals not lawfully present or incarcerated.* An individual who is not lawfully present in the United States or is incarcerated (other than incarceration pending disposition of charges) is not eligible to enroll in a qualified health plan through an Exchange. However, the individual may be an applicable taxpayer if a family member is eligible to enroll in a qualified health plan. See sections 1312(f)(1)(B) and 1312(f)(3) of the Affordable Care Act (42 U.S.C. 18032(f)(1)(B) and (f)(3)) and § 1.36B–3(b)(2).

(5) *Individuals lawfully present.* If a taxpayer's household income is less than 100 percent of the Federal poverty line for the taxpayer's family size and the taxpayer or a member of the taxpayer's family is an alien lawfully present in the United States, the taxpayer is treated as an applicable taxpayer if—

(i) The lawfully present taxpayer or family member is not eligible for the Medicaid program; and

(ii) The taxpayer would be an applicable taxpayer if the taxpayer's household income for the taxable year was between 100 and 400 percent of the Federal poverty line for the taxpayer's family size.

(6) *Special rule for taxpayers with household income below 100 percent of the Federal poverty line for the taxable year.* A taxpayer (other than a taxpayer described in paragraph (b)(5) of this section) whose household income for a taxable year is less than 100 percent of the Federal poverty line for the taxpayer's family size is treated as an applicable taxpayer if—

(i) The taxpayer or a family member enrolls in a qualified health plan through an Exchange;

(ii) An Exchange estimates at the time of enrollment that the taxpayer's household income will be between 100 and 400 percent of the Federal poverty line for the taxable year;

(iii) Advance credit payments are authorized and paid for one or more months during the taxable year; and

(iv) The taxpayer would be an applicable taxpayer if the taxpayer's household income for the taxable year was between 100 and 400 percent of the Federal poverty line for the taxpayer's family size.

(7) *Computation of premium assistance amounts for taxpayers with household income below 100 percent of the Federal poverty line.* If a taxpayer is treated as an applicable taxpayer under paragraph (b)(5) or (b)(6) of this section, the taxpayer's actual household income for the taxable year is used to compute the premium assistance amounts under § 1.36B–3(d).

(c) *Minimum essential coverage*—(1) *In general.* Minimum essential coverage is defined in section 5000A(f) and regulations issued under that section. As described in section 5000A(f), government-sponsored programs, eligible employer-sponsored plans, grandfathered health plans, and certain other health benefits coverage are minimum essential coverage.

(2) *Government-sponsored minimum essential coverage*—(i) *In general.* An individual is eligible for government-sponsored minimum essential coverage if the individual meets the criteria for coverage under a government-sponsored program described in section 5000A(f)(1)(A) as of the first day of the first full month the individual may receive benefits under the program, subject to the limitation in paragraph (c)(2)(ii) of this section. The Commissioner may define eligibility for specific government-sponsored programs further in additional published guidance, see § 601.601(d)(2) of this chapter.

(ii) *Obligation to complete administrative requirements to obtain coverage.* An individual who meets the criteria for eligibility for government-sponsored minimum essential coverage must complete the requirements necessary to receive benefits. An individual who fails by the last day of the third full calendar month following the event that establishes eligibility under paragraph (c)(2)(i) of this section to complete the requirements to obtain government-sponsored minimum essential coverage (other than a veteran's health care program) is treated

as eligible for government-sponsored minimum essential coverage as of the first day of the fourth calendar month following the event that establishes eligibility.

(iii) *Special rule for coverage for veterans and other individuals under chapter 17 or 18 of Title 38, U.S.C.* An individual is eligible for minimum essential coverage under a health care program under chapter 17 or 18 of Title 38, U.S.C. only if the individual is enrolled in a health care program under chapter 17 or 18 of Title 38, U.S.C. identified as minimum essential coverage in regulations issued under section 5000A.

(iv) *Retroactive effect of eligibility determination.* If an individual receiving advance credit payments is determined to be eligible for government-sponsored minimum essential coverage that is effective retroactively (such as Medicaid), the individual is treated as eligible for minimum essential coverage under that program no earlier than the first day of the first calendar month beginning after the approval.

(v) *Determination of Medicaid or Children's Health Insurance Program (CHIP) ineligibility.* An individual is treated as not eligible for Medicaid, CHIP, or a similar program for a period of coverage under a qualified health plan if, when the individual enrolls in the qualified health plan, an Exchange determines or considers (within the meaning of 45 CFR 155.302(b)) the individual to be not eligible for Medicaid or CHIP.

(vi) *Examples.* The following examples illustrate the provisions of this paragraph (c)(2):

Example 1. Delay in coverage effectiveness. On April 10, 2015, Taxpayer D applies for coverage under a government-sponsored health care program. D's application is approved on July 12, 2015, but her coverage is not effective until September 1, 2015. Under paragraph (c)(2)(i) of this section, D is eligible for government-sponsored minimum essential coverage on September 1, 2015.

Example 2. Time of eligibility. Taxpayer E turns 65 on June 3, 2015, and becomes eligible for Medicare. Under section 5000A(f)(1)(A)(i), Medicare is minimum essential coverage. However, E must enroll in Medicare to receive benefits. E enrolls in Medicare in September, which is the last month of E's initial enrollment period. Thus, E may receive Medicare benefits on December 1, 2015. Because E completed the requirements necessary to receive Medicare benefits by the last day of the third full calendar month after the event that establishes E's eligibility (E turning 65), under paragraph (c)(2)(i) and (c)(2)(ii) of this section E is eligible for government-sponsored minimum essential coverage on December 1, 2015, the first day of the first full month that E may receive benefits under the program.

Example 3. Time of eligibility, individual fails to complete necessary requirements. The facts are the same as in *Example 2,* except that E fails to enroll in the Medicare coverage during E's initial enrollment period. E is treated as eligible for government-sponsored minimum essential coverage under paragraph (c)(2)(ii) of this section as of October 1, 2015, the first day of the fourth month following the event that establishes E's eligibility (E turning 65).

Example 4. Retroactive effect of eligibility. In November 2014, Taxpayer F enrolls in a qualified health plan for 2015 and receives advance credit payments. F loses her part-time employment and on April 10, 2015 applies for coverage under the Medicaid program. F's application is approved on May 15, 2015, and her Medicaid coverage is effective as of April 1, 2015. Under paragraph (c)(2)(iv) of this section, F is eligible for government-sponsored minimum essential coverage on June 1, 2015, the first day of the first calendar month after approval.

Example 5. Determination of Medicaid ineligibility. In November 2014, Taxpayer G applies through the Exchange to enroll in health coverage for 2015. The Exchange determines that G is not eligible for Medicaid and estimates that G's household income will be 140 percent of the Federal poverty line for G's family size for purposes of determining advance credit payments. G enrolls in a qualified health plan and begins receiving advance credit payments. G experiences a reduction in household income during the year and his household income for 2015 is 130 percent of the Federal poverty line (within the Medicaid income threshold). However, under paragraph (c)(2)(v) of this section, G is treated as not eligible for Medicaid for 2015.

Example 6. Mid-year Medicaid eligibility redetermination. The facts are the same as in *Example 5,* except that G returns to the Exchange in July 2015 and the Exchange determines that G is eligible for Medicaid. Medicaid approves G for coverage and the Exchange discontinues G's advance credit payments effective August 1. Under paragraphs (c)(2)(iv) and (c)(2)(v) of this section, G is treated as not eligible for Medicaid for the months when G is covered by a qualified health plan. G is eligible for government-sponsored minimum essential coverage for the months after G is approved for Medicaid and can receive benefits, August through December 2015.

(3) *Employer-sponsored minimum essential coverage*—(i) *In general.* For purposes of section 36B, an employee who may enroll in an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) and an individual who may enroll in the plan because of a relationship to the employee (a related individual) are eligible for minimum essential coverage under the plan for any month only if the plan is affordable and provides minimum value. Government-sponsored programs described in section 5000A(f)(1)(A) are not eligible employer-sponsored plans.

(ii) *Plan year.* For purposes of this paragraph (c)(3), a plan year is an eligible employer-sponsored plan's regular 12-month coverage period (or the remainder of a 12-month coverage period for a new employee or an individual who enrolls during a special enrollment period).

(iii) *Eligibility for months during a plan year*—(A) *Failure to enroll in plan.* An employee or related individual may be eligible for minimum essential coverage under an eligible employer-sponsored plan for a month during a plan year if the employee or related individual could have enrolled in the plan for that month during an open or special enrollment period.

(B) *Waiting periods.* An employee or related individual is not eligible for minimum essential coverage under an eligible employer-sponsored plan during a required waiting period before the coverage becomes effective.

(C) *Example.* The following example illustrates the provisions of this paragraph (c)(3)(iii):

Example. (i) Taxpayer B is an employee of Employer X. X offers its employees a health insurance plan that has a plan year (within the meaning of paragraph (c)(3)(ii) of this section) from October 1 through September 30. Employees may enroll during an open season from August 1 to September 15. B does not enroll in X's plan for the plan year October 1, 2014, to September 30, 2015. In November 2014, B enrolls in a qualified health plan through an Exchange for calendar year 2015.

(ii) B could have enrolled in X's plan during the August 1 to September 15 enrollment period. Therefore, unless X's plan is not affordable for B or does not provide minimum value, B is eligible for minimum essential coverage under X's plan for the months that B is enrolled in the qualified health plan during X's plan year (January through September 2015).

(iv) *Continuation coverage.* An individual who may enroll in continuation coverage required under Federal law or a State law that provides comparable continuation coverage is eligible for minimum essential coverage only for months that the individual is enrolled in the coverage.

(v) *Affordable coverage*—(A) *In general*—(*1*) *Affordability for employee.* Except as provided in paragraph (c)(3)(v)(A)(*3*) of this section, an eligible employer-sponsored plan is affordable for an employee if the portion of the annual premium the employee must pay, whether by salary reduction or otherwise (required contribution), for self-only coverage does not exceed the required contribution percentage (as defined in paragraph (c)(3)(v)(C) of this section) of the applicable taxpayer's household income for the taxable year.

(*2*) *Affordability for related individual.* [Reserved]

(*3*) *Employee safe harbor.* An employer-sponsored plan is not affordable for an employee or a related individual for a plan year if, when the employee or a related individual enrolls in a qualified health plan for a period coinciding with the plan year (in whole or in part), an Exchange determines that the eligible employer-sponsored plan is not affordable for that plan year. This paragraph (c)(3)(v)(A)(*3*) does not apply to a determination made as part of the redetermination process described in 45 CFR 155.335 unless the individual receiving an Exchange redetermination notification affirmatively responds and provides current information on affordability. This paragraph (c)(3)(v)(A)(*3*) does not apply for an individual who, with reckless disregard for the facts, provides incorrect information to an Exchange concerning the portion of the annual premium for coverage for the employee or related individual under the plan.

(*4*) *Wellness incentives and employer contributions to health reimbursement arrangements.* The Commissioner may provide rules in published guidance, see § 601.601(d)(2) of this chapter, for determining how wellness incentives and amounts made available under a health reimbursement arrangement are treated in determining the affordability of eligible employer-sponsored coverage under this paragraph (c)(3)(v).

(B) *Affordability for part-year period.* Affordability under paragraph (c)(3)(v)(A) of this section is determined separately for each employment period that is less than a full calendar year or for the portions of an employer's plan year that fall in different taxable years of an applicable taxpayer (a part-year period). An eligible employer-sponsored plan is affordable for a part-year period if the employee's annualized required contribution for self-only coverage under the plan for the part-year period does not exceed the required contribution percentage of the applicable taxpayer's household income for the taxable year. The employee's annualized required contribution is the employee's required contribution for the part-year period times a fraction, the numerator of which is 12 and the denominator of which is the number of months in the part-year period during the applicable taxpayer's taxable year. Only full calendar months are included in the computation under this paragraph (c)(3)(v)(B).

(C) *Required contribution percentage.* The required contribution percentage is 9.5 percent. The percentage may be adjusted in published guidance, see § 601.601(d)(2) of this chapter, for taxable years beginning after December 31, 2014, to reflect rates of premium growth relative to growth in income and, for taxable years beginning after December 31, 2018, to reflect rates of premium growth relative to growth in the consumer price index.

(D) *Examples.* The following examples illustrate the provisions of this paragraph (c)(3)(v). Unless stated otherwise, in each example the taxpayer is single and has no dependents, the employer's plan is an eligible employer-sponsored plan and provides minimum value, the employee is not eligible for other minimum essential coverage, and the taxpayer, related individual, and employer-sponsored plan have a calendar taxable year:

Example 1. Basic determination of affordability. In 2014 Taxpayer C has household income of $47,000. C is an employee of Employer X, which offers its employees a health insurance plan that requires C to contribute $3,450 for self-only coverage for 2014 (7.3 percent of C's household income). Because C's required contribution for self-only coverage does not exceed 9.5 percent of household income, under paragraph (c)(3)(v)(A)(*1*) of this section, X's plan is affordable for C, and C is eligible for minimum essential coverage for all months in 2014.

Example 2. Basic determination of affordability for a related individual. [Reserved]

Example 3. Determination of unaffordability at enrollment. (i) Taxpayer D is an employee of Employer X. In November 2013 the Exchange for D's rating area projects that D's 2014 household income will be $37,000. It also verifies that D's required contribution for self-only coverage under X's health insurance plan will be $3,700 (10 percent of household income). Consequently, the Exchange determines that X's plan is unaffordable. D enrolls in a qualified health plan and not in X's plan. In December 2014, X pays D a $2,500 bonus. Thus, D's actual 2014 household income is $39,500 and D's required contribution for coverage under X's plan is 9.4 percent of D's household income.

(ii) Based on D's actual 2014 household income, D's required contribution does not exceed 9.5 percent of household income and X's health plan is affordable for D. However, when D enrolled in a qualified health plan for 2014, the Exchange determined that X's plan was not affordable for D for 2014. Consequently, under paragraph (c)(3)(v)(A)(*3*) of this section, X's plan is not affordable for D and D is not eligible for minimum essential coverage under X's plan for 2014.

Example 4. Determination of unaffordability for plan year. The facts are the same as in *Example 3,* except that X's employee health insurance plan year is September 1 to August 31. The Exchange for D's rating area determines in August 2014 that X's plan is unaffordable for D based on D's projected household income for 2014. D enrolls in a qualified health plan as of September 1, 2014. Under paragraph (c)(3)(v)(A)(*3*) of this section, X's plan is not affordable for D and D is not eligible for minimum essential coverage under X's plan for the coverage months September to December 2014 and January through August 2015.

Example 5. No affordability information affirmatively provided for annual redetermination. (i) The facts are the same as in *Example 3,* except the Exchange redetermines D's eligibility for advance credit payments for 2015. D does not affirmatively provide the Exchange with current information regarding affordability and the Exchange determines that D's coverage is not affordable for 2015 and approves advance credit payments based on information from the previous enrollment period. In 2015, D's required contribution for coverage under X's plan is 9.4 percent of D's household income.

(ii) Because D does not respond to the Exchange notification and the Exchange makes an affordability determination based on information from an earlier year, the employee safe harbor in paragraph (c)(3)(v)(A)(*3*) of this section does not apply. D's required contribution for 2015 does not exceed 9.5 percent of D's household income. Thus, X's plan is affordable for D for 2015 and D is eligible for minimum essential coverage for all months in 2015.

Example 6. Determination of unaffordability for part of plan year (part-year period). (i) Taxpayer E is an employee of Employer X beginning in May 2015. X's employee health insurance plan year is September 1 to August 31. E's required contribution for self-only coverage for May through August is $150 per month ($1,800 for the full plan year). The Exchange for E's rating area projects E's household income for purposes of eligibility for advance credit payments as $18,000. E's actual household income for the 2015 taxable year is $20,000.

(ii) Under paragraph (c)(3)(v)(B) of this section, whether coverage under X's plan is affordable for E is determined for the remainder of X's plan year (May through August). E's required contribution for a full plan year ($1,800) exceeds 9.5 percent of E's household income (1,800/18,000 = 10 percent). Therefore, the Exchange determines that X's coverage is unaffordable for May through August. Although E's actual household income for 2015 is $20,000 (and E's required contribution of $1,800 does not exceed 9.5 percent of E's household income), under paragraph (c)(3)(v)(A)(*3*) of this section, X's plan is unaffordable for E for the part of the plan year May through August 2015. Consequently, E is not eligible for minimum essential coverage under X's plan for the period May through August 2015.

Example 7. Affordability determined for part of a taxable year (part-year period). (i) Taxpayer F is an employee of Employer X. X's employee health insurance plan year is September 1 to August 31. F's required contribution for self-only coverage for the period September 2014 through August 2015 is $150 per month or $1,800 for the plan year. F does not enroll in X's plan during X's open season but enrolls in a qualified health plan for September through December 2014. F does not request advance credit payments and does not ask the Exchange for his rating

area to determine whether X's coverage is affordable for F. F's household income in 2014 is $18,000.

(ii) Because F is a calendar year taxpayer and Employer X's plan is not a calendar year plan, F must determine the affordability of X's coverage for the part-year period in 2014 (September–December) under paragraph (c)(3)(v)(B) of this section. F determines the affordability of X's plan for the September through December 2014 period by comparing the annual premiums ($1,800) to F's 2014 household income. F's required contribution of $1,800 is 10 percent of F's 2014 household income. Because F's required contribution exceeds 9.5 percent of F's 2014 household income, X's plan is not affordable for F for the part-year period September through December 2014 and F is not eligible for minimum essential coverage under X's plan for that period.

(iii) F enrolls in Exchange coverage for 2015 and does not ask the Exchange to approve advance credit payments or determine whether X's coverage is affordable. F's 2015 household income is $20,000.

(iv) F must determine if X's plan is affordable for the part-year period January 2015 through August 2015. F's annual required contribution ($1,800) is 9 percent of F's 2015 household income. Because F's required contribution does not exceed 9.5 percent of F's 2015 household income, X's plan is affordable for F for the part-year period January through August 2015 and F is eligible for minimum essential coverage for that period.

Example 8 Coverage unaffordable at year end. Taxpayer G is employed by Employer X. In November 2014, the Exchange for G's rating area determines that G is eligible for affordable employer-sponsored coverage for 2015. G nonetheless enrolls in a qualified health plan for 2015 but does not receive advance credit payments. G's 2015 household income is less than expected and G's required contribution for employer-sponsored coverage for 2015 exceeds 9.5 percent of G's actual 2015 household income. Under paragraph (c)(3)(v)(A)(*1*) of this section, G is not eligible for minimum essential coverage under X's plan for 2015.

(vi) *Minimum value.* An eligible employer-sponsored plan provides minimum value only if the plan's share of the total allowed costs of benefits provided to the employee under the plan (as determined under guidance issued by the Secretary of Health and Human Services under section 1302(d)(2) of the Affordable Care Act (42 U.S.C. 18022(d)(2))) is at least 60 percent.

(vii) *Enrollment in eligible employer-sponsored plan*—(A) *In general.* Except as provided in paragraph (c)(3)(vii)(B) of this section, the requirements of affordability and minimum value do not apply for months that an individual is enrolled in an eligible employer-sponsored plan.

(B) *Automatic enrollment.* An employee or related individual is treated as not enrolled in an eligible employer-sponsored plan for a month in a plan year or other period for which the employee or related individual is automatically enrolled if the employee or related individual terminates the coverage before the later of the first day of the second full calendar month of that plan year or other period or the last day of any permissible opt-out period provided by the employer-sponsored plan or in regulations to be issued by the Department of Labor, for that plan year or other period.

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

Example 1. Taxpayer H is employed by Employer X in 2014. H's required contribution for self-only employer coverage exceeds 9.5 percent of H's 2014 household income. H enrolls in X's calendar year plan for 2014. Under paragraph (c)(3)(vii)(A) of this section, H is eligible for minimum essential coverage for 2014 because H is enrolled in an eligible employer-sponsored plan for 2014.

Example 2. The facts are the same as in *Example 1,* except that H terminates plan coverage on June 30, 2014. Under paragraph (c)(3)(vii)(A) of this section, H is eligible for minimum essential coverage under X's plan for January through June 2014 but is not eligible for minimum essential coverage under X's plan for July through December 2014.

Example 3. The facts are the same as in *Example 1,* except that Employer X automatically enrolls H in the plan for calendar year 2015. H terminates the coverage on January 20, 2015. Under paragraph (c)(3)(vii)(B) of this section, H is not eligible for minimum essential coverage under X's plan for January 2015.

(4) *Related individual not claimed as a personal exemption deduction.* An individual who may enroll in minimum essential coverage because of a relationship to another person eligible for the coverage, but for whom the other eligible person does not claim a personal exemption deduction under section 151, is treated as eligible for minimum essential coverage under the coverage only for months that the related individual is enrolled in the coverage.

§ 1.36B–3 Computing the premium assistance credit amount.

(a) *In general.* A taxpayer's premium assistance credit amount for a taxable year is the sum of the premium assistance amounts determined under paragraph (d) of this section for all coverage months for individuals in the taxpayer's family.

(b) *Definitions.* For purposes of this section—

(1) The cost of a qualified health plan is the premium the plan charges; and

(2) The term *coverage family* refers to members of the taxpayer's family who enroll in a qualified health plan and are not eligible for minimum essential coverage (other than coverage in the individual market).

(c) *Coverage month*—(1) *In general.* A month is a coverage month for an individual if—

(i) As of the first day of the month, the individual is enrolled in a qualified health plan through an Exchange;

(ii) The taxpayer pays the taxpayer's share of the premium for the individual's coverage under the plan for the month by the unextended due date for filing the taxpayer's income tax return for that taxable year, or the full premium for the month is paid by advance credit payments; and

(iii) The individual is not eligible for the full calendar month for minimum essential coverage (within the meaning of § 1.36B–2(c)) other than coverage described in section 5000A(f)(1)(C) (relating to coverage in the individual market).

(2) *Premiums paid for a taxpayer.* Premiums another person pays for coverage of the taxpayer, taxpayer's spouse, or dependent are treated as paid by the taxpayer.

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

Example 1. (i) Taxpayer M is single with no dependents. In December 2013, M enrolls in a qualified health plan for 2014 and the Exchange approves advance credit payments. M pays M's share of the premiums. On May 15, 2014, M enlists in the U.S. Army and is eligible immediately for government-sponsored minimum essential coverage.

(ii) Under paragraph (c)(1) of this section, January through May 2014 are coverage months for M. June through December 2014 are not coverage months because M is eligible for minimum essential coverage for those months. Thus, under paragraph (a) of this section, M's premium assistance credit amount for 2014 is the sum of the premium assistance amounts for the months January through May.

Example 2. (i) Taxpayer N has one dependent, S. S is eligible for government-sponsored minimum essential coverage. N is not eligible for minimum essential coverage. N enrolls in a qualified health plan for 2014 and the Exchange approves advance credit payments. On August 1, 2014, S loses eligibility for minimum essential coverage. N terminates enrollment in the qualified health plan that covers only N and enrolls in a qualified health plan that covers N and S for August through December 2014. N pays all premiums not covered by advance credit payments.

(ii) Under paragraph (c)(1) of this section, January through December of 2014 are coverage months for N and August through December are coverage months for N and S. N's premium assistance credit amount for

2014 is the sum of the premium assistance amounts for these coverage months.

Example 3. (i) O and P are the divorced parents of T. Under the divorce agreement between O and P, T resides with P and P claims T as a dependent. However, O must pay premiums for health insurance for T. P enrolls T in a qualified health plan for 2014. O pays the portion of T's qualified health plan premiums not covered by advance credit payments.

(ii) Because P claims T as a dependent, P (and not O) may claim a premium tax credit for coverage for T. See § 1.36B–2(a). Under paragraph (c)(2) of this section, the premiums that O pays for coverage for T are treated as paid by P. Thus, the months when T is covered by a qualified health plan and not eligible for other minimum essential coverage are coverage months under paragraph (c)(1) of this section in computing P's premium tax credit under paragraph (a) of this section.

Example 4. Q, an American Indian, enrolls in a qualified health plan for 2014. Q's tribe pays the portion of Q's qualified health plan premiums not covered by advance credit payments. Under paragraph (c)(2) of this section, the premiums that Q's tribe pays for Q are treated as paid by Q. Thus, the months when Q is covered by a qualified health plan and not eligible for other minimum essential coverage are coverage months under paragraph (c)(1) of this section in computing Q's premium tax credit under paragraph (a) of this section.

(d) *Premium assistance amount.* The premium assistance amount for a coverage month is the lesser of—

(1) The premiums for the month for one or more qualified health plans in which a taxpayer or a member of the taxpayer's family enrolls; or

(2) The excess of the adjusted monthly premium for the applicable benchmark plan over 1/12 of the product of a taxpayer's household income and the applicable percentage for the taxable year.

(e) *Adjusted monthly premium.* The adjusted monthly premium is the premium an issuer would charge for the applicable benchmark plan to cover all members of the taxpayer's coverage family, adjusted only for the age of each member of the coverage family as allowed under section 2701 of the Public Health Service Act (42 U.S.C. 300gg). The adjusted monthly premium is determined without regard to any premium discount or rebate under the wellness discount demonstration project under section 2705(d) of the Public Health Service Act (42 U.S.C. 300gg-4(d)) and may not include any adjustments for tobacco use.

(f) *Applicable benchmark plan*—(1) *In general.* Except as otherwise provided in this paragraph (f), the applicable benchmark plan for each coverage month is the second lowest cost silver plan (as described in section 1302(d)(1)(B) of the Affordable Care Act (42 U.S.C. 18022(d)(1)(B))) offered through the Exchange for the rating area where the taxpayer resides for—

(i) Self-only coverage for a taxpayer—

(A) Who computes tax under section 1(c) (unmarried individuals other than surviving spouses and heads of household) and is not allowed a deduction under section 151 for a dependent for the taxable year;

(B) Who purchases only self-only coverage for one individual; or

(C) Whose coverage family includes only one individual; and

(ii) Family coverage for all other taxpayers.

(2) *Family coverage.* The applicable benchmark plan for family coverage is the second lowest cost silver plan that applies to the members of the taxpayer's coverage family (such as a plan covering two adults if the members of a taxpayer's coverage family are two adults).

(3) *Silver level plan not covering a taxpayer's family.* If one or more silver level plans for family coverage offered through an Exchange do not cover all members of a taxpayer's coverage family under one policy (for example, because of the relationships within the family), the premium for the applicable benchmark plan determined under paragraphs (f)(1) and (f)(2) of this section may be the premium for a single policy or for more than one policy, whichever is the second lowest cost silver option.

(4) *Family members residing at different locations.* [Reserved]

(5) *Plan closed to enrollment.* A qualified health plan that is not open to enrollment by a taxpayer or family member at the time the taxpayer or family member enrolls in a qualified health plan is disregarded in determining the applicable benchmark plan.

(6) *Benchmark plan terminates or closes to enrollment during the year.* A qualified health plan that is the applicable benchmark plan under this paragraph (f) for a taxpayer does not cease to be the applicable benchmark plan solely because the plan or a lower cost plan terminates or closes to enrollment during the taxable year.

(7) *Examples.* The following examples illustrate the rules of this paragraph (f). Unless otherwise stated, in each example the plans are open to enrollment to a taxpayer or family member at the time of enrollment and are offered through the Exchange for the rating area where the taxpayer resides:

Example 1. Single taxpayer enrolls. Taxpayer M is single, has no dependents and enrolls in a qualified health plan. Under paragraph (f)(1)(i) of this section, M's applicable benchmark plan is the second lowest cost silver plan providing self-only coverage for M.

Example 2. Family enrolls. The facts are the same as in *Example 1,* except that M, her spouse N, and their dependent enroll in a qualified health plan. Under paragraphs (f)(1)(ii) and (f)(2) of this section, M's and N's applicable benchmark plan is the second lowest cost silver plan covering M, N, and their dependent.

Example 3. Single taxpayer enrolls with nondependent. Taxpayer O is single and resides with his daughter, K, but may not claim K as a dependent. O purchases family coverage for himself and K. Under paragraphs (f)(1)(i)(A) and (f)(1)(i)(C) of this section, O's applicable benchmark plan is the second lowest cost silver plan providing self-only coverage for O. However, K may qualify for a premium tax credit if K is otherwise eligible. See paragraph (h) of this section.

Example 4. Single taxpayer enrolls with dependent and nondependent. The facts are the same as in *Example 3,* except that O also resides with his teenage son, L, and claims L as a dependent. O purchases family coverage for himself, K, and L. Under paragraphs (f)(1)(ii) and (f)(2) of this section, O's applicable benchmark plan is the second lowest cost silver plan covering O and L.

Example 5. Children only enroll. The facts are the same as in *Example 4,* except that O enrolls only K and L in the coverage. Under paragraph (f)(1)(i)(C) of this section, O's applicable benchmark plan is the second lowest cost silver plan providing self-only coverage for L.

Example 6. Applicable benchmark plan unrelated to coverage purchased. Taxpayers P and Q, who are married, reside with Q's two teenage daughters, M and N, whom they claim as dependents. P and Q purchase self-only coverage for P and family coverage for Q, M, and N. Under paragraphs (f)(1)(ii) and (f)(2) of this section, P's and Q's applicable benchmark plan is the second lowest cost silver plan covering P, Q, M, and N.

Example 7. Change in coverage family. Taxpayer R is single and has no dependents when she enrolls in a qualified health plan for 2014. On August 1, 2014, R has a child, O, whom she claims as a dependent for 2014. R enrolls in a qualified health plan covering R and O effective August 1. Under paragraph (f)(1)(i) of this section, R's applicable benchmark plan for January through July is the second lowest cost silver plan providing self-only coverage for R. Under paragraphs (f)(1)(ii) and (f)(2) of this section, R's applicable benchmark plan for the months August through December is the second lowest cost silver plan covering R and O.

Example 8. Minimum essential coverage for some coverage months. Taxpayer S claims his daughter, P, as a dependent. S and P enroll in a qualified health plan for 2014. S, but not P, is eligible for government-sponsored minimum essential coverage for September to December 2014. Thus, under paragraph (c)(1)(iii) of this section, January through December are coverage months for P and January through August are coverage months for S. Because, under paragraphs (d) and (f)(1) of this section, the premium assistance amount for a coverage month is

computed based on the applicable benchmark plan for that coverage month, S's applicable benchmark plan for January through August is the second lowest cost silver plan under paragraphs (f)(1)(ii) and (f)(2) of this section covering S and P. Under paragraph (f)(1)(i)(C) of this section, S's applicable benchmark plan for September through December is the second lowest cost silver plan providing self-only coverage for P.

Example 9. Family member eligible for minimum essential coverage for the taxable year. The facts are the same as in *Example 8,* except that S is not eligible for government-sponsored minimum essential coverage for any months and P is eligible for government-sponsored minimum essential coverage for the entire year. Under paragraph (f)(1)(i)(C) of this section, S's applicable benchmark plan is the second lowest cost silver plan providing self-only coverage for S.

Example 10. Qualified health plans not covering certain families. (i) Taxpayers V and W are married and live with W's mother, K, whom they claim as a dependent. The Exchange for their rating area offers self-only and family coverage at the silver level through Issuers A, B, and C, who each offer only one silver level plan. Issuers A and B respectively charge V and W a monthly premium of $900 and $700 for family coverage, but do not allow individuals to enroll a parent in family coverage. Issuers A and B respectively charge $600 and $400 for self-only coverage for K. Issuer C offers a qualified health plan that provides family coverage for V, W, and K under one policy for a $1,200 monthly premium. Thus, the Exchange offers the following silver level options for covering V's and W's coverage family:

Issuer A: $1,500 for premiums for two policies ($900 for V and W, $600 for K)

Issuer B: $1,100 for premiums for two policies ($700 for V and W, $400 for K)

Issuer C: $1,200 for premiums for one policy ($1,200 for V, W, and K)

(ii) Because some silver level qualified health plans for family coverage offered on the Exchange do not cover all members of their coverage family under one policy, under paragraph (f)(3) of this section, the premium for V's and W's applicable benchmark plan may be the premium for a single policy or for more than one policy. The coverage offered by Issuer C is the second lowest cost silver level option for covering V's and W's family. The premium for their applicable benchmark plan is the premium for the Issuer C coverage.

Example 11. (i) The facts are the same as in *Example 10,* except that Issuer B covers V, W, and K under one policy for a premium of $1,100, and Issuer C does not allow individuals to enroll parents in family coverage. Issuer C charges a monthly premium of $700 for family coverage for V and W and a monthly premium of $500 for self-only coverage for K. Thus, the Exchange offers the following silver level options for covering V's and W's coverage family:

Issuer A: $1,500 for premiums for two policies ($900 for V and W, $600 for K)

Issuer B: $1,100 for premiums for one policy ($1,100 for V, W, and K)

Issuer C: $1,200 for premiums for two policies ($700 for V and W, $500 for K)

(ii) The coverage offered by Issuer C is the second lowest cost silver level option for covering V's and W's family. The premium for their applicable benchmark plan is the premiums for the two policies available through Issuer C.

Example 12. Family members residing in different locations. [Reserved]

Example 13. Qualified health plan closed to enrollment. Taxpayer Y has two dependents, R and S. Y, R, and S enroll in a qualified health plan. The Exchange for the rating area where the family resides offers silver level plans J, K, L, and M, which are the first, second, third, and fourth lowest cost silver plans covering Y's family. When Y's family enrolls, Plan J is closed to enrollment. Under paragraph (f)(5) of this section, Plan J is disregarded in determining Y's applicable benchmark plan, and Plan L is Y's applicable benchmark plan.

Example 14. Benchmark plan closes to new enrollees during the year. (i) Taxpayers X, Y, and Z each have coverage families consisting of two adults. In the rating area where X, Y, and Z reside, Plan 2 is the second lowest cost silver plan and Plan 3 is the third lowest cost silver plan covering the two adults in each coverage family offered through the Exchange. The X and Y families each enroll in a qualified health plan that is not the applicable benchmark plan (Plan 4) in November during the annual open enrollment period. Plan 2 closes to new enrollees the following June. Thus, on July 1, Plan 3 is the second lowest cost silver plan available to new enrollees through the Exchange. The Z family enrolls in a qualified health plan in July.

(ii) Under paragraphs (f)(1), (f)(2), and (f)(6) of this section, the applicable benchmark plan is Plan 2 for X and Y for all coverage months during the year. The applicable benchmark plan for Z is Plan 3, because Plan 2 is not open to enrollment through the Exchange when the Z family enrolls.

Example 15. Benchmark plan terminates for all enrollees during the year. The facts are the same as in *Example 14,* except that Plan 2 terminates for all enrollees on June 30. Under paragraphs (f)(1), (f)(2), and (f)(6) of this section, Plan 2 is the applicable benchmark plan for X and Y for all coverage months during the year, and Plan 3 is the applicable benchmark plan for Z.

(g) *Applicable percentage*—(1) *In general.* The applicable percentage multiplied by a taxpayer's household income determines the taxpayer's required share of premiums for the benchmark plan. This required share is subtracted from the adjusted monthly premium for the applicable benchmark plan when computing the premium assistance amount. The applicable percentage is computed by first determining the percentage that the taxpayer's household income bears to the Federal poverty line for the taxpayer's family size. The resulting Federal poverty line percentage is then compared to the income categories described in the table in paragraph (g)(2) of this section (or successor tables). An applicable percentage within an income category increases on a sliding scale in a linear manner and is rounded to the nearest one-hundredth of one percent. The applicable percentages in the table may be adjusted in published guidance, see § 601.601(d)(2) of this chapter, for taxable years beginning after December 31, 2014, to reflect rates of premium growth relative to growth in income and, for taxable years beginning after December 31, 2018, to reflect rates of premium growth relative to growth in the consumer price index.

(2) *Applicable percentage table.*

Household income percentage of Federal poverty line	Initial percentage	Final percentage
Less than 133%	2.0	2.0
At least 133% but less than 150%	3.0	4.0
At least 150% but less than 200%	4.0	6.3
At least 200% but less than 250%	6.3	8.05
At least 250% but less than 300%	8.05	9.5
At least 300% but less than 400%	9.5	9.5

(3) *Examples.* The following examples illustrate the rules of this paragraph (g):

Example 1. A's household income is 275 percent of the federal poverty line for A's family size for that taxable year. In the table in paragraph (g)(2) of this section, the initial percentage for a taxpayer with household income of 250 to 300 percent of the Federal poverty line is 8.05 and the final percentage is 9.5. A's Federal poverty line percentage of

275 percent is halfway between 250 percent and 300 percent. Thus, rounded to the nearest one-hundredth of one percent, A's applicable percentage is 8.78, which is halfway between the initial percentage of 8.05 and the final percentage of 9.5.

Example 2. (i) B's household income is 210 percent of the Federal poverty line for B's family size. In the table in paragraph (g)(2) of this section, the initial percentage for a taxpayer with household income of 200 to 250 percent of the Federal poverty line is 6.3 and the final percentage is 8.05. B's applicable percentage is 6.65, computed as follows.

(ii) Determine the excess of B's Federal poverty line percentage (210) over the initial household income percentage in B's range (200), which is 10. Determine the difference between the initial household income percentage in the taxpayer's range (200) and the ending household income percentage in the taxpayer's range (250), which is 50. Divide the first amount by the second amount:

$210 - 200 = 10$
$250 - 200 = 50$
$10/50 = .20$.

(iii) Compute the difference between the initial premium percentage (6.3) and the second premium percentage (8.05) in the taxpayer's range; $8.05 - 6.3 = 1.75$.

(iv) Multiply the amount in the first calculation (.20) by the amount in the second calculation (1.75) and add the product (.35) to the initial premium percentage in B's range (6.3), resulting in B's applicable percentage of 6.65:

$.20 \times 1.75 = .35$
$6.3 + .35 = 6.65$.

(h) *Plan covering more than one family*—(1) *In general.* If a qualified health plan covers more than one family under a single policy, each applicable taxpayer covered by the plan may claim a premium tax credit, if otherwise allowable. Each taxpayer computes the credit using that taxpayer's applicable percentage, household income, and the benchmark plan that applies to the taxpayer under paragraph (f) of this section. In determining whether the amount computed under paragraph (d)(1) of this section (the premiums for the qualified health plan in which the taxpayer enrolls) is less than the amount computed under paragraph (d)(2) of this section (the benchmark plan premium minus the product of household income and the applicable percentage), the premiums paid are allocated to each taxpayer in proportion to the premiums for each taxpayer's applicable benchmark plan.

(2) *Example.* The following example illustrates the rules of this paragraph (h):

Example. (i) Taxpayers A and B enroll in a single policy under a qualified health plan. B is A's 25-year old child who is not A's dependent. B has no dependents. The plan covers A, B, and A's two additional children who are A's dependents. The premium for the plan in which A and B enroll is $15,000. The premium for the second lowest cost silver family plan covering only A and A's dependents is $12,000 and the premium for the second lowest cost silver plan providing self-only coverage to B is $6,000. A and B are applicable taxpayers and otherwise eligible to claim the premium tax credit.

(ii) Under paragraph (h)(1) of this section, both A and B may claim premium tax credits. A computes her credit using her household income, a family size of three, and a benchmark plan premium of $12,000. B computes his credit using his household income, a family size of one, and a benchmark plan premium of $6,000.

(iii) In determining whether the amount in paragraph (d)(1) of this section (the premiums for the qualified health plan A and B purchase) is less than the amount in paragraph (d)(2) of this section (the benchmark plan premium minus the product of household income and the applicable percentage), the $15,000 premiums paid are allocated to A and B in proportion to the premiums for their applicable benchmark plans. Thus, the portion of the premium allocated to A is $10,000 ($15,000 × $12,000/$18,000) and the portion allocated to B is $5,000 ($15,000 × $6,000/$18,000).

(i) [Reserved]

(j) *Additional benefits*—(1) *In general.* If a qualified health plan offers benefits in addition to the essential health benefits a qualified health plan must provide under section 1302 of the Affordable Care Act (42 U.S.C. 18022), or a State requires a qualified health plan to cover benefits in addition to these essential health benefits, the portion of the premium for the plan properly allocable to the additional benefits is excluded from the monthly premiums under paragraph (d)(1) or (d)(2) of this section.

(2) *Method of allocation.* The portion of the premium properly allocable to additional benefits is determined under guidance issued by the Secretary of Health and Human Services. See section 36B(b)(3)(D).

(3) *Examples.* The following examples illustrate the rules of this paragraph (j):

Example 1. (i) Taxpayer B enrolls in a qualified health plan that provides benefits in addition to the essential health benefits the plan must provide (additional benefits). The monthly premium for the plan in which B enrolls is $385 (Amount 1), of which $35 is allocable to the additional benefits. The premium for B's applicable benchmark plan is $440, of which $40 is allocable to the additional benefits. The excess of the premium for B's applicable benchmark plan over B's $60 contribution amount (which is the product of B's household income and the applicable percentage) is $380 per month (Amount 2).

(ii) Under this paragraph (j), the premium for the qualified health plan in which B enrolls and the applicable benchmark premium each is reduced by the portion of the premium that is allocable to the additional benefits provided under that plan. Therefore, Amount 1 is reduced to $350 ($385 − $35), the premium for B's applicable benchmark plan is reduced to $400 ($440 − $40), and Amount 2 is reduced to $340 ($400 less $60). B's premium assistance amount for a coverage month is $340, the lesser of Amount 1 and Amount 2.

Example 2. (i) The facts are the same as in *Example 1,* except that B's applicable benchmark plan provides no benefits in addition to the essential health benefits required to be provided by the plan. Thus, under paragraph (j) of this section, only the amount of the monthly premium for the plan in which B enrolls is reduced by the portion of the premium that is allocable to the additional benefits provided under that plan, and Amount 1 is $350 ($385 − $35). The premium for B's applicable benchmark plan is not reduced under this paragraph (j), and Amount 2 is $380 ($440 − $60). B's premium assistance amount for a coverage month is $350, the lesser of these two amounts.

(k) *Pediatric dental coverage*—(1) *In general.* For purposes of determining the amount of the monthly premium a taxpayer pays for coverage under paragraph (d)(1) of this section, if an individual enrolls in both a qualified health plan and a plan described in section 1311(d)(2)(B)(ii) of the Affordable Care Act (42 U.S.C. 13031(d)(2)(B)(ii)) (a stand-alone dental plan), the portion of the premium for the stand-alone dental plan that is properly allocable to pediatric dental benefits that are essential benefits required to be provided by a qualified health plan is treated as a premium payable for the individual's qualified health plan.

(2) *Method of allocation.* The portion of the premium for a stand-alone dental plan properly allocable to pediatric dental benefits is determined under guidance issued by the Secretary of Health and Human Services.

(3) *Example.* The following example illustrates the rules of this paragraph (k):

Example. (i) Taxpayer C and C's dependent, R, enroll in a qualified health plan. The premium for the plan in which C and R enroll is $7,200 ($600/month) (Amount 1). The plan does not provide dental coverage. C also enrolls in a stand-alone dental plan covering C and R. The portion of the premium for the dental plan allocable to pediatric dental benefits that are essential health benefits is $240 ($20 per month). The excess of the premium for C's applicable benchmark plan over C's contribution amount (the product of C's household income and the applicable percentage) is $7,260 ($605/month) (Amount 2).

(ii) Under this paragraph (k), the amount C pays for premiums (Amount 1) for purposes of computing the premium assistance amount is increased by the portion of the premium for the stand-alone dental plan allocable to pediatric dental benefits that are essential

health benefits. Thus, the amount of the premiums for the plan in which C enrolls is treated as $620 for purposes of computing the amount of the premium tax credit. C's premium assistance amount for each coverage month is $605 (Amount 2), the lesser of Amount 1 (increased by the premiums allocable to pediatric dental benefits) and Amount 2.

(l) *Families including individuals not lawfully present*—(1) *In general.* If one or more individuals for whom a taxpayer is allowed a deduction under section 151 are not lawfully present (within the meaning of § 1.36B–1(g)), the percentage a taxpayer's household income bears to the Federal poverty line for the taxpayer's family size for purposes of determining the applicable percentage under paragraph (g) of this section is determined by excluding individuals who are not lawfully present from family size and by determining household income in accordance with paragraph (l)(2) of this section.

(2) *Revised household income computation*—(i) *Statutory method.* For purposes of paragraph (l)(1) of this section, household income is equal to the product of the taxpayer's household income (determined without regard to this paragraph (l)(2)) and a fraction—

(A) The numerator of which is the Federal poverty line for the taxpayer's family size determined by excluding individuals who are not lawfully present; and

(B) The denominator of which is the Federal poverty line for the taxpayer's family size determined by including individuals who are not lawfully present.

(ii) *Comparable method.* The Commissioner may describe a comparable method in additional published guidance, see § 601.601(d)(2) of this chapter.

§ 1.36B–4 Reconciling the premium tax credit with advance credit payments.

(a) *Reconciliation*—(1) *Coordination of premium tax credit with advance credit payments*—(i) *In general.* A taxpayer must reconcile the amount of credit allowed under section 36B with advance credit payments on the taxpayer's income tax return for a taxable year. A taxpayer whose premium tax credit for the taxable year exceeds the taxpayer's advance credit payments may receive the excess as an income tax refund. A taxpayer whose advance credit payments for the taxable year exceed the taxpayer's premium tax credit owes the excess as an additional income tax liability.

(ii) *Responsibility for advance credit payments.* A taxpayer must reconcile all advance credit payments for coverage of any member of the taxpayer's family. If advance credit payments are made for coverage of an individual for whom no taxpayer claims a personal exemption deduction, the taxpayer who attests to the Exchange to the intention to claim a personal exemption deduction for the individual as part of the determination that the taxpayer is eligible for advance credit payments for coverage of the individual must reconcile the advance credit payments.

(iii) *Advance credit payment for a month in which an issuer does not provide coverage.* For purposes of reconciliation, a taxpayer does not have an advance credit payment for a month if the issuer of the qualified health plan in which the taxpayer or a family member is enrolled does not provide coverage for that month.

(2) *Credit computation.* The premium assistance credit amount is computed on the taxpayer's return using the taxpayer's household income and family size for the taxable year. Thus, the taxpayer's contribution amount (household income for the taxable year times the applicable percentage) is determined using the taxpayer's household income and family size at the end of the taxable year. The applicable benchmark plan for each coverage month is determined under § 1.36B–3(f).

(3) *Limitation on additional tax*—(i) *In general.* The additional tax imposed under paragraph (a)(1) of this section on a taxpayer whose household income is less than 400 percent of the Federal poverty line is limited to the amounts provided in the table in paragraph (a)(3)(ii) of this section (or successor tables). For taxable years beginning after December 31, 2014, the limitation amounts may be adjusted in published guidance, see § 601.601(d)(2) of this chapter, to reflect changes in the consumer price index.

(ii) *Additional tax limitation table.*

Household income percentage of Federal poverty line	Limitation amount for taxpayers whose tax is determined under section 1(c)	Limitation amount for all other taxpayers
Less than 200%	$300	$600
At least 200% but less than 300%	750	1,500
At least 300% but less than 400%	1,250	2,500

(4) *Examples.* The following examples illustrate the rules of this paragraph (a). In each example the taxpayer enrolls in a higher cost qualified health plan than the applicable benchmark plan:

Example 1. Household income increases. (i) Taxpayer A is single and has no dependents. The Exchange for A's rating area projects A's 2014 household income to be $27,925 (250 percent of the Federal poverty line for a family of one, applicable percentage 8.05). A enrolls in a qualified health plan. The annual premium for the applicable benchmark plan is $5,200. A's advance credit payments are $2,952, computed as follows: benchmark plan premium of $5,200 less contribution amount of $2,248 (projected household income of $27,925 × .0805) = $2,952.

(ii) A's household income for 2014 is $33,622, which is 301 percent of the Federal poverty line for a family of one (applicable percentage 9.5). Consequently, A's premium tax credit for 2014 is $2,006 (benchmark plan premium of $5,200 less contribution amount of $3,194 (household income of $33,622 × .095)). Because A's advance credit payments for 2014 are $2,952 and A's 2014 credit is $2,006, A has excess advance payments of $946. Under paragraph (a)(1) of this section, A's tax liability for 2014 is increased by $946. Because A's household income is between 300 percent and 400 percent of the Federal poverty line, if A's excess advance payments exceeded $1,250, under the limitation of paragraph (a)(3) of this section, A's additional tax liability would be limited to that amount.

Example 2. Household income increases, repayment limitation applies. The facts are the same as in *Example 1,* except that A's household income for 2014 is $43,560 (390 percent of the Federal poverty line for a family of one, applicable percentage 9.5). Consequently, A's premium tax credit for 2014 is $1,062 ($5,200 benchmark plan premium less contribution amount of $4,138 (household income of $43,560 × .095)). A's advance credit payments for 2014 are $2,952; therefore, A has excess advance payments of $1,890. Because A's household income is between 300 percent and 400 percent of the Federal poverty line, A's additional tax liability for the taxable year is $1,250 under the repayment limitation of paragraph (a)(3) of this section.

Example 3. Household income decreases. The facts are the same as in *Example 1,* except that A's actual household income for 2014 is $22,340 (200 percent of the Federal poverty line for a family of one, applicable

percentage 6.3). Consequently, A's premium tax credit for 2014 is $3,793 ($5,200 benchmark plan premium less contribution amount of $1,407 (household income of $22,340 × .063)). Because A's advance credit payments for 2014 are $2,952, A is allowed an additional credit of $841 ($3,793 less $2,952).

Example 4. Family size decreases. (i) Taxpayers B and C are married and have two children, K and L (ages 17 and 20), whom they claim as their dependents in 2013. The Exchange for their rating area projects their 2014 household income to be $63,388 (275 percent of the Federal poverty line for a family of four, applicable percentage 8.78). B and C enroll in a qualified health plan for 2014 that covers the four family members. The annual premium for the applicable benchmark plan is $14,100. B's and C's advance credit payments for 2014 are $8,535, computed as follows: benchmark plan premium of $14,100 less contribution amount of $5,565 (projected household income of $63,388 × .0878) = $8,535.

(ii) In 2014, B and C do not claim L as their dependent. Consequently, B's and C's family size for 2014 is three, their household income of $63,388 is 332 percent of the Federal poverty line for a family of three (applicable percentage 9.5), and the annual premium for their applicable benchmark plan is $12,000. Their premium tax credit for 2014 is $5,978 ($12,000 benchmark plan premium less $6,022 contribution amount (household income of $63,388 × .095)). Because B's and C's advance credit payments for 2014 are $8,535 and their 2014 credit is $5,978, B and C have excess advance payments of $2,557. B's and C's additional tax liability for 2014 under paragraph (a)(1) of this section, however, is limited to $2,500 under paragraph (a)(3) of this section.

Example 5. Repayment limitation does not apply. (i) Taxpayer D is single and has no dependents. The Exchange for D's rating area approves advance credit payments for D based on 2014 household income of $39,095 (350 percent of the Federal poverty line for a family of one, applicable percentage 9.5). D enrolls in a qualified health plan. The annual premium for the applicable benchmark plan is $5,200. D's advance credit payments are $1,486, computed as follows: benchmark plan premium of $5,200 less contribution amount of $3,714 (projected household income of $39,095 × .095) = $1,486.

(ii) D's actual household income for 2014 is $44,903, which is 402 percent of the Federal poverty line for a family of one. D is not an applicable taxpayer and may not claim a premium tax credit. Additionally, the repayment limitation of paragraph (a)(3) of this section does not apply. Consequently, D has excess advance payments of $1,486 (the total amount of the advance credit payments in 2014). Under paragraph (a)(1) of this section, D's tax liability for 2014 is increased by $1,486.

Example 6. Coverage for less than a full taxable year. (i) Taxpayer F is single and has no dependents. In November 2013, the Exchange for F's rating area projects F's 2014 household income to be $27,925 (250 percent of the Federal poverty line for a family of one, applicable percentage 8.05). F enrolls in a qualified health plan. The annual premium for the applicable benchmark plan is $5,200. F's monthly advance credit payment is $246, computed as follows: benchmark plan premium of $5,200 less contribution amount of $2,248 (projected household income of $27,925 × .0805) = $2,952; $2,952/12 = $246.

(ii) F begins a new job in August 2014 and is eligible for employer-sponsored minimum essential coverage for the period September through December 2014. F discontinues her Exchange coverage effective November 1, 2014. F's household income for 2014 is $28,707 (257 percent of the Federal poverty line for a family size of one, applicable percentage 8.25).

(iii) Under § 1.36B–3(a), F's premium assistance credit amount is the sum of the premium assistance amounts for the coverage months. Under § 1.36B–3(c)(1)(iii), a month in which an individual is eligible for minimum essential coverage other than coverage in the individual market is not a coverage month. Because F is eligible for employer-sponsored minimum essential coverage as of September 1, only the months January through August of 2014 are coverage months.

(iv) If F had 12 coverage months in 2014, F's premium tax credit would be $2,832 (benchmark plan premium of $5,200 less contribution amount of $2,368 (household income of $28,707 × .0825)). Because F has only eight coverage months in 2014, F's credit is $1,888 ($2,832/12 × 8). Because F does not discontinue her Exchange coverage until November 1, 2014, F's advance credit payments for 2014 are $2,460 ($246 × 10). Consequently, F has excess advance payments of $572 ($2,460 less $1,888) and F's tax liability for 2014 is increased by $572 under paragraph (a)(1) of this section.

Example 7. Changes in coverage months and applicable benchmark plan. (i) Taxpayer E claims one dependent, F. E is eligible for government-sponsored minimum essential coverage. E enrolls F in a qualified health plan for 2014. The Exchange for E's rating area projects E's 2014 household income to be $30,260 (200 percent of the Federal poverty line for a family of two, applicable percentage 6.3). The annual premium for E's applicable benchmark plan is $5,200. E's monthly advance credit payment is $275, computed as follows: benchmark plan premium of $5,200 less contribution amount of $1,906 (projected household income of $30,260 × .063) = $3,294; $3,294/12 = $275.

(ii) On August 1, 2014, E loses her eligibility for government-sponsored minimum essential coverage. E enrolls in the qualified health plan that covers F for August through December 2014. The annual premium for the applicable benchmark plan is $10,000. The Exchange computes E's monthly advance credit payments for the period September through December to be $675 as follows: benchmark plan premium of $10,000 less contribution amount of $1,906 (projected household income of $30,260 × .063) = $8,094; $8,094/12 = $675. E's household income for 2014 is $28,747 (190 percent of the Federal poverty line, applicable percentage 5.84).

(iii) Under § 1.36B–3(c)(1), January through July of 2014 are coverage months for F and August through December are coverage months for E and F. Under paragraph (a)(2) of this section, E must compute her premium tax credit using the premium for the applicable benchmark plan for each coverage month. E's premium assistance credit amount for 2014 is the sum of the premium assistance amounts for all coverage months. E reconciles her premium tax credit with advance credit payments as follows:

Advance credit payments (Jan. to July)	$1,925	($275 × 7)
Advance credit payments (Aug. to Dec.)	3,375	($675 × 5)
Total advance credit payments	5,300	
Benchmark plan premium (Jan. to July)	3,033	(($5,200/12) × 7)
Benchmark plan premium (Aug. to Dec.)	4,167	(($10,000/12) × 5)
Total benchmark plan premium	7,200	
Contribution amount (taxable year household income × applicable percentage)	1,679	($28,747 × .0584)
Credit (total benchmark plan premium less contribution amount)	5,521	

(iv) E's advance credit payments for 2014 are $5,300. E's premium tax credit is $5,521. Thus, E is allowed an additional credit of $221.

Example 8. Part-year coverage and changes in coverage months and applicable benchmark plan. (i) The facts are the same as in *Example 7,* except that F is eligible for government-sponsored minimum essential coverage for January and February 2014, and E enrolls F in a qualified health plan beginning in March 2014. Thus, March through July are coverage months for F and August through December are coverage months for E and F.

(ii) E reconciles her premium tax credit with advance credit payments as follows:

Advance credit payments (March to July)	$1,375	($275 × 5)
Advance credit payments (Aug. to Dec.)	3,375	($675 × 5)
Total advance credit payments	4,750	
Benchmark plan premium (March to July)	2,167	(($5,200/12) × 5)
Benchmark plan premium (Aug. to Dec.)	4,167	(($10,000/12) × 5)
Total benchmark plan premium	6,334	
Contribution amount for 10 coverage months (taxable year household income × applicable percentage × 10/12).	1,399	($28,747 × .0584 × 10/12)
Credit (total benchmark plan premium less contribution amount)	4,935	

(iii) E's advance credit payments for 2014 are $4,750. E's premium tax credit is $4,935. Thus, E is allowed an additional credit of $185.

Example 9. Advance credit payments for months an issuer does not provide coverage. (i) Taxpayer F enrolls in a qualified health plan for 2014 and the Exchange approves advance credit payments. F pays the portion of the premium not covered by advance credit payments for January through April of 2014 but fails to make payments in May, June, and July. As a result, the issuer of the qualified health plan initiates the 3-month grace period under section 1412(c)(2)(B)(iv)(II) of the Affordable Care Act and 45 CFR 156.270(d). During the grace period the issuer continues to receive advance credit payments on behalf of F. On July 1 the issuer rescinds F's coverage retroactive to the end of the first month of the grace period, May 31.

(ii) Under paragraph (a)(1)(iii) of this section, F does not take into account advance credit payments for June or July of 2014 when reconciling the premium tax credit with advance credit payments under paragraph (a)(1) of this section.

(b) *Changes in filing status*—(1) *In general.* Except as provided in paragraph (b)(2) or (b)(3) of this section, a taxpayer whose marital status changes during the taxable year computes the premium tax credit by using the applicable benchmark plan or plans for the taxpayer's marital status as of the first day of each coverage month. The taxpayer's contribution amount (household income for the taxable year times the applicable percentage) is determined using the taxpayer's household income and family size at the end of the taxable year.

(2) *Taxpayers who marry during the taxable year*—(i) *In general.* Taxpayers who marry during and file a joint return for the taxable year may compute the additional tax imposed under paragraph (a)(1) of this section under paragraph (b)(2)(ii) of this section. Only taxpayers who are unmarried at the beginning of the taxable year and are married (within the meaning of section 7703) at the end of the taxable year, at least one of whom receives advance credit payments, may use this alternative computation.

(ii) *Alternative computation of additional tax liability*—(A) *In general.* The additional tax liability determined under this paragraph (b)(2)(ii) is equal to the excess of the taxpayers' advance credit payments for the taxable year over the amount of the alternative marriage-year credit. The alternative marriage-year credit is the sum of both taxpayers' alternative premium assistance amounts for the pre-marriage months and the premium assistance amounts for the marriage months. This paragraph (b)(2)(ii) may not be used to increase the additional premium tax credit computed under paragraph (a)(1)(i) of this section.

(B) *Alternative premium assistance amounts for pre-marriage months.* Taxpayers compute the alternative premium assistance amounts for each taxpayer for each full or partial month the taxpayers are unmarried as described in paragraph (a)(2) of this section, except that each taxpayer treats the amount of household income as one-half of the actual household income for the taxable year and treats family size as the number of individuals in the taxpayer's family prior to the marriage. The taxpayers may include a dependent of the taxpayers for the taxable year in either taxpayer's family size for the pre-marriage months.

(C) *Premium assistance amounts for marriage months.* Taxpayers compute the premium assistance amounts for each full month the taxpayers are married as described in paragraph (a)(2) of this section.

(3) *Taxpayers not married to each other at the end of the taxable year.* Taxpayers who are married (within the meaning of section 7703) to each other during a taxable year but are not married to each other on the last day of the taxable year, and who are enrolled in the same qualified health plan at any time during the taxable year, must allocate the premium for the applicable benchmark plan, the premium for the plan in which the taxpayers enroll, and the advance credit payments for the period the taxpayers are married during the taxable year. The taxpayers may allocate these items to each former spouse in any proportion but must allocate all items in the same proportion. If the taxpayers cannot agree on an allocation, 50 percent of the premium for the applicable benchmark plan, the premiums for the plan in which the taxpayers enroll, and the advance credit payments for the married period are allocated to each taxpayer. If a plan covers only one of these taxpayers for any period during a taxable year, the amounts for that period are allocated entirely to that taxpayer.

(4) *Married taxpayers filing separate returns.* The premium tax credit is allowed to married (within the meaning of section 7703) taxpayers only if they file joint returns. See § 1.36B–2(b)(2). A married taxpayer who receives advance credit payments and files an income tax return as married filing separately has received excess advance payments. Taxpayers who receive advance credit payments as married taxpayers and do not file a joint return must allocate the advance credit payments equally to each taxpayer. The repayment limitation described in paragraph (a)(3) of this section applies to each taxpayer based on the household income and family size reported on that taxpayer's return.

(5) *Taxpayers filing returns as head of household and married filing separately.* If taxpayers enroll in one qualified health plan and receive advance credit payments based on a filing status of married filing a joint tax return, and one taxpayer properly files a tax return as head of household and the other taxpayer files a tax return as married filing separately for that taxable year, advance credit payments are allocated to each taxpayer equally for any period the taxpayers are enrolled in the same qualified health plan.

(6) *Examples.* The following examples illustrate the provisions of this paragraph (b). In each example the taxpayer enrolls in a higher cost qualified health plan than the applicable benchmark plan:

Example 1. Taxpayers marry during the taxable year, general rule for computing additional tax. (i) P is a single taxpayer with no dependents. In 2013 the Exchange for the rating area where P resides determines that P's 2014 household income will be $40,000 (358 percent of the Federal poverty line,

applicable percentage 9.5). P enrolls in a qualified health plan. The premium for the applicable benchmark plan is $5,200. P's monthly advance credit payment is $117, computed as follows: $5,200 benchmark plan premium minus contribution amount of $3,800 ($40,000 × .095) equals $1,400 (total advance credit payment); $1,400/12 = $117.

(ii) Q is a single taxpayer with two dependents. In 2013 the Exchange for the rating area where Q resides determines that Q's 2014 household income will be $35,000 (183 percent of the Federal poverty line, applicable percentage 5.52). Q enrolls in a qualified health plan. The premium for the applicable benchmark plan is $10,000. Q's monthly advance credit payment is $672, computed as follows: $10,000 benchmark plan premium minus contribution amount of $1,932 ($35,000 × .0552) equals $8,068 (total advance credit); $8,068/12 = $672.

(iii) P and Q marry on July 17, 2014 and enroll in a single policy for a qualified health plan covering four family members, effective August 1, 2014. The premium for the applicable benchmark plan is $14,000. Based on household income of $75,000 and a family size of four (325 percent of the Federal poverty line, applicable percentage 9.5), the Exchange approves advance credit payments of $573 per month, computed as follows: $14,000 benchmark plan premium minus contribution amount of $7,125 ($75,000 × .095) equals $6,875 (total advance credit); $6,875/12 = $573.

(iv) P and Q file a joint return for 2014 and report $75,000 in household income and a family size of four. P and Q compute their credit at reconciliation under paragraph (b)(1) of this section. They use the premiums for the applicable benchmark plans that apply for the months married and the months not married, and their contribution amount is based on their Federal poverty line percentage at the end of the taxable year. P and Q reconcile their premium tax credit with advance credit payments as follows:

Advance payments for P (Jan. to July)	$819
Advance payments for Q (Jan. to July)	4,704
Advance payments for P and Q (Aug. to Dec.)	2,865
Total advance payments	8,388
Benchmark plan premium for P (Jan. to July)	3,033
Benchmark plan premium for Q (Jan. to July)	5,833
Benchmark plan premium for P and Q (Aug. to Dec.)	5,833
Total benchmark plan premium	14,699
Contribution amount (taxable year household income × applicable percentage)	7,125
Credit (total benchmark plan premium less contribution amount)	7,574
Additional tax	814

(v) P's and Q's tax liability for 2014 is increased by $814 under paragraph (a)(1) of this section.

Example 2. Taxpayers marry during the taxable year, alternative computation of additional tax. (i) The facts are the same as in *Example 1,* except that P and Q compute their additional tax liability under paragraph (b)(2)(ii) of this section. P's and Q's additional tax is the excess of their advance credit payments for the taxable year ($8,388) over their alternative marriage-year credit, which is the sum of the alternative premium assistance amounts for the pre-marriage months and the premium assistance amounts for the marriage months.

(ii) P and Q compute the alternative marriage-year credit as follows:

Alternative premium assistance amounts for pre-marriage months:		
Benchmark plan premium for P (Jan. to July)	$3,033	(($5,200/12) × 7)
Contribution amount (½ taxable year household income × applicable percentage) × 7/12)	2,078	($37,500 × .095 × 7/12)
Alternative premium assistance amount for P's pre-marriage months	955	($3,033 − $2,078)
Benchmark plan premium for Q (Jan. to July)	5,833	(($10,000/12) × 7)
Contribution amount (½ taxable year household income × applicable percentage × 7/12)	1,339	($37,500 × .0612 × 7/12)
Alternative premium assistance amount for Q's pre-marriage months	4,494	($5,833 − $1,339)
Premium assistance amount for marriage months:		
Benchmark plan premium for P and Q (Aug. to Dec.)	5,833	(($14,000/12 × 5)
Contribution amount (taxable year household income × applicable percentage × 5/12)	2,969	($75,000 × .095 × 5/12)
Premium assistance amount for marriage months	2,864	($5,833 − $2,969)

Alternative marriage-year credit (sum of premium assistance amounts for pre-marriage months and marriage months): $955 + $4,494 + $2,864 = $8,313.

(iii) P and Q reconcile their premium tax credit with advance credit payments by determining the excess of their advance credit payments ($8,388) over their alternative marriage-year credit ($8,313). P and Q must increase their tax liability by $75 under paragraph (a)(1) of this section.

Example 3. Taxpayers marry during the taxable year, alternative computation of additional tax, alternative marriage-year tax credit exceeds advance credit payments. The facts are the same as in *Example 2,* except that the amount of P's and Q's advance credit payments is $8,301. Thus, their alternative marriage-year credit ($8,313) exceeds the amount of their advance credit payments ($8,301). Under paragraph (b)(2)(ii)(A) of this section, the amount of additional tax liability and additional tax credit that P and Q report on their tax return is $0.

Example 4. Taxpayers marry during the taxable year, alternative computation of additional tax. (i) Taxpayer R is single and has no dependents. In 2013, the Exchange for the rating area where R resides determines that R's 2014 household income will be $40,000 (358 percent of the Federal poverty line, applicable percentage 9.5). R enrolls in a qualified health plan. The premium for the applicable benchmark plan is $5,200. R's monthly advance credit payment is $117, computed as follows: $5,200 benchmark plan premium minus contribution amount of $3,800 ($40,000 × .095) = $1,400 (total advance credit); $1,400/12 = $117.

(ii) Taxpayer S is single with no dependents. In 2013, the Exchange for the rating area where S resides determines that S's 2014 household income will be $20,000 (179 percent of the Federal poverty line, applicable percentage 5.33). S enrolls in a qualified health plan. The premium for the applicable benchmark plan is $5,200. S's monthly advance credit payment is $345, computed as follows: $5,200 benchmark plan premium minus contribution amount of $1,066 ($20,000 × .0533) = $4,134 (total advance credit); $4,134/12 = $345.

(iii) R and S marry in September 2014 and enroll in a single policy for a qualified health plan covering them both, beginning October 1, 2014. The premium for the applicable benchmark plan is $10,000. Based on

household income of $60,000 and a family size of two (397 percent of the Federal poverty line, applicable percentage 9.5), R's and S's monthly advance credit payment is $358, computed as follows: $10,000 benchmark plan premium minus contribution amount of $5,700 ($60,000 × .095) = $4,300; $4,300/12 = $358. R's and S's advance credit payments for 2014 are $5,232, computed as follows:

Advance payments for R (Jan. to Sept.)	$1,053	($117 × 9)
Advance payments for S (Jan. to Sept.)	3,105	($345 × 9)
Advance payments for R and S (Oct. to Dec.)	1,074	($358 × 3)
Total advance payments	5,232	

(iv) R and S file a joint return for 2014 and report $62,000 in household income and a family size of two (410 percent of the FPL for a family of 2). Thus, under § 1.36B–2(b)(2), R and S are not applicable taxpayers for 2014 and may not claim a premium tax credit for 2014. However, they compute their additional tax liability under paragraph (b)(2)(ii) of this section. R's and S's additional tax is the excess of their advance credit payments for the taxable year ($5,232) over their alternative marriage-year credit, which is the sum of the alternative premium assistance amounts for the pre-marriage months and the premium assistance amounts for the marriage months. In this case, R and S have no premium assistance amounts for the married months because their household income is over 400 percent of the Federal poverty line for a family of 2.

(v) R and S compute their alternative marriage-year credit as follows:

Premium assistance amount for pre-marriage months:		
Benchmark plan premium for R (Jan. to Sept.)	$3,900	(($5,200/12) × 9)
Contribution amount ((½ taxable year household income × applicable percentage) × 9/12).	2,053	($31,000 × .0883 × 9/12)
Premium assistance amount for R's pre-marriage months	1,847	($3,900 − $2,053)
Benchmark plan premium for S (Jan. to Sept.)	3,900	(($5,200/12) × 9)
Contribution amount ((½ taxable year household income × applicable percentage) × 9/12).	2,053	($31,000 × .0883 × 9/12)
Premium assistance amount for S's pre-marriage months	1,847	($3,900 − $2,053)
Premium assistance amount for marriage months	0	

Alternative marriage-year credit (sum of premium assistance amounts for pre-marriage months and marriage months): $1,847 + 1,847 + 0 = $3,694.

(vi) R and S reconcile their premium tax credit with advance credit payments by determining the excess of their advance credit payments ($5,232) over their alternative marriage-year credit ($3,694). R and S must increase their tax liability by $1,538 under paragraph (a)(1) of this section.

Example 5. (i) *Taxpayers marry during the taxable year, no additional tax liability.* The facts are the same as in *Example 4,* except that S has no income and is enrolled in Medicaid for January through September 2014 and R's and S's household income for 2014 is $37,000 (245 percent of the Federal poverty line, applicable percentage 7.88). Their advance credit payments for 2014 are $2,707 ($1,053 for R for January to September and $1,654 for R and S for October to December). Their premium tax credit for 2014 is $3,484 (total benchmark premium of $6,400 less contribution amount of $2,916).

(ii) Because R's and S's premium tax credit of $3,484 exceeds their advance credit payments of $2,707, R and S are allowed an additional credit of $707. Although R and S marry in 2014, paragraph (b)(2) of this section (the alternative computation of additional tax for taxpayers who marry during the taxable year) does not apply because they do not owe additional tax for 2014.

Example 6. Taxpayers divorce during the taxable year, 50 percent allocation. (i) Taxpayers V and W are married and have two dependents. In 2013, the Exchange for the rating area where the family resides determines that their 2014 household income will be $76,000 (330 percent of the Federal poverty line for a family of 4, applicable percentage 9.5). V and W enroll in a qualified health plan for 2014. The premium for the applicable benchmark plan is $14,100. The Exchange approves advance credit payments of $573 per month, computed as follows: $14,100 benchmark plan premium minus V and W's contribution amount of $7,220 ($76,000 × .095) equals $6,880 (total advance credit); $6,880/12 = $573.

(ii) V and W divorce on June 17, 2014, and obtain separate qualified health plans beginning July 1, 2014. V enrolls based on household income of $60,000 and a family size of three (314 percent of the Federal poverty line, applicable percentage 9.5). The premium for the applicable benchmark plan is $10,000. The Exchange approves advance credit payments of $358 per month, computed as follows: $10,000 benchmark plan premium minus V's contribution amount of $5,700 ($60,000 × .095) equals $4,300 (total advance credit); $4,300/12 = $358.

(iii) W enrolls based on household income of $16,420 and a family size of one (147 percent of the Federal poverty line, applicable percentage 3.82). The premium for the applicable benchmark plan is $5,200. The Exchange approves advance credit payments of $381 per month, computed as follows: $5,200 benchmark plan premium minus W's contribution amount of $627 ($16,420 × .0382) equals $4,573 (total advance credit); $4,573/12 = $381. V and W do not agree on an allocation of the premium for the applicable benchmark plan, the premiums for the plan in which they enroll, and the advance credit payments for the period they were married in the taxable year.

(iv) V and W each compute their credit at reconciliation under paragraph (b)(1) of this section, using the premiums for the applicable benchmark plans that apply to them for the months married and the months not married, and the contribution amount based on their Federal poverty line percentages at the end of the taxable year. Under paragraph (b)(3) of this section, because V and W do not agree on an allocation, V and W must equally allocate the benchmark plan premium ($7,050) and the advance credit payments ($3,438) for the six-month period January through June 2014 when they are married and enrolled in the same qualified health plan. Thus, V and W each are allocated $3,525 of the benchmark plan premium ($7,050/2) and $1,719 of the advance credit payments ($3,438/2) for January through June.

(v) V reports on his 2014 tax return $60,000 in household income and family size of three. W reports on her 2014 tax return $16,420 in household income and family size of one. V and W reconcile their premium tax credit with advance credit payments as follows:

	V	W
Allocated advance payments (Jan. to June)	$1,719	$1,719
Actual advance payments (July to Dec.)	2,148	2,286

	V	W
Total advance payments	3,867	4,005
Allocated benchmark plan premium (Jan. to June)	3,525	3,525
Actual benchmark plan premium (July to Dec.)	5,000	2,600
Total benchmark plan premium	8,525	6,125
Contribution amount (taxable year household income × applicable percentage)	5,700	627
Credit (total benchmark plan premium less contribution amount)	2,825	5,498
Additional credit	.....	1,493
Additional tax	1,042	.....

(vi) Under paragraph (a)(1) of this section, on their tax returns V's tax liability is increased by $1,042 and W is allowed $1,493 as additional credit.

Example 7. Taxpayers divorce during the taxable year, allocation in proportion to household income. (i) The facts are the same as in *Example 6,* except that V and W decide to allocate the benchmark plan premium ($7,050) and the advance credit payments ($3,438) for January through June 2014 in proportion to their household incomes (79 percent and 21 percent). Thus, V is allocated $5,570 of the benchmark plan premiums ($7,050 × .79) and $2,716 of the advance credit payments ($3,438 × .79), and W is allocated $1,481 of the benchmark plan premiums ($7,050 × .21) and $722 of the advance credit payments ($3,438 × .21). V and W reconcile their premium tax credit with advance credit payments as follows:

	V	W
Allocated advance payments (Jan. to June)	$2,716	$722
Actual advance payments (July to Dec.)	2,148	2,286
Total advance payments	4,864	3,008
Allocated benchmark plan premium (Jan. to June)	5,570	1,481
Actual benchmark plan premium (July to Dec.)	5,000	2,600
Total benchmark plan premium	10,570	4,081
Contribution amount (taxable year household income × applicable percentage)	5,700	627
Credit (total benchmark plan premium less contribution amount)	4,870	3,454
Additional credit	6	446

(ii) Under paragraph (a)(1) of this section, on their tax returns V is allowed an additional credit of $6 and W is allowed an additional credit of $446.

Example 8. Married taxpayers filing separate tax returns. (i) Taxpayers X and Y are married and have two dependents. In 2013, the Exchange for the rating area where the family resides determines that their 2014 household income will be $76,000 (330 percent of the Federal poverty line for a family of 4, applicable percentage 9.5). W and Y enroll in a qualified health plan for 2014. The premium for the applicable benchmark plan is $14,100. X's and Y's monthly advance credit payment is $573, computed as follows: $14,100 benchmark plan premium minus X's and Y's contribution amount of $7,220 ($76,000 × .095) equals $6,880 (total advance credit); $6,880/12 = $573.

(ii) X and Y file income tax returns for 2014 using a married filing separately filing status. X reports household income of $60,000 and a family size of three (314 percent of the Federal poverty line). Y reports household income of $16,420 and a family size of one (147 percent of the Federal poverty line).

(iii) Because X and Y are married but do not file a joint return for 2014, X and Y are not applicable taxpayers and are not allowed a premium tax credit for 2014. See § 1.36B–2(b)(2). Under paragraph (b)(4) of this section, half of the advance credit payments ($6,880/2 = $3,440) is allocated to X and half is allocated to Y for purposes of determining their excess advance payments. The repayment limitation described in paragraph (a)(3) of this section applies to X and Y based on the household income and family size reported on each return. Consequently, X's tax liability for 2014 is increased by $2,500 and Y's tax liability for 2014 is increased by $600.

Example 9. (i) The facts are the same as in *Example 8,* except that X and Y live apart for over 6 months of the year and X properly files an income tax return as head of household. Under section 7703(b), X is treated as unmarried and therefore is not required to file a joint return. If X otherwise qualifies as an applicable taxpayer, X may claim the premium tax credit based on the household income and family size X reports on the return. Y is not an applicable taxpayer and is not eligible to claim the premium tax credit.

(ii) X must reconcile the amount of credit with advance credit payments under paragraph (a) of this section. The premium for the applicable benchmark plan covering X and his two dependents is $9,800. X's premium tax credit is computed as follows: $9,800 benchmark plan premium minus X's contribution amount of $5,700 ($60,000 − .095) equals $4,100.

(iii) Under paragraph (b)(5) of this section, half of the advance payments ($6,880/2 = $3,440) is allocated to X and half is allocated to Y. Thus, X is entitled to $660 additional premium tax credit ($4,100 − $3,440). Y has $3,440 excess advance payments, which is limited to $600 under paragraph (a)(3) of this section.

§ 1.36B–5 Information reporting by Exchanges.

(a) *Information required to be reported.* An Exchange must report to the Internal Revenue Service and each taxpayer the following information for the qualified health plan or plans in which the taxpayer or a member of the taxpayer's family enrolls through the Exchange—

(1) The premium for the applicable benchmark plans used to compute advance credit payments and the period coverage was in effect;

(2) The total premium for the coverage in which the taxpayer or family member enrolls without reduction for advance credit payments;

(3) The aggregate amount of any advance credit payments;

(4) The name, address and Social Security number (SSN) of the primary insured and the name and SSN or adoption taxpayer identification number of each other individual covered under the policy;

(5) All information provided to the Exchange at enrollment or during the taxable year, including any change in

circumstances, necessary to determine eligibility for and the amount of the premium tax credit;

(6) Any other information required in published guidance, see § 601.601(d)(2) of this chapter, necessary to determine whether a taxpayer has received excess advance payments.

(b) *Time of reporting.* [Reserved]

(c) *Manner of reporting.* The Commissioner may provide rules in published guidance, see § 601.601(d)(2) of this chapter, for the manner of reporting under this section.

■ **Par. 3.** Section 1.6011–8 is added to read as follows:

§ 1.6011–8 Requirement of income tax return for taxpayers who claim the premium tax credit under section 36B.

(a) *Requirement of return.* A taxpayer who receives advance payments of the premium tax credit under section 36B must file an income tax return for that taxable year on or before the fifteenth day of the fourth month following the close of the taxable year.

(b) *Effective/applicability date.* This section applies for taxable years ending after December 31, 2013.

■ **Par. 4.** In § 1.6012–1, paragraph (a)(2)(viii) is added to read as follows:

§ 1.6012–1 Individuals required to make returns of income.

(a) * * *

(2) * * *

(viii) For rules relating to returns required of taxpayers who receive advance payments of the premium tax credit under section 36B, see § 1.6011–8(a).

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 5.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 6.** In § 602.101, paragraph (b) is amended by adding an 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.
* * * * *	
1.36B–5	1545–2232
* * * * *	

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: May 16, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2012–12421 Filed 5–18–12; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–1063]

RIN 1625–AA00

Moving Security Zone Around Escorted Vessels on the Lower Mississippi River

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Captain of the Port of New Orleans (COTP New Orleans) is re-establishing and extending the effective period for the moving security zone on the Mississippi river, mile marker 90 through mile marker 110, extending 300 yards on all sides of vessels being escorted by one or more Coast Guard assets.

DATES: Section 165.T08–040, temporarily added at 77 FR 6013, effective from January 1, 2012, through March 31, 2012, is re-established and effective from May 23, 2012 through August 15, 2012. Beginning April 1, 2012 this rule continues to be enforced through actual notice.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–1063 and are available online by going to *http://www.regulations.gov*, inserting USCG–2011–1063 in the ''Keyword'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email Lieutenant Commander (LCDR) Kenneth Blair, Sector New Orleans, Coast Guard; telephone 504–365–2392, email *Kenneth.E.Blair@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule. Based on risk evaluations completed, and information gathered, from November 26, 2011 to March 12, 2012 and after evaluating the security needs for escorted vessels, the Coast Guard determined that the existing moving security zones should be extended from April 1, 2012 through August 15, 2012. This moving security zone is needed to protect escorted vessels and personnel from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature. Providing a public notice and comment period for this temporary final rule is contrary to national security and the public interest.

Additionally, the City of New Orleans will be hosting several high visibility events beginning in April, 2012, including the French Quarter Festival and War of 1812 Commemoration that will bring thousands of people into the New Orleans Central Business District. A thirty day notice period would unnecessarily delay the effective dates and would be contrary to the public interest by delaying or foregoing the necessary protections required for these escorted vessels and personnel. For these reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Basis and Purpose

Certain vessels, including high capacity passenger vessels, vessels carrying certain dangerous cargoes as defined in 33 CFR part 160, tank vessels constructed to carry oil or hazardous materials in bulk, and vessels carrying liquefied hazardous gas as defined in 33 CFR part 127 have been deemed by the COTP New Orleans to require escort protection during transit between mile marker 90.0 to mile marker 110.0 of the

Lower Mississippi River. A moving security zone has been established for the escorted vessels, between mile marker 90.0 to mile marker 110.0, extending 300 yards in all directions of the escorted vessels. Vessels will not be allowed to transit through the moving security zone without the permission of the Captain of the Port, New Orleans or the on-scene Coast Guard asset. This security zone is necessary to protect the escorted vessels and personnel from destruction, loss or injury from sabotage or other subversive acts, accidents or other causes of a similar nature.

Discussion of Rule

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

A vessel may request permission of the COTP New Orleans or the on-scene Coast Guard asset to enter the security zone. If permitted to enter the security zone, a vessel must proceed at the minimum safe speed and must comply with the order of the COTP New Orleans or the on-scene asset. No vessel may enter the inner 50-yard portion of the security zone closest to the vessel being escorted. The COTP New Orleans will inform the public of the existence or status of the security zones around escorted vessels in the regulated area by Marine Safety Information Bulletins or Broadcast Notice to Mariners. Coast Guard assets will be clearly identified by lights, vessel markings, or with agency insignia. This moving security zone is necessary to protect vessels deemed to be in need of escort protection by the COTP New Orleans for security reasons.

Regulatory Analyses

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

Regulatory Planning and Review

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

It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). Due to its duration and location the impacts on routine navigation are expected to be minimal.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule fits the category selected from paragraph (34)(g), as it establishes a temporary security zone for a limited period of time.

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.06–1, 6.05–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Section 165.T08–040 is added to read as follows:

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

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

(b) *Effective period.* This rule is effective May 23, 2012 through August 15, 2012. Beginning April 1, 2012 this rule is enforced through actual notice.

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

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

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

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

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

Dated: April 1, 2012.

John J. Arenstam,

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

[FR Doc. 2012–12313 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0674; FRL–9349–3]

Acibenzolar- S -methyl; Time-Limited Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for residues of acibenzolar-S-methyl in or on grapefruit, apples and pears. Syngenta Crop Protection LLC. requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 23, 2012. Objections and requests for hearings must be received on or before July 23, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0674, is available either electronically through *http://www.regulations.gov* or in hard copy at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA

West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. 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 OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Rose Kearns, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–5611; email address: *kearns.rosemary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0674 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before July 23, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0674, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), Mail Code: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 7, 2011 (76 FR 55331) (FRL–8886–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition 1G7889 by Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. The petition requested that 40 CFR 180.561 be amended by establishing temporary tolerances for residues of the fungicide, acibenzolar-S-methyl, in or on apples, grapefruit and pears 0.05 parts per million (ppm) in conjunction with approval of an experimental use permit. That notice referenced a summary of the petition prepared by Syngenta Crop Protection, LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for acibenzolar-S-methyl including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with acibenzolar-S-methyl follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

General information on the toxicity of acibenzolar-S-methyl can be found in a recent tolerance rulemaking for this pesticide in the **Federal Register** of April 11, 2012 (77 FR 21670) (FRL–

9343–3). Specific information on the studies received and the nature of the adverse effects caused by acibenzolar-S-methyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''Acibenzolar-S-methyl Human Health Risk Assessment,'' on page 15 in docket ID number EPA–HQ–OPP–2011–0674.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for Acibenzolar-S-Methyl used for human risk assessment is shown in the recent tolerance rulemaking document for acibenzolar-S-methyl in the **Federal Register** of April 11, 2012 (77 FR 21670).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to acibenzolar-S-methyl, EPA considered exposure under the petitioned-for tolerances as well as all existing acibenzolar-S-methyl tolerances in 40 CFR 180.561. EPA assessed dietary exposures from acibenzolar-S-methyl in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for acibenzolar-S-methyl. In estimating acute dietary exposure, EPA used food consumption information from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed a distribution of residues based on field trial data and tolerance level residues for apple, grapefruit and pear. Empirical and Dietary Exposure Evaluation Model (DEEM) default processing factors were used to modify the field trial data. Maximum screening-level percent crop treated (PCT) estimates were used for commodities for which data were available. If no PCT data were available, 100 PCT was assumed.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA used a conservative chronic dietary exposure analysis for the general U.S. population and various population subgroups. Tolerance level residues and 100 crop treated assumptions were used. DEEM default and empirical processing factors were used to modify the tolerance values.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that acibenzolar-S-methyl does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if certain conditions are met. PCT data was not used for conducting the chronic dietary risk assessment.

2. *Dietary exposure from drinking water.* The residues of concern for drinking water are acibenzolar-S-methyl benzo(1,2,3) thiadiazole-7-carbothioic acid (-S-methyl ester, convertible to benzo(1,2,3)thiadiazole-7-carboxylic acid (CGA–210007) in drinking water. These simulation model take into account data on the physical, chemical, and fate/transport characteristics of acibenzolar-S-methyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of acibenzolar-S-methyl for acute exposures are estimated to be 45 parts per billion (ppb) for surface water and 0.08 ppb for ground water, for chronic exposures for non-cancer assessments are estimated to be 19.1 ppb for surface water and 0.08 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 45 ppb was used to assess the contribution to drinking water.

For chronic dietary risk assessment, the water concentration of value 19.1 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Acibenzolar-S-methyl is currently registered for the following uses that could result in residential exposures: Turfgrass use on sodfarms, golf courses, collegiate athletic fields, and lawns around commercial and industrial buildings. Residential exposure was assessed for adult handlers and for adult and child post-application activities. Exposure for adult and child golfers were used to aggregate adult post-application dermal exposure with dietary and drinking water exposure. The aggregate exposure assessment for children combines dermal and

incidental oral post-application exposure with food and water exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative Effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found acibenzolar-S-methyl to share a common mechanism of toxicity with any other substances, and acibenzolar-S-methyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that acibenzolar-S-methyl does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The toxicology database for acibenzolar-S-methyl is complete and adequate for assessing increased susceptibility under FQPA. The pre- and postnatal toxicity database for acibenzolar-S-methyl includes developmental toxicity studies in rats and rabbits, a DNT study in rats, and a 2-generation reproduction toxicity study in rats. Based on the developmental toxicity in rats and the developmental neurotoxicity studies in rats, there is concern for increased qualitative and/or quantitative susceptibility following in utero exposure to acibenzolar-S-methyl. However, the degree of concern for the increased susceptibility seen in these studies is low as there are no residual uncertainties with regard to pre- and/or postnatal toxicity since NOAELs and LOAELs have been identified for all effects of concern, a clear dose response has been well defined, and the PODs selected for risk assessment are protective of the fetal/offspring effects. Additionally, the dietary and residential risk assessments are conservative and will not underestimate dietary exposure and there are no residual uncertainties in the exposure database.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for acibenzolar-S-methyl is complete.

ii. There are no residual uncertainties identified in the exposure databases. The dietary risk assessment is conservative and will not underestimate dietary and/or non-dietary residential exposure to acibenzolar-S-methyl. The acute analysis assumed a distribution of residues based on field trial data, tolerance level residues for the Experimental Use Permit (EUP) uses and maximum PCT estimates were used for commodities for which data were available. The chronic dietary food exposure assessment was performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to acibenzolar-S-methyl in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by acibenzolar-S-methyl.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to acibenzolar-S-methyl will occupy 37% of the aPAD for children 3–5 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to acibenzolar-S-methyl from food and water will utilize 12% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential uses for acibenzolar-S-methyl. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of acibenzolar-S-methyl is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Acibenzolar-S-methyl is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to acibenzolar-S-methyl.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 700 for females 13–49 years from handler activities, and, 1,600 for females 13–49 years old, and 800–1,000 for children 1–2 and 6–12 years old, respectively, from post-application exposure. Because EPA's level of concern for acibenzolar-S-methyl is a MOE of 100 or below, these short-term-aggregate MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, acibenzolar-S-methyl is not registered for any use pattern that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure.

Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which at least one protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for acibenzolar-S-methyl.

Because no intermediate-term adverse effect was identified, acibenzolar-S-methyl is not expected to pose an intermediate-term risk.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, acibenzolar-S-methyl is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to acibenzolar-S-methyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology high performance liquid chromatography using ultra-violet detection ((HPLC/UV) Method AG–617A) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

There are no established Codex, Mexican, or Canadian maximum residue limits for acibenzolar-S-methyl in/on any commodity. Therefore, international harmonization is not an issue for acibenzolar-S-methyl.

V. Conclusion

Therefore, time-limited tolerances are established for residues of acibenzolar-S-methyl, in or on apple, grapefruit and pear at 0.05 ppm. A time limitation been imposed because these tolerances are being established in conjunction with approval of an EUP to use acibenzolar-S-methyl on apple, pear and grapefruit. The EUP approval period and time-limited tolerances will expire 12/31/2015 which provides ample time for all treated crops to be harvested, stored, and out of channels of trade.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 14, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.561 is amended as follows:

■ a. Redesignate paragraph (a) as (a)(1); and

■ b. Add paragraph (a)(2).

The amendments read as follows:

§ 180.561 Acibenzolar- *S* -methyl; tolerances for residues.

(a) *General.*

(1) * * *

(2) Tolerances are established for residues of acibenzolar- *S* -methyl, benzo(1,2,3)thiadiazole-7-carbothioic acid- *S* -methyl ester, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only those acibenzolar- *S* -methyl residues convertible to benzo(1,2,3)thiadiazole-7-carboxylic acid (CGA–210007), expressed as the Stoichiometric equivalent of acibenzolar- *S* -methyl, in or on the following raw agricultural commodities.

Commodity	Parts per million	Expiration/ revocation date
Apple	0.05	12/31/2015
Grapefruit	0.05	12/31/2015
Pear	0.05	12/31/2015

* * * * *

[FR Doc. 2012–12410 Filed 5–22–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0014; FRL–9349–1]

1,2-Ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2, 4-diisocyanato-1-methylbenzene; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene, when used as an inert ingredient in a pesticide chemical formulation. ICR, Inc., on behalf of Triton Systems, Inc., submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene on food or feed commodities.

DATES: This regulation is effective May 23, 2012. Objections and requests for hearings must be received on or before July 23, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0014, is available either electronically through *http://www.regulations.gov* or in hard copy at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. 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 OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Anthony Britten, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8179; email address: *britten.anthony@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0014 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before July 23, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0014, by one of the following methods.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

In the **Federal Register** of April 4, 2012 (77 FR 20334) (FRL–9340–4), EPA

issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP 1E7912) filed by ICR, Inc., 1330 Dillon Heights Avenue, Baltimore, MD 21228–1199 on behalf of Triton Systems, Inc., 200 Turnpike Road, Chelmsford, MA 01824. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene (CAS Reg. No. 35297–61–1). That notice included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments in response to this notice.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the Toxic Substance Control Act (TSCA) Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

7. The polymer's number average MW is greater than 10,000 daltons. The polymer contains less than 2% oligomeric material below MW 500 and (less than 5% oligomeric material below MW 1,000.

Thus, 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene is greater than 1 million daltons Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene conforms to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found 1, 2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene to share a common mechanism of toxicity with any other substances, and 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-

methylbenzene does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of 1,2-ethanediamine, *N*1-(2-aminoethyl)-polymer with 2,4-diisocyanato-1-methylbenzene. EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene.

VIII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene.

IX. Conclusion

Accordingly, EPA finds that exempting residues of 1,2-ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these rules from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes, or otherwise have any unique impacts on local governments. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

Although this action does not require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

XI. Congressional Review Act

The Congressional Review Act, 5, U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides

and pests, Reporting and recordkeeping requirements.

Dated: May 11, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, the table is amended by alphabetically adding the following entry immediately above the existing entry which reads in part ''1, 2-Ethanediamine, polymer * * *.''

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * * * * * *	
1,2-Ethanediamine, *N*1-(2-aminoethyl)-, polymer with 2,4-diisocyanato-1-methylbenzene, minimum number average molecular weight (in amu), one million	35297–61–1
* * * * * * *	

[FR Doc. 2012–12110 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket No. 80–286; FCC 12–49]

Jurisdictional Separations and Referral to the Federal-State Joint Board

AGENCY: Federal Communications Commission.

ACTION: Interim rule.

SUMMARY: Jurisdictional separations is the process by which incumbent local exchange carriers (incumbent LECs) apportion regulated costs between the intrastate and interstate jurisdictions. In this document, the Commission extends the current freeze of part 36 category relationships and jurisdictional cost allocation factors used in jurisdictional separations until June 30, 2014. Extending the freeze will allow the Commission to provide stability for carriers that must comply with the Commission's separations rules while the Federal-State Joint Board completes its analysis of, and recommendations for, interim and comprehensive reform of the jurisdictional separations process.

DATES: Effective June 22, 2012.

FOR FURTHER INFORMATION CONTACT: Daniel Ball, Attorney Advisor, at 202–418–1577, Pricing Policy Division, Wireline Competition Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O) in CC Docket No. 80–286, FCC 12–49, released on May 8, 2012. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW., Washington, DC 20554.

1. Jurisdictional separations is the process by which incumbent LECs apportion regulated costs between the intrastate and interstate jurisdictions.

2. The 2001 Separations Freeze Order, 66 FR 33202, June 21, 2001, froze all part 36 category relationships and allocation factors for price cap carriers and all allocation factors for rate-of-return carriers. Rate-of-return carriers had the option to freeze their category relationships at the outset of the freeze. The freeze was originally established July 1, 2001 for a period of five years, or until the Commission completed separations reform, whichever occurred first. The 2006 Separations Freeze Extension Order, 71 FR 29843, May 24, 2006, extended the freeze for three years or until the Commission completed separations reform, whichever occurred first. The 2009 Separations Freeze Extension Order, 74 FR 23955, May 22, 2009, extended the freeze until June 30, 2010. The 2010 Separations Freeze Extension Order, 75 FR 30301, June 1, 2010, extended the freeze until June 30, 2011. The 2011 Separations Freeze Extension Order, 76 FR 30840, May 27, 2011, extended the freeze until June 30, 2012.

3. The NPRM proposed extending the current freeze of part 36 category relationships and jurisdictional cost allocation factors used in jurisdictional separations, which freeze would otherwise expire on June 30, 2012, until June 30, 2014. The R&O adopts that proposal. The extension will allow the Commission to continue to work with the Federal-State Joint Board on Separations to achieve comprehensive separations reform. Pending comprehensive reform, the Commission concludes that the existing freeze should be extended on an interim basis to avoid the imposition of undue administrative burdens on incumbent LECs. The overwhelming majority of parties filing comments in response to the NPRM supported extension of the freeze.

4. The extended freeze will be implemented as described in the 2001 Separations Freeze Order. Specifically, price-cap carriers would use the same relationships between categories of investment and expenses within part 32 accounts and the same jurisdictional allocation factors that have been in place since the inception of the current freeze on July 1, 2001. Rate-of-return carriers would use the same frozen jurisdictional allocation factors, and would use the same frozen category relationships if they had opted previously to freeze those as well.

5. As required by the Regulatory Flexibility Act, the Commission certifies that these regulatory amendments will not have a significant impact on small business entities.

Paperwork Reduction Act (PRA)

6. The R&O does not propose any new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new, modified, or proposed ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, 44 U.S.C. 3506(c)(4).

7. The Commission will send a copy of the R&O in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

8. Pursuant to sections 1, 4(i) and (j), 214(e), 254, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 214(e), 254, and 410, the R&O is

adopted. The report and order shall be effective June 22, 2012.

9. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the R&O, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 36

Communications common carriers, Reporting and recordkeeping requirements, Telephone, and Uniform System of Accounts.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 36 as follows:

PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES

■ 1. The authority citation for part 36 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (j), 205, 221(c), 254, 403, and 410.

■ 2. In 47 CFR part 36 remove the words ''June 30, 2012'' and add, in their place, the words ''June 30, 2014'' in the following sections:

■ a. Section 36.3(a) through (e);
■ b. Section 36.123(a)(5) and (a)(6);
■ c. Section 36.124(c) and (d);
■ d. Section 36.125(h) and (i);
■ e. Section 36.126(b)(6), (c)(4), (e)(4), and (f)(2);
■ f. Section 36.141(c);
■ g. Section 36.142(c);
■ h. Section 36.152(d);
■ i. Section 36.154(g);
■ j. Section 36.155(b);
■ k. Section 36.156(c);
■ l. Section 36.157(b);
■ m. Section 36.191(d);
■ n. Section 36.212(c);
■ o. Section 36.214(a);
■ p. Section 36.372;
■ q. Section 36.374(b) and (d);
■ r. Section 36.375(b)(4) and (b)(5);
■ s. Section 36.377(a), (a)(1)(ix), (a)(2)(vii), (a)(3)(vii), (a)(4)(vii), (a)(5)(vii), and (a)(6)(vii);
■ t. Section 36.378(b)(1);
■ u. Section 36.379(b)(1) and (b)(2);
■ v. Section 36.380(d) and (e);
■ w. Section 36.381(c) and (d); and
■ x. Section 36.382(a).

[FR Doc. 2012–12548 Filed 5–22–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 36 and 54

[WC Docket Nos. 10–90, 05–337; DA 12–646]

Connect America Fund; High-Cost Universal Service Support

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this order, the Wireline Competition Bureau (Bureau) adopts the methodology for establishing reasonable limits on recovery of capital costs and operating expenses or ''benchmarks'' for high cost loop support (HCLS). The methodology the Bureau adopts, builds on the analysis proposed in the *USF/ICC Transformation FNPRM,* but also includes several changes in response to the comments from two peer reviewers and interested parties and based on further analysis by the Bureau. These changes significantly improve the methodology while redistributing funding to a greater number of carriers to support continued broadband investment. The methodology the Bureau adopts today is described in detail in a technical appendix to the order.

DATES: Effective June 22, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Bender, Wireline Competition Bureau, (202) 418–1469, Katie King, Wireline Competition Bureau, (202) 418–7491 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in WC Docket Nos. 10–90, 05–337; DA 12–646, released on April 25, 2012. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW., Washington, DC 20554. Or at the following Internet address: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0425/DA-12-646A1.pdf.*

I. Introduction

1. In the *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011, the Commission comprehensively reformed universal service funding for high-cost, rural areas, adopting fiscally responsible, accountable, incentive-based policies to preserve and advance voice and broadband service while ensuring fairness for consumers who pay into the universal service fund (Fund). As a component of those reforms, the Commission adopted a benchmarking rule intended to moderate the expenses of those rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to advance broadband deployment. The Commission sought comment on a specific methodology to limit reimbursable capital and operating costs within HCLS and directed the Bureau to finalize a methodology after receiving public input in response to the proposal.

2. The methodology the Bureau adopts today, which is described in more detail in the technical appendix, summarized below and available in its entirety at Appendix A, *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0425/DA-12-646A1.pdf,* builds on the analysis proposed in the *USF/ICC Transformation FNPRM,* 76 FR 78384, December 16, 2011, but also includes several changes in response to the comments from two peer reviewers and interested parties and based on further analysis by the Bureau. These changes significantly improve the methodology while redistributing funding to a greater number of carriers to support continued broadband investment. The Bureau now estimates that support to approximately 100 study areas with very high costs relative to similarly situated peers will be limited, while approximately 500 study areas will receive additional, redistributed support to fund new broadband investment.

3. In view of the Commission's intent to ''phase in reform with measured but certain transitions,'' the Bureau will phase in the application of these limits. As directed by the Commission, the Bureau is providing public notice in Appendix B (*http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0425/DA-12-646A1.pdf*) regarding the updated company-specific capped values that will be used in the HCLS formula. These capped values (also referred to as limits or benchmarks) will be used from July 1, 2012 through December 31, 2012, in place of an individual company's actual cost data for those rate-of-return cost companies whose costs exceed the caps. While the HCLS benchmarks will be implemented beginning July 1, 2012, support amounts will not be reduced immediately by the full amount as calculated using the benchmarks. Instead, support will be reduced commencing in July 2012 by twenty-five percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks, unless that reduction

would exceed ten percent of the study area's support as otherwise would be calculated based on NECA cost data, absent implementation of this rule. Beginning January 1, 2013, support will be reduced by fifty percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks in effect for 2013. Beginning January 1, 2014, when the Bureau expects to have updated wire center boundaries, as discussed below, the Bureau will update the regressions (the coefficients), and support will be limited, in full, by the benchmarks in effect for 2014. When fully implemented, the Bureau estimates that the roughly 100 study areas that are capped would see approximately $65 million in support reductions, while the roughly 500 study areas that are not capped would receive approximately $55 million in additional support for broadband investment.

II. Discussion

4. In this order, the Bureau implements the Commission's rule to use benchmarks to impose reasonable limits on reimbursable capital and operating costs for rate-of-return carriers for purposes of determining HCLS and adopt the methodology that the Bureau will use to determine carrier-specific benchmarks for rate-of-return cost companies. Consistent with parameters set forth by the Commission, the Bureau compares companies' costs to those of similarly situated companies using statistical techniques to determine which companies shall be deemed similarly situated. As described in more detail in the technical appendix, summarized below, the Bureau uses NECA cost data and quantile regression analyses to generate a capital expense (capex) limit and an operating expense (opex) limit for each rate-of-return cost company study area. The regression-derived limits are set at the 90th percentile of costs for capex and opex compared to similarly situated companies. The capped values will be used in NECA's loop cost algorithm in place of an individual company's actual cost data for those rate-of-return cost companies whose costs exceed the caps, which will result in reduced support amounts for these carriers. As directed by the Commission, NECA will modify the HCLS formula for average schedule companies to reflect the caps derived from the cost company data. Specifically, the Bureau directs NECA to file proposed modifications to the average schedule formula within 30 days of the release of this order. After application of the benchmark methodology, HCLS will be recalculated to account for the additional support available under the overall cap on total HCLS. Additional support will be redistributed to carriers whose loop cost is not limited by the benchmark methodology, and those carriers are required to use the additional support to preserve and advance the availability of modern networks capable of delivering broadband and voice telephony service. Beginning January 1, 2014, carriers unaffected by the benchmark limits will receive additional redistributed support as calculated using a lower adjusted national average cost per loop (NACPL). The lower NACPL will be the NACPL that would be used if total reduced support, as a result of the application of the benchmark methodology, is redistributed to all carriers. Support to carriers affected by the benchmark will be calculated using the NACPL established pursuant to § 36.622 of the Commission's rules. During the transition periods July 1, 2012 to December 31, 2012 and January 1, 2013 to December 31, 2013, the total amount of HCLS available to study areas not affected by the benchmark methodology will be the capped HCLS, as calculated pursuant to § 36.603(a) of the Commission's rules, less the total amount to be paid to study areas affected by the benchmark methodology during the transition periods. HCLS paid to the study areas not affected by the benchmark methodology will be calculated using an adjusted NACPL to produce the capped support pursuant to § 36.603(a) of the Commission's rules. The Bureau directs NECA to provide to the Bureau a recalculated NACPL for redistribution and a schedule of HCLS for all carriers for the six-month period of July 1, 2012 to December 31, 2012 within 30 days of the release of this order. Consistent with current practice, the filing NECA makes each October with the Commission shall include NACPL information and the schedule of HCLS for all carriers for the next year.

5. The methodology that the Bureau adopts builds on the proposed methodology in Appendix H of the *USF/ICC Transformation Order and FNPRM,* but includes some significant improvements based on the many useful comments and ex parte presentations in this proceeding, the comments of two peer reviewers, and further analysis by the Bureau. As in the proposed methodology, the Bureau uses quantile regression analysis and NECA cost data to generate a set of limits for each rate-of-return cost company study area and uses the regression-derived limits in NECA's formula for calculating loop cost. The Bureau modifies the proposal, however, by reducing the overall number of regressions from eleven to two: one for capital expenditures and one for operating expenditures. In addition, Commission staff examined and tested additional independent variables that were available from publicly available data sources, placed additional data sources in the record, and updated the methodology to reflect this further analysis. Below, the Bureau explains these changes to the proposed methodology and responds to other significant issues raised in the record.

A. Number of Regressions

6. The most significant change in methodology is that this analysis generates two caps for each company—a capex limit and an opex limit. The methodology proposed in the *FNPRM* generated eleven different caps for each company that would have limited the values in eleven of the twenty-six steps in NECA's loop cost algorithm. Based on a review of the record and further analysis, the Bureau concludes that a better approach is to divide a company's total cost in step twenty-five of the algorithm into its capex and opex components and use two regressions instead of using eleven independent regressions.

7. Commenters took differing views on the appropriate number of regressions. Commenters supporting more aggregation argue that limiting total cost, or separately limiting capital and operating expenses, is a better approach and suggest the Bureau use a single regression equation, or at most two equations. One peer reviewer also recommended this approach. Conversely, some commenters argued that the proposed eleven limits would not have allowed the algorithm to calculate support as it was intended, and proposed that costs be further disaggregated to the underlying cost elements, *i.e.,* ''data lines,'' that make up each algorithm step.

8. The choice of how many cost limits to adopt reflects a balancing of considerations. Using a greater number of regressions makes it possible to identify outliers at a granular level, but fails to account for the interrelationships within the cost categories that feed into the twenty-six step algorithm as identified in the record and in the peer review. In contrast, using fewer regressions limits the Commission's ability to identify outliers, but enables carriers to account for the needs of individual networks and recognizes the fact that carriers may have higher costs in one category that may be offset by lower costs in others.

9. Balancing these considerations, the Bureau concludes that it is appropriate to reduce the number of separate cost caps set from the proposed approach in Appendix H, but to retain separate limits for capex and opex. The Bureau is persuaded that limiting eleven separate cost categories could have the effect of overly limiting carriers' ability to optimize among spending tradeoffs. At the same time, an approach that only limited total cost would provide fewer safeguards against overspending. Capital and operating expenditures reflect fundamentally different measures of business performance. Using two regressions instead of one provides carriers flexibility to manage their operations, while still enabling the Commission to identify more instances where carriers spend markedly more in either category than their similarly-situated peers.

10. The approach the Bureau adopts is also supported by other considerations. In particular, the methodology the Bureau adopts simplifies the process of fitting the benchmark computation within the structure of NECA's loop cost algorithm. Instead of potentially limiting values in eleven of the twenty-six steps, only the value for companies that exceed the caps in step twenty-five, total unseparated costs is changed. Although the components of step twenty-five are divided into capex and opex components for purposes of running two regressions and separate capex and opex limits are created, the two components are added together for purposes of calculating total costs, study area cost per loop, and ultimately HCLS.

B. Defining Capex and Opex

11. As discussed below and in more detail in the technical appendix, the Bureau defines capex as the plant-related costs in step twenty-five, which include return on capital and depreciation, and defines opex as the remaining components that are added in step twenty-five to calculate total costs. These revised definitions of capex and opex differ from those used in the proposed methodology in several important ways.

12. The most important revision to the capex definition is the treatment of depreciation in relationship to capital costs. To determine capex limits, the proposed methodology created separate caps for two categories of gross plant (cable and wire facilities, and central office equipment), and for the depreciation and amortization associated with those plant categories. In the revised methodology, the Bureau defines capex as the return on net plant and depreciation. Many commenters pointed out that the proposed methodology did not properly account for accumulated depreciation and depreciation expense, and the Bureau agrees. The Bureau does not agree, however, with those who argue that depreciation expense should not be included in the regression analysis. Although depreciation is termed an ''expense'' for regulatory accounting purposes, as the Rural Associations and several other commenters point out, depreciation expense is properly considered as a component of capital costs because it is directly related and calculated as a result of capital investment. The proposed methodology would have limited gross plant, but did not adjust the accumulated depreciation or depreciation expense as would have been necessary when gross plant was limited by the benchmark. The method the Bureau now adopts includes net plant rather than gross plant, so the methodology appropriately accounts for accumulated depreciation.

13. The revised opex definition includes the remaining components that are summed in step 25 in the NECA algorithm to determine total unseparated costs. The proposed methodology excluded three of these—corporate operations expense, operating taxes, and rents—which are now included in determining opex. In the *USF/ICC Transformation Order,* the Commission revised the formula for limiting recovery of corporate operations expenses for HCLS in § 36.621(a)(4) of the Commission's rules. Because of this separate limitation, the proposed methodology did not create an additional limit for corporate operations expense. Now that the Bureau is analyzing all operating costs as a whole, it is appropriate to include corporate operations expense, as well as the other operating expenses, taxes and rents. For purposes of this analysis, the methodology will use either a carrier's actual corporate operations expense or the amount allowable under § 36.621(a)(4), whichever is less. Using the allowable amount, avoids restricting carriers affected by § 36.621(a)(4) twice for their corporate operations expenses above that limitation.

C. Selection of Independent Variables

14. The revised methodology also includes additional independent variables that were suggested by commenters and one of the peer reviewers, and eliminates some that had been included in the methodology proposed in the *USF/ICC Transformation FNPRM,* because the Bureau found the new variables to be better estimators of cost. In the *USF/ICC Transformation FNPRM,* the Commission noted that NRIC's Capital Expenditure Study included variables for frost index, wetlands percentage, soils texture, and road intersections frequency, and invited commenters advocating the inclusion of additional independent variables to identify the data source, completeness, and cost of the additional data, if not publicly available. The Commission specifically sought comment on sources of soil data other than the Soil Survey Geographic Database (SSURGO) used in the NRIC study and how to deal with areas where the SSURGO data are missing or incomplete. Many commenters suggest additional variables, and Bureau staff examined those for which data were available. The technical appendix describes in more detail the independent variables included in the methodology, those examined but excluded, and those that commenters suggested but that could not be included because the data were either unavailable to the Commission, nonpublic, or could not be generated at the study area level. The variables included in the revised methodology are briefly discussed below.

15. The methodology uses cost-driving variables directly where available and proxies that are sufficiently correlated with cost drivers where necessary. For example, the number of loops is a direct measure of a study area's scale, and the number of road miles is a proxy for total loop length. Because most cable follows roads, it is reasonable to believe that the number of road miles in a study area is a good proxy for the cabling required to serve that area. Some commenters suggest that the age of plant is an important variable, and the Bureau agrees. Many carriers have recently replaced aging plant with modern communications networks capable of providing voice and broadband service, and those carriers are not similarly situated to carriers with plant that is more fully depreciated. Accordingly, while data on the average age of plant are not readily available, the revised methodology now includes a variable for the percentage of plant that has not yet been depreciated, which is highly correlated with plant age. The revised methodology also includes variables that account for customer dispersion: density (housing units divided by square miles); number of exchanges, which roughly accounts for the population centers in a study area; and portion of households in urbanized clusters or urbanized areas.

16. In addition, the revised methodology includes several geographic independent variables that Bureau staff developed from various data sources. First, the Bureau agrees with the many commenters who argue that the proposed methodology should include soils data. Bureau staff used the U.S. General Soil Map (STATSGO2) soils database to construct two soil-based variables that are included in the revised methodology: depth of bedrock, and soils difficulty. Although the SSURGO database contains a richer set of soil variables and data at a more granular level than STATSGO2, it does not provide data for the entire country. Some commenters argue that the SSURGO data should be used where available and STATSGO2 for the remaining study areas, but the Bureau declines to use an approach that treats study areas differently depending on the availability of the data. In addition, NRIC's Capital Expenditure Study includes a frost index developed from the SSURGO data, but this information is not available for all areas in the STATSGO2 database. Several commenters discuss the need for such a frost index. As a proxy for this information, Bureau staff developed a climate variable based on the average annual minimum temperature from the U.S. Department of Agriculture's hardiness index.

17. The Bureau also agrees with commenters who emphasized that carriers serving particular areas such as Alaska, Tribal lands, and national parks could face unique challenges. In particular, some commenters suggest that it is more costly to provide service on Tribal lands; the methodology now includes an additional independent variable for the percentage of each study area that is a federally-recognized Tribal land. In addition, Alaskan commenters argued that Alaska is unique because of its harsh climate and other factors; accordingly, the methodology now includes a variable indicating whether or not the study area is in Alaska. Some commenters also argued that it is more difficult to construct and maintain networks in national parks; the methodology also now includes an additional independent variable for the percentage of each study area that lies within a national park. (In the future, if sufficient data become available, the Bureau may consider including a variable that would account for all federal lands (*i.e.,* that is not limited to national park lands).) NRIC's Operating Expenses Study found that operating expenses were correlated with regions, and Bureau staff tested variables for the four census-based regions: Western, Midwest, Northeast and South. The revised methodology also includes the two that were significant: the Midwest and Northeast.

D. Use of Boundary Data

18. All geographic independent variables were rolled up to the study area using Tele Atlas wire center data, which is a widely-used commercially available comprehensive source for this information. Several commenters question the accuracy of those boundaries. For example, the Rural Associations point to a NECA study that concluded many of the Tele Atlas boundaries ''differ quite significantly from actual boundaries.'' In addition, some companies that argue that their boundaries, and in particular the resulting measure of square miles in their service territories, were inaccurate in the proposed methodology have asked how they could correct errors in the data.

19. The only comprehensive set of wire center boundaries are those commercially available from companies such as Tele Atlas and GeoResults. There is precedent for using Tele Atlas' (or a predecessor company's) boundaries. In particular, the Commission's hybrid cost proxy model uses a customer location data set that was created using an earlier version of the Tele Atlas boundaries.

20. The Bureau declines to adopt NRIC's proposal that study area boundaries be modified before implementing the regression methodology based on publicly available state maps. While many states have study area maps available on-line, the vast majority of those maps will not allow Commission staff to calculate the information required for the analysis adopted today. Variables like road miles and those related to local soil conditions require having GIS-based boundaries that can be overlaid with other GIS-based data sets (like road networks and databases of soil conditions). It is not practical to derive such information from printed maps, images on Web sites or PDF files with any accuracy. In addition, it is not clear whether state maps represent authoritative boundaries. Therefore, the Bureau does not believe that the proposal by NRIC is a practical means to derive more reliable study area boundary information quickly.

21. Nevertheless, the Bureau recognizes concerns remain regarding inaccuracies in this data set, and the Bureau adopts a two-part process to address these concerns. First, in the near term, the Commission will provide a streamlined, expedited waiver process for carriers affected by the benchmarks to correct any errors in their study area boundaries. Second, to correct any remaining inaccuracies in the Tele Atlas data set, the Bureau will issue a Public Notice to initiate the process of collecting study area boundaries directly from all rate-of-return carriers. The Public Notice will seek comment on data specifications for a data request that the Bureau would issue after receiving input from the public and interested parties. The Bureau expects that it will have updated boundary data before the Bureau reruns the regression to calculate capex and opex limits that will be used for calculating support for 2014, at which time the limits will apply in full.

22. In light of the protections the Bureau adopts to address errors in the Tele Atlas data, the Bureau declines to delay implementation of the benchmarks beyond the 18-month phase-in described below. The Commission anticipated that ''HCLS benchmarks will be implemented for support calculations beginning July 2012.'' In many cases, more accurate boundaries would not change whether or not a particular company is capped or not by the benchmark methodology. And the streamlined, expedited waiver process the Bureau adopts to correct boundaries in the near-term will address those specific instances where an inaccurate boundary could result in a company losing more support than it would otherwise. Consistent with existing practice, if such a waiver request is granted and a true-up is required, a carrier' support amounts will be trued-up back to July 1, 2012.

23. Specifically, any carrier whose actual boundaries are different from the boundaries used by the Bureau in the methodology adopted today may file a petition for waiver in accordance with § 1.3 of the Commission's rules. To enable the Bureau to determine whether there are special circumstances (*i.e.,* inaccurate boundaries) supporting a waiver, petitioners must provide accurate boundary information in a manner and format that Bureau staff can readily evaluate and process. In Appendix C (*http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0425/DA-12-646A1.pdf*), the Bureau sets forth a template for filing study area maps to help potential petitioners file information efficiently, accurately, and in a manner that will permit the Bureau to evaluate and process the information expeditiously.

24. While potential petitioners may choose to submit boundary information in other formats, the Bureau cautions

that information submitted in other formats may require additional processing, and that the processing could introduce errors and/or delay. For example, if petitioners file hard copy maps, those would need to be rectified (stretched) to have a spatial reference, and digitized by Bureau staff. Accordingly, petitioners that do not wish to use the Bureau's template may wish to consult with Bureau staff in advance of filing boundary information in alternate formats to ensure that the information submitted can be processed quickly.

25. Regardless of how the boundary information is filed, an officer of the company must certify under penalty of perjury that the information provided is accurate. The Bureau also emphasizes that carriers using this waiver process solely to seek changes to their study area boundaries used in the benchmark methodology are not required to file the financial data and other information required for waivers as set forth in the *USF/ICC Transformation Order.* The financial data and other information set forth in the *USF/ICC Transformation Order* is relevant for petitions for waiver alleging that ''reductions in current support levels would threaten [a carrier's] financial viability, imperiling service to consumers in the areas they serve.'' In contrast, when considering whether there are special circumstances and the public interest is served by granting a waiver of the benchmark methodology, the Bureau will be focusing on ensuring that accurate data is used to perform the necessary computations, regardless of the extent of support reduction. In addition, carriers using this streamlined, expedited waiver process to make technical corrections to their study area boundaries need not pay the filing fee associated with requests for waiver of Part 36 separations rules. With the safeguard provided by this streamlined, expedited waiver process, the Bureau concludes it is appropriate to use the Tele Atlas boundaries on an interim basis.

E. Use of Quantile Regression and the 90th Percentile Cost Threshold

26. As discussed in the technical appendix, the Bureau concludes that quantile regression analysis is the appropriate methodology to use to identify study areas that have capex and opex costs that are much higher than those of their similarly situated peers and to cap their cost recovery at amounts that are no higher than the vast majority of similarly situated study areas. The Bureau also concludes that it should set the regression-derived limits at the 90th percentile of costs for capex and opex compared to similarly situated companies.

27. Some commenters criticized the use of the 90th percentile, arguing that it was unreasonable because approximately forty percent of study areas in the methodology proposed in the *FNPRM* would have been subject to limits in one or more of the eleven cost categories used in that analysis. On further consideration, the Bureau has concluded that the proposed methodology was over-inclusive because a carrier that exceeded the cap in only one category, but had costs well below the caps in the other ten, would have received reduced support. As discussed above, however, the Bureau is adopting a revised methodology that relies on aggregated capex and opex caps. Applying the revised methodology with a 90th percentile cap limits reimbursable costs for only fifteen percent of the study areas of cost companies. The net effect is fewer study areas will see reduced support, and more companies will see additional support, due to the distribution of support among HCLS recipients.

28. Accordingly, the Bureau does not agree with commenters who argue that the methodology should limit at most those carriers with costs above the 95th percentile. Indeed, the Bureau notes that using the 90th percentile with the modifications adopted today leads to approximately the same number of study areas with capped costs as would have been the case if the 95th percentile were used with the Appendix H methodology. The Bureau concludes that using the 90th percentile as part of the revised methodology appropriately balances the Commission's twin goals of providing better incentives for carriers to invest prudently and operate more efficiently, and providing additional support to further advance broadband deployment. By providing additional, redistributed HCLS to carriers that do not have the highest costs among similarly situated companies, the budget for high-cost support should enable more broadband deployment than continued funding of more of the highest cost companies at current levels.

29. In view of the fact that many carriers will receive additional, redistributed HCLS, the Bureau takes this opportunity to emphasize the obligations that attach to the additional funding. Section 254(e) of the Act requires that this additional funding—like all federal universal service support—be used ''only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'' Consistent with the *USF/ICC Transformation Order,* the overarching intent is to preserve and advance the availability of modern networks capable of delivering broadband and voice telephony service. Indeed, all rate-of-return carriers are required to provide broadband upon reasonable request beginning July 1, 2012, as a condition of receiving federal high-cost universal service support. Carriers must use their high-cost universal service support—including any additional funding—in compliance with these requirements.

30. The Bureau further notes that all rate-of-return carriers will be required to file a new build-out plan, which accounts for the new broadband obligations, in 2013. Those plans must be updated annually to reflect progress on network improvements and build-out, which should reflect the impact of high-cost universal service support, including any additional funding. The Commission will be reviewing those plans and updates, as well as other information provided in the annual § 54.313 reports, to ensure that carriers are complying with their public interest obligations, including their build-out requirements. Further, the progress report on those plans will be part of the factual basis that supports the annual § 54.314 certification by the states or carriers that support is being used for the intended purposes.

F. Other Issues

31. *Retroactivity.* The Bureau disagrees with commenters who assert that applying the benchmarks to limit HCLS payments constitutes retroactive rulemaking. A rule does not operate retroactively merely because it is ''applied in a case arising from conduct antedating [its] enactment'' or ''upsets expectations based on prior law.'' Rather, a rule operates retroactively if it ''takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.''

32. Here, it cannot fairly be said that the application of these benchmarks will take away or impair a vested right, create a new obligation, impose a new duty, or attach a new disability in respect to the carriers' previous expenditures. There is no statutory provision or Commission rule that provides companies with a vested right to continue to receive support at particular levels or through the use of a particular methodology. Although application of the benchmarks may affect the amount of support a carrier receives for expenditures made in 2010

(or before), it does not change the legal landscape in which those expenditures were made. Rather, as the Commission observed in the *USF/ICC Transformation Order,* ''section 254 directs the Commission to provide support that is sufficient to achieve universal service goals, [but] that obligation does not create any entitlement or expectation that ETCs will receive any particular level of support or even any support at all.''

33. Indeed, consistent with the Commission's focus on service to consumers, the Commission declined to provide any group of companies with a blanket exception from universal service reforms for past investments, recognizing that the current rules were not efficiently serving universal service goals. Providing such exceptions would have made it impossible to reform the system over any reasonable time period. Instead, the Commission established an avenue for companies to demonstrate a need for temporary and/or partial relief from the new rules to ensure its customers do not lose service. Moreover, the decision to phase in the application of the limits over 18 months provides a greater opportunity for carriers to make any necessary adjustments.

34. Critically, the revised methodology now includes an independent variable that captures age of plant, further addressing ''retroactivity'' concerns with respect to capex. Adding this variable raises the cost limits for carriers that have invested recently, by allowing their costs to be judged relative to a peer group of other carriers that have also invested recently. The Bureau also notes that application of the limits to operating expenses clearly presents no ''retroactivity'' concerns.

35. *Predictability and Sufficiency.* The Bureau also rejects the argument that implementing these benchmarks will undermine the predictability or sufficiency of support. At the outset, the Bureau notes that this general argument effectively seeks reconsideration of the Commission's policy judgment to adopt a rule imposing limits on capex and opex in the first instance, which is beyond the scope of this order to implement a methodology as directed by the Commission. As the Commission explained in the *USF/ICC Transformation Order,* the HCLS mechanism operates in fundamentally the same way with or without the benchmarks. In both cases, a certain amount of unpredictability exists because a carrier's support depends in part on a national average that changes from year to year, and companies ''can only estimate whether their expenditures will be reimbursed through HCLS.'' Moreover, as the Commission has suggested, if anything, support will now be more predictable for most carriers because the new rule discourages companies from exhausting the fund by over-spending relative to their peers. The addition of several new independent variables that capture attributes that do not change over time (e.g., depth of bedrock, soils difficulty, the percentage of study area that is a federally-recognized Tribal land, the percentage of each study area that lies within a national park, whether the study area is in the Midwest, Northeast, or Alaska) also improves the predictability of support. In addition, as described below, the same regression coefficients will be used for capex and opex in 2013 as those calculated for 2012, which will provide more certainty as the application of the limits is phased in. Accordingly, commenters' concerns that support amounts will fluctuate radically from year to year are speculative and unpersuasive.

36. As for sufficiency, the very purpose of the benchmarks is to ensure that carriers as a whole receive a sufficient (but not excessive) amount of HCLS, which is one component of high-cost support. As discussed above, the methodology compares carriers' costs to those of similarly situated carriers and reduces HCLS only to the extent that a carrier over-spends relative to its peers. Moreover, excess support is redistributed to carriers that otherwise may be at risk of losing HCLS altogether, and may not otherwise be well-positioned to further advance broadband deployment. Thus, the application of benchmarks is not only consistent with the Commission's interpretation of ''sufficient'' as requiring that the fund remain ''sustainable,'' which the DC Circuit found to be a reasonable interpretation in *Rural Cellular Association* v. *FCC,* but it also complies with the stated intent of section 254 that the Commission's universal service mechanisms should preserve *and advance* universal service.

G. Implementation

37. The limits on costs eligible for reimbursement though HCLS will be implemented beginning July 1, 2012, but support amounts will not be reduced immediately by the full amount as calculated using the benchmarks. Instead, support will be reduced beginning July 1, 2012 and until December 31, 2012 by twenty-five percent of the difference between the support calculated using the study area's cost per loop as reported by NECA and the support as limited by the benchmarks, however, the reduction shall not be greater than ten percent of the study area's HCLS support based on the cost data filed with NECA. Beginning January 1, 2013 and until December 31, 2013, support will be reduced by fifty percent of the difference between the support calculated using the study area's cost per loop as reported by NECA in October 2012 and the support as limited by the benchmarks in effect for 2013. Beginning January 1, 2014, when the Bureau expects to have updated wire center boundaries, as discussed above, the regression coefficients will be updated and the cost data submitted by NECA in October 2013 will be incorporated, and support will be limited, in full, by the benchmarks in effect for 2014.

38. By delaying the full impact of the reductions until 2014, companies who would be adversely affected are provided adequate time to make adjustments and, if necessary, demonstrate that a waiver is warranted either to correct inaccurate boundary information and/or ''to ensure that consumers in the area continue to receive voice service.'' For many companies affected by the benchmarks, the initial twenty-five percent phase-in reduction is a small percentage of their total HCLS. For those whose reduction would be more than ten percent of their HCLS based on NECA cost data, the reduction is limited to ten percent for the remainder of 2012. Moreover, continuing to limit the impact of support reductions in 2013 provides an additional opportunity for carriers to make further adjustments. On balance, the Bureau finds that this measured transition strikes a reasonable balance between the goals of promptly making available additional support to those carriers who, under the new rule, will receive redistributed HCLS to further advance broadband deployment and providing an adequate amount of time for carriers that will experience reductions in support to make adjustments.

39. The Bureau also take steps to provide more certainty regarding the operation of the limits on capex and opex. In particular, to provide carriers with more certainty regarding the impact of the fifty percent phase-in in 2013, the same regression coefficients for capex and opex will be used in 2013 as those calculated for 2012, which enables carriers to estimate their 2013 support now. That is, the regressions will not be updated, but individual study area caps will be recalculated

based on the 2011 cost data filed with NECA, which will be submitted to the Commission in NECA's annual filing in October 2012. This will allow higher caps for those study areas with significant network investment in 2011. By taking into account the 2011 cost data filed with NECA, study areas that may not have qualified for HCLS based on their costs in prior years may be eligible to qualify for HCLS in 2013, thereby providing those study areas with additional support for broadband investment. In addition, study areas whose costs drop below their computed benchmark for 2013 no longer will be considered capped, and therefore will receive support based on their own actual costs and will be eligible to receive redistributed support like other uncapped study areas.

III. Procedural Matters

A. Paperwork Reduction Act

40. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Act Certification

41. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA) requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

42. This Order implements, but does not otherwise modify, the rule adopted by the Commission in *USF/ICC Transformation Order.* These clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to *USF/ICC Transformation Order.* Therefore, the Commission certifies that the requirements of this order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the order including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801(a)(1)(A). In addition, the order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**. *See* 5 U.S.C. 605(b).

C. Congressional Review Act

43. The Commission will send a copy of this order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

D. Data Quality Act

44. The Commission certifies that it has complied with the Office of Management and Budget Final Information Quality Bulletin for Peer Review, 70 FR 2664 (2005), and the Data Quality Act, Public Law 106–554 (2001), codified at 44 U.S.C. 3516 note, with regard to its reliance on influential scientific information in the Report and Order in GN Docket No. 09–191 and WC Docket No. 07–52.

IV. Modeling Limits on Reimbursable Operating and Capital Costs

45. *Overview.* This appendix describes a methodology for determining carrier-specific limits on High Cost Loop Support (HCLS) payments to rate-of-return cost carriers with very high capital expenses (capex) and operating expenses (opex) relative to their similarly situated peers. Building on the record received in response to the *USF/ICC Transformation FNPRM,* and the comments of two peer reviewers, the methodology adopted today refines the HCLS calculation algorithm proposed in the *FNPRM.* This appendix describes both the econometric process used to establish carrier-specific limits to HCLS payments for rate-of-return cost companies and the implementation process.

46. The methodology described herein provides a detailed and implementable mechanism for examining all rural rate-of-return cost study areas and limiting HCLS payments in those study areas that have costs higher than the vast majority of their similarly-situated peers. The Bureau uses data from all the rural rate-of-return cost carriers. The Bureau uses quantile regression for parameter estimation rather than ordinary least squares for reasons set forth below. The most significant change in methodology from that described in the *FNPRM* is that this analysis creates two caps, one each on capex and opex, rather than capping eleven different NECA algorithm steps. Because this methodology builds upon NECA's existing algorithm for calculating average loop costs, the revised methodology can be implemented quickly and simply.

47. *Background.* Today, cost companies eligible for HCLS file with NECA annual detailed cost data, pursuant to Part 36, at the study area level reporting their costs in many different cost categories. The cost categories are then fed into NECA's 26-step Cost Company Loop Cost Algorithm. The early algorithm steps calculate intermediate values (based on the reported cost categories) and feed into the later algorithm steps. Algorithm step 25, which calculates the carrier's total unseparated cost for that study area, sums several of the preceding algorithm steps and then feeds into algorithm step 26, which computes the carrier's total unseparated cost per-loop for that study area by dividing the value for algorithm step 25 by the number loops in the study area. HCLS for each study area is then calculated by the Expense Adjustment Algorithm. This algorithm ultimately determines HCLS payments based on a study area's cost per-loop compared to the nationwide average cost per-loop.

48. *Methodology for Imposing Limits.* Appendix H of the *FNPRM* proposed to create 11 caps (four capex caps and seven opex caps). Several commenters argued that the Bureau should reduce the number of caps because efficient carriers might limit their total expenditures by spending a large amount in one cost category to avoid spending even more money in other categories. Additionally, some commenters and one of the peer reviewers suggested the use of a single cap, that is, a single dependent variable in the cost regressions, noting that the 90th percentile of total cost is not the sum of the 90th percentiles of cost components.

49. For the reasons described in the HCLS Benchmarks Implementation Order, the Bureau concludes that using two caps, one for capex and one for opex, provides the appropriate balance between identifying unusually high costs and providing carriers operational flexibility.

50. To implement this revised framework, the updated methodology separates algorithm step 25 (Total Unseparated Costs) into total capex and total opex cost components. The current algorithm step 25 sums algorithm steps 13 through 24. As a result of the updated methodology, capex components are now summed into algorithm step 25A and opex components are summed into algorithm step 25B. Consistent with the methodology proposed in Appendix H, a company whose actual costs for algorithm step 25A or algorithm step 25B are above the 90th percentile for that cost, compared to similarly situated companies, would be limited to recovering amounts that correspond to the 90th percentile of capex or opex costs, *i.e.* the costs that ninety percent of similarly situated companies would be estimated to have by the regression equation. Algorithm step 25C becomes the new Total Unseparated Costs by summing algorithm steps 25A and 25B. It then feeds into algorithm step 26 (Study Area Cost per Loop) and the subsequent Expense Adjustment Algorithm as before. The Bureau identifies the capex and opex components below.

51. *Use of Quantile Regression.* As proposed in the *FNPRM,* the Bureau uses quantile regression to estimate the caps for the capex and opex cost components. The goal of the regression methodology is to identify study areas that have capex and opex costs that are much higher than their similarly-situated peers and to cap their cost recovery at amounts that are no higher than the vast majority of similarly-situated study areas. Quantile regression allows us to directly estimate the 90th percentile costs for study areas with given characteristics. The critical values become the capex and opex caps.

52. The Bureau concludes that quantile regression is preferable to ordinary least squares for this application. Ordinary least squares regression cannot be used to identify the proper critical values in the tail of the cost distribution without making strong assumptions about the nature of the cost distribution, in particular, that error terms are Gaussian (normally distributed) and homoscedastic. In contrast, quantile regression requires no assumptions about the error terms. This is important because the error terms of the ordinary least squares regressions for capex and opex are both heteroscedastic and non-normal. While methods exist to estimate corrections for heteroscedasticity and non-normal error terms in ordinary least squares regression, these would require additional computational steps without improving the precision of the quantile estimate.

53. Quantile regression is also more resistant to the presence of outliers than ordinary least squares, which can produce biased parameter estimates when outliers are present. Thus, quantile regression parameter estimates are more stable than ordinary least squares parameter estimates if the data include outliers. And although ordinary least squares has methods available for dealing with outliers, such as excluding them from the analysis or using dummy variables, these methods generally require an exercise of judgment to identify outliers. Quantile regression largely avoids the need to make such determinations.

54. Another significant advantage of quantile regression is that it allows the independent variables to have different effects on the dependent variable in the different quantiles. Thus, for example, as the percentage of a study area that is national parkland increases (holding everything else constant), the size of the study area's cost increase could differ based on where it falls in the cost distribution of similarly-situated study areas (which quantile it is in). This is not allowed in ordinary least squares, which assumes that the marginal effect is the same on all study areas. Given that the Bureau is examining study areas with high costs relative to other study areas conditioned on the independent variables used in the design, this is a helpful property.

55. *Use of the Log-Log Specification.* As proposed in the *FNPRM,* the Bureau uses the log-log specification, and therefore take the natural log of the variables most sensitive to scale effects. For the dependent variables, the capex regression uses the natural log of capex, and the opex regression uses the natural log of opex. The Bureau also uses the natural logs of all independent variables used in the methodology except those that are dummy variables, a pure index, or a percentage (namely, Climate, Difficulty, PctTribalLand, PctPark, Alaska, MW, and NE).

56. Some commenters and a peer reviewer argued that the Commission failed to demonstrate the need for taking the natural logs for both the dependent and independent variables. Additionally, a commenter argued that doing so was appropriate when the dependent variable is known to have a multiplicative relationship, and therefore the regressions should use the variables in levels (*i.e.,* that the Bureau should not take the natural log of the variables) or that the Bureau should examine cost per loop. Another commenter, as well as both peer reviewers, noted that the manner in which zeros are dealt with, even when using quantile regression, can affect the results.

57. Because the Bureau's econometric specification is a reduced form, taking the logs of both the dependent and independent variables is acceptable so long as the resulting relationship is linear. The Bureau disagrees with commenters who suggested that the variables should be left in levels. Figure 1 shows that the scatter plot of (the level of) opex versus (the level of) the number of loops is not obviously linear. In contrast, Figure 2 displays the scatter plot of the natural log of opex versus the natural log of loops, and shows that the relationship is linear. Further, in a simple ordinary least squares regression of opex on the number of loops and the natural log of the number of loops, both variables are significant. This indicates that the relationship between opex and loops is nonlinear.

58. Further, some commenters argued that the Bureau should predict costs per loop and that if this were taken approach, density would become an important independent variable. Figure 3 shows that opex per loop as a function of density is nonlinear. In contrast, Figure 4 shows that the relationship between the natural log of opex and density is linear. Similarly, the graph of capex versus road miles does not appear to be linear, but natural log of capex versus the natural log of road miles does. The Bureau thus concludes that the log transformation of the dependent and independent variables that are scale sensitive is the appropriate specification.

59. Finally, the reduction in the number of regressions in the final methodology eliminates the problem of taking the natural log of zero in the dependent variable. Because the final methodology uses two regressions rather than eleven, the values of the dependent variables are never less than or equal to zero, as was the case for many of the values in the algorithm step 8 regression as originally proposed in the FNPRM. Further, none of the independent variables that the Bureau uses have zero values.

60. *Fit of the Regression Model.* Some commenters argued that the regressions in the proposed methodology suffered from low pseudo R-square values, and therefore the proposed methodology should be abandoned. Another commenter asserted that alternative models (*i.e.,* those that were based on levels or on cost per loop) were superior to the proposed model because the

R-square values were higher when using levels or cost per loop.

61. The Bureau concludes that the revised methodology offers sufficient predictive power. Although the pseudo R-square values in the proposed methodology ranged from 0.2745 to 0.5863, the pseudo R-square values in the revised methodology are .6684 for capex and 0.6234 for opex. The Bureau concludes that the final specification has sufficient predictive power to provide a reliable method for setting reasonable limits on carriers' costs. The Bureau also notes that because the dependent variables are different, and because the Bureau is performing quantile regression rather than ordinary least squares regression—the method proposed by NRIC—the Bureau cannot directly compare the pseudo R-square values from the methodology the Bureau uses to the R-square values from commenters' alternative specifications.

62. *Elimination of Independent Variables From Specification.* If a variable is significant in either the capex or opex regression, the variable is included it in both regressions. The Bureau is cognizant of Dr. Koenker's comments that in quantile regression (as in ordinary least squares regression), the inclusion of non-significant variables can inflate the variance of the prediction (yet leave the prediction unbiased). Nevertheless, the Bureau keeps variables that are significant in either regression in both regressions because they can have offsetting effects in the regressions. For example, a carrier facing close-to-the-surface bedrock (which would make trenching more difficult than usual) may find it efficient to use an aerial solution rather than to trench through bedrock. The presence of close-to-the-surface bedrock could then lower the carrier's capex cost but raise its opex cost because cables on poles may be more costly to maintain. Thus, bedrock could raise that carrier's opex costs but could plausibly lower that carrier's capex expenditures. If the Bureau omitted bedrock from the capex regression, the Bureau could be biasing the coefficient values in the regression and therefore biasing the predicted 90th percentile values for capex.

63. Further, the Bureau notes that unlike the regressions in the proposed methodology, the vast majority of the variables in the updated methodology's regressions are significant in both regressions. The Bureau also notes that adding statistically insignificant variables to the regressions do not bias the Bureau's predictions. In light of all these considerations, the Bureau therefore believes it is better to include variables that are significant in either of the regressions in both.

64. In its Updated Opex Study, NRIC suggests creating a cap that uses not just the regression coefficients, but also adds a standard deviation to each regression coefficient. The Bureau declines to do so here. Adding the estimated standard error to the parameter estimates is a non-standard way of creating a confidence interval in the context of quantile regression. In contrast, using the regression quantiles methodology gives a direct unbiased estimate of the 90th percentile predictions for capex and opex.

65. *Use of Census Block Centroids.* Consistent with the methodology set forth in the FNPRM, the Bureau determines which census blocks are in each study area by using the census blocks' centroids. This enables us to generate certain demographic variables for each study area, such as the number of housing units in a study area. Because study area boundaries do not always coincide with census block boundaries, some census blocks will fall into two different study areas. Where a census block's centroid falls inside the study area boundary, the Bureau associates that block with that study area, and if a census block's centroid falls outside of the study area boundary, the Bureau does not.

66. Some commenters suggested that associating census blocks with study areas based on the census block's centroid can distort population and/or housing unit counts. While NRIC argues that such errors do not necessarily cancel each other out, they did not have a material impact on the cost caps in the case of Nebraska. The Bureau concludes that its approach is reasonable. The Bureau could split census blocks that cross study area boundaries into pieces and then assume that end-user locations are spread evenly within census blocks so that housing units are proportionately attributed to study areas. This would increase computational complexity but not necessarily accuracy because end-user locations are not uniformly distributed within census blocks. The Bureau further notes that the vast majority of study areas have many blocks and therefore such errors would tend to cancel each other out. Of the 726 study areas covered by the updated methodology have 1.1 million census blocks in them, so on average, each study area has about 1,567 census blocks. The smallest number of census blocks in a study area is 26, the 5th percentile is 132, and the 10th percentile is 187. Therefore, the vast majority of study areas would not be affected by this issue. Also, there is only one variable that uses the number of housing units (which is derived from the census blocks in the analysis), the natural log of density (see LnDensity below), so the effect of any error should be small.

67. *Dependent Variables.* As described above, the dependent variables in the regressions are the natural log of the capex components and the natural log of opex components of algorithm step 25. Below the Bureau defines capex and opex, but in short, the Bureau assigns all the constituent parts of algorithm step 25, which calculates the carrier's total unseparated cost for that study area, to either capex or opex. Because the Bureau is now aggregating capex costs into a single capex variable, and operational costs into an opex variable, variations in individual capex and opex components are smoothed. This allows us to include data on all elements of capex and opex while still achieving good regression fits.

68. For the purpose of the updated methodology that adopted today, the Bureau defines capex to be the plant-related costs in the current algorithm step 25. The Bureau thus includes the return to capital components, which are algorithm step 23 and algorithm step 24. The Bureau also includes depreciation in capex (algorithm step 17 and algorithm step 18). Although accounting textbooks typically define depreciation as an operating expense, they do so because firms need to recognize a periodic charge against earnings to expense the declining value of assets over the estimated life of the assets. Because depreciation is inherently tied to the carriers' asset investment decisions, the Bureau assigns it to capex. Note that in its Opex Study, NRIC considered depreciation to be sufficiently non-operations-based that NRIC took depreciation out of opex. Although some commenters urged that depreciation be excluded from the methodology altogether, the Bureau disagrees for two reasons. First, depreciation is a valid measure of plant that goes beyond the measure of net plant that goes into algorithm steps 23 and 24. Depreciation is a function of not just the amount of gross plant, but also the useful life of the plant that is used, a meaningful measure. Second, by including depreciation, the Bureau includes all the portions of the existing algorithm step 25.

69. For the purpose of the updated methodology, the Bureau defines opex to be the remaining components of the current algorithm step 25. The Bureau includes algorithm steps 13 and 14 in opex because they are maintenance

expenses. The Bureau also includes algorithm steps 15 and 16 in opex because they are network expenses. Algorithm step 21 in included in opex because it is corporate benefits. Discussed below in more detail are the other algorithm steps included in opex.

70. Algorithm step 19 is corporate operations expense, which is limited in accordance with § 36.621(a)(4) of the Commission's recently revised rules. Although this step is already limited by the updated formula limiting recovery of corporate operations expenses, and was excluded in the methodology as proposed in the *FNPRM,* the Bureau now includes it in opex because the goal of the updated methodology is to examine opex in its entirety. Algorithm step 19 uses DL535 and DL550, which are the lesser of the allowable or actual corporate operations expenses, not the unadjusted corporate operations expenses, so a study area that is affected by § 36.621(a)(4) is not being affected twice by the higher-than-allowable amount.

71. The Bureau similarly includes algorithm step 20 (operating taxes) in opex in the revised methodology. Although the methodology proposed in Appendix H excluded step 20, after further consideration, the Bureau concluded that taxes are an expense that must be paid, just like other operational expenses.

72. Finally, the Bureau includes algorithm step 22 (rents) in opex. This step was excluded from the proposed methodology in Appendix H because the regression fit was poor. Because rents can now be included as a part of opex as a whole as opposed to in its own separate category, the Bureau includes it in the updated methodology.

73. *Independent Variable Specification.* The Bureau's reduced-form regression specification uses as independent variables exogenous factors that the Bureau believes affect a study area's capex and opex. These variables fall into the following categories: scale, age of plant, customer dispersion, and geography. Additionally, the independent variables the Bureau examined and include in this updated methodology are those that are currently available to the Commission and exist for all study areas in the regression analysis.

74. To the extent that the Bureau had the requisite data, staff also tested other variables that commenters suggested be included. First the variables the Bureau included in the methodology are described below, then the variables that the Bureau examined and ultimately excluded, and finally, the variables that commenters suggested but that the Bureau could not include in the methodology due to data issues. All geographic independent variables were rolled up to the study area using Tele Atlas study area boundary data. The Bureau did not include inputs to the production process (such as employees) in the regressions because carriers can choose the amount of these inputs. In other words, carriers with markedly higher costs than their similarly situated peers may be using substantially more of these inputs.

75. Table 1 and Table 2 respectively show descriptive statistics for and correlations between the variables included in the updated methodology. The regression results are included in Table 3.

76. *Scale.* The Bureau uses several variables to measure scale: The number of loops, road miles, road crossings, and the number of study areas held under common control in the state. All the scale measures the Bureau includes in the updated methodology are significant in the opex regression and all but LnRoadMiles are significant in the capex regression.

77. Because the number of loops is a direct measure for the scale of the study area, the Bureau includes the natural log of the number of loops (LnLoops) in the updated methodology. The Bureau expects that the amount of plant a carrier must install will be positively correlated with capex and opex costs because more loops require more investment and operations cost. LnLoops is statistically significant.

78. The Bureau also includes the natural log of the number of road miles (LnRoadMiles), which is a proxy for total loop length. Several commenters argued that some measure of loop length was an important variable. Although some (but not all) cost carriers may report such data to the Department of Agriculture's Rural Utilities Service (RUS), such data are both incomplete and unavailable to the Bureau. The Bureau agrees with NRIC that cable generally follows roads, so the number of road miles in a study area should correlate with the cabling required to serve that area.

79. In its Capital Expenditure Study, NRIC predicted that road intersections would slow fiber construction and impose other costs and found that the number of intersections was a significant predictor of predicted construction costs. The Bureau agrees that the number of such crossings is another good proxy for scale and therefore included the natural log of road crossings (LnRoadCrossings).

80. The scale variables (LnRoadMiles) and road crossings (LnRoadCrossings) are significant in the opex regression, but have the opposite sign from each other. Only road crossings are significant in the capex regression.

81. The last scale variable is the number of study areas in the state that are owned by the same holding company or have common control in the state (LnStateSACs). The Bureau anticipated that this variable would be a good predictor of capex and opex costs because some expenses could be shared among study areas. For capex, study areas that are part of a larger organization (*i.e.,* the study area has more commonly-owned study areas in the state) may allow installation crews to be deployed more efficiently. For opex, study areas that are part of a larger organization can share various expenses, especially headquarters-related expenses, which would allow for some specialization among management employees. The Bureau found LnStateSACs to be significant for both capex and opex.

82. *Age of Plant.* Commenters stated that age of plant was an important variable for two reasons: First, because the cost of recent capital investments is higher due to inflation and second, because the return component of capital expenses is calculated on net plant, and recent investment will be depreciated less fully than old plant. While the Bureau cannot readily determine the average age of carriers' plant, the percentage of the plant that has not yet been depreciated (PctUndepPlant) should be highly correlated with plant age: More recently installed plant will be less depreciated. Holding all else constant, the less of a carrier's plant is depreciated (which yields a higher PctUndepPlant), the higher its capex should be. The intuition for the effect of PctUndepPlant on opex is ambiguous. The Bureau finds that this variable is a strong cost predictor for both capex and opex.

83. *Customer Dispersion.* The Bureau includes three variables that account for customer dispersion. Many commenters asserted that density was an important cost predictor, and that their costs are high in part because of the rural areas they serve. The Bureau therefore expects that density is negatively correlated with both capex and opex costs. Density (LnDensity) is the natural log of the following quotient: number of housing units in the study area divided by the size of the study area in square miles as reported by the Tele Atlas boundaries. The Bureau finds that it is significant in both regressions.

84. The Bureau also includes the natural log of the number of exchanges in the study area as a proxy for customer

dispersion (LnExchanges). Although the straightforward measure of density calculates the average customer density within the study area, the number of exchanges roughly accounts for the number of population centers within the study area because most population centers will have their own exchanges. The more population centers (holding other factors constant), the higher capex and opex costs will be because more cabling will be required to connect the customers within the study area to each other, and the farther the employees will need to drive to fix any troubles. The variable LnExchanges is significant in both regressions.

85. The final customer dispersion variable accounts for the portion of households in urban clusters or urbanized areas (PctUrban). To the extent that rural carriers also serve urbanized pockets, the Bureau would expect their costs to be higher, holding all other variables (including road miles) constant, because wage rates may be higher near urbanized areas. The Bureau thus expects PctUrban to be positively correlated to opex, and it is. PctUrban's effect on capex is less clear: The labor costs associated with trenching are capitalized, so to the extent that labor near urban areas is more expensive, the higher capital costs should be. But capitalized labor is only one of many costs in capex, so the effect may not be strong. PctUrban is positive but not significant in the capex regression.

86. *Geography.* Commenters suggested the inclusion of several geographically-based variables such as soil type. The Bureau agrees. When creating many of the indexes for geographic variables, the Bureau took into account the location of roads within the study area because cabling generally follows roads. For these variables the Bureau overlaid road data in the study area with the sources of geographic information and calculated variables that were either percentages, or where appropriate, averages.

87. For example, commenters stated that soil type is an important cost predictor. The Bureau therefore constructed a soil difficulty index (Difficulty). This index is similar to the index in the NRIC capex study in which soil types were matched with construction difficulty values established for the Commission's High Cost Proxy Model (HCPM), which the Commission used to calculate high-cost support for non-rural carriers. The STATSGO2 database the Bureau uses lists more soil types than the original STATSGO database, however, so there are many soil types in the STATSGO2 database for which there are no construction difficulty values from the HCPM. NRIC tried several options, but settled on assuming the soil difficulty level to be 1 (the lowest level of difficulty) for those soil types not found in the table. The Bureau's soil difficulty index builds on the NRIC methodology. When faced with soil types that do not appear on the original HCPM list, the Bureau interpolates the difficulty rating based on similar soil types in the HCPM list. The Bureau manually associates unmatched soil types from the STATSGO2 data with similar soil texture in the original HCPM table, and used the difficulty rating of the similar soil types in the HCPM list for the new soil type in the STATSGO2 database. The new extended table associates a difficulty rating for all soil types in the STATSGO2 database. The Bureau then calculated the average soil construction value along the roads in each study area.

88. The Bureau finds soil difficulty to be a statistically significant predictor in opex. Although NRIC found that soil difficulty was a significant predictor of construction costs, Difficulty is positive in capex, but not significant. Although the Bureau also expected soil difficulty to be positive in the capex regression, an alternative hypothesis is that in locations where trenching is unusually expensive, an efficient carrier may install aerial plant (use poles rather than trench). This would involve lower capital costs than trenching, but higher future operations costs. Thus, it is plausible that in the presence of difficult-to-trench soils, carriers experience no obvious change in capex or, in some circumstances possibly even reduced capex costs.

89. Because NRIC suggested that the methodology account for close-to-the-surface bedrock, the Bureau calculated the percentage of road miles within each study area where bedrock was within 36 inches of the surface (PctBedrock36). The NRIC capex study found that predicted construction costs were positively associated with close-to-the-surface bedrock, so the Bureau might expect that the coefficient on PctBedrock36 should be positive in the capex regression.

90. The Bureau finds that close-to-the-surface bedrock is significant in the opex regression, but that it is not significant in the capex regression. This result could occur for the same reasons as for soil construction difficulty above or because the construction difficulty of bedrock has already been captured by the soil difficulty variable.

91. Pointing to the NRIC Capex study, which suggested that construction costs are higher in areas where the ground is frozen more often, several commenters argued that the regressions should include a frost index. The frost index in the NRIC capex study uses of the number of frost-free days from the SSURGO data. Unfortunately, this information is not available for all areas in the STATSGO2 database. The Bureau believes that the USDA's hardiness index is a useful proxy for this information, and the Bureau uses it to create a simple index called Climate that is based on the average annual minimum temperature. The lower the minimum temperature, the more days the ground is likely to be frozen. The higher the index, the more frost-free days the study area would have. Based on the comments in the record, the Bureau expected this variable to be negatively correlated with capex (the higher the index, the more frost-free days the area should have, so construction costs should be lower).

92. The Climate variable (Climate) is positive and has low p-values in the regressions, which means that it is unlikely to be a spurious result. However, it is positively correlated with capex and opex.

93. Commenters also stated that it is more difficult to construct and maintain networks on tribal lands and in national parks because of permitting and similar issues, so the Bureau includes two additional variables: (1) The percentage of each study area that is a federally-recognized Tribal land (PctTribalLand), and (2) the percentage of each study area that lies within a national park (PctParkLand).

94. The coefficient for the percentage of the study area that is tribal land (PctTribalLand) is positive for both capex and opex regressions, but is significant in only the opex regression. The percentage of the study area that is national park land (PctParkLand) is positive and significant in both regressions. As can be seen in Table 1, most of the study areas do not contain either tribal or national park land, and it may be a simple lack of data that causes a lack of significance for PctTribalLand in the capex regression. Nonetheless, the Bureau agrees that both capex and opex costs could be higher in the presence of these factors, so the Bureau includes them in the model.

95. Finally, based on comments in the record that certain areas of the country face unique circumstances, the Bureau tested several regional variables. Alaskan commenters suggested that Alaska was unique because of its harsh climate and other factors. The Bureau therefore added the dummy variable Alaska to the regressions, which equals

1 for the 17 study areas in Alaska and zero elsewhere.

96. The Bureau also includes regional dummies because in its Original Opex study NRIC found that opex costs were correlated with regions. Although NRIC did not include region dummy variables in the regression, instead opting to use 2005 median home value, which it also used in its Updated Opex Study, the Bureau includes region in the updated methodology. The Bureau tested the four census-based regions: Western (West), Midwest (Midwest), Northeast (Northeast) and South (South). The Bureau found that Midwest and Northeast were each significant in at least one regression, so the updated methodology includes them.

97. *Use of Soil Database Information.* The Bureau's source for soil data is the U.S. General Soil Map (STATSGO2) soils database. The Bureau selected STATSGO2 as a data source because it provides data for the entire country. The Soil Survey Geographic Database (SSURGO) soils data from the Natural Resource Conservation Service (NRCS) that the Nebraska Rural Independent Companies capex study used to generate soil, frost and wetland variables is an attractive database because it contains a richer set of soil variables and contains data at a smaller granular area than the STATSGO2 database. Unfortunately, as can be seen from the graph on page 23 of the NRIC comments, not only do the SSURGO data not cover Guam or American Samoa, and much of Alaska, but there are also numerous other holes in the data in many states. Thus, there are many study areas in Alaska where there is no SSURGO data and even some conterminous United States study areas such as the West Kentucky Rural Telephone Coop (Study Area Code 260421) where there is virtually no SSURGO spatial data. The Bureau therefore could not apply the results of a SSURGO-based model to these companies because the needed data would be missing. The Bureau concludes, therefore, that it is not practical to use the SSURGO data at this time.

98. Two commenters argue that the Bureau should use the SSURGO data for study areas covered by it and use STATSGO2 for the remaining study areas. The Bureau has concerns about this approach for several reasons, and ultimately declines to do so. In particular, the commenters' proposed approach would mean that those study areas for which the SSURGO data are not universally available would be treated inconsistently with those for which the SSURGO are universally available. In addition, it would be challenging to combine the two data sets for those study areas where the Bureau has only some SSURGO data. Given these problems, the Bureau concludes that the implementation and fairness benefits of a nationally uniform approach based on STATS2GO outweigh the benefits of using SSURGO data for a subset of areas. Discussed below are the elements of the STATSGO2 data the Bureau uses.

99. *Independent Variables Tested But Not Used in the Model.* Based on commenters' suggestions and the analysis proposed in Appendix H, the Bureau tested several additional variables that were ultimately excluded from the final model because they were not significant for either capex or opex.

100. In its Capex Study, NRIC found that rain frequency increased construction cost per household. Following NRIC's model, the Bureau used the Samson weather station data, and for each study area, calculated the average number of days per year with greater than 0.5 inches of rainfall (DaysAbvPt5). The Bureau found DaysAbvPt5 was not significant in either regression.

101. The Bureau also tested the average slope in study areas (slope) using data in the STATSGO2 database. The Bureau's hypothesis was that the steeper the slope, the more difficult it would be to build and maintain cabling. The coefficient on slope was insignificant (*i.e.,* statistically indistinguishable from zero) in both regressions and therefore dropped from the model.

102. The Bureau similarly tested the percentage of the study area that was water (PctWater), but did not include it in the updated model because it was insignificant in both regressions. This is unsurprising. The proposed model included PctWater to account for the fact that cabling may have to be run around bodies of water, but the updated model accounts for the number of road miles (as a proxy for loop length), so the additional cabling associated with routing around water has already been accounted for.

103. The Bureau tested the percentage of road miles where the water table was within 36 inches of the surface (PctWaterTable36). The Bureau found the variable PctWaterTable36 to be weakly significant in opex, but it had an implausible negative sign in both the capex and opex regressions. Because of the sign issue and because inclusion of the variable does not markedly improve the fit, the Bureau excludes it from the model so as not to lower the cap for study areas with high water tables.

104. Accipiter suggested adding the percentage change in loops (PctLoopChange) to account for study areas that are growing, because growing carriers ''are prone to have unique cost structures.'' The Bureau believes the PctUndepPlant proxies for this, but out of an abundance of caution, the Bureau tested PctLoopChange, but found that it was insignificant, suggesting that PctUndepPlant is proxying for the unique cost structures that Accipiter is concerned about.

105. Based on NRIC's updated opex regression, the Bureau tested statewide median house values, but found them to be insignificant. This is unsurprising because statewide values include mostly urban houses. The Bureau's regional independent variables, however, helped capture the intended effect.

106. The Bureau also tested the natural log of the number of stream crossings (LnStreamCross), which could increase construction costs in the same way that road crossings do. The Bureau found LnStreamCross to be significant and negative in opex, but insignificant in capex. Because the coefficient was an implausible sign in the opex regression without an offsetting plausible coefficient in the other regressions, the Bureau omitted LnStreamCross from both regressions.

107. The proposed model also included the number of census blocks in the study area. Although the natural log of the total number of census blocks (LnBlocks) was weakly significant in the opex regression, it was not significant in the capex regression. Although the Bureau generally included variables that were significant in at least one regression in both regressions, the Bureau omitted census blocks from the updated model regressions for two reasons. First, commenters did not think that the number of blocks was a good proxy for density. Also, the Bureau is now accounting for customer dispersion and density directly through independent variables LnRoadMiles, LnRoadCrossings and LnDensity.

108. *Unavailable Independent Variables.* Several carriers suggested additional variables to the regression analysis, but the Bureau was unable to include them because the data were either unavailable to the Commission, nonpublic, or data could not be generated at the study area level. The Bureau recognizes that some of the unavailable variables could be significant if they could be included, but given the other enhancements made to the regressions described herein, the Bureau concludes that the methodology is adequate to identify cost outliers among similarly situated companies.

109. The NRIC capex study postulated that the presence of wetlands would increase construction costs because of need for additional ''approvals and specialized techniques.'' It found that wetlands were positively correlated with increased predicted construction costs. As NRIC points out, however, wetlands data are not available for Colorado, Wisconsin and Montana. Since the Bureau's objective is to develop a methodology that applies equally to all cost carriers, the Bureau could not include wetlands data in the updated methodology.

110. Similarly, commenters suggested the following additional variables that, if not already proxied in the model, could not be used because they were unavailable to the Commission, nonpublic, or data could not be generated at the study area level: Age of investment; broadband speed capability; cable route miles or cable sheath miles; status as carrier of last resort; copper versus fiber networks; cost of living and labor costs; environmental; legal and regulatory costs; loop length/average loop length; right of way costs and vacant lots; and weather patterns.

111. One commenter argues that the Bureau's methodology should include variables that are not universally available and that it is better to comprehensively study a representative sample of study areas and apply the results to the wider population of study areas. The commenter does not specify, however, how the Bureau could apply that knowledge to study areas for which the information is unavailable.

112. *Implementation.* For each study area, the regressions will be used to generate the 90th percentile predicted values for both the natural log of capex and the natural log of opex. These values will then be converted back to ''levels'' by using the inverse of the natural log function.

113. The lower of the study area's original algorithm step 25A and the level of the predicted 90th percentile capex value will be retained in algorithm step 25A. Similarly, the lower of the study area's original algorithm step 25B and level of the predicted 90th percentile opex value will be retained in algorithm step 25B. These values will then be summed in algorithm step 25C, which will feed into algorithm step 26.

V. Ordering Clauses

114. Accordingly, *it is ordered,* that pursuant to the authority contained in sections 1, 2, 4(i), 201–206, 214, 218–220, 251, 254, and 303(r), and of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 152, 154(i), 201–206, 214, 218–220, 251, 254, 303(r), 1302, and pursuant to §§ 0.91, 0.131, 0.201(d), 0.291, 0.331, 1.3, and 1.427 of the Commission's rules, 47 CFR 0.91, 0.131, 0.201(d), 0.291, 0.331, 1.3, 1.427 and pursuant to the delegations of authority in paragraphs 210, 217, 226 and 1404 of *USF/ICC Transformation Order,* 26 FCC Rcd 17663 (2011), 76 FR 73830, November 29, 2011, that this Order *is adopted,* effective June 22, 2012.

115. *It is further ordered,* that the Commission *shall send* a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

116. *It is further ordered,* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Sharon E. Gillett,

Chief, Wireline Competition Bureau.

[FR Doc. 2012–12539 Filed 5–22–12; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[ET Docket No. 10–235; FCC 12–45]

Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, Report and Order

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the *Report and Order,* the Commission takes preliminary steps toward making a portion of the UHF and VHF frequency bands currently used by the broadcast television service available for new uses as required under the recently enacted *Spectrum Act,* while also preserving the integrity of the television broadcast service.

DATES: Effective June 22, 2012.

FOR FURTHER INFORMATION CONTACT: Shaun Maher, *Shaun.Maher@fcc.gov* of the Media Bureau, Video Division, (202) 418–2324.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* FCC 12–45, adopted on April 27, 2012, and released on April 27 2012. The full text of the *Report and Order* is available for inspection and copying during regular business hours in the FCC Reference Center, 445 12th Street SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Executive Summary

In the *Report and Order,* the Commission takes a preliminary step toward making a significant portion of the UHF and VHF frequency bands (U/V Bands) currently used by the broadcast television service available for new uses. This action serves to further address the nation's growing demand for wireless broadband services, promote the ongoing innovation and investment in mobile communications and ensure that the United States keeps pace with the global wireless revolution. At the same time, the approach helps preserve broadcast television as a healthy, viable medium and would be consistent with the general proposal set forth in the National Broadband Plan to repurpose spectrum from the U/V bands for new wireless broadband uses through, in part, voluntary contributions of spectrum to an incentive auction. This action is consistent with the recent enactment by Congress of new incentive auction authority for the Commission (*Spectrum Act*). Specifically, this item sets out a framework by which two or more television licensees may share a single six MHz channel in connection with an incentive auction.

Paperwork Reduction Act of 1995 Analysis

The *Report and Order* contains no new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13 (44 U.S.C. 3501 through 3520).

Synopsis

The *Report and Order* does not act on the proposals in the Notice of Proposed Rulemaking to establish fixed and mobile allocations in the U/V bands or to improve TV service on VHF channels. The *Report and Order* states that the Commission will undertake a broader rulemaking to implement the *Spectrum*

Act's provisions relating to an incentive auction for U/V band spectrum, and that it believes it will be more efficient to act on new allocations in the context of that rulemaking. In addition, the record created in response to the *Notice of Proposed Rulemaking* does not establish a clear way forward to significantly increase the utility of the VHF bands for the operation of television services. The *Report and Order* states that the Commission will revisit this matter in a future proceeding.

With respect to the channel sharing provisions, the *Report and Order* makes clear that channel sharing arrangements will be voluntary. Broadcasters will decide whether to enter into a channel sharing arrangement and will be given flexibility with respect to determining some of the key parameters under which they will combine their multiple television stations onto a single six MHz channel.

Despite sharing a single channel and transmission facility, each station will continue to be licensed separately, have its own call sign and will separately be subject to all of the Commission's obligations, rules, and policies. Each station must comply with the technical, operational, and programming obligations (e.g., children's programming, political broadcasting, minimum operating hours, main studio, Emergency Alert System).

Stations utilizing a shared channel will be required to retain at least enough capacity to operate one standard definition (''SD'') programming stream in order to meet the Commission's requirement to ''transmit at least one over-the-air video broadcast signal provided at no direct charge to viewers.'' However, stations will have the flexibility within this ''minimum capacity'' requirement to tailor their agreements. This flexible channel sharing will allow parties to meet their individual programming and economic needs.

Class A television stations may participate in channel sharing in connection with an incentive auction but low power television and TV translators may not.

Any full power television or Class A television permittee, as well as any applicant for an original construction permit may execute a channel sharing agreement. The party relinquishing spectrum, though, must hold a license prior to the commencement of the auction process.

Commercial and noncommercial educational (NCE) stations are permitted to share a single television channel.

The *Report and Order* defers consideration of ownership issues that may arise as a result of channel sharing arrangements until a future proceeding.

As mandated in the *Spectrum Act,* the channel sharing rules will neither increase nor decrease the cable and satellite carriage rights currently afforded broadcast licensees. Specifically, regardless of the number of stations sharing a single six MHz channel, each station will be licensed separately and will therefore continue to have at least one—but only one—''primary'' stream of programming entitled to carriage rights under the rules so long as the licensee continues to meet all relevant technical requirements.

The *Report and Order* leaves for future consideration the subject of channel sharing by stations outside the context of an incentive auction.

Final Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (''RFA'') [1] an Initial Regulatory Flexibility Analysis (''IRFA'') was included in the *Notice of Proposed Rulemaking (FNPRM*) in this proceeding.[2] Written public comments were requested on the IRFA. This present Final Regulatory Flexibility Analysis.[3]

A. Need for, and Objectives of, the Proposed Rules

In the *Report and Order,* the Commission amends its rules to establish a framework that permits two or more television licensees to share a single six megahertz TV channel. The new channel sharing rules framework will, for the first time, permit two or more television stations to share a single channel. Such sharing will allow stations to relinquish a portion of their spectrum for new uses while continuing to provide television service to viewers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments received in response to the IRFA.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [5] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[6] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

Television Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' [8] The SBA has created the following small business size standard for Television Broadcasting firms: Those having $14 million or less in annual receipts.[9] The Commission has estimated the number of licensed commercial television stations to be 1,387.[10] In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,387 commercial television stations (or approximately 72 percent) had revenues of $13 million or less.[11] We therefore estimate that the majority of commercial television broadcasters are small entities.

We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [12] must be

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et. seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''), Public Law 104–121, Title II, 110 Stat. 847 (1996).

[2] *See FNPRM,* 25 FCC Rcd 13833.

[3] *See* 5 U.S.C. 604.

[4] 5 U.S.C. 603(b)(3).

[5] 5 U.S.C. 601(6).

[6] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[7] Small Business Act, 15 U.S.C. 632 (1996).

[8] U.S. Census Bureau, 2007 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/naics/2007/def/ND515120.HTM#N515120.*

[9] 13 CFR 121.201, NAICS code 515120 (updated for inflation in 2008).

[10] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 11, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf*

[11] We recognize that BIA's estimate differs slightly from the FCC total given *supra.*

[12] ''[Business concerns] are affiliates of each other when one concern controls or has the power to

included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 393.[13] These stations are non-profit, and therefore considered to be small entities.[14]

In addition, there are also 6,739 low power television stations (LPTV), TV Translators and Class A television stations.[15] Given the nature of this service, we will presume that all of these licensees qualify as small entities under the above SBA small business size standard.

Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [16] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts.[17] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[18] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[19] Thus, the majority of these firms can be considered small.

Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[20] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[21] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[22] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers.[23] Thus, under this second size standard, most cable systems are small.

Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [24] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[25] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[26] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[27] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

The *Report and Order* contains no new or revised information collection requirements subject to the Paperwork Reduction Act of 1995.[28]

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from

control the other or a third party or parties controls or has to power to control both.'' 13 CFR 21.103(a)(1).

[13] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 11, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf*

[14] *See generally* 5 U.S.C. 601(4), (6).

[15] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 11, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.*

[16] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition); *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[17] 13 CFR 121.201, NAICS code 517110.

[18] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[19] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[20] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[21] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[22] 47 CFR 76.901(c).

[23] Warren Communications News, *Television & Cable Factbook 2008,* ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[24] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[25] 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[26] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[27] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[28] The Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

coverage of the rule, or any part thereof, for small entities.[29]

The *Report and Order* adopted general channel sharing rules and policies. Among these, the Commission determined that only licensees would be permitted to participate in channel sharing in conjunction with the reverse auction. The Commission found that the burden on small entities of limiting channel sharing to only licensees is outweighed by the need to clear as many television channels as possible for reallocation and use by commercial wireless entities to enhance broadband wireless offerings.

The Commission permitted Class A television stations to participate in channel sharing but channel sharing by low power television stations and TV translators was not permitted. The Commission determined that the burden on small entities is outweighed by the intent of Congress to limit channel sharing in conjunction with the reverse auction to only full power television and Class A stations as well as the need to complete the successful repacking of television channels and identify channels for reallocation to broadband wireless use.

The Commission determined that commercial and noncommercial educational television stations could share a single television channel. The Commission did not find that there would be a significant impact on small entities by this decision. The decision would have little impact and any impact would affect all entities equally.

The Commission adopted a requirement that stations involved in channel sharing retain the right to use at least enough spectrum to operate one SD channel. The Commission did not find that there would be a significant impact on small entities by this requirement. Since channel sharing is voluntary, the requirement of retaining sufficient channel capacity to operate at least 1 SD channel would have little impact and any impact would affect all entities equally.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

G. Report to Congress

The Commission will send a copy of the *Report and Order,* including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[30] In addition, the Commission will send a copy of the *Report and Order,* including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Report and Order* and FRFA (or summaries thereof) will be published in the **Federal Register**.[31]

List of Subjects

47 CFR Part 73

Television, television broadcasting.

47 CFR Part 76

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 73 and 76 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation continues to read:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Add § 73.3700 to read as follows:

§ 73.3700 Channel sharing.

(a) *Channel sharing generally.* For purposes of this subsection, ''reverse auction'' shall mean the reverse auction set forth in section 6403(a) of the See Middle Class Tax Relief and Job Creation Act of 2012. Subject to the provisions of this section, qualified television stations may voluntarily seek Commission approval to share a single six megahertz channel in conjunction with a proposal submitted in the reverse auction. Each station sharing a single channel shall continue to be licensed and operated separately, have its own call sign and be separately subject to all of the Commission's obligations, rules, and policies.

(b) *Basic qualifications.* (1) Any full power television station or Class A television station permittee or licensee, as well as any applicant for an original construction permit may execute a channel sharing agreement to be considered in conjunction with the reverse auction.

(2) The party relinquishing spectrum pursuant to a channel sharing agreement must hold a license prior to the commencement of the reverse auction wherein its channel sharing agreement shall be considered.

(3) Channel sharing agreements shall contain a provision requiring that each channel sharing licensee shall retain spectrum usage rights adequate to ensure a sufficient amount of the shared channel capacity to allow it to provide at least one Standard Definition (SD) program stream at all times.

(4) Channel sharing is permissible between commercial and noncommercial educational television stations.

(5) Channel sharing is permissible between full power television stations, between Class A television stations and between full power and Class A television stations.

(c) *Preservation of carriage rights.* A broadcast television station that voluntarily relinquishes spectrum usage rights under this section in order to share a television channel and that possessed carriage rights under section 338, 614, or 615 of the Communications Act of 1934 (47 U.S.C. 338; 534; 535) on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

PART 76—MULTICHANNEL VIDEO AND CABLE SERVICE

■ 3. The authority citation continues to read:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 4. Add 76.56(g) to read as follows:

§ 76.56 Signal carriage obligations.

* * * * *

(g) *Channel sharing carriage rights.* A broadcast television station that voluntarily relinquishes spectrum usage rights under 73.3700 of this chapter in order to share a television channel and that possessed carriage rights under section 338, 614, or 615 of the Communications Act of 1934 (47 U.S.C. 338; 534; 535) on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

■ 5. Add 76.66(n) to read as follows:

§ 76.66 Satellite broadcast signal carriage.

* * * * *

(n) *Channel sharing carriage rights.* A broadcast television station that voluntarily relinquishes spectrum usage rights under § 73.3700 of this chapter in order to share a television channel and

[29] *See* 5 U.S.C. 603(c).

[30] *See* 5 U.S.C. 801(a)(1)(A). The Congressional Review Act is contained in Title II, section 251, of the CWAAA, *see* Public Law 104–121, Title II, section 251, 110 Stat. 868.

[31] *See* 5 U.S.C. 604(b).

that possessed carriage rights under section 338, 614, or 615 of the Communications Act of 1934 (47 U.S.C. 338; 534; 535) on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

[FR Doc. 2012–12551 Filed 5–22–12; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120321208–2076–02]

RIN 0648–BC07

Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Fishing Year 2012

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

ACTION: Final rule.

SUMMARY: NMFS implements management measures for the 2012 summer flounder, scup, and black sea bass recreational fisheries in Federal waters. These actions are necessary to comply with regulations implementing the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) and to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Recreational management measures are intended to prevent overfishing the summer flounder, scup, and black sea bass resources in 2012.

DATES: Effective May 18, 2012.

ADDRESSES: Copies of the Supplemental Environmental Assessment (SEA) for the 2012 recreational management measures document, including the Supplemental Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (SEA/RIR/IRFA) and other supporting documents for the recreational management measures are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. These documents are also accessible via the Internet at *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, (978) 281–9218.

SUPPLEMENTARY INFORMATION:

General Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Atlantic States Marine Fisheries Commission (Commission) and the Mid-Atlantic Fishery Management Council (Council), in consultation with the New England and South Atlantic Fishery Management Councils. The FMP and its implementing regulations, which are found at 50 CFR part 648, subparts A (general provisions), G (summer flounder), H (scup), and I (black sea bass), describe the process for specifying annual recreational management measures that apply in the Exclusive Economic Zone (EEZ). The states from North Carolina to Maine manage these fisheries within 3 nautical miles of their coasts, under the Commission's plan for summer flounder, scup, and black sea bass. The Federal regulations govern fishing activity in the EEZ, as well as vessels possessing Federal permits for summer flounder, scup, and/or black sea bass, regardless of where they fish.

A proposed rule to implement the 2012 Federal recreational measures for the summer flounder, scup, and black sea bass recreational fisheries was published on April 30, 2012 (77 FR 25394). Additional background and information is provided in the preamble to the proposed rule and is not repeated here.

2012 Recreational Management Measures

The 2012 coastwide recreational harvest limits were previously established by a final rule published on April 23, 2012 (77 FR 24151). The 2012 recreational harvest limits are as follows: Summer flounder, 8.76 million lb (3,973 mt); scup, 8.45 million lb (3,833 mt); and black sea bass, 1.32 million lb (599 mt). Recreational harvest limits are the target objectives or ''quotas'' established for the summer flounder, scup, and black sea bass recreational fisheries. The management measures (i.e., minimum fish size requirements, angler possession limits, and fishing seasons) established by this rule are all designed to ensure that recreational landings do not exceed the recreational harvest limits.

This final rule implements management measures that apply in the Federal waters of the EEZ and to all federally permitted party/charter vessels with applicable summer flounder, scup, and/or black sea bass permits, regardless of where they fish during the 2012 fishing year. The management measures established by this rule are as follows: For summer flounder, use of state-by-state conservation equivalency measures, which is the status quo management system; for scup, a 10.5-inch (26.67-cm) minimum fish size, a 20-fish per person possession limit, and a year-round season; and, for black sea bass, a 12.5-in (31.75-cm) minimum fish size, a 25-fish per person possession limit and fishing seasons from May 19–October 14 and November 1–December 31, as well as an open season of January 1 through the end of February that would have a 12.5-in (31.75 cm) minimum fish size and a 15-fish per person possession limit. More detail on these measures is provided in the following sections:

Federal permit holders are reminded that, as a condition of their Federal permit, they must abide by the Federal measures, even if fishing in state waters. In addition, in instances where the state-implemented measures are different than the Federal measures, federally permitted vessels must adhere to the more restrictive of the two measures. This will be applicable for both the 2012 scup and black sea bass recreational fisheries.

All minimum fish sizes discussed below are total length measurements of the fish, i.e., the straight-line distance from the tip of the snout to the end of the tail while the fish is lying on its side. For black sea bass, total length measurement does not include the caudal fin tendril. All possession limits discussed below are per person.

Summer Flounder Recreational Management Measures

This final rule implements conservation equivalency as the management approach for the 2012 summer flounder recreational fishery. NMFS implemented Framework Adjustment 2 to the FMP on July 29, 2001 (66 FR 36208), to permit the use of conservation equivalency to manage the recreational summer flounder fishery. Conservation equivalency allows each state to establish its own recreational management measures to achieve its state harvest limit partitioned from the coastwide recreational harvest limit by the Commission. The combined effect of all of the states' management measures achieves the same level of conservation as would Federal coastwide measures, hence the term conservation equivalency. This means that minimum fish sizes, possession limits, and fishing seasons developed and adopted by the individual states from Massachusetts to

North Carolina will be utilized as the Federal waters measures for 2012.

The Commission notified the NMFS Northeast Regional Administrator by letter dated May 4, 2012, that the 2012 summer flounder recreational fishery management programs (i.e., minimum fish size, possession limit, and fishing seasons) implemented by the states from Massachusetts to North Carolina have been reviewed by the Commission's Technical Committee and approved by the Commission's Summer Flounder Management Board (SF Board). The correspondence indicates that the Commission-approved management programs are projected to restrict 2012 recreational summer flounder coastwide landings consistent with the state-specific requirements established by the Technical Committee and SF Board through the Commission process.

Based on the recommendation of the Commission, the NMFS Northeast Regional Administrator finds that the recreational summer flounder fishing measures proposed to be implemented by the individual states for 2012 are the conservation equivalent of the season, minimum size, and possession limit prescribed in §§ 648.102, 648.103, and 648.105(a), respectively. According to § 648.107(a)(1), vessels subject to the recreational fishing measures of this part and landing summer flounder in a state with an approved conservation equivalency program shall not be subject to Federal measures, and shall instead be subject to the recreational fishing measures implemented by the state in which they land. Section 648.107(a) has been amended to recognize state-implemented measures as conservation equivalent of the coastwide recreational management measures for 2012. For clarity, the 2012 summer flounder management measures adopted by the individual states vary according to the state of landing, as specified in Table 1.

TABLE 1—2012 COMMISSION APPROVED STATE-BY-STATE CONSERVATION EQUIVALENT RECREATIONAL MANAGEMENT MEASURES FOR SUMMER FLOUNDER

State	Minimum size (inches)	Possession limit	Open season
Massachusetts	16.5	5 fish	May 22–September 30.
Rhode Island	18.5	8 fish	May 1–December 31.
Connecticut*	18	5 fish	May 15–October 31.
New York	19.5	4 fish	May 1–September 30.
New Jersey	17.5	5 fish	May 5–September 28.
Delaware	18	4 fish	January 1–October 23.
Maryland	17	3 fish	April 14–December 16.
PRFC	16.5	4 fish	All year.
Virginia	16.5	4 fish	All year.
North Carolina	15	6 fish	All year.

Note: At 44 designated shore sites in CT, anglers may keep 5 fish at 16.0 inches (40.64 cm), May 1–September 30.

Scup Recreational Management Measures

NMFS is implementing the management measures as proposed in the April 30, 2012, proposed rule. These measures are a 10.5-in (26.67-cm) minimum fish size, a 20-fish per person possession limit, and year-round open season (i.e., January 1–December 31).

These measures, in conjunction with the regional approach being applied to state waters through the Commission, are expected to constrain landings to the 8.45-million-lb (3,833-mt) recreational harvest limit.

NMFS acknowledges that the Commission will continue managing the recreational scup fishery through a Commission-based conservation equivalency program that has no comparable measures in the Federal FMP. Thus, recreational management measures will differ between state and Federal waters in 2012. Historically, very little of the scup recreational harvest comes from Federal waters.

Black Sea Bass Recreational Management Measures

NMFS is implementing the following measures for Federal waters during the 2012 fishery: A 12.5-in (31.75-cm) minimum fish size and a 15-fish per person possession limit from January 1 through the end of February; and a 12.5-in (31.75-cm) minimum fish size and a 25-fish per person possession limit from May 19–October 14 and from November 1–December 31. Measures for state waters will vary by state. Because the Commission-based measures implemented by the states are different than the Federal water measures, Federal permit holders are required to adhere to the more restrictive set of measures irrespective of whether the vessel is fishing in state or Federal waters. Similarly, private anglers must adhere to the recreational measures implemented by the state in which the fish will be landed as all the state-implemented measures place restrictions on possession as opposed to landings.

For additional information on state-implemented management measures, please contact the marine fisheries management agency for the state in question or the Commission (*www.asmfc.org;* (703) 842–0740).

Comments and Responses

NMFS received three comments regarding the proposed recreational management measures. All three comments discussed the proposed opening of the recreational black sea bass fishery. Two of the comments requested that NMFS not delay implementing the final rule so that the black sea bass fishery would open on May 19, 2012. One comment requested that NMFS not make the rule effective until after that date. Detailed responses are addressed below.

Comment: The State of Delaware Division of Fish & Wildlife commented that they did not want NMFS to publish the final rule in time to make the Council's recommended May 19, 2012, start date for the recreational black sea bass fishery. Delaware's rulemaking process would not allow them to open state waters on May 19, 2012, which could put federally permitted charter/party vessels home-ported in Delaware at a disadvantage because they could not land their catch in the state until the season is opened in its waters. Delaware claims that this is a violation of National Standard 4 of the Magnuson-Stevens Act.

Response: NMFS disagrees that implementing the Council's recommended measure for the start of the black sea bass fishery is a violation of National Standard 4. Reopening a fishing season is not an allocation or assignment of fishing privileges

contemplated by National Standard 4, and does not discriminate between residents of different states. Currently, the Federal regulations prescribe that the black sea bass season starts on May 22. Delaying implementation of this action to satisfy Delaware's request would have negative economic impacts for charter and party boat owners that are home-ported in other states that open the recreational fishing season on May 19. These vessels would be prevented from fishing on their traditional fishing grounds in Federal waters on a weekend (May 19–20) during which a significant amount of recreational fishing is expected to occur. The fact that a uniform coastwide reopening of the black sea bass season in Federal waters has a differing effect among the states is a function of the varied processes these states follow to establish a fishing season. It is not a discriminatory, unfair, or inequitable result imposed by the Federal regulation opening the recreational black sea bass fishery in Federal waters.

Comment: The Recreational Fishing Alliance commented that it supported all of the proposed measures for summer flounder, scup, and black sea bass. The comment expressed concern regarding the opening of the black sea bass fishery and stressed the importance of the additional fishing opportunity that having the rule effective before May 19, 2012, would provide to recreational fishermen.

Response: NMFS agrees that the additional weekend is important for recreational fishermen to take advantage of the increased fishing opportunity recommended by the Council. NMFS has made this rule effective as soon as possible after the close of the proposed rule comment period in an effort to have the fishery open on May 19, 2012.

Comment: One commenter said that he hoped that there would not be a delay in opening the black sea bass fishery beyond May 19. The commenter suggested that if the opening was delayed beyond the Council's recommended start date that NMFS add additional time on to the end of the season.

Response: As noted above, NMFS has made this rule effective as soon as possible after the close of the proposed rule comment period in an effort to have the fishery open on May 19, 2012. If the opening is delayed, however, the Council's recommended black sea bass season, as implemented through this rule, already extends the season in October an additional weekend beyond the status quo, and it would not be appropriate from NMFS to add 3 additional days beyond that.

Classification

The Regional Administrator, Northeast Region, NMFS, determined that this final rule implementing the 2012 summer flounder, scup, and black sea bass recreational management measures is necessary for the conservation and management of the summer flounder, scup, and black sea bass fisheries, and is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Administrative Procedure Act

The Assistant Administrator for Fisheries, NOAA, finds good cause to waive the requirement for a 30-day delay in effectiveness under the provisions of section 553(d) of the Administrative Procedure Act because a delay in its effectiveness would not serve any legitimate purpose while unfairly prejudicing federally permitted charter/party vessels. This action will open the recreational black sea bass fishery 3 days earlier than currently scheduled, allowing charter/party vessel operators to book trips starting on Saturday, May 19. Because some states' black sea bass fisheries are already open or will open on May 19, 2012, federally permitted charter/party vessels would be prohibited from fishing, even in state waters, until the Federal regulations are effective. This would unnecessarily disadvantage the federally permitted vessels, which would be prohibited from fishing at a time when state-licensed vessels could be engaged in fishing activities.

In addition, this rule increases the possession limit for scup and extends fishing opportunities for fishermen that would otherwise be constrained under the current seasons. If this final rule is delayed for 30 days, the fishery would likely forego some amount of landings and revenues during the delay period. While some of these restrictions would be alleviated after this rule becomes effective, fishermen may be not able to recoup the lost economic opportunity of foregone trips that would result from delaying the effectiveness of this action. Delaying the opening of the scup and black sea bass seasons would complicate business plans currently being developed by charter/party operations, and prohibit them from effectively advertising and booking trips for the upcoming fishing season.

Finally, requiring a 30-day delay before the final rule becomes effective does not provide any benefit to the regulated parties. Unlike actions that require an adjustment period to comply with new rules, charter/party operators will not have to purchase new equipment or otherwise expend time or money to comply with these management measures. Rather, complying with this final rule simply means adhering to the published management measures for each relevant species of fish while the charter/party operators are engaged in fishing activities.

For these reasons, the Assistant Administrator finds good cause to waive the 30-day delay and to implement this rule upon filing with the Office of the Federal Register.

Final Regulatory Flexibility Analysis

Included in this final rule is the FRFA prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the economic impacts described in the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support the action. Copies of the EA/RIR/IRFA and SEA are available from the Council and NMFS (see **ADDRESSES**).

Statement of Objective and Need

A description of the reasons why the 2012 recreational management measures for summer flounder, scup, and black sea bass are being implemented, and the objectives of and legal basis for this final rule implementing both actions are explained in the preambles to the proposed rule and this final rule, and are not repeated here.

A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

Three comments were received on the proposed rule. However, none of the comments addressed the IRFA or economic analysis and did not result in any changes to the rule.

Description and Estimate of Number of Small Entities to Which This Rule Will Apply

The recreational management measures could affect any of the 982 vessels possessing a Federal charter/party permit for summer flounder, scup, and/or black sea bass in 2010, the most recent year for which complete data are available. However, only 414 vessels reported active participation in the 2010 recreational summer flounder, scup, and/or black sea bass fisheries, based on

Vessel Trip Reports where the amount of kept summer flounder, scup, or black sea bass is greater than zero on a reported charter/party trip. The Small Business Administration (SBA) considers commercial fishing entities (NAICS code 114111) to be small entities if they have no more than $4 million in annual sales, while the size standard for charter/party operators (part of NAICS code 487210) is $7 million in sales. Because any vessel at any time may be issued an open access charter/party summer flounder, scup, and/or black sea bass permit, it is difficult to determine how many vessels or owners will participate in this fishery in a given year. Although some firms own more than one vessel, available data make it difficult to reliably identify ownership control over more than one vessel. Thus, all of the entities (fishing vessels) affected by this action are considered small entities under the SBA size standards for charter/party fishing businesses ($7.0 million in annual gross sales). Therefore, there are no disproportionate effects on small versus large entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

Description of the Steps Taken To Minimize Economic Impact on Small Entities

In seeking to minimize the impact of recreational management measures (minimum fish size, possession limit, and fishing season) on small entities (i.e., Federal party/charter permit holders), NMFS is constrained to implementing measures that meet the conservation objectives of the FMP and Magnuson-Stevens Act. Management measures must provide sufficient constraints on recreational landings, such that the established recreational harvest limits have a low likelihood of being exceeded, which might lead to overfishing the stock. This rule maintains the status quo recreational management measures for summer flounder and implements less restrictive management measures for scup and black sea bass in Federal waters.

Summer flounder alternatives. The alternatives examined by the Council and forwarded for consideration by NMFS consisted of the non-preferred alternative of coastwide measures (an 18.5-inch (46.99-cm) minimum fish size, a 2-fish per person possession limit, and open season from May 1 through September 30), and the preferred alternative of state-by-state conservation equivalency (see Table 2 for measures) with a precautionary default backstop (status quo). These were alternatives 1 and 2, respectively, in the Council's SEA/RIR/IRFA. These two alternatives were determined by the Council to provide a high probability of constraining recreational landings to levels at or below the 2012 recreational harvest limit. Therefore, either alternative recreational management system could be considered for implementation by NMFS, as the critical metric of satisfying the regulatory and statutory requirements would likely be met by either.

Next, NMFS considered the recommendation of both the Council and Commission. Both groups recommended implementation of state-by-state conservation equivalency, with a precautionary default backstop. The recommendations of both groups were not unanimous: Some Council and Commission members objected to the use of conservation equivalency, stating a preference for coastwide measures.

For NMFS to disapprove the Council's recommendation for conservation equivalency and substitute coastwide management measures, NMFS must reasonably demonstrate that the recommended measures are either inconsistent with applicable law or that the conservation objectives of the FMP will not be achieved by implementing conservation equivalency. NMFS does not find the Council and Commission's recommendation to be inconsistent with the implementing regulations of the FMP at § 648.100 or the Magnuson-Stevens Act, including the 10 National Standards.

The additional metric for consideration by NMFS, applicable to the FRFA, is examination of the economic impacts of the alternatives on small entities consistent with the stated objectives of applicable statutes. As previously stated, both coastwide measures (alternative 1) and conservation equivalency (alternative 2) are projected to achieve the conservation objectives for the 2012 summer flounder recreational fishery. However, the economic impacts of the two alternatives are not projected to be equal in the Council's analyses: The economic impacts on small entities under the coastwide measures management system would vary in comparison to the conservation equivalency system, dependent on the specific state wherein the small entities operate.

Quantitative analyses of the economic impacts associated with conservation equivalency measures are not available. This is because the development of the individual state measures occurs concurrent to the NMFS rulemaking process to ensure timely implementation of final measures for the 2012 recreational fishery; thus, the specific measures implemented by states are not available for economic impact analyses. Instead, qualitative methods were utilized by the Council to assess the relative impact of conservation equivalency (alternative 2) to coastwide measures (alternative 1). The Council analysis concluded, and NMFS agrees, that conservation equivalency is expected to minimize impacts on small entities because individual states can develop specific summer flounder management measures that allow the fishery to operate during each state's critical fishing periods while still achieving conservation goals.

NMFS is implementing the Council and Commission's recommended state-by-state conservation equivalency measures because: (1) NMFS finds no compelling reason to disapprove the Council and Commission's recommended 2012 management system, as the management measures contained in conservation equivalency are projected to provide the necessary restriction on recreational landings to prevent the recreational harvest limit from being exceeded; and (2) the net economic impact to small entities on a coastwide basis are expected to be mitigated, to the extent practicable, for a much larger percentage of small entities.

Scup alternatives. NMFS is implementing the Council's preferred measures as the Federal water measures for the 2012 fishing year: A 10.5-inch (26.67-cm) minimum fish size; a 20-fish per person possession limit; and year-round open season. Similar to the summer flounder discussion, this suite of scup measures (alternative 2) provides the greatest economic opportunity for small entities from the alternatives available by providing the maximum fishing opportunity in Federal waters that also meets the requirements of the Magnuson-Stevens Act, the FMP, and achieves the conservation objectives for 2012. Alternative 1 for a 10.5-inch (26.67-cm) minimum fish size, 10-fish per person possession limit, and open seasons of June 6–September 26 contained measures that had higher impacts on small entities fishing in Federal waters, as it contains more restrictive measures than would be necessary to satisfy the management objectives.

Black sea bass alternatives. As previously stated in the preamble,

individual states have developed and implemented measures for use in state waters. This rule implements the Council's preferred measures (Alternative 2 in the Council's SEA/RIR/IRFA): A 12.5-inch (31.75-cm) minimum fish size and a 25-fish possession limit for the May 19–October 14 and November 1–December 31 fishing seasons; and a 12.5-in (31.75-cm) minimum fish size and a 15-fish possession limit for January 1 through the end of February for Federal waters. This alternative provides the greatest associated economic opportunities to small entities of the measures considered for Federal waters that also meets the statutory and regulatory requirements for the 2012 fishery. Alternative 1 (a 13.0-inch (33.02-cm) minimum fish size, a 25-fish per person possession limit, and open season of May 22 through October 11 and November 1 through December 31), would result in higher impacts on small entities fishing in Federal waters, as it contains more restrictive measures than would be necessary to satisfy the management objectives.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as the small entity compliance guide was prepared and will be sent to all holders of Federal party/charter permits issued for the summer flounder, scup, and black sea bass fisheries. In addition, copies of this final rule and the small entity compliance guide are available from NMFS (see **ADDRESSES**) and at the following Web site: *http://www.nero.noaa.gov*.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 17, 2012.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.107, introductory paragraph (a) and paragraph (b) are revised to read as follows:

§ 648.107 Conservation equivalent measures for the summer flounder party/charter and recreational fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by Massachusetts through North Carolina for 2012 are the conservation equivalent of the minimum fish size, season, and possession limit prescribed in §§ 648.104(b), 648.105, and 648.106(a), respectively. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

* * * * *

(b) Federally permitted vessels subject to the recreational fishing measures of this part, and other recreational fishing vessels subject to the recreational fishing measures of this part and registered in states whose fishery management measures are not determined by the Regional Administrator to be the conservation equivalent of the minimum size, season, and possession limit prescribed in §§ 648.104(b), 648.105, and 648.106(a), respectively, due to the lack of, or the reversal of, a conservation equivalent recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission, shall be subject to the following precautionary default measures: Season—May 1 through September 30; minimum size—20.0 inches (50.80 cm); and possession limit—two fish.

■ 3. Section 648.127 is revised to read as follows:

§ 648.127 Scup recreational fishing season.

Fishermen and vessels that are not eligible for a moratorium permit under § 648.4(a)(6) may possess scup year-round, subject to the possession limit specified in § 648.128(a). The recreational fishing season may be adjusted pursuant to the procedures in § 648.122.

■ 4. In § 648.128, paragraph (a) is revised to read as follows:

§ 648.128 Scup possession restrictions.

(a) *Party/Charter and recreational possession limits.* No person shall possess more than 20 scup in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a scup moratorium permit, or is issued a scup dealer permit. Persons aboard a commercial vessel that is not eligible for a scup moratorium permit are subject to this possession limit. The owner, operator, and crew of a charter or party boat issued a scup moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.122.

* * * * *

■ 5. In § 648.145, paragraph (a) is revised to read as follows:

§ 648.145 Black sea bass possession limit.

(a) From January 1 through February 28, no person shall possess more than 15 black sea bass in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a black sea bass moratorium permit, or is issued a black sea bass dealer permit. From May 19 through October 14, and from November 1 through December 31, no person shall possess more than 25 black sea bass in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a black sea bass moratorium permit, or is issued a black sea bass dealer permit. Persons aboard a commercial vessel that is not eligible for a black sea bass moratorium permit may not retain more than 15 black sea bass from January 1 through February 29, or more than 25 black sea bass from May 19 through October 14 and from November 1 through December 31. The owner, operator, and crew of a charter or party boat issued a black sea bass moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.142.

* * * * *

■ 6. Section 648.146 is revised to read as follows:

§ 648.146 Black sea bass recreational fishing season.

Vessels that are not eligible for a moratorium permit under § 648.4(a)(7), and fishermen subject to the possession limit specified in § 648.145(a), may possess black sea bass from January 1 through February 28, May 19 through October 14, and November 1 through December 31, unless this time period is

adjusted pursuant to the procedures in § 648.142.

[FR Doc. 2012–12422 Filed 5–18–12; 11:15 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 100
Wednesday, May 23, 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 HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2012–0020]

Privacy Act of 1974: Implementation of Exemptions; Automated Targeting System

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a updated system of records pursuant to the Privacy Act of 1974 for the ''Department of Homeland Security/U.S. Customs and Border Protection—*006—Automated Targeting System* (ATS) System of Records'' and this proposed rulemaking. The Department is publishing this Notice of Proposed Rulemaking to ensure that the exemptions previously published are clearly and appropriately applied to all records in the updated system of records.

DATES: Comments must be received on or before June 22, 2012.

ADDRESSES: You may submit comments, identified by docket number DHS–2012–0020, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Laurence E. Castelli (202–325–0280), CBP Privacy Officer, Office of International Trade, U.S. Customs and Border Protection, Mint Annex, 799 Ninth Street NW., Washington, DC 20229. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to update and expand an existing Department of Homeland Security SORN titled, U.S. Customs and Border Protection, DHS/CBP–006—Automated Targeting System (ATS) 72 FR 43650, August 6, 2007.

The SORN published elsewhere in the **Federal Register** is being updated and expanded to inform the public about changes to the Automated Targeting System (ATS) categories of individuals, categories of records, routine uses, access provisions, and sources of data. DHS/CBP is updating and expanding the categories of individuals, categories of records and sources of records stored in ATS because it has certain data that it must ingest for performance purposes. The Privacy Impact Assessment (PIA), which DHS will publish on its Web site (*http://www.dhs.gov/privacy*) concurrently with the publication of the SORN in the **Federal Register**, provides a full discussion of the functional capabilities of ATS and its modules. DHS and CBP have previously exempted portions of ATS from the access, amendment, and public accounting provisions of the Privacy Act because it is a law enforcement system. DHS and CBP, however, will consider each request for access to records maintained in ATS to determine whether or not information may be released. DHS and CBP further note that despite the exemption taken on this system of records they are providing access and amendment to passenger name records (PNR) collected by CBP pursuant to its statutory authority, 49 U.S.C. 44909, as implemented by 19 CFR 122.49d; Importer Security Filing (10+2 documentation) information; and any records that were ingested by ATS where the source system of records already provides access and/or amendment under the Privacy Act.

ATS provides the following basic functionalities to support the CBP officer in identifying individuals and cargo that need additional review across the different means or modes of travel to and from the United States:

- *Comparison:* ATS compares information on travelers and cargo coming into and going out of the country against law enforcement and intelligence databases to identify individuals and cargo requiring additional scrutiny. For example, ATS compares information on individuals (identified as passengers, travelers, crewmembers, or persons appearing on documents supporting the movement of cargo) trying to enter the country or trying to enter merchandise into the country against the Terrorist Screening Database (TSDB), which ATS ingests from the DHS Watchlist Service (WLS), and outstanding wants and warrants.
- *Rules:* ATS compares existing information on individuals and cargo entering and exiting the country with patterns identified as requiring additional scrutiny. The patterns are based on CBP officer experience, analysis of trends of suspicious activity, and raw intelligence corroborating those trends. For example, ATS might compare information on cargo entering the country against a set of scenario-based targeting rules that indicate a particular type of fish rarely is imported from a given country.
- *Federated Query:* ATS allows users to search data across many different databases and correlates it across the various systems to provide a person centric view of all data responsive to a query about the person's identity from the selected data bases.

In order to do the above, ATS pulls data from many different source systems. In some instances ATS is the official record for the information, while in other instances ATS ingests and maintains the information in order to improve the functionality of the system or provides a pointer to the information in the underlying system. Below is a summary:

- *Official Record:* ATS maintains the official record for Passenger Name Records (PNR) collected by CBP pursuant to its statutory authority, 49

U.S.C. 44909, as implemented by 19 CFR 122.49d; for Importer Security Filing (10+2 documentation) information, which provides advanced information about cargo and related persons and entities for risk assessment and targeting purposes; for results of Cargo Enforcement Exams; for the combination of license plate, Department of Motor Vehicle (DMV) registration data and biographical data associated with a border crossing; for law enforcement and/or intelligence data, reports, and projects developed by CBP analysts that may include public source and/or classified information; and information obtained through memorandum of understanding or other arrangements because the information is relevant to the border security mission of the Department.

• *Ingestion of Data:* ATS maintains copies of key elements of certain CBP databases in order to minimize the processing time for searches on the operational systems and to act as a backup for certain operational systems, including, but not limited to: Automated Commercial Environment (ACE), Automated Commercial System (ACS), Automated Export System (AES), Advance Passenger Information System (APIS), Border Crossing Information (BCI), Consular Electronic Application Center (CEAC), Enforcement Integrated Database (EID) [which includes the Enforcement Case Tracking System (ENFORCE)], Electronic System for Travel Authorization (ESTA), Global Enrollment System (GES), Non-Immigrant Information System (NIIS), historical National Security Entry-Exit Registration System (NSEERS), Seized Asset and Case Tracking System (SEACATS), U.S. Immigration and Customs Enforcement (ICE) Student Exchange and Visitor Information System (SEVIS), Social Security Administration (SSA) Master Death File, TECS, Terrorist Screening Database (TSDB) through the DHS Watchlist Service (WLS), and WebIDENT. If additional data is ingested and that additional data does not require amendment of the categories of individuals or categories of records in the SORN, the PIA for ATS will be updated to reflect that information. The updated PIA can be found at *www.dhs.gov/privacy.*

• *Pointer System:* ATS accesses and uses additional databases without ingesting the data, including, but not limited to: CBP Border Patrol Enforcement Tracking System (BPETS), Department of State Consular Consolidated Database (CCD), commercial data aggregators, CBP's Enterprise Geospatial Information Services (eGIS), DHS/USVISIT IDENT, National Law Enforcement Telecommunications System (Nlets), DOJ's National Crime Information Center (NCIC), the results of queries in the FBI's Interstate Identification Index (III), and the National Insurance Crime Bureau's (NICB's) private database of stolen vehicles. If additional data is ingested and that additional data does not require amendment of the categories of individuals or categories of records in the SORN, the PIA for ATS will be updated to reflect that information. The updated PIA can be found at *www.dhs.gov/privacy*.

DHS/CBP has reorganized the ATS routine uses to provide greater uniformity across DHS systems. Consistent with DHS's information sharing mission, information stored in ATS may be shared with other DHS components, as well as appropriate Federal, State, local, tribal, foreign, or international government agencies. This sharing will only take place after DHS determines that the recipient has a need to know the information to carry out functions consistent with the routine uses set forth in the SORN.

DHS has exempted the system from the notification, access, amendment, and certain accounting provisions of the Privacy Act of 1974 because of the law enforcement nature of ATS. Despite the exemptions taken on this system of records, CBP and DHS are not exempting the following records from the access and amendment provisions of the Privacy Act: passenger name records (PNR) collected by CBP pursuant to its statutory authority, 49 U.S.C. 44909, as implemented by 19 CFR 122.49d; Importer Security Filing (10+2 documentation) information; and any records that were ingested by ATS where the source system of records already provides access and/or amendment under the Privacy Act. A traveler may obtain access to his or her PNR and request amendment as appropriate, but records concerning the targeting rules, the responses to rules, case events, law enforcement and/or intelligence data, reports, projects developed by CBP analysts that may include public source and/or classified information, information obtained through memorandum of understanding or other arrangements because the information is relevant to the border security mission of the Department, or records exempted from access by the system from which ATS ingested or accessed the information, will not be accessible to the individual.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy (*Privacy Policy Guidance Memorandum 2007–1,* most recently updated January 7, 2009), DHS extends administrative Privacy Act protections to all persons, regardless of citizenship, where systems of records maintains information on both U.S. citizens and lawful permanent residents, as well as visitors.

The Privacy Act allows government agencies to exempt systems of records from certain provisions of the Act. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

As such, DHS is continuing to claim exemptions from certain requirements of the Privacy Act for DHS/CBP–006—Automated Targeting System (ATS) System of Records. Some information in DHS/CBP–006—Automated Targeting System (ATS) System of Records relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS' ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard officially classified and/or controlled information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large

number of federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived.

A notice of system of records for DHS/CBP–006—Automated Targeting System (ATS) System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Replace paragraph 45 at the end of Appendix C to Part 5, with the following:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

45. The DHS/CBP–006—Automated Targeting System (ATS) System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP–006—Automated Targeting System (ATS) System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities. The DHS/CBP–006—Automated Targeting System (ATS) System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from certain provisions of the Privacy Act as follows:

- Pursuant to 5 U.S.C. 552a(j)(2), the system is exempt from 5 U.S.C. 552a(c)(3) and (c)(4), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).
- Pursuant to 5 U.S.C. 552a(j)(2), the system (except for passenger name records (PNR) collected by CBP pursuant to its statutory authority, 49 U.S.C. 44909, as implemented by 19 CFR 122.49d; Importer Security Filing (10+2 documentation) information; and any records that were ingested by ATS where the source system of records already provides access and/or amendment under the Privacy Act) is exempt from 5 U.S.C. 552a(d)(1), (d)(2), (d)(3), and (d)(4).
- Pursuant to 5 U.S.C. 552a(k)(1) and (k)(2), the system is exempt from 5 U.S.C. 552a(c)(3); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).
- Pursuant to 5 U.S.C. 552a(k)(1) and (k)(2), the system (except for passenger name records (PNR) collected by CBP pursuant to its statutory authority, 49 U.S.C. § 44909, as implemented by 19 CFR 122.49d; Importer Security Filing (10+2 documentation) information; and any records that were ingested by ATS where the source system of records already provides access and/or amendment under the Privacy Act) is exempt from (d)(1), (d)(2), (d)(3), and (d)(4).

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose classified and security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Individuals) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2012–12395 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–06–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–105; NRC–2012–0056]

In-core Thermocouples at Different Elevations and Radial Positions in Reactor Core

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; receipt and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is publishing for public comment a notice of receipt for a petition for rulemaking (PRM), dated February 28, 2012, which was filed with the NRC by Mr. Mark Edward Leyse (the petitioner). The petition was docketed by the NRC on March 2, 2012, and assigned Docket No. PRM–50–105. The petitioner requests that the NRC amend its regulations to ''require all holders of operating licenses for nuclear power plants (''NPP'') to operate NPPs with in-core thermocouples at different elevations and radial positions throughout the reactor core.''

DATES: Submit comments by August 6, 2012. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date. Due to resource constraints the NRC cannot guarantee explicit response to comments received after this date.

ADDRESSES: You may access information and comment submissions related to this petition for rulemaking, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0056. You may submit comments by the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0056. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3667, email: *Cindy.Bladey@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0056 when contacting the NRC about the availability of information for this petition for rulemaking. You may access information related to this petition for rulemaking, which the NRC possesses and is publicly available, by the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0056.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to pdr.resource@nrc.gov. The incoming petition is in ADAMS under accession No. ML12065A215.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0056 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. The Petitioner

The petition states that the petitioner previously submitted an earlier PRM to the NRC on emergency core cooling systems (ADAMS Accession No. ML070871368), which the NRC assigned Docket ID PRM–50–84 (73 FR 71564; November 25, 2008). In addition, the petition states that the petitioner co-authored a paper entitled, ''Considering the Thermal Resistance of Crud in LOCA Analysis'' (American Nuclear Society, 2009 Winter Meeting, Washington, DC (November 15–19, 2009)).

III. The Petition

In its petition (ADAMS Accession No. ML12065A215), the petitioner requests that the NRC amend its regulations in Title 10 of the Code of Federal Regulations (10 CFR) part 50, ''Domestic Licensing of Production and Utilization Facilities,'' to ''require all holders of operating licenses for nuclear power plants (''NPP'') to operate NPPs with in-core thermocouples at different elevations and radial positions throughout the reactor core to enable NPP operators to accurately measure a large range of in-core temperatures in NPP steady-state and transient conditions.'' The petitioner further asserts that, in the event of a severe accident, in-core thermocouples would provide NPP operators with ''crucial information to help operators manage the accident.''

In addition to several other reports and findings cited by the petitioner to support the petition, the petitioner cites the ''Report of the President's Commission on the Accident at Three Mile Island [TMI]: The Need for Change: The Legacy of TMI,'' dated October 1979. The petitioner states that ''[i]n the last three decades, NRC has not made a regulation requiring that NPPs operate with in-core thermocouples at different elevations and radial positions throughout the reactor core to enable NPP operators to accurately measure a large range of in-core temperatures in NPP steady-state and transient conditions, which would help fulfill the President's Commission recommendations. If another severe accident were to occur in the United States, NPP operators would not know what the in-core temperatures were during the progression of the accident.'' The petitioner continues by stating that ''[i]n a severe accident, core-exit thermocouples would be the primary

tool that was used to detect inadequate core cooling and core uncover.'' The petitioner states ''[t]he problem with using a predetermined core-exit temperature measurement to signal the time for NPP operators to transition from EOPs [Emergency Operating Procedures] to implementing SAMGs [Severe Accident Management Guidelines] is that experimental data indicates that core-exit temperature (''CET'') measurements have significant limitations: (1) '[t]he use of the CET measurements has limitations in detecting inadequate core cooling and core uncovery;' (2) '[t]he CET indication displays in all cases a significant delay (up to several 100 [seconds]);' and (3) '[t]he CET reading is always significantly lower (up to several 100 [Kelvin]) than the actual maximum cladding temperature.' '' [1] The petitioner continues by asserting that ''despite the fact that 'the nuclear industry developed SAMGs during the 1980s and 1990s in response to the [Three Mile Island] accident and followup activities,' which 'included extensive research and study (including several [probabilistic risk assessments]) on severe accidents and severe accident phenomena,' [2] NRC and the nuclear industry have ignored experimental data indicating that CET measurements have significant limitations. And ignored the President's Commission recommendations that NPPs have 'instruments that can provide proper warning and diagnostic information; for example, the measurement of the full range of temperatures within the reactor vessel under normal and abnormal conditions.' '' [3]

The petitioner cites the NRC's July 2011 ''Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident,'' by stating that '''EOPs typically cover accidents to the point of loss of core cooling and initiation of inadequate core cooling (*e.g.,* core exit temperatures in PWRs greater than 649 degrees Celsius (1200 degrees Fahrenheit)).' '' [4] The petitioner continues by stating ''[u]nfortunately, NRC and Westinghouse do not consider that experimental data from tests conducted at four facilities indicates that CET measurements would not be an adequate indicator for when to transition from EOPs to implementing SAMGs in a severe accident.''

The petitioner cites findings of experiments, including a LOFT LP–FP–2 experiment, and states that ''[t]he results of LOFT LP–FP–2 and other experiments demonstrate the need for NPPs to operate with in-core thermocouples at different elevations and radial positions throughout the reactor core to enable NPP operators to accurately measure a large range of in-core temperatures in NPP steady-state and transient conditions.''

The petition states that the ''[p]etitioner is submitting this 10 CFR 2.802 petition because if NPPs were to operate with in-core thermocouples at different elevations and radial positions throughout the reactor core to enable NPP operators to accurately measure a large range of in-core temperatures in NPP steady-state and transient conditions, it would help improve public and plant-worker safety. In the event of a severe accident, in-core thermocouples would enable NPP operators to accurately measure in-core temperatures, providing crucial information to help operators manage the accident; for example, indicating the time to transition from EOPs to implementing SAMGs.'' The petitioner also asserts that ''[i]f implemented, the regulation proposed in this petition for rulemaking would help improve public and plant-worker safety.''

Dated at Rockville, Maryland, this 16th day of May 2012.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2012–12475 Filed 5–22–12; 8:45 am]

BILLING CODE 7590–01–P

[1] Robert Prior, *et al.,* OECD Nuclear Energy Agency, Committee on the Safety of Nuclear Installations, ''Core Exit Temperature (CET) Effectiveness in Accident Management of Nuclear Power Reactor,'' NEA/CSNI/R(2010)9, November 26 2010, p. 128.

[2] Charles Miller, *et al.,* NRC, ''Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident,'' SECY–11–0093, July 12, 2011, available at: *www.nrc.gov,* NRC Library, ADAMS Documents, Accession Number: ML 111861807, p. 47.

[3] John G. Kemeny, *et al.,* ''Report of the President's Commission on the Accident at Three Mile Island: The Need for Change: The Legacy of TMI,'' p. 72.

[4] Charles Miller, *et al.,* ''Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident,'' p. 47.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0287; Airspace Docket No. 11–AWP–21]

RIN 2120–AA66

Proposed Amendment of Air Traffic Service Routes; Southwestern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); correction.

SUMMARY: This action corrects the description of VOR Federal airway V–16 to include a previous amendment to the description that was inadvertently omitted in the NPRM.

DATES: Comments must be received on or before June 7, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace, Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION: On April 23, 2012, Docket No. FAA–2012–0287; Airspace Docket No. 11–AWP–21 was published in the **Federal Register** proposing to amend various Air Traffic Service Routes in the Southwestern United States (77 FR 24156). The description of V–16 in the NPRM did not reflect a previous amendment of the route that was published on September 19, 2011 (76 FR 57902). The incorrect part of the V–16 description in the NPRM reads ''* * * Kennedy; Dear Park, NY; Calverton, NY; Norwich, CT * * *'' The correct version is ''* * * Kennedy; INT Kennedy 040° and Calverton, NY 261° radials; Calverton; Norwich, CT * * *'' The corrected airspace description is rewritten for clarity.

Correction to Proposed Rule

Accordingly, pursuant to the authority delegated to me, the NPRM for the proposed amendment of Air Traffic Service Routes; Southwestern United States as published in the **Federal Register** of April 23, 2010 (77 FR 24156) FR Doc. 2012–9675, is corrected as follows:

By removing the description of V–16 starting at line 16, column 3, on page 24157, and inserting the following:

V–16 [Amended]

From Los Angeles, CA; Paradise, CA; Palm Springs, CA; Blythe, CA; Buckeye, AZ;

Phoenix, AZ; INT Phoenix 155° and Stanfield, AZ, 105° radials; Tucson, AZ; San Simon, AZ; INT San Simon 119°(T)/106°(M) and Columbus, NM, 277°(T)/265°(M) radials; Columbus; El Paso, TX; Salt Flat, TX; Wink, TX; INT Wink 066° and Big Spring, TX, 260° radials; Big Spring; Abilene, TX; Bowie, TX; Bonham, TX; Paris, TX; Texarkana, AR; Pine Bluff, AR; Marvell, AR; Holly Springs, MS; Jacks Creek, TN; Shelbyville, TN; Hinch Mountain, TN; Volunteer, TN; Holston Mountain, TN; Pulaski, VA; Roanoke, VA; Lynchburg, VA; Flat Rock, VA; Richmond, VA; INT Richmond 039° and Patuxent, MD, 228° radials; Patuxent; Smyrna, DE; Cedar Lake, NJ; Coyle, NJ; INT Coyle 036° and Kennedy, NY, 209° radials; Kennedy; INT Kennedy 040° and Calverton, NY 261° radials; Calverton; Norwich, CT; Boston, MA. The airspace within Mexico and the airspace below 2,000 feet MSL outside the United States is excluded. The airspace within Restricted Areas R–5002A, R–5002C, and R–5002D is excluded during their times of use. The airspace within Restricted Areas R–4005 and R–4006 is excluded.

Issued in Washington, DC, on May 16, 2012.

Ellen Crum,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2012–12571 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0386; Airspace Docket No. 12–AEA–6]

Proposed Establishment of Class E Airspace; Quakertown, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Quakertown, PA, to accommodate new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures at Quakertown Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before July 9, 2012. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U. S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2012–0386; Airspace Docket No. 12–AEA–6, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2012–0386; Airspace Docket No. 12–AEA–6) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2012–0386; Airspace Docket No. 12–AEA–6.'' The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRMs

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

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

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Quakertown, PA, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures for Quakertown Airport. Controlled airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations at the airport.

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

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

would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at Quakertown Airport, Quakertown, PA.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment:

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

AEA PA E5 Quakertown, PA [New]

Quakertown Airport, PA
(Lat. 40°26′07″ N., long. 75°22′55″ W.)

That airspace extending upward from 700 feet above the surface within an 8.3-mile radius of Quakertown Airport, and within 5.4 miles each side of the 099° bearing from the airport, extending from the 8.3-mile radius to 11.1-miles east of the airport.

Issued in College Park, Georgia, on May 16, 2012.

Michael D. Wagner,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2012–12545 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0249; Airspace Docket No. 12–ASO–16]

Proposed Establishment of Class E Airspace; Apopka, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Apopka, FL, to accommodate the Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures at Orlando Apopka Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before July 9, 2012. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U. S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2012–0249; Airspace Docket No. 12–ASO–16, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2012–0249; Airspace Docket No. 12–ASO–16) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2012–0249; Airspace Docket No. 12–ASO–16.'' The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRMs

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

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

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Apopka, FL, providing the controlled airspace required to support the RNAV GPS standard instrument approach procedures for Orlando Apopka Airport. Controlled airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations at the airport.

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

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at Orlando Apopka Airport, Apopka, FL.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ASO FL E5 Apopka, FL [New]

Orlando Apopka Airport, FL

(Lat. 28°42′27″ N., long. 81°34′55″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Orlando Apopka Airport.

Issued in College Park, Georgia, on May 16, 2012.

Michael D. Wagner,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2012–12550 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2011–0348]

RIN 1625–AA01

Anchorage; Change to Cottonwood Island Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard is revising its proposed rule to increase the availability of designated anchorages on the Columbia River. In response to comments on its prior proposal, the Coast Guard proposes a smaller extension of the Cottonwood Island Anchorage than that originally proposed, and the creation of a new anchorage area upriver from the center of the City of Prescott, OR.

DATES: Comments and related material must be received by the Coast Guard on or before June 22, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0348 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email ENS Ian McPhillips, Waterways Management Branch, Coast Guard Marine Safety Unit Portland; telephone 503–240–9319, email *Ian.P.McPhillips@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0348), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand delivery, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2011–0348'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0348'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But, you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

The Captain of the Port Columbia River believes that the size of the Cottonwood Island Anchorage is insufficient as currently established based on both the current demand for anchorage grounds and the forecasted growth of vessel traffic on the Columbia River. Sufficient anchorage area, both in number and size, is especially important in this area because of the unpredictable hazardous conditions of the Columbia River Bar, which at times prevents vessels from safely navigating downriver. This rule would increase the size of the current Cottonwood Island Anchorage and create a new anchorage on the Columbia River.

Discussion of Comments and Changes

In June of 2011 the Coast Guard published a Notice of Proposed Rule Making (NPRM) that proposed the expansion of the Cottonwood Island Anchorage to river mile 72–26. This NPRM received a total of eleven comments. Nine comments were made in support of the new change to the Cottonwood Island Anchorage area. Two comments, made by a consortium of local land owners, expressed concerns that vessels anchoring in the parts of the proposed anchorage near residential areas ashore could negatively impact air quality, noise levels, and property values. The distance between the shore-side boundary of the anchorage and the shore in this residential area is less than 70 feet.

To address the stated issues the Coast Guard proposes a smaller extension of the Cottonwood Island Anchorage than that originally proposed and the creation of a new anchorage area upriver from the center of the City of Prescott, OR. The resulting anchorage grounds would not include the waters off of the residential areas that prompted the two comments by land owners.

This revised proposed rule would extend the east side of the existing Cottonwood Island Anchorage to river mile 71–08. The newly created Prescott Anchorage would be located between the Oregon side of the Columbia River channel and the Oregon shore. It would extend approximately from river mile 72–05 to river mile 72–26.

Regulatory Analyses

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

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The proposed rule is not significant because the modification of the existing anchorage and establishment of a new anchorage area should not have any significant costs or impacts on maritime activities associated with it.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small

entities because the modification of an existing anchorage and the creation of a new anchorage does not have any significant costs or impacts on maritime activities associated with it.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Waterways Management Branch, Coast Guard Marine Safety Unit Portland, Oregon, telephone 503–240–9319. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 0023.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule involves increasing the size of an anchorage and creating a new anchorage area, which is categorically excluded, under Figure 2–1, paragraph 34(f) of the Instruction. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

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

PART 110—ANCHORAGE REGULATIONS

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

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

2. Revise § 110.228(a)(10) and (11) to read as follows:

§ 110.228 Columbia River, Oregon and Washington.

(a) * * *

(10) *Cottonwood Island Anchorage.* The waters of the Columbia River bounded by a line connecting the following points:

46°05′56.88″ N	122°56′53.19″ W
46°05′14.06″ N	122°54′45.71″ W

46°04′57.12″ N	122°54′12.41″ W
46°04′37.55″ N	122°53′45.80″ W
46°04′13.72″ N	122°53′23.66″ W
46°03′54.94″ N	122°53′11.81″ W
46°03′34.96″ N	122°53′03.17″ W
46°03′11.61″ N	122°52′56.29″ W
46°03′10.94″ N	122°53′10.55″ W
46°03′32.06″ N	122°53′19.69″ W
46°03′50.84″ N	122°53′27.81″ W
46°04′08.10″ N	122°53′38.70″ W
46°04′29.41″ N	122°53′58.17″ W
46°04′49.89″ N	122°54′21.57″ W
46°05′06.95″ N	122°54′50.65″ W
46°05′49.77″ N	122°56′58.12″ W

(11) *Prescott Anchorage.* The waters of the Columbia River bounded by a line connecting the following points:

46°02′47.01″ N	122°52′53.90″ W
46°02′26.32″ N	122°52′51.89″ W
46°02′25.92″ N	122°53′00.38″ W
46°02′46.54″ N	122°53′03.87″ W

* * * * *

Dated: May 18, 2012.

A.T. Ewalt,

Captain, U.S. Coast Guard, Acting Commander, Thirteenth Coast Guard District.

[FR Doc. 2012–12456 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0353]

RIN 1625–AA00

Safety Zone; Alexandria Bay Chamber of Commerce, St. Lawrence River, Alexandria Bay, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on the St. Lawrence River, Alexandria Bay, NY. This proposed rule is intended to restrict vessels from a portion of the St. Lawrence River during the Alexandria Bay Chamber of Commerce fireworks display. The safety zone established by this proposed rule is necessary to protect spectators and vessels from the hazards associated with a fireworks display.

DATES: Comments and related material must be received by the Coast Guard on or before June 7, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0353 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email LT Christopher Mercurio, Chief of Waterway Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0353), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via www.regulations.gov, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number USCG–2012–0353 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the proposed rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number USCG–2012–0353 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

Between 9:15 p.m. and 9:35 p.m. on July 4, 2012 a fireworks display will take place on the St. Lawrence River near Alexandria Bay, NY. The Captain of the Port Buffalo has determined that fireworks launched proximate to watercraft pose a significant risk to public safety and property. Such hazards include premature detonations, dangerous detonations, dangerous projectiles, and falling or burning debris.

Discussion of Proposed Rule

The proposed safety zone would be effective and enforced from 8:45 p.m. until 10:05 p.m. on July 4, 2012. It would encompass all waters of St. Lawrence River, Alexandria Bay, NY starting within a 1120FT radius of position 44°20′38.48″ N, and 075°55′19.07″ W. (NAD 83)

Entry into, transiting, or anchoring within the proposed safety zone would be prohibited unless authorized by the Captain of the Port Buffalo or his on-scene representative. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16.

This proposed temporary safety zone is necessary to ensure the safety of spectators and vessels during the Alexandria Bay Chamber of Commerce fireworks display.

Regulatory Analyses

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

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this proposed rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this proposed rule will be relatively small and enforced for relatively short time. Also, the proposed safety zone is designed to minimize its impact on navigable waters. Furthermore, the proposed safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the proposed safety zone when permitted by the Captain of the Port.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed temporary final rule may affect the following entities, some of which might be small entities: the owners of operators of vessels intending to transit or anchor in a portion of the St. Lawrence River near Alexandria Bay, New York between 8:45 p.m. to 10:05 p.m. on July 4, 2012.

This proposed safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This proposed rule will be in effect for only 80 minutes and the proposed safety zone will allow vessels to move freely around the proposed safety zone on the St. Lawrence River. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If this proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Christopher Mercurio, Chief of Waterway Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and would not create an environmental risk to

health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, because it involves the establishment of a safety zone.

A preliminary environmental analysis checklist and a preliminary categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T09–0353 to read as follows:

§ 165.T09–0353 Safety Zone; Alexandria Bay Chamber of Commerce, St. Lawrence River, Alexandria Bay, NY.

(a) *Location.* The safety zone will encompass all waters of the St. Lawrence River, Alexandria Bay, NY starting within a 1120FT radius of position 44°20′38.48″ N, and 075°55′19.07″ W. (NAD 83)

(b) *Enforcement Period.* This regulation will be enforced on July 4, 2012 from 8:45 p.m. until 10:05 p.m.

(c) *Regulations.*

(1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf. The on-scene representative of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: May 3, 2012.

S.M. Wischmann,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2012–12455 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0368]

RIN 1625–AA00

Safety Zone, Atlantic Intracoastal Waterway; Wrightsville Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on the waters of the Atlantic Intracoastal Waterway at Wrightsville Beach, North Carolina. The safety zone will temporarily restrict vessel movement commencing Sept 1, 2012. The safety zone is necessary to provide for the safety of mariners on navigable waters during maintenance on the U.S. 74/76 Bascule Bridge crossing the Atlantic Intracoastal Waterway, mile 283.1, at Wrightsville Beach, North Carolina.

DATES: Comments and related material must be received by the Coast Guard on or before June 22, 2012.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West

Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email CWO3 Joseph M. Edge, U.S. Coast Guard Sector North Carolina; telephone 252–247–4525, email *Joseph.M.Edge@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number (USCG–2012–0368) in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2012–0368) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Basis and Purpose

North Carolina Department of Transportation has awarded a contract to American Bridge Company of Coraopolis, PA to perform bridge maintenance on the U.S. 74/76 Bascule Bridge crossing the Atlantic Intracoastal Waterway, mile 283.1, at Wrightsville Beach, North Carolina. The contract provides for cleaning, painting, steel repair, and grid floor replacement to commence on September 1, 2012 with a completion date of May 1, 2013. The contractor will utilize a 40 foot deck barge with a 40 foot beam as a work platform and for equipment staging. This safety zone is needed to provide a safety buffer to transiting vessels as bridge repairs present potential hazards to mariners and property due to reduction horizontal clearance.

C. Discussion of Proposed Rule

The Coast Guard is proposing a temporary safety zone that would encompass the waters directly under the U.S. 74/76 Bascule Bridge crossing the Atlantic Intracoastal Waterway, mile 283.1, at Wrightsville Beach, North Carolina (34°13′07″ N, 077°48′46″ W). All vessels transiting the this section of the waterway requiring a horizontal clearance of greater than 50 feet will be required to make a one hour advanced notification to the U.S. 74/76 Bascule Bridge tender while the safety zone is in effect. This zone will be in effect from 8 a.m. September 1, 2012 through 8 p.m. May 1, 2013.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. This rule would not restrict traffic from transiting a portion of the Atlantic Intracoastal Waterway, it imposes a one hour notification to ensure the waterway is clear of impediment to allow passage to vessels requiring a horizontal clearance of greater than 50 feet.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies

under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of commercial tug and barge companies, recreational and commercial fishing vessels intending to transit the specified portion of Atlantic Intracoastal Waterway from 8 a.m. September 1, 2012 through 8 p.m. May 1, 2013.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone will apply to this section of the Atlantic Intracoastal Waterway, vessel traffic will be able to request passage by providing a one hour advanced notification. Before the effective period, the Coast Guard will issue maritime advisories widely available to the users of the waterway. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the ''For Further Information Contact'' section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves the establishment of a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T05–0368 to read as follows:

§ 165.T05–0368 Safety Zone; Atlantic Intracoastal Waterway, Wrightsville Beach, NC.

(a) Regulated Area. The following area is a safety zone: This zone includes the waters directly under and 100 yards either side of the U.S. 74/76 Bascule Bridge crossing the Atlantic Intracoastal Waterway, mile 283.1, at Wrightsville Beach, North Carolina (34°13′07″ N 077°48′46″ W).

(b) Regulations. The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0368. In addition the following regulations apply:

(1) All vessels and persons are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port North Carolina.

(2) All vessels requiring greater than 50 feet horizontal clearance to safely transit through the U.S. 74/76 Bascule Bridge crossing the Atlantic Intracoastal Waterway, mile 283.1, at Wrightsville Beach, North Carolina must contact the bridge tender on VHF–FM marine band radio channels 13 and 16 one hour in advance of intended transit.

(3) Persons or vessels requiring entry into or passage within the zone must request authorization from the Captain of the Port North Carolina or his designated representative by telephone at (910) 343–3882 or on VHF–FM marine band radio channel 16.

(4) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

(5) The operator of any vessel within or in the immediate vicinity of this safety zone shall: (i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) Definitions. (1) Captain of the Port North Carolina means the Commander, Coast Guard Sector North Carolina or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

(2) Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port North Carolina to assist in enforcing the safety zone described in paragraph (a) of this section.

(d) Enforcement. The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) Enforcement period. This section will be enforced from 8 a.m. September 1, 2012 through 8 p.m. May 1, 2013 unless cancelled earlier by the Captain of the Port.

Dated: May 10, 2012.

A. Popiel,

Captain, U.S. Coast Guard Captain of the Port Sector North Carolina.

[FR Doc. 2012–12459 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0354]

RIN 1625–AA00

Safety Zone; A Salute to Our Heroes Fireworks, Hamlin Beach State Park, Hamlin, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on Hamlin Beach State Park, Hamlin, NY. This proposed rule is intended to restrict vessels from a portion of water off Hamlin Beach State Park during the A Salute to Our Heroes on July 07, 2012. The safety zone established by this proposed rule is necessary to protect spectators, participants, and vessels from the hazards associated with firework display.

DATES: Comments and related material must be received by the Coast Guard on or before June 7, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0354 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email LT Christopher Mercurio, Chief of Waterway Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0354), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number ''USCG–2012–0354'' into the ''search'' box and click ''search.'' Click on ''Submit a Comment'' on the line associated with this rulemaking. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the proposed rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number USCG–2012–0354 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

Between 10:15 p.m. and 11 p.m. on July 7, 2012 a fireworks display will be held on the waters of Hamlin Beach State Park near Hamlin, NY. The Captain of the Port Buffalo has determined that fireworks launched proximate to watercraft pose a significant risk to public safety and property. Such hazards include premature detonations, dangerous detonations, dangerous projectiles, and falling or burning debris.

Discussion of Proposed Rule

The proposed safety zone would be effective and enforced from 9:45 p.m. until 11:30 p.m. on July 7, 2012. The proposed safety zone would encompass all waters of Hamlin Beach State Park, Hamlin, NY within a 700 FT radius of position 43°21′51.9″ N and 77°56′59.6″ W (NAD 83).

Entry into, transiting, or anchoring within the proposed safety zone would be prohibited unless authorized by the Captain of the Port Buffalo or his on-scene representative. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16.

This proposed temporary safety zone is necessary to ensure the safety of spectators and vessels during the ''A Salute to Our Heroes'' fireworks display.

Regulatory Analyses

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

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this proposed rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this proposed rule will be relatively small and enforced for a relatively short time. Also, the proposed safety zone is designed to minimize its impact on navigable waters. Furthermore, the proposed safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the proposed safety zone when permitted by the Captain of the Port.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed temporary final rule may affect the following entities, some of which might be small entities: the owners of operators of vessels intending to transit or anchor in a portion of Lake Erie near Hamlin, NY on July 07, 2011 from 9:45 p.m. until 11:30 p.m.

This proposed safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: this proposed rule will only be enforced for 105 minutes in a low vessel traffic area. Vessel traffic can pass safely around the zone. Before the effective period, maritime advisories will be issued, which include a Broadcast Notice to Mariners.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If this proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Christopher Mercurio, Chief of Waterway Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email

SectorBuffaloMarineSafety@uscg.mil. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, because it involves the establishment of a safety zone.

A preliminary environmental analysis checklist and a preliminary categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T09–0354 to read as follows:

§ 165.T09–0354 Safety Zone; A Salute to Our Heroes Fireworks, Hamlin Beach State Park, Hamlin, NY.

(a) *Location.* The safety zone will encompass all waters of the Hamlin Beach State Park, Hamlin, NY within a 700 FT radius of position 43°21′51.9″ N and 77°56′59.6″ W (NAD 83).

(b) *Enforcement Period.* This regulation will be enforced on July 7, 2012 from 9:45 p.m. until 11:30 p.m.

(c) *Regulations.*

(1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf. The on-scene representative of the Captain of the Port Buffalo is any Coast Guard

commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: May 3, 2012.

S.M. Wischmann,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2012–12464 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0351]

RIN 1625–AA00

Safety Zone; Olcott Fireworks, Lake Ontario, Olcott, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on Lake Ontario, Olcott, NY. This proposed rule is intended to restrict vessels from a portion of Lake Ontario during the Olcott fireworks display. The safety zone established by this proposed rule is necessary to protect spectators, participants, and vessels from the hazards associated with firework display.

DATES: Comments and related material must be received by the Coast Guard on or before June 7, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0351 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email LT Christopher Mercurio, Chief of Waterway Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0351), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number USCG–2012–0351 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number USCG–2012–0351 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

Between 10 p.m. and 10:30 p.m. on July 3, 2012 a fireworks display will take place on Lake Ontario near Olcott, NY. The Captain of the Port Buffalo has determined that fireworks launched proximate to watercraft presents significant hazards to public spectators and participants. Such hazards include premature detonations, dangerous

detonations, dangerous projectiles, and falling or burning debris.

Discussion of Proposed Rule

The proposed safety zone will be effective and enforced from 9:30 p.m. until 11 p.m. on July 3, 2012. The proposed safety zone will encompass all waters of Lake Ontario, Olcott, NY within a 1120 FT radius of position 43°20′23.57″ N and 78°43′09.50″ W (NAD 83).

Entry into, transiting, or anchoring within the proposed safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his on-scene representative. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16.

This proposed temporary safety zone is necessary to ensure the safety of spectators and vessels during the Olcott Fireworks.

Regulatory Analyses

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

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this proposed rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this proposed rule will be relatively small and enforced for a relatively short time. Also, the safety zone is designed to minimize its impact on navigable waters. Furthermore, the safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed temporary final rule may affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in a portion of Lake Ontario near Olcott, New York between 9:30 p.m. to 11 p.m. on July 3, 2012.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: this rule will be in effect for only 90 minutes and the safety zone will allow vessels to move freely around the safety zone on Lake Ontario. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If this proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Christopher Mercurio, Chief of Waterway Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, because it involves the establishment of a safety zone.

A preliminary environmental analysis checklist and a preliminary categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T09–0351 to read as follows:

§ 165.T09–0351 Safety Zone; Olcott Fireworks, Lake Ontario, Olcott, NY.

(a) *Location.* The safety zone will encompass all waters of Lake Ontario, Olcott, NY within a 1120 FT radius of position 43°20′23.57″ N and 78°43′09.50″ W (NAD 83).

(b) *Effective and Enforcement Period.* This regulation is effective and will be enforced on July 3, 2012 from 9:30 p.m. until 11 p.m.

(c) *Regulations.*

(1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf. The on-scene representative of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: May 3, 2012.

S.M. Wischmann,

Captain, U.S. Coast Guard Captain of the Port Buffalo.

[FR Doc. 2012–12453 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0347; FRL–9677–2]

Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; Milwaukee-Racine Nonattainment Area; Determination of Attainment for the 2006 24-Hour Fine Particle Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: EPA is extending the comment period for a proposed rule published April 24, 2012 (77 FR 24436). On April 24, 2012, EPA proposed to approve a determination of attainment for the Milwaukee-Racine, Wisconsin area for the 2006 24-hour fine particle National Ambient Air Quality Standard submitted by the State of Wisconsin on March 7, 2011. In response to a May 1, 2012, request from David C. Bender, EPA is extending the comment period for 30 days.

DATES: The comment period for the proposed rule published April 24, 2012 (77 FR 24436) is being extended for 30 days to June 25, 2012.

ADDRESSES: Submit comments, identified by Docket ID No. EPA–R05–OAR–2011–0347, to: Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, *aburano.douglas@epa.gov.* Additional instructions to comment can be found in the notice of proposed rulemaking published April 24, 2012 (77 FR 24436).

FOR FURTHER INFORMATION CONTACT: Gilberto Alvarez, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West

Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6143, *alvarez.gilberto@epa.gov.*

Dated: May 11, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–12509 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2012–0344, FRL–9676–1]

Approval and Promulgation of Implementation Plans; State of Oregon; Regional Haze State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve portions of a State Implementation Plan (SIP) revision submitted by the State of Oregon on December 10, 2010 and supplemented on February 1, 2011, as meeting the requirements of Clean Air Act (CAA or the Act) section 169A and B and Federal Regulations in 40 CFR 51.308. In a previous action on July 5, 2011, EPA approved portions of the December 10, 2010, SIP submittal as meeting the requirements for interstate transport for visibility of CAA section 110(a)(2)(D)(II) and certain requirements of the regional haze program including the requirements for best available retrofit technology (BART). 76 FR 38997. The action in this **Federal Register** notice addresses the remaining requirements of the CAA and EPA's rules that require states to prevent any future and remedy any existing anthropogenic impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the ''regional haze program''). In this action, EPA proposes to approve the remaining regional haze SIP elements for which EPA previously took no action in the July 5, 2011 notice.

DATES: Written comments must be received at the address below on or before June 22, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2012–0344 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: R10-Public_Comments@epa.gov.*
- *Mail:* Keith Rose, EPA Region 10, Suite 900, Office of Air, Waste and Toxics, 1200 Sixth Avenue, Seattle, WA 98101.
- *Hand Delivery:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Keith Rose, Office of Air, Waste and Toxics, AWT–107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2012–0344. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA, without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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 form. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101. EPA requests that if at all possible, you contact the individual listed below to view a hard copy of the docket.

FOR FURTHER INFORMATION CONTACT: Keith Rose at telephone number (206) 553–1949, *rose.keith@epa.gov*, or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean the EPA. Information is organized as follows:

Table of Contents

I. Background for EPA's Proposed Action

In the CAA Amendments of 1977, Congress established a program to protect and improve visibility in the national parks and wilderness areas. See CAA section 169A. Congress amended the visibility provisions in the CAA in 1990 to focus attention on the problem of regional haze. See CAA section 169B. EPA promulgated regulations in 1999 to implement sections 169A and 169B of the Act. These regulations require states to develop and implement plans to ensure reasonable progress toward improving visibility in mandatory Class I Federal areas [1] (Class I areas). 64 FR 35714 (July 1, 1999); see also 70 FR 39104 (July 6, 2005) and 71 FR 60612 (October 13, 2006).

On behalf of the State of Oregon, the Oregon Department of Environmental Quality (ODEQ) submitted its Regional Haze State Implementation Plan (Regional Haze SIP submission or SIP submittal) to EPA on December 10, 2010 and supplemented on February 1, 2011. In a previous action EPA approved certain provisions in Oregon's Regional Haze SIP submission. 76 FR 38997. This previous action approved the provisions BART (40 CFR 51.308(e), calculation of baseline and natural conditions (40 CFR 51.308(d)(2)), and state wide emission inventory of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any mandatory Class I area. EPA also approved Oregon Administrative Rules OAR 340–223–0010 through 340–223–0080 (Regional Haze Rules). In that same action, EPA also approved portions of the SIP submittal as meeting the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to the visibility prong for the 1997 8-hour ozone and 1997 $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS).

In this action, EPA is proposing to approve the remaining provisions of Oregon's Regional Haze SIP submission including the portions that address the regional haze requirements for establishing Reasonable Progress Goals (RPGs) and the Long Term Strategy (LTS).

A. Definition of Regional Haze

Regional haze is impairment of visual range or colorization caused by emission of air pollution produced by numerous sources and activities, located across a broad regional area. The sources include but are not limited to, major and minor stationary sources, mobile sources, and area sources including non-anthropogenic sources. These sources and activities may emit fine particles ($PM_{2.5}$) (e.g., sulfates, nitrates, organic carbon, elemental carbon, and soil dust), and their precursors (e.g., sulfur dioxide (SO_2), nitrogen oxides (NO_X), and in some cases, ammonia (NH_3) and volatile organic compounds (VOC)). Atmospheric fine particulate reduces clarity, color, and visual range of visual scenes. Visibility reducing fine particulate is primarily composed of sulfate, nitrate, organic carbon compounds, elemental carbon, and soil dust, and impairs visibility by scattering and absorbing light. Fine particulate can also cause serious health effects and mortality in humans, and contributes to environmental effects such as acid deposition and eutrophication. See 64 FR at 35715.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national parks and wilderness areas. The average visual range in many Class I areas in the Western United States is 100–150 kilometers, or about one-half to two-thirds the visual range that would exist without manmade air pollution. Id. Visibility impairment also varies day-to-day and by season depending on variation in meteorology and emission rates.

B. Regional Haze Rules and Regulations

In section 169A of the 1977 CAA Amendments, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in Class I areas which impairment results from manmade air pollution.'' CAA section 169A(a)(1). On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources, i.e., ''reasonably attributable visibility impairment'' (RAVI). 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35713) (the regional haze rule or RHR). The RHR revised the existing visibility regulations to integrate into the regulation, provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III of this rulemaking. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands.[2] 40 CFR 51.308(b) requires states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

C. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments and various Federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to effectively address the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account

[1] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[2] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to regional haze impairment can originate from across state lines, even across international boundaries, EPA has encouraged the States and Tribes to address visibility impairment from a regional perspective. Five regional planning organizations [3] (RPOs) were created nationally to address regional haze and related issues. One of the main objectives of the RPOs is to develop and analyze data and conduct pollutant transport modeling to assist the States or Tribes in developing their regional haze plans.

The Western Regional Air Partnership (WRAP),[4] one of the five RPOs nationally, is a voluntary partnership of State, Tribal, Federal, and local air agencies dealing with air quality in the West. WRAP member States include: Alaska, Arizona, California, Colorado, Oregon, Montana, New Mexico, North Dakota, Idaho, South Dakota, Utah, Washington, and Wyoming. WRAP Tribal members include Campo Band of Kumeyaay Indians, Confederated Salish and Kootenai Tribes, Cortina Indian Rancheria, Hopi Tribe, Hualapai Nation of the Grand Canyon, Native Village of Shungnak, Nez Perce Tribe, Northern Cheyenne Tribe, Pueblo of Acoma, Pueblo of San Felipe, and Shoshone-Bannock Tribes of Fort Hall.

As a result of the regional planning efforts in the West, all states in the WRAP region contributed information to a Technical Support System (TSS) which provides an analysis of the causes of haze, and the levels of contribution from all sources within each state to the visibility degradation of each Class I area. The WRAP States consulted in the development of reasonable progress goals, using the products of this technical consultation process to co-develop their reasonable progress goals for the Western Class I areas. The modeling done by the WRAP relied on assumptions regarding emissions over the relevant planning period and embedded in these assumptions were anticipated emissions reductions in each of the States in the WRAP, including reductions from BART and other measures to be adopted as part of the State's long term strategy for addressing regional haze. The reasonable progress goals in the draft and final regional haze SIPs that have now been prepared by States in the West accordingly are based, in part, on the emissions reductions from nearby States that were agreed on through the WRAP process.

II. Requirements for Regional Haze SIPs

A. The CAA and the Regional Haze Rule

Regional haze SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment. The specific regional haze SIP requirements are discussed in further detail below.

B. Determination of Baseline, Natural, and Current Visibility Conditions

The RHR establishes the deciview (dv) as the principal metric for measuring visibility. This visibility metric expresses uniform changes in haziness in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility is determined by measuring the visual range (or deciview), which is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky. The deciview is a useful measure for tracking progress in improving visibility, because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.[5]

The deciview is used in expressing reasonable progress goals (which are interim visibility goals towards meeting the national visibility goal), defining baseline, current, and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure ''reasonable progress'' toward the national goal of preventing and remedying visibility impairment in Class I areas caused by manmade air pollution by reducing anthropogenic emissions that cause regional haze. The national goal is a return to natural conditions, i.e., manmade sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437), and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP submittal and periodically review progress every five years midway through each 10-year implementation period. To do this, the RHR requires states to determine the degree of impairment (in deciviews) for the average of the 20% least impaired (''best'') and 20% most impaired (''worst'') visibility days over a specified time period at each of their Class I areas. In addition, states must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. EPA has provided guidance to states regarding how to calculate baseline, natural and current visibility conditions in documents titled, EPA's *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, (EPA–454/B–03–005 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf*), (hereinafter referred to as ''EPA's 2003 Natural Visibility Guidance''), and *Guidance for Tracking Progress Under the Regional Haze Rule* (EPA–454/B–03–004 September 2003 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf*), (hereinafter referred to as ''EPA's 2003 Tracking Progress Guidance'').

For the first regional haze SIPs that were due by December 17, 2007, ''baseline visibility conditions'' were the starting points for assessing ''current'' visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20% least impaired days and 20% most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current

[3] See *http://www.epa.gov/air/visibility/regional.html* for description of the regional planning organizations.

[4] The WRAP Web site can be found at *http://www.wrapair.org.*

[5] The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725 (July 1, 1999).

conditions will indicate the amount of progress made. In general, the 2000–2004 baseline time period is considered the time from which improvement in visibility is measured.

C. Consultation With States and Federal Land Managers

The RHR requires that states consult with Federal Land Managers (FLMs) before adopting and submitting their SIPs. 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of visibility impairment in any Class I area and to offer recommendations on the development of the reasonable progress goals and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

D. Best Available Retrofit Technology

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires States to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources [6] built between 1962 and 1977, to procure, install, and operate the ''Best Available Retrofit Technology'' (BART) as determined by the state. States are directed to conduct BART determinations for such sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. The regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. Once a State has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date EPA approves the regional haze SIP. See CAA section 169A(g)(4); 40 CFR 51.308(e)(1)(iv).

EPA previously approved Oregon's BART determination for the sources subject to BART in its jurisdiction. See 76 FR 38997. Please refer to that action for details of the BART requirements and EPA's rationale for approval of the BART provisions in the Oregon Regional Haze SIP submission.

E. Determination of Reasonable Progress Goals

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two reasonable progress goals (RPGs) (i.e., two distinct goals, one for the ''best'' and one for the ''worst'' days) for every Class I area for each (approximately) 10-year implementation period. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for ''reasonable progress'' toward achieving natural (i.e., ''background'') visibility conditions. In setting RPGs, states must provide for an improvement in visibility for the most impaired days over the (approximately) 10-year period of the SIP, and ensure no degradation in visibility for the least impaired days over the same period.

States have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in EPA's RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in EPA's *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* July 1, 2007, Memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp.4–2, 5–1) (''EPA's Reasonable Progress Guidance''). In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (referred to as the ''uniform rate of progress'' (URP) or the ''glidepath'') and the emission reduction measures needed to achieve that rate of progress over the 10-year period of the SIP. Uniform progress towards achievement of natural conditions by the year 2064 represents a rate of progress which states are to use for analytical comparison to the amount of progress they expect to achieve. In setting RPGs, each state with one or more Class I areas (''Class I state'') must also consult with potentially ''contributing states,'' i.e., other nearby states with emission sources that may be affecting visibility impairment at the state's Class I areas. See 40 CFR 51.308(d)(1)(iv).

F. Long Term Strategy

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15 year strategy for making reasonable progress, 40 CFR 51.308(d)(3) of the RHR requires that states include an LTS in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include ''enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals'' for all Class I areas within, or affected by emissions from, the state. See 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. See 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included, in its SIP, all measures necessary to obtain its share of the emissions reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to sufficiently address interstate visibility issues. This is especially true where two states belong to different RPOs.

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS: (1) Emissions reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures

[6] The set of ''major stationary sources'' potentially subject to BART is listed in CAA section 169A(g)(7).

to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. See 40 CFR 51.308(d)(3)(v).

G. Coordinating Regional Haze and Reasonably Attributable Visibility Impairment

As part of the RHR, EPA revised 40 CFR 51.306(c) regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing regional haze visibility impairment, which was due December 17, 2007, in accordance with 40 CFR 51.308(b) and (c). On or before this date, the state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and regional haze, and the state must submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTS's, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submissions and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state's LTS must report on both regional haze and RAVI impairment and must be submitted to EPA as a SIP revision.

H. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(d)(4) of the RHR includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the state. The strategy must be coordinated with the monitoring strategy required in section 51.305 for RAVI. Compliance with this requirement may be met through ''participation'' in the IMPROVE network, i.e., review and use of monitoring data from the network. The monitoring strategy is due with the first regional haze SIP, and it must be reviewed every five years. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible, in electronic format;
- Developing a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements, including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject to BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met. Each state also is required to submit a report to EPA every five years that evaluates progress toward achieving the RPG for each Class I area within the state and outside the state if affected by emissions from within the state. 40 CFR 51.308(g). The first progress report is due five years from submittal of the initial regional haze SIP revision. At the same time a 5-year progress report is submitted, a state must determine the adequacy of its existing SIP to achieve the established goals for visibility improvement. See 40 CFR 51.308(h).

III. EPA's Analysis of Oregon Regional Haze SIP

A. Affected Class I Areas

There are twelve mandatory Class I areas, or portions of such areas, within Oregon: Mt. Hood Wilderness, Mt. Jefferson Wilderness, Mt. Washington Wilderness, Three Sisters Wilderness, Diamond Peak Wilderness, Crater Lake National Park, Mountain Lakes Wilderness, Gearhart Mountain Wilderness, Kalmiopsis Wilderness, Strawberry Mountain Wilderness, and Eagle Cap Wilderness, are all within Oregon State borders. Hells Canyon Wilderness Area is a shared Class I area with Idaho. See 40 CFR 81.410. Oregon is responsible for developing reasonable progress goals for the Class I areas in Oregon and, through agreement with Idaho, is also responsible for developing the reasonable progress goals for the Hells Canyon Class I area. Oregon reviewed interstate transport of haze pollutants with neighboring states, focusing on source apportionment information to identify visibility impacts in Oregon and neighboring state Class I areas. Oregon consulted with Washington, Idaho, California and Nevada. See the Oregon Regional Haze SIP submittal, chapter 13, section 13.2; see, also the WRAP Technical Support Document, February 28, 2011 [7] (WRAP TSD) supporting this action and 76 FR 38997.

The Oregon SIP submittal addresses the eleven Class I areas that are completely within the State border, the Class I area with shared jurisdiction with Oregon and Idaho, and the visibility impacts of Oregon sources on Class I areas in neighboring states.

B. Baseline and Natural Conditions

EPA previously evaluated and approved Oregon's determination of baseline and natural conditions for all eleven Class I areas in Oregon. See 76 FR 12651 (March 8, 2011) and 76 FR 38997 (July 5, 2011) (proposed and final rule respectively). The discussion of baseline and natural conditions in those **Federal Register** notices is relevant when evaluating the State's Reasonable Progress Goals which we are proposing to approve today. Thus, the discussion below summarizes EPA's previous explanation of the baseline and natural conditions in Oregon's Class I areas.

Oregon established baseline and natural visibility conditions as well as the URP to achieve natural visibility

[7] EPA evaluated the technical work products of the WRAP used by Oregon in support of this Regional Haze SIP submittal. The results of that evaluation are included in the document ''WRAP Technical Support Document'' or WRAP TSD.

conditions in 2064 for all eleven of the Class I areas wholly within its borders. The SIP submittal also included these conditions for Hells Canyon Wilderness Area, as determined by WRAP and established by Oregon and Idaho.

Baseline visibility was calculated from monitoring data collected by IMPROVE monitors for the most-impaired (20% worst) days and the least-impaired (20% best) days. Oregon used the WRAP derived natural visibility conditions. In general, WRAP based their natural condition estimates on EPA guidance; *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Program (EPA–45/B–03–0005 September 2003)* but incorporated refinements which EPA believes provides results more appropriate for western states than the general EPA default approach. See WRAP TSD section 2.E.

Because individual monitors are used to represent visibility conditions for groups of Class I areas in Oregon, not every Class I area in Oregon has an IMPROVE monitor. Specifically, the Oregon Class I areas are segregated into six groups. These groups, and Class I areas they contain, are:

- North Cascades: Mt. Hood Wilderness Area.
- Central Cascades: Mt. Jefferson, Mt. Washington, and Three Sisters Wilderness Areas.
- Southern Cascades: Crater Lake National Park, Diamond Peak, Mountain Lakes, and Gearhart Wilderness Areas.
- Coast Range: Kalmiopsis Wilderness Area.
- Eastern Oregon: Strawberry Mountain and Eagle Cap Wilderness Areas.
- Eastern Oregon/Western Idaho: Hells Canyon Wilderness Area.

Visibility conditions on the 20% worst days during the 2000–04 baseline period for each group of Class I areas were determined to be:

- North Cascades—14.9 dv.
- Central Cascades—15.3 dv.
- Southern Cascades—13.7 dv.
- Coast Range—15.5 dv.
- Eastern Oregon—18.6 dv.
- Eastern Oregon/Western Idaho—18.6 dv.

Visibility conditions on the 20% best days during the 2000–04 baseline period for each group of Class I areas were determined to be:

- North Cascades—2.2 dv.
- Central Cascades—3.0 dv.
- Southern Cascades—1.7 dv.
- Coast Range—6.3 dv.
- Eastern Oregon—4.5 dv.
- Eastern Oregon/Western Idaho—5.5 dv.

Natural visibility conditions on the 20% worst days for each group of Class I areas were determined to be:

- Northern Cascades—8.4 dv.
- Central Cascades—8.8 dv.
- Southern Cascades—7.6 dv.
- Coast Range—9.4 dv.
- Eastern Oregon—8.9 dv.
- Eastern Oregon/Western Idaho—8.3 dv.

C. Oregon Emission Inventory

EPA previously evaluated and approved Oregon's emissions inventory of pollutants that impact the twelve Class I areas in Oregon, as well as the impacts of emissions from Oregon BART-eligible sources on nearby Class I in other states. See 76 FR 12651 and 76 FR 38997. Below is a summary of emission inventories of the most significant visibility impairing pollutants in Oregon, which are SO_2, NO_X, and organic carbon. These pollutants, and their visibility impacts, were explained in more detail in the notices for the previous rulemaking.

Point sources in Oregon account for 39% of total state-wide SO_2 emissions. The most significant point sources are coal-fired electrical generation units. Area sources (such as Pacific offshore shipping, wood combustion, and natural gas combustion) contribute about 21% to Oregon statewide SO_2 emissions. On-road mobile and off-road mobile sources contribute a combined total of 21% of the Oregon SO_2 emissions. On-road mobile sources account for 43% of the total NO_X statewide emissions in Oregon, and off-road mobile sources account for 21% of the NO_X. Natural fire accounts for 11% of the NO_X, and point sources account for 10% of the NO_X emissions. Most of the organic carbon emissions in Oregon are from natural fire, which fluctuate greatly from year to year. For 2002, about 68% of statewide organic carbon emissions in Oregon were due to natural fire. Anthropogenic fire (prescribed fire, agricultural field burning, and outdoor residential burning) accounts for 9% of the statewide organic carbon emissions.

D. Sources of Visibility Impairment in Oregon Class I Areas

Oregon used a two step process to identify the contribution of each source or source category to existing visibility impairment. First, ambient pollutant concentrations by species (sulfate, nitrate, organic carbon, fine particulate, etc) were determined from the IMPROVE sampler representing each Class I area. These concentrations were then used to determine the extinction coefficient for each pollutant species according to the updated IMPROVE algorithm. Extinction was then converted to deciview values, the required visibility metric identified in the RHR. Second, appropriate modeling tools were used to determine which source categories contributed to the ambient concentrations of each pollutant species in each Class I area. Thus, impairment was distributed by source category.

The WRAP and Western States selected the Comprehensive Air Quality Model with Extensions (CAMx) in conjunction with PM Source Apportionment Technology (PSAT) first to determine source contribution to ambient sulfate and nitrate concentrations and then to decide which geographic source regions contribute to haze at specific Class I areas. The second modeling tool used by WRAP was the Weighted Emissions Potential (WEP) model, which was used primarily as a screening tool to determine the contribution of ambient organic carbon, elemental carbon, $PM_{2.5}$, and coarse PM concentrations to visibility impairment in Oregon Class I areas. Description of these tools, their use and evaluation of them are described in more detail in section 6 of the WRAP TSD. Below is a summary of the source categories that contribute to the SO_2, NO_X, and organic carbon, which cause the most significant visibility impairment in Class I areas in Oregon.

The results of the PSAT and WEP modeling show that sources of visibility impairment in the Oregon Class I area vary significantly by location. The PSAT results show that the 20% worst days during 2000–2004 in the North and Central Cascades Class I areas are mostly impacted by sulfate from a combination of SO_2 point, area, and mobile sources in Washington and Oregon, and marine shipping in the Pacific offshore region. Most of the sulfate impacting the Southern Cascade Class I areas is from point sources in Oregon, Washington, California, and Canada. Pacific offshore shipping is also a substantial contributor of sulfate to this area. The most significant sources of sulfate to the only coastal Oregon Class I area (Kalmiopsis Wilderness Area) are natural fires in Oregon, and marine shipping in the Pacific Ocean. For the 20% worst days in Eastern Oregon Class I areas, the contribution of sulfates from each geographical area is relatively low, with the largest contribution being from point sources from Canada, Washington, and Oregon. See Oregon Regional Haze SIP submittal Figures 9.2.1–1 through Figures 9.2.1–6.

The PSAT results for nitrate show that a majority of the nitrate impacting the

North and Central Cascades Class I areas is from mobile sources in Oregon and Washington. For the 20% worst days in Southern Cascades, the most significant sources of nitrate are mobile sources in California, Oregon and Washington. A majority of the nitrate impacting the Kalmiopsis Wilderness Area is from mobile sources in Oregon and from marine shipping in the Pacific Ocean. The visibility on the 20% worst days in the Eastern Oregon Class I areas is significantly impacted by a combination of point, area, and mobile NO_X sources in Idaho, Oregon and Washington. See Oregon Regional Haze SIP submittal Figures 9.2.2–1 through Figures 9.2.2–6.

Based on the WEP model results, the organic carbon in the North Cascades area on the 20% worst visibility days comes mostly from area sources and natural fires in Oregon, with a small contribution from areas sources in Washington. For the 20% worst visibility days in the Central Cascades areas, most of the organic carbon comes from a combination of area source emissions and natural and anthropogenic fire in Oregon. For the 20% worst visibility days in the Southern Cascades area, approximately 90% of the organic carbon contribution came from natural fires in 2002. For the 20% worst visibility days in the Kalmiopsis Wilderness area, almost all of the organic carbon for the 2002 base year came from natural fire. For the 20% worst visibility days in the Eastern Oregon Class I areas, most of the organic carbon contribution came from a combination of natural fires and anthropogenic fires in Idaho and Oregon.

In its previous final rulemaking EPA found that Oregon had appropriately identified the primary pollutants impacting its Class I areas, and that the SIP contains an appropriate analysis of the impact these pollutants have on visibility in the Class I areas in Oregon. See 76 FR 38997.

E. Best Available Retrofit Technology

EPA previously reviewed and approved Oregon's BART determinations for all sources subject to BART in Oregon. See 76 FR 38997. As explained in the **Federal Register** notice approving the State's determinations, BART was determined for one source, the PGE Boardman Electric Generating Unit (EGU), and Federally Enforceable Permit Limits (FEPLs) were established for four BART-eligible sources to reduce visibility impacts at any Class I area below the 0.5 dv subject to BART-subject threshold. These four sources are:

- PGE Beaver EGU
- Georgia Pacific Wauna Mill
- International Paper, Springfield
- Amalgamated Sugar Plant, Nyssa

In summary, the emission limits established through FEPLs for the above four sources were achieved through the following methods.

1. PGE Beaver EGU: To achieve the emission limits established in the Title V permit, the facility is using ultra-low sulfur diesel fuel (with no more than 0.0015% sulfur) in its oil-fired BART eligible units. The source must also use only ''pipe line quality'' natural gas in the gas-fueled PWEU1 unit.

2. Georgia Pacific Wauna Mill: To achieve the emission limits established in the Title V permit, the mill has reduced its SO_2 emissions by (1) permanently reducing use of fuel oil in the Power Boiler, (2) discontinuing the use of fuel oil in the Lime Kiln until the Non-Condensable Gas Incinerator (NCGI) unit is shut down, and (3) limiting pulp production rate to 1,030 tons per day until the NCGI unit is shut down, at which time production rate will be limited to 1,350 tons per day.

3. International Paper, Springfield: To achieve the emission limits established in its Title V permit, the plant has reduced its emissions of SO_2, NO_X, and PM by accepting limits on fuel usage and operation, and meeting a combined SO_2 and NO_X daily emission limit based on a plant fuel use specific formula. The permit requires this facility to include the package boiler (EU–150B) emissions when demonstrating compliance with condition 210 of the permit until the source submits a notice of completion of No. 4 recovery boiler mud and steam drum replacement.

4. Amalgamated Sugar Plant, Nyssa: This plant is currently shutdown and has no identified date to resume operations. In the event this source resumes operation in the future, ODEQ will require that this facility be subject to a FEPL in its Title V permit, or conduct a BART analysis and install BART prior to resuming operation.

The PGE EGU near Boardman, Oregon is a coal-fired power plant capable of producing about 617 MW of electricity constructed between 1962 and 1977, and based on 2005 actual emissions data, emitted about 12,000 tons of SO_2, 8,300 tons of NO_X, and 880 tons of particulate matter (PM) that year. ODEQ determined BART for this source to be 0.23 lbs/mmBtu for NO_X based on a new low-NO_X burner/modified overfire air system, 0.40 lbs/mmBtu for SO_2 based on initial operational efficiency of a new Direct Sorbent Injection System, and 0.40 lb/mmBtu for PM, based on the current PM emission limit for the existing electrostatic precipitation system. The BART rule for this facility requires that the Foster Wheeler boiler at the facility permanently cease burning coal by no later than December 31, 2020. OAR 340–223–0030(1)(e).

F. Reasonable Progress Goals

1. Determination of Reasonable Progress Goals

The RHR requires States to show ''reasonable progress'' toward natural visibility conditions over the time period of the SIP, with 2018 as the first milestone year. The RHR at 40 CFR 51.308(d)(1) also requires that the State establish a goal, expressed in deciviews (dv), for each Class I area within the State that provides for reasonable progress towards achieving natural visibility conditions by 2064. As such the State must establish an RPG for each Class I area that provides for visibility improvement for the most-impaired (20% worst) days and ensures no degradation in visibility for the least-impaired (20% best) days in 2018.

RPGs are estimates of the progress to be achieved by 2018 through implementation of the LTS which includes anticipated emission reductions from all State and Federal regulatory requirements implemented between the baseline and 2018, including, but not limited to, BART and any additional controls for non-BART sources or emission activities including any Federal requirements that reduce visibility impairing pollutants. As explained above, the rate needed to achieve natural conditions by 2064 is referred to as the uniform rate of progress or URP.

If the State establishes a reasonable progress goal that provides for a slower rate of improvement than the rate that would be needed to attain natural conditions by 2064, the State must demonstrate based on the factors in 51.308(d)(1)(i)(A), that the rate of progress for the implementation plan to attain natural conditions by 2064 is not reasonable; and the progress goal adopted by the State is reasonable. The State must provide an assessment of the number of years it would take to attain natural conditions if visibility continues at the rate of progress selected by the State. 40 CFR 51.308(d)(B)(ii).

The primary tool relied upon by Oregon for determining regional haze improvements by 2018 and for establishing the RPGs, was the CMAQ modeling conducted by WRAP. The CMAQ model was used to estimate 2018 visibility conditions in Oregon, based on application of the regional haze strategies included in this plan. WRAP developed CMAQ modeling inputs,

including annual meteorology and emissions inventories for: (1) A 2002 actual emissions base case, (2) a planning case to represent the 2000–04 regional haze baseline period using averages for key emissions categories, and (3) a projected 2018 case to determine improvements achievable by 2018. EPA approves the use of the CMAQ model to determine future visibility conditions in Oregon Class I areas. A more detailed description of the CMAQ modeling performed by WRAP can be found in the WRAP TSD for this action.

To determine the 2018 RPGs for its Class I areas, ODEQ followed the eleven steps described below:

1. Compare baseline conditions to natural conditions. For each Class I area, ODEQ identified baseline (2000–2004) visibility and natural conditions in 2064, for the 20% worst and best days.

2. Identify the Uniform Rate of Progress for achieving natural conditions on the 20% worst days. For each Class I area, ODEQ calculated the URP glide path from baseline to 2064, including the 2018 planning milestone, for the 20% worst days.

3. Identify contributing pollutant species. For each Class I area, ODEQ identified the pollutant species that are contributing to visibility impairment on during the 2000–2004 baseline 20% worst and 20% best days.

4. Identify major emission sources within the State. Using the WRAP Emission Inventory for 2002 and 2018, ODEQ identified statewide emissions by source category and pollutant, and identified projected emission trends from current (2002) to the 2018 planning milestone.

5. Identify the larger emission sources contributing to visibility impairment. For each Class I area, ODEQ identified the relative contribution of anthropogenic and non-anthropogenic sources in Oregon and neighboring states to the 20% worst and best days, using monitoring data, and source apportionment and modeling results.

6. Document the emission reductions from BART. ODEQ described the results of the BART process, and identified the emission reductions that will be achieved from BART and from FEPLs taken by sources so that they are no longer subject to BART.

7. Identify projected visibility change in 2018 from ''on-the-books'' controls and BART. For each Class I area, ODEQ determined the visibility improvement expected in 2018 from on-the-books controls and BART, using the WRAP CMAQ modeling results, for the 20% worst and best days.

8. Identify sources or source categories that are major contributors and apply the four- factor analysis. As a result of the analysis under step 5 above, for each Class I area, ODEQ determined key pollutant species and source categories that could have the greatest impact on visibility in Oregon Class I areas, and analyzed these sources using the four-factor analysis.

9. Describe the results of the four-factor analysis. ODEQ conducted a four-factor analysis on the major Oregon source emission categories using the following factors: Cost of compliance, time necessary for compliance, energy and non-air quality environmental impacts of compliance, and remaining useful life of any potentially affected sources.

10. Set the RPGs based on the above steps. ODEQ set the RPGs for each Class I area in deciviews, based on expected improvements by 2018 for the 20% worst and 20% best days, due to on-the-books controls, BART, and the results of the four-factor analysis on major source categories.

11. Compare RPG to the 2018 URP milestone and provide an affirmative demonstration that reasonable progress is being made. For each Class I area, ODEQ compared the RPG developed in step 10 to the 2018 URP milestone and provided an affirmative demonstration that reasonable progress is being made.

After considering each of the factors described above, Oregon established RPGs for each of its mandatory Class I areas. The visibility projections were based on estimates of emissions reductions from all existing and known controls resulting from Federal and state CAA programs as of December 2010. Oregon's RPGs for its 12 Class I areas are shown in Table 1 below.

TABLE 1—2018 RPGS FOR CLASS I AREAS IN OREGON

Region	Oregon class I area	20% Worst days			Years from baseline to attain natural conditions at reasonable progress	20% Best days	
		Baseline condition (dv)	2018 Uniform rate of progress (dv)	2018 Reasonable progress goal (dv)		Baseline condition (dv)	2018 reasonable progress goal (dv)
Northern Cascades	Mt. Hood Wilderness Area	14.9	13.4	13.8	87	2.2	2.0
Central Cascades	Mt. Jefferson, Mt. Washington, and Three Sisters Wilderness Areas.	15.3	13.8	14.3	93	3.0	2.9
Southern Cascades	Diamond Peak, Mountain Lakes, and Gearhart Mountain Wilderness Areas and Crater Lake National Park.	13.7	12.3	13.4	287	1.8	1.5
Coast Range	Kalmiopsis Wilderness Area	15.5	14.1	15.1	216	6.3	6.1
Eastern Oregon	Strawberry Mountain and Eagle Cap Wilderness Areas.	18.6	16.3	17.5	125	4.5	4.1
Eastern Oregon/ Western Idaho.	Hells Canyon Wilderness Area	18.6	16.2	16.6	74	5.5	4.7

SIP submission Table 11.4.2–2 as supplemented by May 7, 2012 letter from ODEQ.

2. Demonstration of Reasonable Progress

Oregon recognized that based on the results of the CMAQ modeling, none of the Class I areas in Oregon are expected to achieve the URP for 2018. Nevertheless, Oregon concludes that the goals it established for each of the Class I areas for the first planning cycle are reasonable, and no additional controls are reasonable at this time. Oregon believes that these RPGs are justified and ''reasonable'' based on the following considerations: (1) Findings of the four-factor analysis which evaluated controls on major source categories that impact visibility in Class I areas in Oregon, (2) substantial future emission reductions from the PGE Boardman EGU, initially due to BART emission limits in place by 2014, and then further reductions in emissions from this facility when it ceases to burn coal by the end of 2020, (3) evidence that emissions from natural sources (primarily wildfires) significantly impact visibility in the Class I areas and adversely affect Oregon's ability to reach the 2018 URP goal, (4) evidence that offshore marine shipping emissions

significantly impact visibility in the Class I areas and adversely affect Oregon's ability to meet the 2018 URP goal in these Class I areas, and (5) ODEQ's demonstration that it will achieve significant reductions of SO_2 and NO_X emissions from anthropogenic sources in Oregon, primarily due to major reductions in mobile source emissions of SO_2 and NO_X by 2018. See Oregon Regional Haze SIP submission section 11.4.1 for additional detail.

These five factors, and how they were considered, are summarized in the following paragraphs.

Findings of the Four-Factor Analysis: ODEQ based its analysis on the WRAP four-factor analysis for Oregon, and focused on the largest anthropogenic point and areas sources that have the greatest projected amounts of SO_X and NO_X emissions in each source category in 2018. Based on the emissions inventory, ODEQ identified the following source categories as being the largest SO_X and NO_X emitters: External Combustion Boilers; Stationary Source Fuel Combustion; Industrial Processes; Internal Combustion Engines; Agricultural Orchard Heaters; and Waste Disposal, Treatment, and Recovery. The annual SO_2 and NO_X emissions from each of these categories are shown in Table 2.

TABLE 2—OREGON'S LARGEST SOURCE CATEGORIES

Pollutant	Type	Source category	Extent of contribution
SO_2	Point	External Combustion Boilers	858 tons/year.
	Point	Industrial Processes	377 tons/year.
	Area	Stationary Source Fuel Combustion	5,699 tons/year.
	Area	Misc. (Agriculture Orchard Heaters)	2,243 tons/year.
NO_X	Point	External Combustion Boilers	4,995 tons/year.
	Point	Industrial Processes	3,639 tons/year.
	Point	Internal Combustion Engines	3,688 tons/year.
	Area	Stationary Source Fuel Combustion	13,454 tons/year.
	Area	Waste Disposal, Treatment, and Recovery	2,881 tons/year.

ODEQ's four-factor analysis for each source category is summarized below:

a. External Boilers: This source category consists of point sources with emissions totaling 858 tons per year (tpy) of SO_2 and 4,995 of NO_X. Technically feasible NO_X emission control technologies for external boilers included Overfire Air, Selective Non-Catalytic Reduction and Selective Catalytic Reduction. See section 11.3.3.1 of the SIP submittal for additional detail regarding the State's analysis of this source category.

b. Industrial Processes: This source category consists of SO_2 and NO_X point sources, with emissions totaling 377 tpy of SO_2 and 3,639 tpy of NO_X In this category, ODEQ focused on cement manufacturing, which is the only sizable subcategory in this category, with about 57% of the NO_X in the Industrial Processes category. See section 11.3.3.1, Industrial Processes table and section 11.3.3.3 of the SIP submittal for additional detail regarding the State's analysis of this source category.

c. Stationary Source Fuel Combustion: This source category consists of area sources, with emissions totaling 5,699 tpy of SO_2 and 13,354 tpy of NO_X The largest subcategory in this category is residential wood and natural gas combustion (6,642 tpy of NO_X, combined). These represent the woodstoves and home heating devices found throughout Oregon. ODEQ's residential wood heating rules in OAR 340, Division 262, require that only certified woodstoves can be sold in the state. As a result of these current federally enforceable state requirements and programs for residential wood heating, ODEQ did not conduct a four-factor analysis for this subcategory. ODEQ also found that the low emissions generated by natural gas home heating devices did not warrant further analysis. The remaining sizeable subcategories were industrial and commercial/institutional combustion, involving mostly natural gas and distillate oil. ODEQ believes that emissions from these subcategories come from smaller generators and engines. The control options available for stationary sources burning natural gas are very limited, since this fuel already produces very low emissions, and there are no cost-effective post-combustion controls for this category of sources. As a result of its review of this source category, ODEQ did not believe a detailed four-factor analysis was appropriate, and that such a review would not identify any cost effective controls. See section 11.3.3.2 of the SIP submittal for additional detail regarding the State's analysis of this source category.

d. Waste Disposal, Treatment, and Recovery: This source category consists of NO_X area sources with emissions totaling 2,881 tpy. ODEQ found that the largest source within this category is residential open burning, which like agricultural and forestry burning is not suitable for applying the four-factor analysis because there are no feasible emission control technologies for these types of sources. However, as discussed below, ODEQ intends to conduct an evaluation of residential open burning to determine the extent of the contribution to visibility impairment, and the need for emission reductions, as part of the LTS of this plan (See chapter 12, section 12.6.3 of the SIP submittal).

e. Agricultural Orchard Heaters: This source category consists of SO_2 area sources with emissions totaling 2,243 tpy. ODEQ found that a four-factor analysis was not appropriate for this category of sources for the following reasons: (1) ODEQ's confidence in the emissions estimates from orchard heaters is very low, (2) these heaters are used only intermittently, to prevent frost damage for selected crops in diverse regions of the state, and the probability that the intermittent use and spatial distribution of this source is a sizeable contributor to Class I area impairment is extremely low, and (3) few cost effective control options are available for this type of source. See section 11.3.3.5 of the SIP submittal for additional detail regarding the State's analysis of this source category.

f. Internal Combustion Engines: This source category consists of NO_X point sources with emissions totaling 3,688 tpy. This source category consists of two types of engines: (1) Natural gas fired reciprocating internal combustion engines, and (2) natural gas fired turbines that are compressors, combustors, or power turbines. Emissions from internal combustion engines vary from engine to engine, model to model, and mode of operation. ODEQ found that there was no currently available information on this source

category that would allow a four-factor analysis. Given the relatively low emissions represented by this source category, and the unknown level of contribution to visibility impairment, ODEQ decided not to conduct any further analysis on this source category. See section 11.3.3.6 of the SIP submittal for additional detail regarding the State's analysis of this source category.

As the purpose of the reasonable progress analysis is to evaluate the potential of controlling certain sources or source categories to address visibility from manmade sources, the four-factor analysis conducted by Oregon addressed only anthropogenic sources on the assumption that the focus should be on sources that could be controlled. Thus, in its evaluation of potential sources or source categories for reasonable progress, the state primarily evaluated controls on point sources. Oregon determined that the key pollutants contributing to visibility impairment from sources in Oregon are SO_2, NO_X, and organic carbon. The State determined that the major source of organic carbon was natural fire, and after reviewing the WRAP modeling results, Oregon found that PM emissions from point sources only contribute a minimal amount to the visibility impairment in the Oregon Class I areas. Therefore, for this initial planning period, Oregon focused on SO_2 and NO_X controls for point source emissions. Based on its evaluation, Oregon concluded that little gain would be achieved from further reduction in SO_2 and NO_X from point sources in Oregon, and therefore concluded it is not reasonable to require controls for these source categories at this time. See Chapter 11.3 of the Oregon SIP submittal.

Substantial emission reductions From the PGE Boardman EGU: ODEQ projects that there will be a total SO_2 and NO_X emission reduction of 9,944 tpy from the PGE Boardman facility when BART emission controls are fully implemented by July 2014. These reductions will result in an additional visibility improvement of 2.4 dv in the Mt. Hood Class I area, and an additional cumulative visibility improvement of 16.2 dv in all 14 Class I areas impacted by this source. By 2018, there will be an additional reduction of 2,400 tpy of SO_2 when the reasonable progress controls (Direct Sorbent Injection-phase 2) are implemented, resulting in an additional 2.3 dv of cumulative improvement. By the end of 2020, when Boardman permanently ceases to burn coal, there will be an additional combined SO_2 and NO_X reduction of 12,877 tpy, resulting in an additional 13.0 dv cumulative improvement in all 14 Class I areas. See appendix D–7 of the Oregon Regional Haze SIP submittal.

Significant contribution to visibility impairment from natural sources: The emission data in Chapter 8 of the SIP submittal demonstrate that there are major contributions of Organic Carbon (OC), Elemental Carbon (EC), $PM_{2.5}$, and coarse particulate matter (coarse PM) from wildfires and windblown dust to the total state inventory for these species. In 2002, OC from wildfires constituted 69% of the total state's OC emission inventory, and EC from wildfires constituted 61% of the state's EC emission inventory. Also in 2002, windblown dust constituted 26% of the Oregon's total $PM_{2.5}$ inventory, and constituted 61% of the coarse PM inventory. Based on CMAQ modeling results shown in Chapter 9 of the SIP submittal, OC and $PM_{2.5}$ from wildfires, and $PM_{2.5}$ and coarse PM from windblown dust, had significant to substantial impacts on visibility in Oregon Class I areas on the 20% worst days in 2002. The contribution of natural fires to visibility impairment from OC in Oregon Class I areas ranges from about 15% at the Mt. Hood Class I area to about 95% at the Kalmiopsis Class I area. Windblown dust and wildfires combined contribute from about 10% to 90% of the $PM_{2.5}$ measured ambient air concentrations in the Oregon Class I areas, and windblown dust and wildfires combined contribute from about 30% to 95% of the coarse PM measured in Oregon Class I areas. Since the emissions from these natural sources are uncontrollable, and are projected to remain at 2002 baseline levels through 2018, emissions from these sources will continue to have major visibility impacts on Oregon Class I areas, prevent visibility improvement from achieving the URP, and increase the percent contribution to visibility impairment from uncontrolled sources as concentrations of pollutants from controlled sources decrease.

Evidence that offshore marine shipping emissions affect ability to meet the 2018 URP goal: ODEQ found that marine vessel emissions (primarily SO_2 and NO_X) are a significant contributor to haze in Oregon Class I areas, and significantly affect Oregon's ability to meet its 2018 URP milestones. The PSAT and WEP results in the Oregon SIP submittal Chapter 9 show that offshore marine emissions are a significant contributor to visibility impairment in the Kalmiopsis Class I area and the seven Oregon Class I areas in the Cascade Mountains. Marine vessel emissions are included in the ''Pacific offshore'' portion of the pie charts shown in Figures 9.2.1–1 through 9.2.1–5 of the SIP submittal. According to the emission inventory in Chapter 8 of the Oregon SIP submittal, marine vessel emissions constitute 56% of the total SO_2 and 31% of the total NO_X inventory for the State of Oregon for 2002. As discussed further in the long term strategy portion of the submittal, Oregon has only limited ability to regulate offshore marine emissions and the Pacific offshore marine vessel emissions are currently beyond Oregon's regulatory authority.

ODEQ's determination that it will achieve significant reductions of SO_2 and NO_X emissions by 2018: Oregon explained that it will achieve significant reduction of SO_2 and NO_X emissions from anthropogenic sources in Oregon by 2018, primarily due to existing Federal rules that control SO_2 and NO_X emissions from mobile sources. See section 11.4.3 of the SIP submittal. Based on the WEP analyses of SO_2 and NO_X emissions in 2018, SO_2 emissions from sources upwind of the Class I areas in Oregon are projected to decrease by 33% to 46%, and upwind emissions of NO_X are projected to decrease by 28% to 48% on the 20% worst days compared to the 2002 baseline. These results are shown in Tables 11.4.2–2 and 11.4.2–3 of the SIP submittal. As a result of this reduction in SO_2 and NO_X emissions, the CMAQ regional visibility modeling results project a 4% to 18% improvement in visibility in Oregon Class I areas due to reductions in SO_2 emissions, and projects a 27% to 58% improvement in visibility in the Oregon Class I areas from reductions in NO_2 emissions. See section 11.4.2 of the SIP submittal.

3. EPA's Determination Whether the SIP Meets 40 CFR 51.308(d)(1)

In a previous action, EPA approved Oregon's determination of baseline and natural visibility conditions in each Class I area in Oregon. See 76 FR 38997. The linear progress from baseline visibility to natural visibility in 2064 defines the URP. The '2018 URP' is the rate of progress to be achieved by 2018 in order to stay on track to achieve natural conditions by 2064. In reviewing the Oregon SIP submittal, EPA independently evaluated whether there are reasonable control measures available for sources located within Oregon's regulatory jurisdiction that would achieve further progress toward achieving the 2018 URP.

We began this evaluation using a screening methodology called ''Q/d'' to determine which stationary (point) sources would be candidates for

controls under reasonable progress. The value Q/d is the ratio of the mathematical sum of actual SO_2, NO_X and PM emissions in tpy, denoted as ''Q'', divided by the distance (in kilometers, denoted as ''d'') of the point source to the nearest Class I area. A high Q/d would indicate the likelihood of the source causing or contributing to impairment in that Class I area.

To determine the Q/d value that would provide assurance that a source would, or would not, cause or contribute to impairment in any Class I area, we considered the modeled visibility impacts from the CALPUFF modeling used to determine the BART-eligible sources subject to BART in EPA Region 10 and the distance of the source to the nearest Class I area. There were 19 BART-eligible sources used in this analysis. See memorandum to the files from Keith Rose, EPA Region 10, dated March 21, 2012, for this analysis. All sources with a Q/d ratio of less than 26.1 had visibility impacts of less than 0.5 dv. The resultant average of the range is about 0.3 dv, which is more conservative than the 0.5 dv that was used in determining which sources would be subject-to-BART under the federal BART regulations. Since the threshold is more conservative than the subject-to-BART threshold, we believe that a Q/d value of 20 is reasonable for determining which point sources the State should consider for the reasonable progress analysis.

Next, EPA determined the Q/d ratio at all non-BART point sources in Oregon based on information in the EPA National Emission Inventory database for emissions for point sources in 2005. Based on the 2005 EPA National Emission Inventory Database, six of the largest non-BART point sources and their Q/d values are: Roseburg Forest Products (16.9 Q/d), Co-Gen Co. LLC (15.5 Q/d), Gas Transmission Northwest Corporation (14.0 Q/d), Weyerhaeuser Company, Albany (13.1 Q/d), Boise Cascade Corporation, La Grande (12.7 Q/d), and Boise Cascade Corporation, Elgin (11.5 Q/d). Since all of these sources have Q/d values below 20, EPA believes that their impacts on nearby Class I areas are expected to be less than 0.5 dv. Thus, EPA agrees with Oregon's conclusion that additional controls of non-BART point sources for reasonable progress purposes are not reasonable in the first planning period, because even though there are cost effective controls identified, visibility improvement is anticipated to be relatively small.

EPA also considered control measures for anthropogenic fire (prescribed forest fire and agricultural fire). Oregon already operates a robust enhanced smoke management program for prescribed forest fire and agricultural burning (see description of Oregon's smoke management and agricultural burning programs in section G.5 below). There are no other source categories of smoke that appear to emit visibility impairing pollutants sufficient to warrant consideration for additional control at this time.

In regard to the impact of offshore marine shipping emissions, ODEQ did not consider potential improvements in visibility its Class I areas due to amendments adopted by the International Maritime Organization (IMO) in October 2008. See *http://www.imo.org/blast/mainframe.asp?topic_id=233.* These amendments, known as the Annex VI amendments specify: (1) New fuel quality requirements for commercial marine vessels beginning from July 2010, (2) Tier II and III NO_X emission standards for new commercial marine engines, and (3) Tier I NO_X requirements for existing pre-2000 commercial marine engines. The Annex VI amendments designate waters within 200 miles of the North American coast as an emission control area, including waters offshore of Oregon. Even though the effects of IMO Annex VI amendments were not evaluated in the Oregon SIP submittal, EPA believes that visibility impacts from marine vessel emissions will decrease by 2018 when the requirements of the Annex VI amendments are fully implemented. Because these reductions were not included in the CMAQ or WEP analyses conducted by WRAP for Oregon, the specific visibility improvements cannot be quantified at this time, but they will likely result in further visibility improvements in the Oregon Class I areas located near the coast and in the Cascade Mountains.

As explained in the EPA's RGP Guidance, the 2018 URP estimate is not a presumptive target and the State's RPGs may be lesser, greater or equivalent to the glide path. The glide path to 2064 represents a rate of progress which states must use for analytical comparison to the amount of progress they expect to achieve. EPA believes the RPGs established by Oregon for the Class I areas in Oregon, although not achieving the URP, are reasonable when considering that significant visibility improvement is expected from BART controls for Boardman and other point sources, additional controls on other point sources and other source categories would not result in significant visibility improvement, and the significant visibility impacts due to uncontrollable natural fire and significant impacts from off shore marine emissions. Consequently, we propose to find that the State has demonstrated that its 2018 RPGs are reasonable and consistent with 40 CFR 51.308(d)(1) and 51.308(d)(1)(ii).

G. Long Term Strategy

The Long Term Strategy (LTS) required by 40 CFR 51.308(d)(3) is a compilation of all existing and anticipated new air pollution control measures. The LTS must include ''enforceable emission limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals'' for all Class I areas within or affected by emissions from the State. 40 CFR 51.308(d)(3). In developing its LTS, Oregon considered all the factors required for developing a LTS identified in the RHR. These factors included: (1) Ongoing Air Pollution Control Programs, (2) Measures to Mitigate Impacts of Construction Activities, (3) Emission Limitations and Schedules for Compliance, (4) Source Retirement and Replacement Schedules, (5) Smoke Management Techniques for Agricultural and Forestry Burning, and (6) Enforceability of Emission Limitations and Control Measures. A summary of how Oregon is addressing each of these factors in its LTS is provided below.

1. Ongoing Air Pollution Control Programs

a. Prevention of Significant Deterioration/New Source Review Rules

In Oregon, a primary regulatory tool for addressing visibility impairment from industrial sources is the Prevention of Significant Deterioration (PSD) New Source Review rules. The SIP approved Oregon PSD rules protect visibility in Class I areas from new industrial sources, and major changes to existing sources, by requiring a visibility impact assessment (OAR 340, Division 225). Specifically, OAR 340–225–0070 describes the process for conducting a visibility impact assessment and review by ODEQ, as well as the process for conducting modeling to determine visibility impacts, which is used to determine if a source causes a significant impairment in any Class I area. Any new major source or major modifications within a distance of 300 km of a Class I area that are found through modeling to cause significant visibility impairment will not be issued an air quality permit by Oregon unless the impact is mitigated. The level of significance is defined as an increase in

visibility impairment above natural background of 5%.

b. Reasonably Attributable Visibility Impairment BART

Oregon has adopted the RAVI BART requirements as part of the Oregon Visibility Protection Plan. RAVI specifies that if the Federal Land Manager certifies that visibility impairment exists in a federal Class I area, Oregon would be required to analyze BART controls and identify BART for any contributing source.

c. Oregon's Phase I Visibility Protection Program

In 1986, Oregon adopted EPA's Phase I Visibility rule into Oregon Visibility Protection Plan (OAR 340–200–0040). This rule addresses visibility impairment that is ''reasonably attributable'' to one or small group of sources, in relatively close proximity to a Class I area. The Oregon Visibility Protection Plan contains short and long-term strategies to address reasonably attributable impairment, including PSD new source review rules along with seasonal protection of visibility during the summer months from prescribed forestry burning and agricultural field burning. Air quality monitoring showed that during the summer months in the northern and central Cascades, visibility was frequently impaired by smoke or ''plume blight'' from Willamette Valley agricultural open field burning and forest prescribed burning. Monitoring also demonstrated that there was summer visibility impairment in the Eagle Cap Wilderness area caused by Union County agricultural open field burning, and that field burning in Jefferson County was contributing to summer visibility impairment in the central Oregon Cascade Class I areas. As a result, ODEQ adopted specific visibility control strategies for these areas into the original plan. These included smoke management requirements to avoid Class I visibility impacts from Willamette Valley, Jefferson County and Union County open field burning, and from forest prescribed burning in parts of Western Oregon. The Jefferson and Union County smoke management programs adopted provisions to avoid any burning upwind of nearby Class I areas. The Oregon Department of Forestry Smoke Management Program was revised to shift prescribed burning in Western Oregon from the summer to the spring and fall, as part of an effort to eliminate burning during the summer. Oregon also explained that it made additional revisions and improvements to the Visibility Protection Plan in 2002 as part of the Oregon Visibility Protection Plan Reasonable Progress Report, March 5, 2002. See SIP Submittal section 12.5.5.1 for additional discussion of the Oregon Phase I Visibility Protection Program.

d. Implementation of State and Federal Mobile Source regulations

Mobile source annual emissions show a major decrease in NO_X and SO_2 in Oregon from 2002 to 2018, due to numerous ''on the books'' federal mobile source regulations for on-road mobile sources as well as non-road mobile sources and equipment. These rules are expected to reduce SO_2 emissions as well as NO_X and PM emissions. In 2005, Oregon adopted California's emissions standards for light and medium duty vehicles as the Oregon Low Emission Vehicle Program. This program took effect beginning with 2009 model year vehicles. Although the primary purpose was to reduce greenhouse gas emissions, these rules will also decrease NO_X and PM emissions from light and medium duty vehicles. In 2007, the Oregon Legislature authorized a clean diesel program that included funding for a grant/loan program to retrofit existing diesel engines with exhaust controls, repowering non-road diesel engines with biodiesel, and scrapping older engines. ODEQ projects that with normal turnover bringing new, cleaner engines into the fleet, there will be a 60% reduction in diesel $PM_{2.5}$ emissions by 2018.

e. On-Going Implementation of Programs To Meet PM_{10} NAAQS

In Oregon there are six communities that are PM_{10} maintenance areas and two communities that are nonattainment areas under the PM_{10} NAAQS. All of these communities are located within 20 to 50 miles of one or more Class I area, and have the potential to impact visibility in these Class I areas. As a result of being designated as PM_{10} nonattainment areas, these communities have made significant reductions in PM_{10} emissions in the last 10 years by adopting control strategies to reduce PM_{10} emissions from sources such as residential woodstoves and outdoor burning. For example, ODEQ's federally enforceable wood-heating rules (OAR 340, Division 262) require woodstove curtailment programs in each of these communities, and specify that only certified woodstoves be sold in the state. Oregon's wood-heating rules have been very effective in reducing PM_{10} levels during the heating months in these communities.

2. Measures To Mitigate the Impacts of Construction Activities

Oregon's rules addressing impacts from construction activities are primarily found in the OAR 340, Division 208. OAR 340–208–0210 addresses ''fugitive emissions'' from a variety of sources, and would be the most applicable regulation to construction activities. This regulation requires ''reasonable precautions'' be taken to prevent particulate matter from becoming airborne from activities such as construction projects. Actions that can be taken to control particulate emissions include the use of water or chemicals to control dust from demolition, construction operations, unpaved roads at construction sites, and material stockpiles, and containment of sandblasting operations.

3. Emission Limitations and Schedules of Compliance

Emission limits and compliance schedules for stationary sources are specified under Oregon and federal regulations in accordance with the CAA. Additionally as discussed above, the emission limits and schedules of compliance for those sources with BART limits, and sources taking FEPLs, are described in Chapter 10 of the SIP submittal and in our previous action approving these limits and schedules.

4. Source Retirement and Replacement Schedules

Oregon's LTS contains an evaluation of non-BART sources, as described below. This evaluation will include a review of all existing industrial sources to identify scheduled shutdowns, retirements in upcoming years, or replacement schedules, such as planned installation of new control equipment to meet other regulations or routine equipment replacement or modernization.

5. Smoke Management Techniques for Agricultural and Forestry Burning

Smoke from agricultural and forestry burning are major contributors to visibility impairment in Oregon Class I areas. Organic and elemental carbon particulates are the dominant pollutant species contributing to haze in Oregon Class I areas on the 20% worst days. Much of these particulates are from wildfires, which fluctuates significantly from year to year, but there is also a significant contribution from controlled agricultural and forestry burning. Of the controlled burning, prescribed forestry burning represents the largest source, at approximately 58% of the total burning in the state, and agricultural burning

(including open field burning) is approximately 11%.

In Oregon, prescribed forest burning and agricultural burning is regulated under the Oregon Smoke Management Plan. On November 2, 2007, the Oregon Department of Forestry (ODF) adopted revisions to this plan which included new visibility protection provisions that incorporated references to the Oregon Regional Haze Plan and the Enhanced Smoke Management Program (ESMP) criteria in the RHR section 309. Oregon's current smoke management programs, operated by Oregon Department of Agriculture (ODA) and ODF, includes the following ESMP elements: (1) Taking actions to minimize smoke emissions, (2) burning only during appropriate weather conditions in order to avoid smoke impacts in urban areas, (3) encourages using alternatives to fire, and includes a comprehensive reference manual of alternatives to prescribed fire, (4) a requirement that burning permits must be obtained prior to burning, and (5) a burn authorization process that involves the issuance of smoke management forecasts and burning instructions. Agricultural burning in the Willamette Valley is further controlled under a smoke management program operated by ODA. Field burning in Jefferson and Union counties is controlled through smoke management programs established by county ordinance and operated at that level. These county programs have requirements to avoid burning upwind of nearby Class I areas when smoke would impair visibility.

6. Enforceability of Emission Limitations and Control Measures

Oregon has ensured that all emission limitations and control measures used to meet reasonable progress goals are enforceable, and pursuant to OAR 340–200–0040, are included in the State of Oregon Clean Air Act Implementation Plan. ODEQ has adopted the Oregon Regional Haze Plan, including the Oregon BART rules, into the SIP submittal, which ensures that all elements in the plan are enforceable.

In addition to six factors discussed above, Oregon indicated a number of additional measures it intends to take in the future as part of its long term strategy. As described in additional detail in the SIP submittal section 12.6, the State intends to: (1) Further evaluate controls for Non-BART Sources, (2) evaluate prescribed burning contribution to haze and possible controls, (3) evaluate the contribution from general outdoor open burning, and (4) evaluate the contribution from rangeland burning. EPA acknowledges these additional measures and analysis that Oregon is planning to conduct, but is not necessary to take these specific activities into account at this time in evaluating whether the enforceable measures contained in the State's LTS satisfy the RHR requirement.

EPA is proposing to find that Oregon adequately addressed the RHR requirements in developing its LTS. The LTS provides sufficient documentation to ensure that Oregon will meet its emission reduction obligations for all Class I areas it affects in the first planning period. Oregon relied on monitoring, emission inventories and modeling information from the WRAP as the technical basis for its LTS. Coordination and consultation occurred with other states through the WRAP, in which all western states participated in developing the technical analysis upon which their SIPs are based. Oregon's analysis included all anthropogenic sources of visibility impairment including major and minor stationary sources, mobile sources, and area sources. The anticipated net effect on visibility over the first planning period due to changes in point, area, and mobile source emissions is an improvement in visibility in all Class I areas in Oregon on the worst 20% days, and no degradation of visibility on the 20% best days.

H. Monitoring Strategy and Other Implementation Plan Requirements

The primary monitoring network for regional haze in Oregon is the IMPROVE network. There are currently IMPROVE sites in the Mt. Hood Wilderness area, Three Sister Wilderness area, Crater Lake National Park, Kalmiopsis Wilderness area, Strawberry Mountain Wilderness area, and Hells Canyon Wilderness area. IMPROVE monitoring data from 2000–2004 serves as the baseline for the regional haze program, and is relied upon in the Oregon Regional Haze submittal. Oregon commits to rely on the IMPROVE network for complying with the regional haze monitoring requirement in EPA's RHR for the current and future regional haze implementation periods. See section 4.4 of the SIP submittal. Data produced by the IMPROVE monitoring network will be used for preparing the five-year progress reports and the 10-year SIP revisions, each of which relies on analysis of the preceding five years of data.

I. Consultation With States and Federal Land Managers

Through the WRAP, member states and Tribes worked extensively with the FLMs from the U.S. Departments of the Interior and Agriculture to develop technical analyses that support the regional haze SIPs for the WRAP states. The proposed Regional Haze plan for Oregon was provided to the FLM for comment on November 11, 2008, the start of a 60-day comment period. See section 13.1 of the SIP submittal. Oregon also consulted with the States of Washington, Idaho, Nevada, and California.

Oregon commits to continued consultation with the FLMs and the other states as part of the continued implementation of the plan and for future progress reports and revisions. This continuing consultation process will provide the opportunity for on-going opportunities to address a host of items including, for example, the implementation of emission control programs, changes to the monitoring strategy or monitoring locations, status of state actions to meet commitments for future assessments or rulemaking, and work on the five-year reviews and ten-year revisions. Additionally, Oregon consulted with the tribes during development of their plan through the WRAP activities and direct outreach to the tribes.

J. Periodic SIP Revisions and Five-Year Progress Reports

Section 51.308(f) of the RHR requires that the regional haze plans be revised and submitted to EPA by July 31, 2018 and every 10 years thereafter. 40 CFR 51.308(g) requires the state to submit a progress report to EPA every five years evaluating progress towards the reasonable progress goals for each Class I area in the State and each Class I area located outside the State which may be affected by emissions from within the State. Oregon has committed to evaluate and reassess its Regional Haze plan and to provide a Regional Haze SIP revision by July 31, 2018 for the next 10 year planning cycle. See section 13.5 of the SIP submittal. Oregon has also committed to submitting the five-year review and report on the Regional Haze plan. See section 13.1 of the SIP submittal.

IV. What action is EPA proposing?

On June 21, 2011, EPA approved portions of the Oregon Regional Haze Plan submitted December 10, 2010, as supplemented on February 1, 2011, including the Oregon's emission inventory, determination of baseline and natural conditions and the BART controls and emission limits. Today, for the reasons explained above, EPA is proposing to approve the remaining parts of the Oregon Regional Haze submittal as meeting the requirements

set forth in section 169A and 169B of the Act and in 40 CFR 51.300–308 regarding regional haze.

V. Oregon Notice Provision

Oregon Revised Statute 468.126, prohibits ODEQ from imposing a penalty for violation of an air, water, or solid waste permit unless the source has been provided five days' advanced written notice of the violation and has not come into compliance or submitted a compliance schedule within that five-day period. By its terms, the statute does not apply to Oregon's Title V program or to any program if application of the notice provision would disqualify the program from Federal delegation. Oregon has previously confirmed that, because application of the notice provision would preclude EPA approval of the Oregon SIP, no advance notice is required for violation of SIP requirements.

VI. Scope of Action

Oregon has not demonstrated authority to implement and enforce the Oregon Administrative rules within ''Indian Country'' as defined in 18 U.S.C. 1151. ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation. Therefore, this SIP approval does not extend to ''Indian Country'' in Oregon. See CAA sections 110(a)(2)(A) (SIP shall include enforceable emission limits), 110(a)(2)(E)(i) (State must have adequate authority under State law to carry out SIP), and 172(c)(6) (nonattainment SIPs shall include enforceable emission limits).

VII. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the rule neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of sections 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, EPA nonetheless provided a consultation opportunity to Tribes in Idaho, Oregon and Washington in letters dated January 14, 2011. EPA received one request for consultation, and we have followed-up with that Tribe.

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Visibility, and Volatile organic compounds.

Dated: May 14, 2012.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2012–12490 Filed 5–22–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2012–0078, FRL–9675–5]

Approval and Promulgation of Implementation Plans; State of Washington; Regional Haze State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the Best Available Retrofit Technology (BART) determination for the TransAlta Centralia Generation LLC coal-fired power plant in Centralia, Washington (TransAlta). The Washington State Department of Ecology (Ecology) submitted its Regional Haze State Implementation Plan (SIP) on December 22, 2010 to meet the requirements of 40 CFR 50.308. On December 29, 2011 Ecology submitted an update to the SIP submittal containing a revised and updated BART determination for TransAlta. EPA plans to act on the remaining Regional Haze SIP elements for Washington in the near future.

DATES: Written comments must be received at the address below on or before June 22, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2012–0078 by one of the following methods:

- *www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: R10-Public_Comments@epa.gov.*
- *Mail:* Steve Body, EPA Region 10, Suite 900, Office of Air, Waste and Toxics, 1200 Sixth Avenue, Seattle, WA 98101.
- *Hand Delivery:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Steve Body,

Office of Air, Waste and Toxics, AWT–107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2012–0078. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA, without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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 form. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101. EPA requests that if at all possible, you contact the individual listed below to view a hard copy of the docket.

FOR FURTHER INFORMATION CONTACT: Steve Body at telephone number (206) 553–0782, *body.steve@epa.gov*, or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean the EPA. Information is organized as follows:

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I. Background for EPA's Proposed Action

In the Clean Air Act (CAA) Amendments of 1977, Congress established a program to protect and improve visibility in the national parks and wilderness areas. See CAA section 169A. Congress amended the visibility provisions in the CAA in 1990 to focus attention on the problem of regional haze. See CAA section 169B. EPA promulgated regulations in 1999 to implement sections 169A and 169B of the Act. These regulations require states to develop and implement plans to ensure reasonable progress toward improving visibility in mandatory Class I Federal areas [1] (Class I areas). 64 FR 35714 (July 1, 1999); see also 70 FR 39104 (July 6, 2005) and 71 FR 60612 (October 13, 2006).

Today EPA is proposing action on the portion of the Regional Haze SIP submission relating to the TransAlta facility by proposing to approve the BART determination for oxides of nitrogen (NO_X) emissions from TransAlta. Ecology submitted its Regional Haze SIP on December 22, 2010, to meet the requirements of 40 CFR 50.308. (Regional Haze SIP Submittal) On December 29, 2011, Ecology submitted an update to the SIP submittal containing a revised BART determination for TransAlta. (SIP Supplement) Because the BART determination includes a requirement to begin injection of ammonia or urea by January 1, 2013 and a date of January 31, 2013 for TransAlta to comply with emission limits based on installation and operation of selective non-catalytic reduction (SNCR), EPA has determined that early action on this separate portion of the SIP submittal is appropriate at this time. EPA is still reviewing the remaining portions of the SIP submittal and will take action on the remaining elements in the near future.

A. Definition of Regional Haze

Regional haze is impairment of visual range or colorization caused by emission of air pollution produced by numerous sources and activities, located across a broad regional area. The sources include, but are not limited to, major and minor stationary sources, mobile sources, and area sources including non-anthropogenic sources. Visibility impairment is primarily caused by fine particulate matter ($PM_{2.5}$) or secondary aerosol formed in the atmosphere from precursor gasses (e.g., sulfur dioxide (SO_2), nitrogen oxides (NO_X), and in some cases, ammonia and volatile organic compounds). Atmospheric fine particulate reduces clarity, color, and visual range of visual scenes. Visibility reducing fine particulate is primarily composed of sulfate, nitrate, organic carbon compounds, elemental carbon, and soil dust, and impairs visibility by scattering and absorbing light. Fine particulate can also cause serious health effects and mortality in humans, and contributes to environmental effects such as acid deposition and eutrophication.[2]

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national parks and wilderness areas. Average visual range in many Class I areas in the Western United States is 100–150 kilometers, or about one-half to two-thirds the visual range that would exist without manmade air pollution.[3] Visibility impairment also varies day-to-day and season-to-season depending on

[1] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[2] See 64 FR at 35715.

[3] *Id.*

variation in meteorology and emission rates.

B. Regional Haze Rules and Regulations

In section 169A of the 1977 CAA Amendments, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in Class I areas which impairment results from manmade air pollution.'' CAA section 169A(a)(1). On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources, i.e., ''reasonably attributable visibility impairment''. 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35713) (the Regional Haze Rule or RHR). The RHR revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and to establish a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III of this rulemaking. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands.[4] 40 CFR 51.308(b) requires states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

II. Requirements for Regional Haze SIPs

A. The CAA and the Regional Haze Rule

Regional haze SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment.

B. Best Available Retrofit Technology

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires States to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources[5] built between 1962 and 1977 procure, install, and operate the ''Best Available Retrofit Technology'' as determined by the state. States are directed to conduct BART determinations for such sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at appendix Y to 40 CFR Part 51 (hereinafter referred to as the ''BART Guidelines'') to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. 70 FR 39104. In making a BART applicability determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts, a state must use the approach set forth in the BART Guidelines. A State is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources. Regardless of source size or type however, a state must meet the CAA and regulatory requirements for selection of BART, and the state's BART and analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility-impairing pollutants are sulfur dioxide, nitrogen oxides, and fine particulate matter. EPA has indicated that states should use their best judgment in determining whether volatile organic compounds or ammonia compounds impair visibility in Class I areas.

Under the BART Guidelines, States may select and document an exemption threshold value to determine those BART-eligible sources not subject to BART. A BART-eligible source with an impact below the threshold would not be expected to cause or contribute to visibility impairment in any Class I area. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. Generally, an exemption threshold set by the State should not be higher than 0.5 deciview (dv).

In their SIPs, States must identify BART-eligible sources that have a visibility impact in any Class I area above the 'BART subject' exemption threshold established by the State and thus, subject to BART. States must document their BART control analysis and determination for all sources subject to BART.

The term ''BART-eligible source'' used in the BART Guidelines means the collection of individual emission units at a facility that together comprises the BART-eligible source. In making a BART determination, section 169A(g)(2) of the CAA requires that States consider the following factors: (1) The costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. See also 40 CFR 51.308(e)(1)(ii)(A).

The regional haze SIP must include source-specific BART emission limits and compliance schedules for each

[4] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

[5] The set of ''major stationary sources'' potentially subject to BART is listed in CAA section 169A(g)(7).

source subject to BART. Once a State has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date EPA approves the regional haze SIP. CAA section 169(g)(4) and 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source. States have the flexibility to choose the type of control measures they will use to meet the requirements of BART.

III. BART Determination for TransAlta

A. Washington's BART Determination for TransAlta

1. TransAlta is Subject to BART

The TransAlta Centralia Generation LLC power plant, located in Centralia, Washington, is a two unit coal-fired power plant rated at 702.5 MW each, when burning coal from the Centralia coalfield as originally designed. The units now burn coal from the Wyoming Powder River Basin and are rated at 670 MW each. The units were commissioned in 1971 and 1972, are one of the 26 BART source categories specified in 40 CFR 51.301 and emit over 250 tons per year (t/y) of an air pollutant. Modeling to determine whether TransAlta would be subject to BART under the RHR demonstrated TransAlta had a maximum impact of 5.5 dv at Mt. Rainier National Park from both SO_2 and NO_X emissions. This impact is above the threshold used by Washington for determining those BART eligible sources subject to BART. These units are BART-eligible and subject to BART as described in the SIP submittal, Supplement Appendix L.

On June 11, 2003, EPA approved a revision to the Washington SIP for visibility (Visibility SIP) which included controls for NO_X, SO_2, and particulate matter for TransAlta. 68 FR 34821. In the action approving these provisions, EPA determined the required controls to be BART for SO_2 and PM. Alstrom concentric low NO_X burners with overfire air was required to control NO_X emissions with emission limits of 0.302 lb/mmBtu for Unit #1 and 0.306 lb/mmBtu for Unit #2. EPA found these controls did not represent BART for NO_X in 2003 and the **Federal Register** notice accompanying that action stated that a BART determination for NO_X was not being made at that time. Specifically we explained ''* * * while the NO_X emission limitation may have represented BART when the emission limits in the [reasonably available control technology] RACT Order were negotiated, recent technology advancements have been made. EPA cannot now say that the emission limitations in the SWAPCA RACT Order for NO_X represent BART. However EPA is approving the emission limits for NO_X as a strengthening of the SIP for visibility purposes.'' Thus, to date there is not a SIP approved BART determination for NO_X emissions at TransAlta. 68 FR 34824.

2. BART Evaluation and Determination

The TransAlta NO_X BART determination to comply with 40 CFR 51.308(e) was submitted to EPA in two separate submittals. The first submittal was included in the December 22, 2010 Regional Haze SIP submittal. Washington subsequently reevaluated its determination for TransAlta and on December 29, 2011, submitted an update to the Regional Haze SIP (referred to in this notice as the SIP Supplement). This update included a revised NO_X BART determination, the First Revision Order No. 6426 (hereafter referred to as the Revised BART Compliance Order) and technical analysis document for the TransAlta power plant and the related parts of the Regional Haze SIP. The revised BART determination and Revised BART Compliance Order establish a NO_X emission limit of 0.21 lb/mmbtu, and among other things, requires selective noncatalytic reduction (SNCR) to be installed by January 1, 2013. The Revised BART compliance order also provides that one coal unit must cease burning coal by December 31, 2020, and the other coal unit cease burning coal by December 31, 2025, unless Ecology determines that State or Federal law requires SCR to be installed on either unit.

Additionally, by way of background, on May 21, 2009, the Governor issued Executive Order 09–05 which contained provisions for TransAlta regarding compliance with Washington State's greenhouse gas (GHG) emission performance standards. Subsequently, the Executive Order was superseded by Washington State Senate Bill 5769 (also known as E2SSB 5769), which was signed by the Governor on April 29, 2011 and became effective August 22, 2011, and provided that the plant owners must bring the two coal-fired units into compliance with the GHG performance standards by specified dates. See SIP Supplement L–45–46 and Revised Code of Washington (RCW) Chapter 80–80. The law requires that one of the TransAlta units comply with the GHG performance standards by December 31, 2020 and the other by December 31, 2025. See RCW 80.80.040. As documented in public testimony by the plant owners, State Legislature, environmental organizations and the Governor's Office, the coal-fired units at the TransAlta plant must be decommissioned in order to comply with these new GHG standards. Accordingly, one unit will be decommissioned no later than December 31, 2020 and the second unit will be decommissioned by December 31, 2025. TransAlta is also required to install SNCR by January 1, 2013, to control NO_X emissions. RCW 80.80.100. Additionally, the law states that the requirement to meet the GHG performance standard does not apply if Ecology determines that State or Federal law requires selective catalytic reduction (SCR) to be installed on either coal-fired unit. See Section 106 of Chapter 180, Laws of 2011 and SIP Supplement L–46, see also RCW 80.80.040.

In conducting its BART evaluation for TransAlta, Ecology followed the steps outlined in EPA BART Guidelines at 40 CFR 51, Appendix Y. Briefly this evaluation included the: (1) Identification of all available retrofit technology, (2) elimination of technically infeasible technology, (3) identification of control efficiencies of feasible technology, (4) evaluation of impacts and document results, and (5) evaluation of visibility impacts.

The Visibility SIP submittal for our June 11, 2003 approval identified a long list of available NO_X control technologies which were evaluated for technical feasibility at the TransAlta plant. That list was narrowed to the technically feasible controls which Ecology used as a starting point for the current BART determination. See SIP Supplement L–79 (Table B–1 Nitrogen Oxide Controls evaluated in the 1997 Reasonable Achievable Control Technology Process). Ecology evaluated, or reevaluated, a number of the NO_X control technologies for TransAlta including: low NO_X burners with close coupled and over-fired air (LNC3); Flex Fuel [6]; SCR; SNCR; Rotating over-fire air (ROFA)/Rota mix; neutral net technology; and natural gas re-burning. The State found ROFA is infeasible because it has never been tested nor demonstrated in a large tangentially

[6] Flex Fuel refers to the switch from Centralia, Washington coal to coal from the Power River Basin in Wyoming. Powder River Basin coal has a higher heat content requiring less fuel for the same heat extraction, as well as a lower nitrogen and sulfur content than coal from Centralia. Flex Fuel also required changes to boiler design to accommodate Powder River Basin coal.)

fired boiler of this size. The State also determined that ''Neutral Net'' technology likewise has not been guaranteed to perform and reduce emissions and there are other comparable proven technologies available. The State also found that natural gas re-burning is not listed in the EPA RBLC for use in any coal fired boilers and that it would be less efficient at controlling NO_X emissions than the Flex-Fuel plus SNCR as required by Washington's Legislature.

Washington evaluated the cost effectiveness of the technically feasible control options for TransAlta. It found that Flex Fuel alone will reduce NO_X emissions by 3,139 t/y and will also reduce SO_2 emissions by 1,287 t/y. See SIP Supplement L–67. Based on evaluation of installations at other large tangentially fired power plants, the State determined that SNCR plus Flex Fuel is expected to achieve a 20 to 25% reduction in NO_X emissions. The State estimated capital costs for SNCR plus Flex Fuel at TransAlta to be $135 million and annual operating costs of $17.3 million based on an emission limit of 0.21 lb/mmbtu. The retrofit costs for TransAlta will be higher than other similarly sized power plants due to boiler design. The State also calculated the SNCR plus Flex Fuel cost effectiveness to be $2,162/t based on a 25% control efficiency and a 8,022 t/y reduction in NO_X emissions. See SIP Supplement L–71.

Among the other technologies considered, Washington also evaluated SCR which would provide a 95% NO_X control efficiency. The State considered two scenarios; one including SCR on only one unit and another scenario with SCR on both units. Using a presumptive BART emission limit of 0.15 lb NO_X/mmbtu, they estimated the emission reductions for SCR on one unit to be 4,364 t/y and 7,855 t/y for SCR on both units. The capital cost for one unit was estimated at $290.12 million and about double that for SCR on both units. Washington estimated it would take 4 years to design and install SCR with a compliance date of late 2016. The cost effectiveness for SCR on only one unit was calculated at $ 8,205/t. See SIP Supplement L–58. If SCR was to be installed on both units, the State calculated cost effectiveness for SCR on Unit #1 to be $14,800/t and Unit #2 to be $8,400/t. See SIP Supplement L–69. Washington determined SCR is not cost effective under either scenario and that it is not reasonable to require SCR for this facility.

Washington considered the modeled visibility impairment in the baseline years and the visibility improvement potentially achievable from the various control technologies and control scenarios. The modeling indicated that TransAlta has the greatest impact at Mt. Rainier National Park with a current 5.5 dv impact (3 year 98th percentile value). See Table below and SIP Supplement Appendix L Table 3–1. This impact is reduced to 3.5 dv with emission limits based on Flex Fuel plus SNCR, for a 2.0 dv improvement. Significant improvement in visibility is also expected in 11 other Class I areas. With the expected decommissioning of both emission units by December 31, 2025, there will be a 5.5 dv improvement in visibility at Mt. Rainier National Park and significant improvement in the 11 other Class I areas. The estimated visibility impact from baseline emissions and the improvement associated with each control technology is shown below. See SIP Supplement Table 3–1.

THREE-YEAR DELTA DECIVIEW RANKING SUMMARY

[The 8th day in any year or the 22nd day over the 3-year period, are the 98th percentile days]

Class I area	Visibility criterion	Baseline emissions	Control scenario 1SNCR	Control scenario 2Flex fuel	Control scenario 3Flex fuel	Control scenario 4SCR
Alpine Lakes Wilderness	Max 98% value (8th high) in any year.	4.871	4.393	3.564	2.949	3.057
	3-yrs Combined 98% value (22nd high).	4.346	3.844	2.994	3.057	2.531
Glacier Peak Wilderness	Max 98% value (8th high) in any year.	3.615	3.209	2.403	2.049	2.036
	3-yrs Combined 98% value (22nd high).	2.622	2.294	1.905	1.532	1.562
Goat Rocks Wilderness	Max 98% value (8th high) in any year.	4.993	4.398	3.676	3.069	3.137
	3-yrs Combined 98% value (22nd high).	4.286	3.708	3.108	2.637	2.385
Mt. Adams Wilderness	Max 98% value (8th high) in any year.	3.628	3.118	2.646	2.194	1.984
	3-yrs Combined 98% value (22nd high).	3.628	3.152	2.591	2.147	1.934
Mt. Hood Wilderness	Max 98% value (8th high) in any year.	3.471	3.051	2.345	1.978	2.082
	3-yrs Combined 98% value (22nd high).	2.830	2.388	1.997	1.665	1.543
Mt. Jefferson Wilderness	Max 98% value (8th high) in any year.	2.079	1.784	1.399	1.150	1.159
	3-yrs Combined 98% value (22nd high).	1.888	1.596	1.267	1.053	1.061
Mt. Rainier National Park	Max 98% value (8th high) in any year.	5.447	4.774	4.318	3.606	3.359
	3-yrs Combined 98% value (22nd high).	5.489	4.743	4.225	3.501	3.275
Mt. Washington Wilderness	Max 98% value (8th high) in any year.	2.027	1.756	1.323	1.106	1.170
	3-yrs Combined 98% value (22nd high).	1.414	1.248	1.323	0.737	0.855

THREE-YEAR DELTA DECIVIEW RANKING SUMMARY—Continued

[The 8th day in any year or the 22nd day over the 3-year period, are the 98th percentile days]

Class I area	Visibility criterion	Baseline emissions	Control scenario 1SNCR	Control scenario 2Flex fuel	Control scenario 3Flex fuel	Control scenario 4SCR
North Cascades National Park	Max 98% value (8th high) in any year.	2.821	2.496	1.852	1.570	1.658
	3-yrs Combined 98% value (22nd high).	2.212	1.887	1.486	1.570	1.183
Olympic National Park	Max 98% value (8th high) in any year.	4.645	4.040	3.192	2.695	2.506
	3-yrs Combined 98% value (22nd high).	4.024	3.456	2.991	2.486	2.339
Pasayten Wilderness	Max 98% value (8th high) in any year.	1.954	1.701	1.287	1.075	1.160
	3-yrs Combined 98% value (22nd high).	1.482	1.318	0.999	0.822	0.864
Three Sisters Wilderness	Max 98% value (8th high) in any year.	2.172	1.910	1.333	1.139	1.172
	3-yrs Combined 98% value (22nd high).	1.538	1.328	0.993	0.819	0.902

Ecology also evaluated the energy and non-air environmental impacts associated with the technically feasible control options. Upon review, Ecology found there would be insignificant energy and non-air environmental impacts from installation of the technically feasible control options. The State did recognize that ammonia slip from SNCR could cause an increase in secondary aerosol due to the increase in ammonia in the atmosphere, but found that this will be limited by an optimization study during the first year of operation of SNCR.

Based on its full consideration of the BART factors as described above, Washington determined BART for NO_X for the TransAlta plant is 0.21 lb/mmbtu based on installation and operation of SNCR plus Flex Fuel. The State's BART determination also requires the use of sub-bituminous coal from the Powder River Basin, or other coal that will achieve similar emission rates, and a requirement to optimize SNCR for the lowest NO_X emissions while minimizing ammonia slip. The BART determination allows for the NO_X limit to be revised reflecting the optimization to a level no higher than 0.21 lb/mmbtu. See SIP Supplement, Table 4–1 at L–75 and Revised BART Compliance Order Section 5.5.3. The Revised BART Compliance Order also requires one coal fired unit to permanently cease burning coal no later than December 31, 2020 and the second coal fired unit to permanently cease burning coal no later than December 31, 2025 unless Ecology determines that state or federal law requires that SCR must be installed on either unit. Revised BART Compliance Order Section 4. The BART determination results in approximately a 30% NO_X reduction from the existing NO_X emission limit of 0.302 and 0.306 lb/mmBtu.

B. EPA's Assessment of the State's BART Determination

EPA reviewed Washington's SIP submittal, including the December 22, 2010 Regional Haze Submittal and the December 29, 2011 SIP Supplement. Washington followed 40 CFR 308(e) and EPA BART Guidelines of Appendix Y in determining BART for TransAlta. Washington evaluated NO_X controls taking into consideration the 5 factors for making a BART determination.

Ecology evaluated 37 different NO_X control technologies during its RACT review process for TransAlta in 1997. That analysis was supplemented and updated as part of their 2011 BART determination for the facility. EPA believes that Washington appropriately determined the costs of compliance, including the cost effectiveness of alternative controls. The initial cost estimates were determined by TransAlta's contractor CH2MHill and reviewed by Washington. Where Washington determined that the CH2MHill analysis was lacking detail, Washington requested and received additional information. The costs were generally based on EPA's Cost Control Manual, but deviations were used where appropriate based on the physical constraints at the TransAlta facility. For example, the plant currently employs wet limestone forced oxidation to control SO_2 emissions, electrostatic precipitators followed by wet scrubbing systems to control particulate matter, and low NO_X burners with close coupled overfire air to control NO_X emissions. These existing controls occupy space in the exhaust ducting minimizing space for additional controls for NO_X. Therefore, additional control equipment would require the redesign and installation of additional support structures, as well as the potential relocation of existing control equipment, thus increasing the cost of additional NO_X control. For example, SNCR would need to be located in an area where the exhaust temperature is around 2100 °F, and existing SCR requires cooler temperatures, both of which would require a redesign of support structures.

As previously explained, Washington determined that there are insignificant energy and non-air environmental impacts from either SNCR plus flex fuel or SCR. We acknowledge that either SNCR or SCR will require an insignificant amount of additional energy. As the State recognized, ammonia slip, or excess ammonia in the exhaust gasses from SNCR, can cause fouling of the air heater requiring excessive maintenance as well as increased particulate formation in the atmosphere through secondary aerosol formation to ammonium sulfate and ammonium nitrate. However, this potential impact is minimized by the ammonia limit of 0.5 parts per million and the required optimization protocol. As discussed above, Ecology recognized that the facility previously installed BART for SO_2 and particulate matter and improved NO_X control and EPA believes that these controls were appropriately considered in evaluating the emission reductions and NO_X control costs in making the BART determination.

As described above, Ecology evaluated the degree of visibility

improvement anticipated from the use of possible NO_X control technologies. Washington appropriately determined that the NO_X BART determination will result in visibility improvement in Mt Rainier National Park by 2.0 dv on the 20% most impaired days and improve visibility in 11 other Class I areas.

The specific BART emission limits and compliance dates, along with the requirements for the optimization study, monitoring, recordkeeping and reporting requirements, are included in the Revised BART Compliance Order. Upon EPA approval of this portion of the Regional Haze SIP Submittal, the Order becomes federally enforceable for purposes of the Washington Regional Haze SIP. Finally, pursuant to Washington's visibility protection program, WAC 173–400–151, the controls required by the State's BART determination must be installed as expeditiously as possible but in no event later than five years from when the State's Regional Haze SIP amendment is approved by EPA. More specifically, the Revised BART Compliance Order, which was included in the update to the Regional Haze SIP submission, provides that ''[b]eginning on the 31st operating day after December 31, 2012 the NO_X emissions limitation for the two coal fired utility steam generating units is 0.21 lb/mmbtu, 30 operating day average, both units averaged together including all emissions during start-up and shut-down.'' SIP Supplement L–30 (Revised BART Compliance Order section 1.1) Therefore, this satisfies the requirement in 40 CFR 51.308(e)(1)(iv) that ''each source subject to BART install and operate BART as expeditiously as possible, but in no event later than 5 years after approval of the implementation plan approval.''

For the above reasons, EPA agrees with Ecology's analysis and its the selection of BART for NO_X at the TransAlta plant because the analyses were conducted in a manner that is consistent with EPA's BART Guidelines. Additionally, the conclusions reflect a reasonable application of EPA's guidance to this particular source. Therefore, EPA proposes to approve the NO_X BART determination for TransAlta as meeting the requirements of 40 CFR 51.308(e).

IV. What action is EPA proposing?

For the reasons explained above, and in recognition of the State legislation and the Revised BART Compliance Order which result in the decommissioning of the coal-fired units by 2020 and 2025, EPA is proposing to approve the BART determination for TransAlta, including the Revised BART Compliance Order. The BART determination requires SNCR plus Flex Fuel as BART for the TransAlta coal-fired power plant with an emission limit of 0.21 lb/mmBtu with a 30 day rolling average beginning January 31, 2013, including fuel quality requirements and the allowance for a revised NO_X emission limit not to exceed 0.21 lb/mmbtu.

V. Statutory and Executive Order Reviews

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the rule neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, EPA nonetheless provided a consultation opportunity to Tribes in Idaho, Oregon and Washington in letters dated January 14, 2011. EPA received one request for consultation, and we have followed-up with that Tribe.

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Visibility, and Volatile organic compounds.

Dated: May 14, 2012.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2012–12504 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[FRL–9671–5; EPA–HQ–OW–2012–0195]

Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Intent.

SUMMARY: The EPA intends to expeditiously propose revisions to its Phase I stormwater regulations to specify that stormwater discharges from logging roads [1] are not stormwater discharges ''associated with industrial activity.'' This notice of intent is in

[1] EPA notes that the 9th Circuit decision in *NEDC* v. *Brown* addressed only certain logging roads, not forest roads more generally. EPA interprets the decision as not affecting the status of silvicutural activities other than logging roads. EPA's regulations at 40 CFR 122.26(b)(14) and 122.27 exclude most silviculture activities from the requirement to obtain an NPDES stormwater permit, with certain exceptions.

response to the Ninth Circuit Court of Appeals which found in *Northwest Environmental Defense Center* v. *Brown* that certain logging roads are stormwater point sources ''associated with industrial activity.'' Additionally, EPA is seeking comment on approaches for addressing water quality impacts associated with discharges of stormwater from forest roads. Where appropriate best management practices (BMPs) are used, receiving waters can be protected and impacts can be minimized. If not properly managed, however, stormwater discharges from some forest roads can cause preventable impairments to water quality. EPA believes that stormwater discharges from forest roads should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that are well-suited to address the complexity of forest road ownership, management, and use. Section 402(p) of the Clean Water Act allows EPA to consider a range of regulatory and non-regulatory approaches and determine which forest road discharges (if any) should be regulated under 402(p)(6). The EPA intends to study the water quality impacts of forest roads and existing federal, state, tribal, and voluntary programs designed to address them to determine if additional Agency action is necessary. The EPA will seek input again prior to taking additional action.

DATES: Comments must be received on or before June 22, 2012.

ADDRESSES: You may submit comments, identified by docket number EPA–HQ–OW–2012–0195, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue NW., Washington DC, 20460, Attention Docket ID No. EPA–HQ–OW–2012–0195.
- *Hand Delivery/Courier:* EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Avenue 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.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2012–0195. 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 *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: 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, i.e., CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Water Docket, EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For further information on this notice, you may contact Jeremy Bauer, EPA Headquarters, Office of Water, Office of Wastewater Management via email at *bauer.jeremy@epa.gov* or telephone at 202–564–2775.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Applicability

This notice does not impose requirements on any entity. If you have questions regarding the applicability of this notice, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Copies of This Document and Other Information

This document is available for download at *http://www.epa.gov/npdes/stormwater/forestroads* or under docket EPA–HQ–OW–2012–0195.

II. Background

A. Purpose

This notice describes the administrative steps the Agency intends to take to address the unpermitted stormwater discharges identified under *Northwest Environmental Defense Center* v. *Brown,* 1063 F.3d 1176 (9th Cir. 2011) and related discharges subject to the partial remand under *Environmental Defense Center, Inc.* v. *EPA,* 344 F.3d. 832, 863 (9th Cir. 2003). Specifically, the Agency is announcing its plan to propose revisions to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of ''storm water discharge associated with industrial activity.'' The effect of this revision would be to remove any obligation for an owner or operator of a logging road that has discharges of stormwater to waters of the United States to seek coverage of the discharge under the Stormwater Multisector General Permit and to comply with that General Permit or to have an individual permit under section 402 of the Clean Water Act for such a discharge. EPA is aware that a Congressional moratorium on NPDES permitting of some logging roads is set to expire on September 30, 2012, and intends to move expeditiously to complete this revision.

At the same time, the Agency intends to evaluate stormwater discharges from forest roads to determine what additional measures, if any, are necessary to address such discharges. The EPA is publishing this notice to request comment on some potential approaches that the Agency should consider for addressing stormwater discharges from forest roads. As indicated earlier in this notice, the Agency will seek input again prior to taking additional action.

B. Overview of Forests and Forest Roads

A vast and diverse network of forest roads provides access into and through the nation's forested lands. These roads traverse federal public land, state and local public land, county land, tribal land, private land, and they can span any combinations of these. The network includes active and inactive roads that vary in age and condition. Some roads on public lands are unauthorized and may not be included in existing inventories. Forest roads provide important access for a wide range of activities, including timber operations, recreation, fire protection, transportation, and often serve multiple purposes by multiple users at the same time.

There are about 751 million acres of forested land in the United States. Private forests make up over half (56 percent) or approximately 423 million acres (USDA Forest Service 2008), and account for over 90 percent of all timber harvested in the United States in recent years (Adams et al., 2006). Of the private forest land, 62 percent is owned by families and individuals and is commonly referred to as ''family forests.'' Most of the family forest owners (around 61 percent) own fewer than 10 acres of forest land. Owners of the remaining private forest land include corporations, Real Estate Investment Trusts (REITs), conservation organizations, clubs, and Native American tribes (USDA Forest Service 2008). Over 300 Native American reservations are significantly forested, and Native American tribal lands include 17.9 million acres of forest land, including 7.7 million acres of productive timberland (ITC 2007). Private forest land owners invest considerable resources in forest road construction and maintenance, as they are critical assets that enhance property values, maintain economic viability, and facilitate sustainable forestry management.

Forty-four percent of forest land is publicly-owned, or approximately 328 million acres. The Federal government administers an estimated 76 percent of the public forest land. State forestry, park, and wildlife agencies account for most of the 21 percent of state-owned public forest land. The remaining 3 percent of public forest land is owned by local governments, such as counties and towns (USDA Forest Service 2008). Within the United States, the distribution of public versus private forests differs greatly among the various regions of the country. For example, forest-ownership in the Northwest is dominated by public (primarily the USFS and BLM) ownership, while private ownership is more prevalent in the Southeast and Northeast (*Ibid.*).

While some forest road inventory information on federal lands is available, meaningful interpretation and comparison of that information requires an understanding of differences in inventory methods used (e.g., minimum road length included in road length counts), differences in the classes of forest roads (e.g., road surfacing, sediment production and delivery, and hydrologic connectivity), and differences in road densities. Nevertheless, the networks of forest roads on federal land are vast by any measure, with total lengths on the order of tens of thousands to hundreds of thousands of miles. The networks in other publicly-owned forests, tribal forests, and private forests have not been fully catalogued, and the density and condition of forest roads on these lands, as with the federal lands, varies widely.

Forest road networks differ greatly in development through time and layout over terrain, and they carry this history into their present performance and environmental impacts (Gucinski et al, 2001). In many parts of the 193 million acres of the National Forest System (NFS), the major roads were built in the 1950s and 1960s, with secondary and tertiary feeder roads following as the road networks expanded into watersheds. In other areas, logging roads developed from previous road systems used for mining in the Rocky Mountain and southwestern states or agriculture in the southern Appalachians, Ozarks, and New England. Thus, changes in forest road standards through time (for example, width, construction methods, position in the landscape) have affected different parts of road networks. Consequently, each forest road network commonly contains a collection of older and newer roads, designed to different standards, for various purposes, and crossing terrain of differing sensitivities. This mosaic of road segments has implications for how the forest road network will interact with the forest watershed, streams, and other downstream aquatic resources (Gucinski et al., 2001), as well as for what is practicable, or even feasible, to address stormwater discharges from these roads.

Regional differences are also evident in where the forest roads were located. For example, in southeastern Alaska, main roads were built on the broad, valley floors, where timber growing on the lower hillslopes was yarded downhill to them. In California, west of the Sierra Nevada, major roads were built along broad ridges, with secondary roads leading down into headwater areas. The main roads into western Oregon forests entered watersheds along narrow stream bottoms and then climbed the adjacent steep, unstable hill slopes to access timber extending from ridge to valley floor (Gucinski et al., 2001).

Federal forest roads on both BLM and Forest Service lands generally support traffic from multiple uses such as recreational, administrative, fire protection, and mineral and silvicultural activities. Of those, only a portion may be used for accessing timber resources. The federal land management agencies may grant easements, reservations, and permits for the purpose of construction, operation, and maintenance or use of roads crossing their lands.

The majority of BLM industrial logging operations occur on Oregon and California (O&C) lands [2] which have approximately 14,455 miles of road. BLM O&C lands are interspersed in a checkerboard pattern with many landowners. The roads often cross multiple jurisdictions, including tribal, state, county and private land as well as BLM lands. As a result, a complex system of road right-of-way agreements exists on the BLM O&C lands, as discussed later in this notice.

The paragraphs above discuss the range of property types into which forest roads provide access. The same road may pass through multiple owners and multiple properties. Moreover, the ownership of the road does not necessarily correspond to the ownership of the forest land. For example, a BLM owned road may pass through private property, and a privately owned road may pass through BLM property.

In general, only a subset of forest roads are active or open in any given year or at any given time of year. When active or open, forest roads may be serving multiple purposes by a number of different users. For example, those roads that are open and used for logging may cross multiple ownerships with overlapping responsibilities for the road and be used by multiple logging operators during the same time frame. This creates a highly complex mosaic of overlapping responsibilities. The EPA does not have information on all forest roads but notes that usage for some roads, including forest roads on private property, may only occur during harvesting once every 20 years or so.

Some forest roads are inactive and have been closed and ''storm-proofed''

[2] Oregon and California (O&C) Lands Act of 1937. 43 U.S.C. 1181a. The O&C Lands Act placed management jurisdiction of the lands under the United States Department of the Interior.

(i.e., they have appropriate BMPs for road drainage and erosion control and for reducing the vulnerability of the roads to natural disasters). Others may have been closed or abandoned. Among both active and inactive forest roads are older forest roads that were built or located without the benefit of newer standards.

The wide range of regulatory and non-regulatory approaches authorized under section 402(p) of the CWA are well-suited to address stormwater discharges originating from the complex and diverse forest road universe because such approaches provide for flexibility and prioritization and allow EPA to focus on the subset of forest roads with stormwater discharges that cause or contribute to water quality impacts. Under 402(p) EPA could build on or defer to other federal, state, tribal, local, and voluntary programs.

C. Overview of Water Quality Impacts From Stormwater Discharges From Forest Roads

The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. 1251(a). High quality water supplies from forests are widely recognized as valuable resources. Forests cover about one-third of the continental United States. Most major rivers and streams originate in forested catchments (NCASI, 1994), and 80 percent of the nation's freshwater sources originates in these forests (USFS 2000). In 2000, the US Forest Service (USFS) calculated the marginal value of water from all National Forest System (NFS) lands to be at least $3.7 billion per year (*Ibid.*). Between 50 and 75 percent of the population of the United States relies on forest lands for good quality water (Neary et al. 2009), and approximately 60 million people rely on NFS lands as the primary source of their drinking water (Dissmeyer 2000).

Stormwater discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts. Results of nationwide waterbody assessments from the EPA's Assessment and Total Maximum Daily Loads (TMDL) Tracking and Implementation System (ATTAINS), which contains the most currently available data reported by states to the EPA under Sections 305(b) and 303(d) of the CWA, found silviculture (forestry) and related activities, including forest and logging roads, to be among the top twelve probable sources of impairment for rivers, streams, and coastal shorelines (USEPA 2012).

The ATTAINS database indicates that silviculture sources contributed to impairment of 19,444 miles of rivers and streams (3.8 percent of the total of 514,795 miles impaired) and 242,583 acres of lakes, reservoirs and ponds (1.9 percent of the total of 13,038,033 acres of impaired). States cited ''Logging roads (construction and use)'' as the ''specific source'' of impairment in the case of 1,334 miles of rivers and streams (.003 percent of total impaired) and 6,150 acres of lakes, reservoirs and ponds (.0005 percent of total impaired).

The contribution of silviculture to water quality impairments can vary by region, and the contribution of discharges from forest roads to water quality impairments in the ATTAINS database may not be representative due to reporting differences among states. Some states may have categorized the source of impairment as ''hydromodifcation'' or ''habitat alteration''; many states consistently report in the ''unknown'' source category for impairments—the third leading probable source category of impairment nationwide. Additionally, much of the nation's waters still remain unassessed (72 percent of rivers and streams; 54 percent of lakes, reservoirs, and ponds; 62 percent of bays and estuaries; and 96 percent of coastal shorelines). The EPA considered the differential contribution from forest road stormwater discharges on water quality as the Agency developed the potential approaches for addressing these sources. For example, the EPA recognizes that not all forest roads cause water quality impacts and that the majority of the water quality impacts caused by discharges from forest roads may be attributed to a relatively small subset of forest roads and often a small portion of those roads (Nelson et al., 2010; Fly et al., 2010; Luce and Black, 2001; Luce and Black, 1999). Thus, any approach to address stormwater discharges from forest roads would likely focus on the subset of forest roads that were not properly constructed or are not properly maintained.

Stormwater discharges from improperly constructed or maintained forest roads can lead to excess sedimentation in nearby waters and subsequently lead to physical, biological and ecological impacts to water quality. These forest roads can degrade aquatic ecosystems by increasing levels of fine sediment input to streams and by altering natural streamflow patterns. Forest road runoff from improperly designed or maintained forest roads can detrimentally affect stream health and aquatic habitat by increasing sediment delivery and stream turbidity. This can adversely affect the survival of dozens of sensitive aquatic biota (salmon, trout, other native fishes, amphibians and macroinvertebrates) where these species are located. Increased fine sediment deposition in streams and altered streamflows and channel morphology can result in increased adult and juvenile salmonid mortality where present (e.g., in the Northwest and parts of the East), a decrease in aquatic amphibian and invertebrate abundance or diversity, and decreased habitat complexity.

The physical impacts of forest roads on streams, rivers, downstream water bodies and watershed integrity have been well documented but vary depending on site-specific factors. Improperly designed or maintained forest roads can affect watershed integrity through three primary mechanisms: they can intercept, concentrate, and divert water (Williams, 1999). Forest roads can intercept water falling as rainfall directly on road surfaces and cutbanks as well as subsurface water moving underground down the hillslope. They can concentrate flow on the road surface and in adjacent ditches and channels. Forest roads, if not properly designed, can divert both surface and subsurface water from flow paths that otherwise would be taken in the absence of a road. The hydrologic and geomorphic consequences resulting from these three processes will vary based on the forest road and underlying material. In some cases, impacts may be negligible, while they may be significant in others. Potential effects of forest roads that were not properly constructed or are not properly maintained on water quality can include increased loading of sediment due to erosion and mass wasting, increased suspended solids and turbidity, increased sediment deposition and bed load, alteration of stream morphology and channel simplification, altered streamflow, pollution from other chemicals associated with forest roads, increased turbidity and sedimentation in water treatment and supply systems, siltation of streambed substrates, impairments of spawning and rearing habitat, and degradation of habitat for salmonids, other fish, invertebrates, and other aquatic organisms.

Section VII, References, at the end of this notice provides a preliminary list of articles and publications that have examined various potential effects of stormwater discharges from forest roads, as well as management practices to address them. The EPA will further

review this literature as part of its detailed study of these sources. The Agency also welcomes suggestions for additional references that it should consider in its review.

D. Description and Effectiveness of BMPs and Current Practices

Forest roads are vital components of the human use of forested systems (Gucinski et al., 2001). They provide access for recreation, resource extraction, fire suppression activities, and many other forest management activities. While improperly built and maintained forest roads can have detrimental effects on the water quality, the application of appropriate BMPs can minimize these effects.

Owners and operators of many forest lands may already be employing a variety of effective approaches to manage, operate, and maintain forest roads to control stormwater discharges. These approaches are implemented by the forest road owners themselves or by operators or users of the roads. Depending on the jurisdiction, owners or operators use BMPs as a result of state program requirements, federal requirements, or because they may follow voluntary programs, including forest stewardship and sustainability initiatives. Under these required or voluntary programs, owners and operators of forest roads use BMPs to minimize or prevent discharges of pollutants into surface waters. They include design approaches, treatment techniques, operating procedures, and practices to control runoff, spillage, and leaks.

1. State Programs

Most states have forest land management laws regulating multiple aspects of forest and timber resources and management and the products derived from these resources. Many states have a complex legal framework of forestry regulations that shape the state's forest road BMP programs. This framework and the resulting BMP programs vary considerably from one state to another. States also differ in how they distribute responsibility and authority for the forest road BMP programs among the state water quality, forestry, and fish and wildlife agencies. This notice describes three existing state programs to illustrate some of the variety among the states. Descriptions of the remaining state programs may be available through state Web pages.

In Washington State, the forest practices act and rules (Forests and Fish Rules) apply to all private and state forest roads. Forest Practices Rules require that forest landowners construct and maintain roads to avoid potential or actual damage to public resources, such as water quality and fish habitat. The Washington program addresses both new forest roads as well as existing roads. The program requires larger forest landowners to complete an inventory of existing roads, identify where roads are impacting state resources (including fish and water quality), and allows for prioritization of repairing, relocating, or abandoning existing roads to correct problems. All large forest landowners must develop and submit for approval by the Washington Department of Natural Resources (DNR) a Road Maintenance and Abandonment Plan (RMAP) in which they inventory their forest roads and outline a schedule for any needed road work, including a timeline to bring old roads up to current standards or to decommission or ''abandon'' substandard roads. Small forest landowners are required to submit a ''checklist RMAP,'' which is a form landowners fill out to indicate they have assessed their roads included in a harvest and identified any potential road maintenance problems. While the program is enforceable, the state focuses first on technical assistance and then, to correct problems, uses progressive enforcement mechanisms and generally reserves civil penalties for more serious infractions. If a problem is identified, WA DNR describes the outcome expected, and the landowner describes what BMPs will be used to correct it.

Forest roads that no longer need to be used or cannot meet the performance standards are encouraged to be abandoned. Abandonment strategies may involve the removal of stream crossing structures and unstable road fill, installing water bars, re-vegetating exposed soils, and employing other similar techniques. WA DNR must approve the roadwork before the road can be considered abandoned.

Florida relies primarily on voluntary compliance with state approved forest road BMPs. However, BMPs can be enforced where noncompliance leads to a significant risk to water quality. When a significant risk has been identified, professionally-trained BMP foresters advise the landowners on how to implement corrective measures. Afterward, a follow-up site evaluation is made to reassess compliance. Landowner non-compliance with recommendations made by the BMP Forester could result in a referral to the appropriate regulatory agency for enforcement action.

California's Forest Practice Rules establish a comprehensive framework that includes state-developed and approved BMPs for silvicultural activities on private lands, including road-building practices, and other related silvicultural activities. California allows coverage under one approach that includes requirements that closely resemble those of an individual permit, known as ''Waste Discharge Requirements,'' as well as another approach allowing the use of a ''waiver'' whose requirements are closer to those of a general or regional permit. Having a ''waiver'' obviates the procedural need for coverage under the ''Waste Discharge Requirements'' program, but the substantive requirements of that program remain enforceable.

The California program is based on input from state water quality and natural resource agencies and incorporates a formal, annual adaptive management process reflecting incremental analysis of BMPs, which regularly results in updated BMP requirements. The waste discharge requirements apply similarly and equally to both public and private lands. Enforceability of the Forest Practice Rules is overseen by multiple agencies: California Department of Forestry, the California Department of Fish and Game, and the state water Quality Control Board and Regional Water Quality Control Boards (California's water quality agency).

Many states have been monitoring forestry BMP implementation for the past 20 years or more. During that time, state forestry agencies have approached implementation monitoring in different ways with varying degrees of detail, precision, and statistical strength. In general, BMP implementation has been reported to be highest on public land, followed in descending order by forest industry land, corporate non-industrial land, and private non-industrial land (Prud'homme and Greis, 2002).

EPA recognizes that one-size-fits-all approaches may not be appropriate for addressing the multiplicity of issues and situations within and across states. EPA welcomes diversity in state programs and will be carefully studying the full range of such programs as it considers whether any additional measures to address stormwater discharges from forest roads are needed.

2. USDA Forest Service Programs

a. Forest Service National BMP Program

The goal of the USDA Forest Service (USFS) National BMP Program is to improve agency performance and accountability in managing water quality in a manner consistent with the CWA and state water quality programs. Current USFS policy directs compliance with any required CWA permits and

state rules and regulations, and requires the use of approved BMPs to control pollution. The National BMP Program was developed over the past decade and is currently in the initial stages of implementation. It is intended to provide consistency among USFS administrative units to efficiently administer BMPs and demonstrate performance and accountability at multiple scales in an adaptive management context. The program is intended to meet or exceed state BMP objectives as well as to simplify and standardize water quality protection measures and monitoring on NFS land. (USDA Forest Service 2012)

The National Core BMPs integrate existing state and USFS regional BMPs under one umbrella to facilitate an agency-wide BMP implementation and effectiveness monitoring program. The National Core BMPs provide a general, non-prescriptive framework of BMPs for the broad range of activities that occur on NFS lands. (*Ibid.*)

b. Forest Service Watershed Condition Framework

The USFS's Watershed Condition Framework (WCF) is a comprehensive approach for classifying watershed condition, implementing integrated restoration in priority watersheds on national forests and grasslands, and tracking and monitoring outcome-based program accomplishments for performance accountability (USDA Forest Service 2011). The policy goal of the USFS WCF is ''to protect National Forest System watersheds by implementing practices designed to maintain or improve watershed condition, which is the foundation for sustaining ecosystems and the production of renewable natural resources, values, and benefits.'' The WCF provides a consistent way to evaluate watershed condition at both the national and forest levels. The WCF consists of reconnaissance-level assessments by individual national forests, implementation of integrated improvement activities—including those related to roads—within priority watersheds, validation and monitoring of watershed condition class changes, and aggregation of program performance data for national reporting.

c. Forest Service Legacy Roads Project

The USFS has been engaged in an extensive program of road improvement efforts called the Legacy Roads Project since 2008. The goals of this effort are to reduce the hydrologic and geomorphic impacts of the existing USFS road network on critical watersheds and aquatic resources by decommissioning or upgrading forest roads. The Legacy Roads Monitoring Project is a regional effort to examine the effectiveness of the road decommissioning, storm damage risk reduction (aka ''storm-proofing'') and road storage projects.

3. United States Department of the Interior Bureau of Land Management Programs

The Bureau of Land Management (BLM) manages 58 million acres of forest and woodlands in eleven western states and Alaska, including 2.4 million acres within the Oregon and California (O&C) grant lands in western Oregon. BLM O&C regulations regarding third party road uses provide that ''The intent and expectation of both parties to agreements is that roads are left in 'at least as good condition as existed prior to commencement of use''' (43 CFR 2812.6–2(b)(2)). The Federal Land Policy Management Act (FLPMA) requires public lands to be managed on the basis of multiple use and sustained yield without permanent impairment of the land and quality of the environment. Under Sec 502 of FLPMA, the Interior Secretary is authorized to provide for the maintenance of roads within and near the public lands and perform that work, in part, by cooperative financing with other public agencies and with private agencies and persons in proportion to their use. Forest roads may be constructed and maintained by logging operators, private landowners, the BLM, the USFS, or state or county governments. BLM roads, culverts, and bridges are designed, constructed, and maintained in accordance with policies and standards found in BLM 9100 Manual Series (Engineering) for road BMPs. In Oregon and Washington, the BLM has recently (2011) updated BMPs and, as a result, current road construction and maintenance standards are substantially improved over the standards in existence when the CWA was enacted in 1972. BLM timber sale contracts contain extensive specifications related to methods and timing of road construction and maintenance. In addition, the BLM often includes operational restrictions in their timber sale contracts to reflect appropriate protections for fish species listed under the Endangered Species Act (ESA).

Under rights-of-way agreements, examples exist of private companies owning roads constructed on BLM lands, and BLM owning roads built on private lands. There are dozens of rights-of-way agreements in place on O&C lands. These agreements are subject to frequent amendment as landowners consolidate or sell lands or split off separate corporate entities for business purposes, creating a complex access program.

4. Tribal Programs

Tribal governments in partnership with the US government dedicate substantial resources to improving Indian forest management (ITC 1993). Much of the responsibility for managing Indian forests across the country is carried out by the Bureau of Indian Affairs (BIA) with the involvement of tribal governments. The National Indian Forest Resources Management Act (NIFRMA), Title III, Public Law 101–630, directs the Secretary of the Interior, in consultation with the affected Indian tribes, to obtain an independent assessment of the status of Indian forest resources and their management. Similar to the National Forest Management Act, the NIFRMA requires the development of forestry management plans under which the forests are managed in accordance with BMPs, as approved thorough an interdisciplinary team. The Tribal Forest Protection Act (Pub. L. 108–278) authorizes the Secretary of Agriculture and the Secretary of the Interior to enter into an agreement or contract with Indian tribes to carry out projects to protect Indian forest land. Protection of such land is particularly important for tribes because they pass their land on from generation to generation. This helps to ensure future availability of natural resources, including healthy forests and clean water.

Many tribes have taken on significant roles in sustainable forest management. For example, the Menominee Indian Tribe of Wisconsin manages 95 percent of the forested portions of the reservation for long-term sustainability through the Menominee Tribal Enterprises which has received certifications for sustainable management from two groups, Scientific Certification Systems (The Forest Conservation Program) and the Rainforest Alliance (SmartWood), and is accredited by the Forest Stewardship Council. As another example, the Northern Cheyenne Tribe requires that all new roads be obliterated and seeded after forest harvesting activities. Similarly, the Blackfeet Nation has a no net new road miles policy, in that new forest roads associated with forest harvest must be closed, or other roads must be closed in their place.

5. Voluntary Certification Programs

On private forestlands, significant BMP implementation can be attributed to growing involvement of forest owners

in sustainable forestry certification programs. Several certification programs exist. Under one program, the Sustainable Forestry Initiative (SFI) of the American Forest and Paper Association, member companies must meet or exceed state BMPs on company-owned forest land (Prud'homme and Greis, 2002). Because SFI is linked to state BMPs, the forest road BMPs applied under SFI vary by state. Some forest products companies impose sanctions on timber producers who fail to implement BMPs when logging on other ownerships.

Under another, the Forest Stewardship Council (FSC) certification program, certified forest owners and operators follow a set of principles and criteria that support responsible forest management (FSC 2012). Principles and criteria include conservation of biological diversity, water resources, soils, and unique and fragile ecosystems and landscapes. Under FSC certification, additional requirements tailored by region guidelines must also be met in addition to state BMPs.

Under a third program, the American Tree Farm System, a written certification is issued by an independent third-party that attests to the sustainable management of a working forest (ATFS 2012). In addition to requirements that they be in compliance with state BMPs, certified forest managers must also attest compliance with eight standards of sustainability, including the maintenance or enhancement of the environment and ecosystems.

Certification programs can both help ensure implementation of state BMPs and in some instances require additional BMPs. Forestry operations that utilize experienced and informed land managers generally have higher rates of BMP implementation. Thus, many states recommend that landowners utilize forestry professionals (e.g., private consultants, certified Master Loggers) when planning any forest management operations. Many certification programs require involvement of forestry professionals.

E. Successes and Remaining Challenges

As described above, successful federal, state, tribal, and local programs for controlling stormwater discharges from logging and forest roads currently exist in many parts of the country and many forest owners are implementing BMP programs to address these discharges. Some studies have observed trends of decreasing sediment input as forest roads are closed and storm-proofed or newly built or brought up to standards (e.g., Dubé et al. 2010).

However, this does not mean that all of the existing programs have been successful at effectively addressing stormwater discharges from forest roads, and some discharges continue to cause or contribute to impairments for the Nation's waters.

At the same time, not all forest roads are alike, and the severity of the remaining challenges varies. There is evidence that a majority of the water quality impacts caused by discharges from forest roads can be attributed to a relatively small subset of forest roads and often a small portion of those roads (Nelson et al., 2010; Fly et al., 2010; Luce and Black, 2001; Luce and Black, 1999). Thus, EPA believes that further study of forest roads and their impacts is needed in order to determine what additional measures may be needed to address remaining water quality impacts. EPA will consider a full range of potential approaches to address water quality impacts associated with discharges of stormwater from forest roads.

III. Approaches for Managing Stormwater Discharges From Forest Roads

The Agency is considering several options for addressing significant water quality impacts caused by stormwater discharges from forest roads. EPA is considering designating a subset of stormwater discharges from forest roads for appropriate action under section 402(p)(6) of the Act. Section 402(p)(6) allows the EPA flexibility in issuing regulations to address designated stormwater discharges and does not require the use of NPDES permits. 33 U.S.C. 1342(p)(6). Section 402(p) allows for a broad range of regulatory and non-regulatory approaches and provides flexibility as to which stormwater discharges, if any, should be designated under Section 402(p)(6). For example, in lieu of regulation, EPA could support or defer to other federal, state, tribal, local, and voluntary programs. If EPA does determine that regulation under Section 402(p)(6) is appropriate for a subset of stormwater discharges from forest roads, such a regulation might address discharges only from roads used for logging or might address discharges based on contribution of the discharge to a water quality problem. Section 402(p)(6), in turn, provides considerable flexibility to EPA if it does designate any discharges for regulation in how it regulates those discharges.

EPA intends to further study the impacts of stormwater discharges from forest roads, available management practices and approaches, and the effectiveness of existing Federal, State, Tribal, local and private programs in managing these discharges, as it considers appropriate next steps.

IV. Outreach and Stakeholder Involvement

The EPA is in the process of reviewing available information on both the water quality impacts of stormwater discharges from forest roads as well as existing practices for their control. Consistent with past Agency actions, the EPA invites interested stakeholders and the public to share in the exchange of information and to engage as the Agency considers alternative approaches for addressing stormwater discharges from forest roads.

The Agency participated in the recent technical symposium hosted by the Society of American Foresters during which EPA scientists and engineers had the opportunity to hear perspectives on forest roads and the Clean Water Act from state and industry representatives directly. In addition, the EPA has begun communicating with states, tribes, and other federal agencies to understand their current forest road stormwater management programs. The Agency worked closely in particular with USDA (the USFS) and the Department of the Interior (the BLM). The EPA also welcomes information from other interested parties and plans to work closely with other stakeholders moving forward.

The EPA encourages stakeholders and the public to provide input into its consideration of appropriate measures to address stormwater discharges from forest roads and is already planning to host public meetings and webcasts to provide a forum for them to do so.

V. Next Steps

The Agency will move expeditiously to propose a revision to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of ''storm water discharge associated with industrial activity.'' EPA is aware that a Congressional moratorium on NPDES permitting of some logging roads is set to expire on September 30, 2012, and intends to move expeditiously to complete this revision. EPA will also study the water quality impacts of forest roads and existing federal, state, tribal, and voluntary programs designed to address them to determine if additional Agency action is necessary. EPA also plans to hold listening sessions to obtain stakeholder input this summer on its consideration of how best to address stormwater discharges from forest roads.

VI. Request for Comment

The EPA requests comment on potential approaches for addressing stormwater discharges from forest roads. The Agency also seeks input on examples of successful existing BMP-based state programs, tribal programs, and voluntary certification programs for managing stormwater discharges from forest roads; how these programs are implemented; how program accountability is assured; the costs of implementing those programs, including costs incurred by owners or operators of forest roads as well as the costs incurred by the organizations responsible for implementation and enforcement; the demonstrable successes of these programs; and the lessons learned in implementing such programs.

The EPA will again seek input on any additional measures to address such discharges before taking additional action.

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Dated: May 18, 2012.

Nancy K. Stoner,

Acting Assistant Administrator.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0001; FRL–9347–8]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before June 22, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online

instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), Mail Code: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and email address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or 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 EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available online at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP 2E7988.* (EPA–HQ–OPP–2012–0204). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide imidacloprid (1-[6-chloro-3-pyridinyl) methyl]-*N*-nitro-2-imidazolidinimine) and its metabolites containing the 6-chloropyridinyl moiety, in or on fish at 0.05 parts per million (ppm) and fish-shellfish, mollusk at 0.05 ppm. Adequate enforcement methodologies, Bayer gas chromatography/mass spectrometry (GC/MS) method 00200 and Bayer GC/MS method 00191, is available to enforce the tolerance expression. Contact: Sidney Jackson, (703) 305–

7610, email address: *jackson.sidney@epa.gov.*

2. *PP 0F7690.* (EPA–HQ–OPP–2012–0234). BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709, requests to establish tolerances in 40 CFR part 180 for the insecticide for the combined residues of alpha-cypermethrin and cypermethrin including zeta-cypermethrin (*S*)-α-cyano-3-phenoxy-benzyl (1*R*,3*R*)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropane-carboxylate and (*R*)-α-cyano-3-phenoxybenzyl (1*S*,3S)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropane-carboxylate, in or on tree nuts (group 14); dried shelled pea and bean, except soybean (subgroup 6C); corn, grain; corn, corn, sweet; soybeans; and sugar beet roots at 0.05 ppm; succulent shelled pea and bean (subgroup 6B); and root and tuber vegetables (group 1) at 0.1 ppm; cucurbit vegetables (group 9); fruiting vegetables (group 8); sugar beet, tops; and wheat, grain at 0.2 ppm; citrus fruit (group 10) at 0.35 ppm; cottonseed, legume, edible podded vegetable (subgroup 6A); and sorghum, grain at 0.5 ppm; rice, grain at 1.5 ppm; citrus, dried pulp at 1.8 ppm; *Brassica,* head and stem (subgroup 5A) at 2.0 ppm; citrus, oil at 4.0 ppm; leafy vegetable, except *Brassica* (group 4) at 10 ppm; and alfalfa, hay at 15 ppm. Cypermethrin is a pyrethroid insecticide consisting of three asymmetric carbon atoms, and therefore, 8 stereo-isomeric mixtures. Cypermethrin is also characterized as consisting of cis- and trans-configured diastereo-isomeric components based on orientation around its cyclopropane ring. Zeta-cypermethrin and alpha-cypermethrin are optimized stereo-isomeric mixtures of cypermethrin, each consisting of 4 major components. These zeta-cypermethrin and alpha-cypermethrin components are the enriched trans-(alpha-*S*) and cis (cis2-*R*) isomeric orientations of cypermethrin, respectively. There is a practical analytical method for detecting and measuring levels of cypermethrin in or on food with a limit of detection (LOD) that allows monitoring of food with residues at or above the levels set in these tolerances GC with electron capture detection (GC/ECD) and liquid chromatography with tandem mass spectrometry (LC/MS/MS) methods are available. Contact: Bewanda Alexander, (703) 305–7460, email address: *alexander.bewanda@epa.gov.*

3. *PP 1F7894.* (EPA–HQ–OPP–2011–0668). E.I. du Pont de Nemours & Company (''DuPont''), 1007 Market Street, Wilmington, DE 19898, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide cyantraniliprole, 3-bromo-1-(3-chloro-2-pyridinyl)-*N*-[4-cyano-2-methyl-6-[(methylamino)carbonyl]phenyl]-1*H*-pyrazole-5-carboxamide, including its metabolites and degradates, in or on almond hulls at 30 ppm; berries and small fruits, bushberries (crop subgroup 13–07B) at 4 ppm; *Brassica* (cole) leafy vegetables, head and stem *Brassica* (crop subgroup 5A) at 2 ppm; *Brassica* (cole) leafy vegetables, leafy *Brassica* greens (crop subgroup 5B) at 30 ppm; bulb vegetables, onion, bulb (crop subgroup 3–07A) at 0.04 ppm; bulb vegetables, onion, green (crop subgroup 3–07B) at 8 ppm; cattle, fat at 0.01 ppm; cattle, liver at 0.04 ppm; cattle, meat at 0.01 ppm; cattle, meat byproducts, except liver at 0.01 ppm; cherries at 6 ppm; citrus fruits (crop group 10–10) at 0.7 ppm; cotton gin byproduct at 10 ppm; cucurbit vegetables (crop group 9) at 0.3 ppm; fruiting vegetables (crop group 8–10) at 2 ppm; goat, fat at 0.01 ppm; goat, liver at 0.04 ppm; goat, meat at 0.01 ppm; goat, meat byproducts, except liver at 0.01 ppm; hog, fat at 0.01 ppm; hog, liver at 0.04 ppm; hog, meat at 0.01 ppm; hog, meat byproducts, except liver at 0.01 ppm; horse, fat at 0.01 ppm; horse, liver at 0.04 ppm; horse, meat at 0.01 ppm; horse, meat byproducts, except liver at 0.01 ppm; leafy vegetables (except *Brassica* vegetables) (crop group 4) at 15 ppm; milk at 0.01 ppm; milk, fat at 0.04 ppm; oilseeds, except cotton gin byproduct (crop group 20) at 1 ppm; pome fruits (crop group 11–10) at 0.8 ppm; root and tuber vegetables, tuberous and corm vegetables (crop subgroup 1C) at 0.15 ppm; sheep, fat at 0.01 ppm; sheep, liver at 0.04 ppm; sheep, meat at 0.01 ppm; sheep, meat byproducts, except liver at 0.01 ppm; stone fruits, except cherries (crop group 12) at 1.5 ppm; tree nuts, except almond hulls (crop group 14) at 0.06 ppm; citrus, oil at 6 ppm; citrus, raw peel at 2 ppm; and potato, wet peel at 0.3 ppm. In addition, DuPont is proposing pursuant to section 408 (d) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a (d), to amend 40 CFR part 180 to establish indirect or inadvertent tolerances for residues of cyantraniliprole, 3-bromo-1-(3-chloro-2-pyridinyl)-*N*-[4-cyano-2-methyl-6-[(methylamino)carbonyl]phenyl]-1*H*-pyrazole-5-carboxamide, including its metabolites and degradates, in or on the following commodities: Foliage of legume vegetables (crop group 7), forage at 0.15 ppm, hay at 0.6 ppm; forage, fodder and straw of cereal grains (crop group 16), forage at 0.06 ppm, hay and straw at 0.15 ppm; grass forage, fodder, and hay (crop group 17), forage at 0.06 ppm, hay at 0.15 ppm; leaves of root and tuber vegetables (human food or animal feed) (crop group 2) at 0.04 ppm; nongrass animal feeds (forage, fodder, straw, and hay) (crop group 18), forage at 0.06 ppm, hay at 0.15 ppm; peanut hay at 0.03 ppm; and root and tuber vegetables, root vegetables (crop subgroup 1A) at 0.03 ppm. Adequate analytical methodology, high-pressure liquid chromatography with (HPLC) electrospray tandem mass spectrometry (ESI–MS/MS) detection, is available for enforcement purposes. Contact: Thomas Harris, (703) 308–9423, email address: *harris.thomas@epa.gov.*

4. *PP 1F7953.* (EPA–HQ–OPP–2012–0060). Mitsui Chemicals Agro, Inc., c/o Landis International, Inc., P.O. Box 5126, Valdosta, GA 31603, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide dinotefuran, (*RS*)-1-methyl-2-nitro-3-(tetrahydro-3-furylmethyl)guanidine and its major metabolites DN, 1-methyl-3-(tetrahydro-3-furylmethyl)guanidine, and UF, 1-methyl-3-(tetrahydro-3-furylmethyl)-urea, in or on rice, grain at 10 ppm. Practical analytical methodology for detecting and measuring levels of dinotefuran and its metabolites, UF and DN, in or on raw agricultural commodities has been conducted. Dinotefuran and its metabolites in the plant matrix extracts were analyzed by HPLC and thin layer chromatography (TLC) to determine the number of metabolites and their relative distribution in the samples. The HPLC method was validated for determination of dinotefuran, DN and UF in or on tomatoes and peppers, cucurbits, *Brassica,* grapes, potatoes, mustard greens, rice, and lettuce for raw agricultural commodity matrices and in or on tomato paste and puree, grape juice and raisins and potato chips, granules, and wet peel, rice grain, hulls, and bran for processed commodity matrices. After extraction with a water/acetonitrile mixture and clean up with hexane and extraction columns, concentrations of dinotefuran and its metabolites were quantified after HPLC separation by MS/MS detection. Contact: Rita Kumar, (703) 308–8291, email address: *kumar.rita@epa.gov.*

5. *PP 1F7956.* (EPA–HQ–OPP–2012–0177). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419–8300, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide cyproconazole, in or on peanut, nutmeat at 0.03 ppm; peanut, hay at 6 ppm; peanut, meal at 0.03 ppm; peanut, butter at 0.03 ppm; and peanut, refined oil at 0.03 ppm. An adequate analytical method for cyproconazole, AM–0842–0790–0, is available for

enforcement purposes. Determination and quantitation for cyproconazole are conducted using GC employing mass selective detection (MSD). A method for analysis of triazole metabolites is available using Morse Labs Analytical Method No. Meth-160, Revision #2. Residues are quantified by GC equipped with a nitrogen-phosphorous detector (NPD). The limit of quantitation (LOQ) is 0.01 ppm for cyproconazole parent. The analytical method, AM–0842–0790–0, is available in the Pesticide Analytical Manual, Vol. II (PAM II). Contact: Shaunta Hill, (703) 347–8961, email address: *hill.shaunta@epa.gov.*

6. *PP 1F7967.* (EPA–HQ–OPP–2012–0092). BASF Corporation, c/o Landis International, Inc., P.O. Box 5126, 3185 Madison Highway, Valdosta, GA 31603, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide dinotefuran, (*RS*)-1-methyl-2-nitro-3-(tetrahydro-3-furylmethyl)guanidine, in or on all food/feed items (other than those already covered by a higher tolerance as a result of use on growing crops) in food/feed handling establishments where food products are held, processed or prepared at 0.01 ppm. Practical analytical methodology for detecting the magnitude of residues that accumulate in/on perishable food matrices (butter, processed meat, lettuce, bread, milk, peaches and pie), on non-perishable food matrices ((candy M&Ms), rice, crackers, potatoes and flour) and on bare surfaces (dinner plates, aluminum foil and table knives) following a spot and crack and crevice treatment of dinotefuran in a simulated food handling establishment has been conducted. The analytical method included sample extraction with acetonitrile or acetonitrile/water in conjunction with a solid-phase extraction/clean-up of extracts prior to analysis. Quantitation of dinotefuran in extracts was performed using LC/MS/MS. Contact: Rita Kumar, (703) 308–8291, email address: *kumar.rita@epa.gov.*

7. *PP 2F7973.* (EPA–HQ–OPP–2012–0269). BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide cyflumetofen, in or on almond, hulls at 4.0 ppm; fruit, citrus, group 10 at 0.3 ppm; citrus, oil at 16 ppm; grape at 0.6 ppm; grape, raisin at 0.9 ppm; fruit, pome, group 11 at 0.3 ppm; strawberry at 0.6 ppm; tomato at 0.2 ppm; and nut, tree, group 14 at 0.01 ppm. The analytical method D1003, ''Method for Determination of Residues of Cyflumetofen (BAS 9210 I) and its Metabolites in Plant Matrices using LC–MS/MS'' was validated successfully for the analysis of cyflumetofen and its metabolites (B–1, AB–6, and AB–7) in tomato (high water), soybean seed (high oil), rice grain (high starch), dry bean (high protein), orange (high acid), raisins (process fraction), orange oil (process fraction), orange juice (process fraction), and rice straw (feed). Contact: Driss Benmhend, (703) 308–9525, email address: *benmhend.driss@epa.gov.*

8. *PP 2F7976.* (EPA–HQ–OPP–2012–0282). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide azoxystrobin (methyl (*E*)-2-(2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy]phenyl)-3-methoxyacrylate) and the *Z* isomer of azoxystrobin, (methyl (*Z*)-2-(2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy] phenyl)-3-methoxyacrylate), in or on oat, forage at 4 ppm; oat, hay at 7 ppm; oat, straw at 3 ppm; oat, grain at 1 ppm; rye, forage at 4 ppm; rye, straw at 0.8 ppm and rye, grain at 0.07 ppm and in or on the animal commodities poultry, meat at 0.01 ppm; poultry, fat at 0.01 ppm; poultry, liver at 0.2 ppm; egg at 0.1 ppm; cattle, liver at 0.5 ppm; cattle, kidney at 0.1 ppm; hog, liver at 0.2 ppm and hog, kidney at 0.03 ppm. An adequate analytical method, GC–NPD or in mobile phase by HPLC with ultra-violet (UV) detection (HPLC–UV), is available for enforcement purposes with a LOD that allows monitoring of food with residues at or above the levels set in these tolerances. The Analytical Chemistry section of the EPA concluded that the method(s) are adequate for enforcement. Analytical methods are also available for analyzing meat, milk, poultry and eggs which also underwent successful independent laboratory validations. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

9. *PP 2F7984.* (EPA–HQ–OPP–2012–0283). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide azoxystrobin (methyl (*E*)-2-(2-[6-(2-cyanophenoxy) pyrimidin-4-yloxy]phenyl)-3-methoxyacrylate) and the *Z* isomer of azoxystrobin, (methyl (*Z*)-2-(-[6-(2-cyanophenoxy)pyrimidin-4-yloxy] phenyl)-3-methoxyacrylate), in or on the animal commodities poultry, meat at 0.01 ppm; poultry, fat at 0.01 ppm; poultry, liver at 0.2 ppm; egg at 0.1 ppm; cattle, liver at 0.5 ppm; cattle, kidney at 0.1 ppm; hog, liver at 0.2 ppm and hog, kidney at 0.03 ppm. An adequate analytical method, GC–NPD or in mobile phase by HPLC with ultra-violet (UV) detection (HPLC–UV), is available for enforcement purposes with a LOD that allows monitoring of food with residues at or above the levels set in these tolerances. The Analytical Chemistry section of the EPA concluded that the method(s) are adequate for enforcement. Analytical methods are also available for analyzing meat, milk, poultry and eggs which also underwent successful independent laboratory validations. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

10. *PP 2F7997.* (EPA–HQ–OPP–2012–0262). BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide topramezone, 3-(4,5-dihydro-3-isoxazolyl)-2-methyl-4-(methylsulfonyl)phenyl](5-hydroxy-1-methyl-1*H*-pyrazol-4-yl)methanone, in or on fish at 0.05 ppm and shellfish at 0.05 ppm. Suitable independently validated analytical methods (for animal matrices), LC/MS/MS, are submitted for detecting and measuring topramezone levels in or on food with an application LOD that is satisfactory for enforcing the requested tolerances. Contact: Bethany Benbow, (703) 347–8072, email address: *benbow.bethany@epa.gov.*

11. *PP 2F8005.* (EPA–HQ–OPP–2012–0308). K–I Chemical U.S.A., Inc., c/o Landis International, Inc., 3185 Madison Highway, P.O. Box 5126,Valdosta, GA 31603–5126, requests to establish tolerances in 40 CFR part 180 for residues of the herbicide pyroxasulfone (3-[(5-(difluoromethoxy)-1-methyl-3-(trifluoromethyl) pyrazole-4-ylmethylsulfonyl]-4,5-dihydro-5,5-dimethyl-1,2-oxazole) and its metabolites M–3 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1*H*-pyrazol-4-carboxylic acid), M–25 (5-difluoromethoxy-3-trifluoromethyl-1*H*-pyrazol-4-yl)methanesulfonic acid and M–28 (3-[1-carboxy-2-(5,5-dimethyl-4,5-dihydroisoxazol-3-ylthio)ethylamino]-3-oxopropanoic acid) calculated as the stoichiometric equivalent of pyroxasulfone, in or on soybean, seed at 0.07 ppm; and pyroxasulfone (3-[(5-(difluoromethoxy)-1-methyl-3-(trifluoromethyl) pyrazole-4-ylmethylsulfonyl]-4,5-dihydro-5,5-dimethyl-1,2-oxazole) and its metabolites M–1 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1*H*-pyrazol-4-ylmethanesulfonic acid), M–3 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1*H*-pyrazol-4-carboxylic acid), and M–25 (5-difluoromethoxy-3-trifluoromethyl-1*H*-pyrazol-4-yl)methanesulfonic acid) calculated as the stoichiometric equivalent of pyroxasulfone in or on soybean, forage at 1.5 ppm and soybean, hay at 2.0 ppm. EPA has approved an analytical

enforcement methodology including LC/MS/MS to enforce the tolerance expression for pyroxasulfone. Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

Amended Tolerances

1. *PP 2E7993.* (EPA–HQ–OPP–2012–0241). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend the tolerance in 40 CFR 180.300 by increasing the tolerance for residues of the plant regulator ethephon, in or on tomato from 2.0 ppm to 3.5 ppm. The increased tolerance is required to accommodate tomatoes of less than one inch in diameter grown in the greenhouse. Adequate methods for purposes of enforcement of ethephon tolerances in plant commodities, ruminant tissues and milk are available. The FDA (PAM Vol. I Appendix, 8/93) indicates that ethephon is not recovered through any of the Multiresidue Protocols. Contact: Andrew Ertman, (703) 308–9367, email address: *ertman.andrew@epa.gov.*

2. *PP 2F7975.* (EPA–HQ–OPP–2012–0246). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419, requests to amend the tolerances in 40 CFR 180.434 for residues of the fungicide propiconazole, 1*H*-1,2,4-Triazole, 1-([2-(4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl)-, and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound, in or on barley, hay from 1.4 ppm to 30 ppm; barley, straw from 10 ppm to 20 ppm; barley, grain from 0.3 ppm to 3 ppm; oat, forage from 1.7 ppm to 4 ppm; oat, hay from 1.4 ppm to 15 ppm; oat, grain from 0.3 ppm to 3 ppm; rye, forage from 1.7 ppm to 9 ppm; rye, straw from 10 ppm to 9 ppm; wheat, forage from 1.7 ppm to 15 ppm; wheat, hay from 1.4 ppm to 30 ppm; wheat, straw from 10 ppm to 20 ppm; and grain, aspirated fraction from 30 ppm to 108 ppm. Analytical methods adequate to determine parent propiconazole, total propiconazole as 2,4-dichlorobenzoic acid, and the triazole metabolites (1,2,4-Triazole, Triazole Alanine, and Triazole Acetic Acid) are available for enforcement purposes with LOD that allow monitoring of food with residues at or above the levels set in this tolerance. Contact: Heather Garvie, (703) 308–0034, email address: *garvie.heather@epa.gov.*

3. *PP 2F7976.* (EPA–HQ–OPP–2012–0282). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419, requests to amend the tolerances in 40 CFR 180.507 for residues of the fungicide azoxystrobin (methyl (*E*)-2-(2-[6-(2-cyanophenoxy) pyrimidin-4-yloxy]phenyl)-3-methoxyacrylate) and the *Z* isomer of azoxystrobin, (methyl (*Z*)-2-(2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy] phenyl)-3-methoxyacrylate), in or on animal commodities cattle, fat from 0.03 ppm to 0.3 ppm; hog, fat from 0.010 ppm to 0.1 ppm and hog, meat from 0.01 to 0.02 ppm. An adequate analytical method, GC–NPD or in mobile phase by HPLC with ultra-violet (UV) detection (HPLC–UV), is available for enforcement purposes with a LOD that allows monitoring of food with residues at or above the levels set in these tolerances. The Analytical Chemistry section of the EPA concluded that the method(s) are adequate for enforcement. Analytical methods are also available for analyzing meat, milk, poultry and eggs which also underwent successful independent laboratory validations. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

4. *PP 2F7981.* (EPA–HQ–OPP–2007–0099). Nichino America, Inc., 4550 New Linden Hill Road, Suite 501, Wilmington, DE 19808, has requested that the established tolerances listed in 40 CFR 180.639 for residues of the insecticide flubendiamide *per se,* (N^2-[1,1-dimethyl-2-(methylsulfonyl)ethyl]-3-iodo-N^1-[2-methyl-4-[1,2,2,2-tetrafluoro-1-(trifluoromethyl) ethyl]phenyl]-1,2-benzenedicarboxamide), in or on apple, wet pomace be increased from 2.0 ppm to 5.0 ppm; and fruit, pome, group 11 be increased from 0.70 ppm to 1.5 ppm. Adequate enforcement methodology, LC/MS/MS detection (Methods 00816/M002 and 00912), is available to enforce the tolerance expression. Contact: Carmen Rodia, (703) 306–0327, email address: *rodia.carmen@epa.gov.*

5. *PP 2F7984.* (EPA–HQ–OPP–2012–0283). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419, requests to amend the tolerances in 40 CFR 180.507 for residues of the fungicide azoxystrobin (methyl (*E*)-2-(2-[6-(2-cyanophenoxy) pyrimidin-4-yloxy]phenyl)-3-methoxyacrylate) and the *Z* isomer of azoxystrobin, (methyl (*Z*)-2-(2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy] phenyl)-3-methoxyacrylate), in or on barley, hay from 15 ppm to 7 ppm; barley, straw from 7 ppm to 8 ppm; barley, grain from 3 ppm to 2 ppm; wheat, forage from 25 ppm to 10 ppm; wheat, hay from 15 ppm to 20 ppm; wheat, straw from 4 ppm to 6 ppm and grain, aspirated fraction from 420 ppm to 460 ppm and in or on the animal commodities cattle, fat from 0.03 ppm to 0.3 ppm; hog, fat from 0.010 ppm to 0.1 ppm and hog, meat from 0.01 to 0.02 ppm. An adequate analytical method, GC–NPD or in mobile phase by HPLC with ultra-violet (UV) detection (HPLC–UV), is available for enforcement purposes with a LOD that allows monitoring of food with residues at or above the levels set in these tolerances. The Analytical Chemistry section of the EPA concluded that the method(s) are adequate for enforcement. Analytical methods are also available for analyzing meat, milk, poultry and eggs which also underwent successful independent laboratory validations. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

List of Subjects in 40 CFR Part 180

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 9, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2012–12126 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 11–154; Report No. 2951]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for reconsideration.

SUMMARY: In this document, Petitions for Reconsideration (Petitions) have been filed in the Commission's Rulemaking proceeding by the Consumer Electronics Association, Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.,* and TVGuardian, LLC.

DATES: Oppositions to the Petition must be filed by June 7, 2012. Replies to an opposition must be filed June 18, 2012.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Diana Sokolow, *Diana.Sokolow@fcc.gov mailto: Diana.Sokolow@fcc.gov,* Media Bureau, Policy Division, 202–418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of Commission's document, Report No. 2951, released May 17, 2012. The full text of this document is available for viewing and copying in Room CY–B402, 445 12th Street SW.,

Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). The Commission will not send a copy of this *Notice* pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), because this *Notice* does not have an impact on any rules of particular applicability.

Subject: Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, published at 77 FR 19480, March 30, 2012, and published pursuant to 47 CFR 1.429(e). *See* 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)).

Number of Petitions Filed: 3.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–12613 Filed 5–22–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 070719377–2189–01]

RIN 0648–AV81

Confidentiality of Information; Magnuson-Stevens Fishery Conservation and Management Reauthorization Act

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

ACTION: Proposed rule.

SUMMARY: The National Marine Fisheries Service (NMFS) proposes revisions to existing regulations governing the confidentiality of information submitted in compliance with any requirement or regulation under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA). The purposes of these revisions are to make both substantive and non-substantive changes necessary to comply with the MSA as amended by the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) and the 1996 Sustainable Fisheries Act (SFA). In addition, revisions are necessary to address some significant issues that concern NMFS' application of the MSA confidentiality provision to requests for information.

DATES: Written comments on the proposed rule must be received on or before June 22, 2012.

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2012–0030, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0030 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to Karl Moline, NMFS, Fisheries Statistics Division F/ST1, Room 12441, 1315 East West Highway, Silver Spring, MD 20910.
- *Fax:* (301) 713–1875; Attn: Karl Moline.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Karl Moline at 301–427–8225.

SUPPLEMENTARY INFORMATION:

I. Background

The Magnuson-Stevens Act authorizes the Secretary of Commerce (Secretary) to regulate domestic fisheries within the 200-mile U.S. Exclusive Economic Zone (EEZ). 16 U.S.C. 1811. Conservation and management of fish stocks is accomplished through Fishery Management Plans (FMPs). Eight regional fishery management councils (Councils) prepare FMPs and amendments to those plans for fisheries within their jurisdiction. Id. 1853. The Secretary has exclusive authority to prepare and amend FMPs for highly migratory species in the Atlantic Ocean. Id. 1852(a)(3), 1854(g).

Information collection is an important part of the fishery management process. Conservation and management measures in FMPs and in their implementing regulations must be based on the best scientific information available (see National Standard 2, 16 U.S.C. 1851(a)(2)). Under section 303(a)(5) of the Magnuson-Stevens Act, any Fishery Management Plan a Council or the Secretary prepares must specify the pertinent information to be submitted to the Secretary with respect to commercial, recreational, or charter fishing, and fish processing in the fishery. Id. 1853(a)(5). In addition, section 303(b)(8) provides that an FMP may require that one or more observers be carried onboard a vessel for the purpose of collecting data necessary for the conservation and management of the fishery. Id. 1853(b)(8).

The Magnuson-Stevens Act sets forth information confidentiality requirements at section 402(b), 16 U.S.C. 1881a(b). Under the Act as amended, the Secretary must maintain the confidentiality of any information that is submitted in compliance with the Act and any observer information. The MSA includes exceptions to these confidentiality requirements. Some exceptions allow for the sharing of confidential information with specified entities provided that these parties treat the information as confidential, while others allow for the release of information without restrictions. In addition, the MSA authorizes the Secretary to disclose information that is subject to the Act's confidentiality requirements in ''any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information.'' Id. 1881a(b)(3).

Section 402(b)(3) of the Act provides that the ''Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement or regulation under this Act * * *''. Id. 1881a(b)(3). Accordingly, NMFS has promulgated confidentiality regulations, which are set forth at 50 CFR part 600, subpart E. Certain terms used in these regulations are defined under 50 CFR part 600, subpart A. NMFS last revised the regulations under subpart E in February 1998 (63 FR 7075). The revisions were non-substantive.

NMFS now proposes substantive and non-substantive revisions to its regulations at 50 CFR part 600 subpart A, subpart B, and subpart E in order to implement confidentiality requirements amendments, which were included in the 1996 SFA and the 2006 MSRA. NMFS proposes additional revisions to address some significant issues that have arisen in the day-to-day application of the MSA confidentiality provisions to information requests. These proposed revisions seek to balance the mandate to protect confidential information with exceptions that authorize disclosure of information to advance fishery conservation and management, scientific research, enforcement, and transparency in fishery management actions.

The proposed rule is informed by other statutes that NMFS administers, including the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the Freedom of Information Act (FOIA). Development of this proposed rule required NMFS to interpret several statutory provisions, including provisions for release of information in aggregate or summary form, a limited access program exception, and provisions regarding observer information. Accordingly, NMFS highlights these elements of the proposed rule in the discussion below and seeks public comment on options and alternatives for these and other aspects of the proposed rule.

Below, NMFS provides information on three types of proposed changes. NMFS begins with proposed changes that concern the expanded scope of the confidentiality requirements. Next, NMFS presents changes that concern exceptions allowing for the disclosure of confidential information. Lastly, NMFS presents changes necessary to improve the clarity of the regulations.

II. Proposed Changes Addressing the Expanded Scope of the MSA Confidentiality Requirements

Because statutory amendments have broadened the scope of the MSA's confidentiality requirements, NMFS proposes corresponding regulatory changes. At the MSA's enactment, its confidentiality requirements applied to ''[a]ny statistics submitted to the Secretary'' in compliance with an FMP. Public Law 94–265, Title III, 303(d) (1976). Congress broadened the confidentiality requirements through the 1996 SFA, Public Law 104–297 (1996), in two respects. First, the 1996 SFA substituted the word ''information'' for ''statistics.'' Id. 203. As a result, the statute's confidentiality requirements protected ''any information submitted to the Secretary'' in compliance with an FMP. The 1996 SFA also expanded the confidentiality requirements to apply not just to information submitted in compliance with an FMP, but to information submitted in compliance with ''any requirement or regulation'' under the Act. Id. Accordingly, NMFS' proposed rule would update the confidentiality regulations under 50 CFR part 600 to reflect the changes to the law made in 1996.

In addition, this proposed rule would implement further broadening of the confidentiality requirements made by the 2006 MSRA, Public Law 109–479 (2007). Prior to the 2006 MSRA, the confidentiality requirements applied only to information submitted to the Secretary in compliance with any requirement or regulation under the Magnuson-Stevens Act. The 2006 MSRA amended the confidentiality requirements at section 402(b) of the Magnuson-Stevens Act, 16 U.S.C. 1881a(b), to include information submitted to a State fishery management agency or a Marine Fisheries Commission in compliance with a requirement or regulation under the Act. Public Law 109–479, Title II 203. The 2006 MSRA also amended the confidentiality requirements to apply to any observer information, which is now defined under section 3(32) of the Magnuson-Stevens Act. 16 U.S.C. 1802(3)(32).

Specifically, NMFS proposes making the following changes to its regulations in order to implement these amendments to the scope of the MSA confidentiality requirement:

1. Replacing the term ''statistics'' with ''information'' in 50 CFR 600.130 and in all regulations under 50 CFR subpart E;

2. Outlining procedures to preserve the confidentiality of all information submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission by any person in compliance with the requirements of the Magnuson-Stevens Act. (§ 600.410(b));

3. Deleting the definition of ''confidential statistics'' and adding a definition for ''confidential information'' (§ 600.10); and

4. Adding a definition for observer employer/observer provider (§ 600.10). Fisheries observer programs are predominantly contractors hired through private observer employer/observer provider companies. These companies provide qualified persons to perform observer duties on vessels engaged in fishing for species managed under the MSA. NMFS proposes the definition to ensure that observer employer/observer provider companies properly handle information that is required to be maintained as confidential under the MSA.

III. Proposed Changes Concerning Exceptions to the Confidentiality Requirement

The MSA's confidentiality requirements are also subject to a number of exceptions that apply if certain conditions are satisfied. Some exceptions allow NMFS to share confidential information with other entities provided that the recipients will maintain it as confidential, while other exceptions allow for the disclosure of confidential information even if the confidentiality will not be maintained by the recipients. In addition, a provision of the MSA authorizes the Secretary to aggregate or summarize information that is subject to the Act's confidentiality requirements into a non-confidential form ''which does not directly or indirectly disclose the identity or business of any person who submits such information.'' 16 U.S.C. 1881a(b)(3). Non-confidential aggregate or summary form information may be released to the public.

NMFS proposes regulatory changes to address significant issues that concern application of exceptions to the confidentiality requirements and the aggregation and summarization provision. NMFS presents these changes in the following order: First, substantive changes addressing disclosure of confidential information without requiring the recipient to keep it confidential; next, substantive changes addressing disclosure of aggregated or summarized confidential information; and finally, non-substantive changes regarding the sharing of confidential information with other entities provided that it remains confidential.

A. Proposed Changes Concerning Exceptions to Confidentiality Requirements, Where Disclosed Information May Not Remain Confidential

The following changes would implement exceptions that authorize the disclosure of confidential information without further restrictions on its disclosure. Public comments on these provisions, numbered 1–4 below, are especially important, because they propose disclosures where NMFS does not require the recipients to maintain confidentiality.

1. Exception for release of information required to be submitted for a determination under a limited access program: While MSA section 402(b) generally provides for confidentiality of information, section 402(b)(1)(G)

provides an exception for information that is ''required to be submitted to the Secretary for any determination under a limited access program.'' Id. 1881a(b)(1)(G). The scope of this exception depends on how the terms ''limited access program'' and ''determination'' are defined, and because the statute offers no definitions, NMFS now proposes definitions for these terms. NMFS' interpretation of this exception is important for fisheries managed under limited access programs, because disclosure of information could advance the transparency of the decision-making process and provide those seeking privileges, and privilege holders, with information that may be necessary for an appeal of a determination under a limited access program. However, because MSA section 402(b) generally requires confidentiality, NMFS must consider carefully the breadth of its interpretation of the exception under 402(b)(1)(G). NMFS seeks public comment on the below proposed approaches to ''limited access program,'' ''determination,'' and the information to be covered under the exception, and alternative approaches that NMFS might consider.

Proposed Definition for ''Limited Access Program''

As explained above, the MSA does not define ''limited access program'' as that term appears in section 402(b), and the interpretations of the term could range across a wide spectrum. At one end of the spectrum, NMFS could broadly interpret ''limited access program'' under section 402(b) as meaning ''limited access system,'' which is defined at MSA section 3(27). If NMFS takes this approach, the definition would allow very broad disclosure, applicable to any fishery in which participation is limited to ''those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.'' *See* 16 U.S.C. 1802(27) (defining limited access system); *see also id.* 1853(b)(6) (setting forth requirements for establishing limited access system). At the other end of the spectrum, NMFS could more narrowly interpret ''limited access program'' as only MSA section 303A limited access privilege programs (LAPPs). 16 U.S.C. 1853a. *See also id.* 1802(26) (defining ''limited access privilege'').

While NMFS encourages comments on the full range of interpretations available for the term, at this time NMFS does not propose to interpret ''limited access program'' as meaning either a ''limited access system'' or a ''limited access privilege program.'' Taking into account these terms, different potential interpretations of section 402(b)(1)(G), and prior and ongoing work in developing LAPP and LAPP-like programs, NMFS proposes a moderately broad interpretation, defining the term ''limited access program'' to mean a program that allocates privileges, such as a portion of the total allowable catch (TAC), an amount of fishing effort, or a specific fishing area to a person as defined by the MSA. Information required to be submitted for a determination for such programs could be disclosed.

This interpretation of limited access program would include specific types of programs defined under the MSA, such as section 303A LAPPs and Individual Fishing Quotas (MSA 3(23)). It would also include other management programs not specifically mentioned in the Act, such as programs that allocate a TAC, or a portion of a TAC, to a sector or a cooperative, and programs that grant an exclusive privilege to fish in a geographically designated fishing ground. The Act does not preclude the development of other management programs that are similar to LAPPs but fall outside the section 303A requirements and provisions; the definition of ''limited access program'' could apply to them as well, allowing disclosure of information submitted for determinations under such programs.

Proposed Definition for ''Determination''

It is also possible to interpret ''determination'' under MSA 402(b)(1)(G) in many different ways. On the one hand, ''determination'' could mean any decision that NMFS makes for a fishery managed under a limited access program. Alternatively, it could mean those determinations that are more specific to limited access programs, like NMFS' allocation and monitoring of fishing privileges. Privileges allocated and monitored under limited access programs include limited access privileges, individual fishing quotas, a sector's annual catch entitlement, and other exclusive allocative measures such as a grant of an exclusive privilege to fish in a geographically designated fishing ground.

NMFS proposes the latter approach: defining ''determination'' to mean a grant, denial, or revocation of privileges; approval or denial of a transfer of privileges; or other similar NMFS regulatory determination applicable to a person. ''Person'' is already defined under MSA section 3(36), and a determination that generally concerns a fishery, such as a stock assessment, would not be considered a ''determination under a limited access program.'' This approach seeks to enhance the transparency of NMFS' administration of limited access programs and enable parties to have information necessary for appealing determinations.

It is important to note that the statutory exception in MSA 402(b)(1)(G) applies regardless of whether NMFS actually has made a determination. Therefore, NMFS' proposed rule would allow for release of information required to be submitted for a determination, even if NMFS has not made one. Information could be disclosed under the exception if there are sufficient facts suggesting that NMFS will use the information to make a determination, such as where participants in a limited access program submit information to NMFS for it to determine whether the participants have fished within their allocated privileges. The information would be immediately releasable even if NMFS has not made its determination.

Similarly, prior landing information would be releasable if a Council had submitted an FMP or plan amendment for a limited access program for Secretarial approval and NMFS issued a notice in the **Federal Register** stating that it will use prior landings data for initial allocation determinations under a proposed limited access program. However, the exception would not be applicable where a Council is merely considering developing a limited access program. In that case, there would be insufficient facts to support a conclusion that information was submitted to NMFS for it to make a determination under a limited access program.

NMFS believes that the proposed rule approach will enhance accuracy in limited access program implementation. For example, by making catch histories available before making initial allocation determinations, fishermen can verify the accuracy of the information.

Additional Issues Regarding the Scope of Information Releasable Under the Limited Access Program Exception to the Confidentiality Requirements

NMFS has considered several issues related to the scope of information to be covered under the limited access program exception to the confidentiality requirements. Specifically, NMFS has considered tailoring information releases to the relevant determination, maintaining medical and other information as confidential, releasing limited access program information

submitted prior to the MSRA, and releasing information that was initially submitted for non-limited access program reasons. NMFS solicits public comment on its proposed approaches to these four issues, as described below, and also on other potential approaches for addressing the scope of information to be covered under the exception.

NMFS proposes that information releases be tailored for release at the level of the relevant limited access program determination. Thus, information submitted by a specific vessel for a determination about that vessel would be released at the vessel level. However, information submitted by a sector for a determination related to all vessels that operate in the respective sector would be released at the sector level. For example, the Georges Bank Cod Hook Sector is required to submit information on the vessel catch or effort history, and NMFS uses this information to determine whether the Sector is complying with its approved Sector Operations Plan. In this instance, information would be released at the sector level. There may, however, be instances where NMFS uses a sector's data to make determinations about each vessel within the sector. In such cases, information would be released at the vessel level.

NMFS has considered that medical and other personal information may be used for certain determinations under limited access programs and therefore would be within the scope of the confidentiality exception contemplated by subparagraph 402(b)(1)(G). For example, shareholders under the North Pacific Sablefish and Halibut Individual Transferable Quota (ITQ) program must submit such information to support an application for a medical transfer under the regulations. In such cases, NMFS would consider whether Exemption Six of the Freedom of Information Act applies to the information. 5 U.S.C. 552(b)(6). Exemption Six authorizes the withholding of information about individuals in ''personnel and medical files and similar files'' when the disclosure of such information ''would constitute a clearly unwarranted invasion of personal privacy.'' Id. There may be other instances where NMFS applies applicable FOIA Exemptions to information that is otherwise releasable under subparagraph 402(b)(1)(G).

NMFS is considering the treatment of information previously maintained as confidential. Prior to the enactment of the MSRA, a number of fisheries were managed under limited access programs. NMFS required information to be submitted for determinations under these programs. Accordingly, development of these confidentiality regulations requires consideration of whether the confidentiality exception in MSA section 402(b)(1)(G) applies to information submitted prior to the passage of the MSRA.

Congress did not expressly say whether MSA 402(b)(1)(G) applies to information submitted prior to enactment of the 2006 MSRA. NMFS believes there are two approaches to this issue. NMFS could apply the exception to all limited access program information submitted to NMFS, regardless of when the information was submitted. Under this approach, NMFS could release information pursuant to this exception even if the information had been submitted prior to enactment of the MSRA. This approach reflects an application of current law, in that the limited access program exception would be applied to NMFS' post-MSRA handling of information. Alternatively, NMFS could apply the exception only to information which has been required to be submitted at a point after enactment of the MSRA. This approach recognizes that when people submitted information pre-MSRA, they may have had a different understanding of what information NMFS could release than that which the current law permits.

NMFS is inclined to apply the exception for limited access program information without regard to when a person submitted information to the agency. Applying the current law in a manner favoring disclosure would enhance transparency as to the historical distribution of resources under limited access programs and allow prospective purchasers of fishing permits to have greater access to permit catch histories. Although NMFS is disinclined to adopt an approach that would apply the exception for limited access information based on the timing of the submission of the information, the agency is interested in public comment on this approach and other potential approaches. NMFS also specifically seeks comment on how the preferred approach or others would affect business or other interests, including comments on expectations of, or reliance on, confidentiality protections.

In addition, NMFS notes that non-limited access program fisheries may, through appropriate Council or Secretarial action, transition to limited access programs. In these situations, information submitted under a non-limited access program fishery may later be relevant for determinations regarding privileges under a newly established limited access program. For the same reasons discussed above, and to promote efficiency and reduce reporting requirements on the regulated industry, NMFS proposes that information previously submitted under non-limited access program fisheries that it uses or intends to use for determinations under newly established limited access programs be treated as within the scope of the confidentiality exception under subparagraph 402(b)(1)(G). NMFS seeks public comment on this proposed approach and other approaches to this issue.

2. Exception for release of information required under court order: Magnuson-Stevens Act section 402(b)(1)(D) provides an exception for the release of confidential information when required by court order. 16 U.S.C. 1881a(b)(1)(D). Information disclosed under this exception may become part of a public record. To clarify when this section applies, NMFS proposes definitions for ''court'' and ''order'' which make clear that the exception applies only to orders issued by a federal court (§ 600.425(d)). In developing these definitions, NMFS considered whether an order from a state court was within the scope of MSA section 402(b)(1)(D). Unless expressly waived by Congress, sovereign immunity precludes state court jurisdiction over a federal agency. In NMFS' view, Congress has not waived sovereign immunity through MSA section 402(b)(1)(D). Therefore, under this proposed rule, NMFS would not honor state court orders as a basis for disclosure of confidential information. State court orders would be handled under 15 CFR part 15, subpart A, which sets forth the policies and procedures of the Department of Commerce regarding the production or disclosure of information contained in Department of Commerce documents for use in legal proceedings pursuant to a request, order, or subpoena.

3. Exception for release of information to aid law enforcement activity: This proposed rule would add text to address sections 402(b)(1)(A) and (C) of the Magnuson-Stevens Act, which provide that confidential information may be released to federal and state enforcement personnel responsible for fishery management plan enforcement. (§ 600.425(e)). The proposed rule would allow enforcement personnel to release confidential information during the enforcement of marine natural resources laws. In such cases, previously confidential information may become part of a public record.

4. Exception for release of information pursuant to written authorization: Section 402(b)(1)(F) of the Magnuson-Stevens Act allows for the release of confidential information ''when the

Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act.'' 16 U.S.C. 1881a(b)(1)(F). Through this rulemaking, NMFS proposes procedures to ensure that the written authorization exception is utilized only by the person who submitted the information. To that end, NMFS proposes that a person who requests disclosure of information under this exception prove their identity by a statement consistent with 28 U.S.C. 1746, which permits statements to be made under the penalty of perjury as a substitute for notarization.

Generally, the holder of the permit for a vessel, or the permit holder's designee, will be considered the person who submitted information in compliance with the requirements of the MSA. In cases where requirements to provide information are not tied to a permit, the person who is required to submit the information and is identified in the information as the submitter may execute the written authorization for that information. In most cases, the identity of the submitter of information will be the person who signed the document provided to NMFS. For example, the regulation that implements the MSA financial interest disclosure provision requires that persons nominated for appointment to a regional fishery management council file a signed financial interest form. 16 U.S.C. 1852(j). As the person who is required to submit and sign the financial interest form, a Secretarial nominee would be considered the submitter of the form and, as such, would be able to authorize its disclosure. NMFS intends to develop and make available a model ''authorization to release confidential information'' form.

In the context of the observer information provisions of MSA section 402(b), the written authorization exception is subject to different interpretations. The exception applies when the ''person submitting'' information requests release of such information. MSA section 402(b)(2) provides for disclosure of observer information under the written authorization exception but does not identify who the ''person submitting'' that information is. Accordingly, to apply the written authorization exception to observer information, the submitter of observer information must be identified.

A further complication is that observer programs collect and create different types of observer information for fishery conservation and management. The primary category of observer information is information that is used for scientific and management purposes. Among other things, the Magnuson-Stevens Act requires that fishery management plans specify pertinent data on fishing and fish processing to be submitted to the Secretary, including but not limited to the type and quantity of fishing gear used, catch in numbers of fish or weight thereof, areas in which fishing was engaged in, and economic information. 16 U.S.C. 1853(a)(5). The Act also requires establishment of standardized bycatch reporting methodology. Id. 1853(a)(11). To obtain this and other information, FMPs may require that vessels subject to the plan carry one or more observers. Id. 1853(b)(8).

In addition, NMFS' regional observer programs have established administrative procedures through which observers create information for program operation and management. Information created through these administrative procedures is used to review observer performance, evaluate the observer's data and collection methodology, and to assess any reports of non-compliance with fishery regulations. More generally, observer programs use this information to evaluate the overall effectiveness of the observer program. Program administrative procedures generally require observers to maintain an official logbook (also referred to as field notes, a journal or diary) that includes technical information related to collection and sampling methodologies and notes that concern their work while deployed on a vessel. Following completion of a fishing trip, observers use their logbooks and their general recollection of the fishing trip to answer post-trip debriefing questions during a debriefing process. Debriefings are generally conducted by NMFS personnel at NMFS facilities, although some observer programs may have debriefings conducted at observer provider offices by observer provider supervisory personnel. NMFS, or the observer provider as appropriate, compiles the observer's responses into a post-trip debriefing report. Observer providers that are tasked with administration of observer debriefings are required to provide debriefing reports to NMFS.

NMFS is interested in public comment on different options for applying the written authorization exception to observer information. As discussed above, it is unclear what observer information is submitted and who acts as the ''person submitting'' observer information. One approach would be to treat the permit holder as the person who submits both types of observer information. That is, the permit holder would be the person who submits observer information collected for scientific and management purposes and observer information created for administration of the observer program. A second option would be to treat the observer, or the observer's employer, as the person who submits both types of observer information. A third option would be to treat the permit holder as the submitter of observer information collected for scientific and management purposes but not as the submitter of observer information that is created for program administration (e.g, field notes, journals, or diaries). Under this option, there would be no submitter of observer information that is created for program administration. Rather, this information would be treated as internal program information and not subject to the written authorization exception.

In light of the ambiguity in the statute, and recognizing the different purposes for the two types of observer information, NMFS is proposing to apply the third approach and is disinclined to adopt the other two options. However, NMFS will consider the other two options following public comment.

Under NMFS' proposed approach, permit holders would be considered the submitters of information collected for scientific and management purposes and would therefore be allowed to authorize release of that information. On the other hand, there would be no ''submitter'' of observer information created for administration of the observer program and it would be treated as internal program information. As such, this information would not be subject to disclosure to the permit holder under the written authorization exception or under FOIA. In withholding debriefing reports, NMFS would apply FOIA Exemption Three, which, as explained above, authorizes the withholding of information that is prohibited from disclosure under another Federal statute. Here, MSA section 402(b)(2) requires the withholding of observer information.

NMFS believes that this approach is consistent with the definition of ''submit.'' Observers submit information collected for scientific and management purposes to the respective observer programs but do so on behalf of the permit holder that is required to carry an observer. Observer information compiled for administration of the observer program, including information set forth in observer

logbooks, journals, or diaries and the information in observer debriefing reports, is not ''submitted'' information. Rather, this information is created through program administrative procedures and should be treated as internal program information.

In addition, NMFS believes that the third approach is consistent with the purpose of the written authorization exception, which is to provide permit holders and other submitters of information with access to information that concerns their business and that was obtained by NMFS through a person's compliance with a requirement or regulation under the Magnuson-Stevens Act.

B. Proposed Changes Requiring the Protection of Business Information in Releases Allowed by Aggregation and Summarization Exception

NMFS proposes regulatory definitions to ensure protection for business information. The MSA at section 402(b)(3) provides that ''the Secretary may release or make public any information submitted in compliance with any requirement or regulation under the Magnuson-Stevens Act in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information.'' 16 U.S.C. 1881a(b)(3). Under this provision, the Secretary, acting through NMFS, may aggregate and summarize information that is subject to the Act's confidentiality requirements into a non-confidential form. The application of the provision's language directly corresponds to the level of protection afforded to information that is subject to the MSA confidentiality requirements. Current agency regulations include a definition of ''aggregate or summary form'' that allows for the public release of information subject to the confidentiality requirements if the information is ''structured in such a way that the identity of the submitter cannot be determined either from the present release of the data or in combination with other releases.'' § 600.10. The regulations also state that the Assistant Administrator for Fisheries will not release information ''that would identify the submitter, except as required by law.'' Id. § 600.425(a). As a result, information may be disclosed in any aggregate or summary form that does not disclose the identity of a submitter. These regulations focus on protection of submitters' identity, but this approach does not provide any specific protection for submitters' ''business'' information.

Application of Protection Beyond Identity to Financial and Operational Information

NMFS reviewed the legal and policy basis for this approach as part of its development of revised regulations for implementation of the 2006 MSRA and the 1996 SFA. It appears that NMFS has historically interpreted the two different elements of MSA 402(b)(3)—''identity of any person'' and ''business of any person''—to mean submitters' identifying information, including that which would identify them personally and that which would identify their businesses. NMFS has reassessed the application of MSA section 402(b)(3) and, based on this reassessment, believes that Congress intended the MSA confidentiality provision to protect a broader scope of information than that which would identify submitters. Therefore, NMFS proposes to revise the regulatory definition of ''aggregate or summary form'' to protect against the disclosure of the ''business of any person'' and proposes to add a specific definition for ''business of any person'' that would provide broader protection for information submitted in compliance with the MSA and any observer information.

The statutory language ''business of any person'' is ambiguous, and NMFS acknowledges that it could be subject to different interpretations. As explained above, NMFS has historically interpreted this language to mean only the identity or name of a person's business such as ''ABC Fishing Company.'' NMFS believes that a broader interpretation is more consistent with congressional intent and legal rules for interpretation of statutes. Therefore, NMFS proposes to clarify ''business of any person'' by defining it at § 600.10 as meaning financial and operational information. Financial information would include information in cash flow documents and income statements, and information that contributes to the preparation of balance sheets. Operational information would include fishing locations, time of fishing, type and quantity of gear used, catch by species in numbers or weight thereof, number of hauls, number of employees, estimated processing capacity of, and the actual processing capacity utilized, by U.S. fish processors. By providing these definitions, NMFS limits releases to an aggregate or summary form which does not disclose the specified financial and operational information of a person.

When responding to FOIA requests for MSA confidential information, NMFS takes into consideration FOIA Exemption Three, 5 U.S.C. 552(b)(3), and other relevant FOIA exemptions. FOIA Exemption Three applies to information that is exempted from disclosure by another statute. NMFS interprets MSA section 402(b) to exempt from disclosure information that would directly or indirectly disclose the identity or business of any person. As explained above, this proposed rule would require NMFS to consider both factors—not just identity—when applying the aggregate or summary form provisions of the regulations. While this could result in more information being withheld, NMFS believes that detailed and useful information will continue to be disclosed under the aggregate or summary form provisions. NMFS intends to develop, and make available for public comment, aggregation guidelines based on the definition for aggregate or summary form and other elements of the final MSA confidentiality rule. NMFS' preferred option is to adopt an approach that requires protection of submitters' business information. Accordingly, the agency is disinclined to continue to allow for the disclosure of aggregated or summarized information that protects only submitters' identifying information. However, NMFS seeks specific public comment on the proposed definitional changes and other potential options to aggregation and summarization of information subject to the confidentiality requirements.

Exclusion of Observer Information From Definition of Protected Business Information

In developing this proposed rule, NMFS considered whether its definition for ''business of any person'' should include observer information that concerns interactions with protected species. As discussed above, NMFS may release MSA confidential information in ''aggregate or summary form,'' which would ''not directly or indirectly disclose the identity or business of any person.'' By excluding observer information that concerns interactions with protected species from the definition of ''business of any person,'' observer information could be released publicly in aggregate or summary form as long as it would not directly or indirectly result in disclosure of the identity of the vessel involved in the interaction. Thus, in most cases, NMFS would be able to disclose specific details of interactions with protected species.

Release of observer information that concerns interactions with protected species would advance implementation of statutory mandates under the MMPA

and the ESA. For example, this information is critical for deliberations by Take Reduction Teams (TRT) that are convened under section 118(f)(6)(A) of the MMPA. 16 U.S.C. 1387(f)(6)(A)(i). TRTs established under the MMPA must meet in public and develop plans to reduce incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. See Id. at 1387(f)(6)(D) (public meetings) and 1387(f) (development of take reduction plans). Specific details about interactions with marine mammals that occurred during commercial fishing operations are critical to developing a plan. Id. 1387(f). This information is often available only through observer records. Without detailed observer information on interactions with protected species, TRTs may be unable to develop targeted plans to reduce bycatch of protected species.

Detailed information on interactions with protected species may also facilitate implementation of the ESA. NMFS may need to present detailed information about commercial fisheries interactions with species listed under the ESA in a biological opinion. See § 402.14(g)(8) (requirements for biological opinions). Furthermore, both the MMPA and the ESA require that NMFS use the best available scientific information when making determinations. 16 U.S.C. 1386(a) (MMPA stock assessments) and 16 U.S.C. 1536(c)(1) (ESA biological assessments).

For these reasons, NMFS proposes that the definition of ''business of any person'' exclude the following observer information on protected species interactions: species of each marine mammal or ESA-listed species incidentally killed or injured; the date, time, and geographic location of the take; and information regarding gear used in the take that would not constitute a trade secret under FOIA, 5 U.S.C. 552(b)(4). While excluding observer information that concerns interactions with protected species from the definition of ''business of any person'' would advance MSA, ESA, and MMPA mandates, NMFS recognizes that it would also result in the public disclosure of specific information collected by observers during fishing operations. For example, the location of an interaction with a protected species would, in some cases, identify where a vessel fished.

Because observer information that concerns interactions with protected species could also be viewed as a vessel's operational information, NMFS seeks public comments on this proposed approach and other potential approaches to this issue. Although NMFS is disinclined to define ''business of any person'' to include observer information that concerns interactions with protected species, the agency will consider viable approaches other than its proposed interpretation.

C. Proposed Changes Allowing Disclosure of Confidential Information Where Limitations Apply To Further Disclosure

NMFS proposes the following changes concerning confidentiality requirement exceptions that allow for information to be shared with other entities, provided that specified precautions protect the information.

1. Adding procedures that authorize the sharing of observer information between observer employer/observer providers for observer training or to validate the accuracy of the observer information collected. (§ 600.410(c)(4)).

2. Adding procedures that authorize the disclosure of confidential information in support of homeland and national security activities. (§ 600.415(c)(3)).

3. Adding procedures that authorize the disclosure of confidential information to State employees responsible for fisheries management. (§ 600.415(d)).

4. Adding procedures that authorize the disclosure of confidential information to State employees responsible for FMP enforcement pursuant to a Joint Enforcement Agreement with the Secretary. (§ 600.415(e)).

5. Adding procedures that authorize the disclosure of confidential information to Marine Fisheries Commission employees. (§ 600.415(f)).

6. Revising procedures under which confidential information can be disclosed to Council members for use by the Council for conservation and management purposes. (§ 600.415(g)(2)). Under MSA section 402(b)(3), the Secretary may approve a Council's use of confidential information for conservation and management purposes. 16 U.S.C. 1881a(b)(3). NMFS' current confidentiality regulations implement this authority under § 600.415(d)(2). That regulation authorizes the Assistant Administrator, NOAA Fisheries (AA), to grant a Council access to confidential information upon written request by the Council Executive Director. In determining whether to grant access, the AA must consider, among other things, the ''possibility that the suppliers of the data would be placed at a competitive disadvantage by public disclosure of the data at Council meetings or hearings.'' Id. During development of this proposed action, a question was raised regarding whether this text allows public disclosure of information that was released to a Council under this procedure. As MSA section 402(b)(3) provides for disclosure of information for use by a Council, NMFS proposes to clarify and revise § 600.415(d)(2)(ii) by removing the ''public disclosure'' text.

7. Adding procedures to authorize release of confidential information to a Council's scientific and statistical committee (SSC). (§ 600.415(g)(3)). Under the Magnuson-Stevens Act as amended by the 2006 MSRA, Councils must establish, maintain, and appoint the members of an SSC. 16 U.S.C. 1852(g)(1)(A). Members appointed by Councils to SSCs shall be Federal or State employees, academicians, or independent experts. Id. 1852(g)(1)(C). The role of the SSC is, among other things, to assist the Council in the development, collection, evaluation and peer review of statistical, biological, economic, social, and other scientific information as is relevant to the Council's development and amendment of any FMP. Id. 1852(g)(1)(A). Furthermore, the SSC is required to provide its Council ongoing scientific advice for fishery management decisions, including, among other things, recommendations for acceptable biological catch and preventing overfishing and reports on stock status and health, bycatch, and social and economic impacts of management measures. Id. 1852(g)(1)(B). To carry out these responsibilities, SSC members may need to evaluate confidential information. NMFS may release confidential information to Federal and State employees appointed to a Council's SSC as provided under Magnuson-Stevens Act section 402(b)(1)(A) and (B). However, the existing confidentiality regulations do not address release of confidential information to academicians or independent experts appointed to an SSC. Because all members of a Council's SSC may need to evaluate confidential information, NMFS proposes to add procedures through which a Council can request, through its Executive Director, that members of the Council's SSC that are not Federal or State employees be granted access to confidential information.

NMFS proposes to add this procedure pursuant to Magnuson-Stevens Act section 402(b)(3), which authorizes the Secretary to approve the release and use of confidential information by a Council for fishery conservation and management. Given the statutory role that a Council's SSC has in development

and amendment of any FMP, NMFS believes that establishing a process for releasing confidential information to an SSC is consistent with the statutory authorization that allows a Council to use confidential information for fishery conservation and management. NMFS recognizes the concern that members of a SSC, who are not Federal or State employees, may gain personal or competitive advantage through access to confidential information. To address this concern, the proposed procedures would require the AA to approve any request from a Council Executive Director that confidential information be released to the Council for use by SSC members who are not Federal or State employees. In making a decision regarding such a request, the AA must consider whether those SSC members might gain personal or competitive advantage from access to the information.

8. Adding procedures that authorize the release of observer information when the information is necessary for proceedings to adjudicate observer certifications. (§ 600.425(b)).

IV. Proposed Changes Clarifying NMFS' Confidentiality Regulations

NMFS proposes the following non-substantive changes intended to improve the clarity and accuracy of the regulations.

1. Removing the existing language at § 600.410(a)(2) that states ''After receipt, the Assistant Administrator will remove all identifying particulars from the statistics if doing so is consistent with the needs of NMFS and good scientific practice.''

Through experience, NMFS has found that maintaining identifying information is necessary for programmatic needs, including FMP monitoring, quota share allocations, capacity modeling, and limited access program development. Accordingly, NMFS would no longer require the removal of identifiers from confidential information when NMFS uses the information to complete programmatic actions. However, NMFS would preserve the confidentiality of identifying information unless an exception allows for release.

2. The authorization to disclose information under section 402(b)(1)(B), as amended by the MSRA and codified in the United States Code, appears to have a typographical error. Prior to the MSRA, section 402(b)(1)(B) authorized the release of confidential information to ''State or Marine Fisheries Commission employees pursuant to an agreement with the Secretary that prevents the public disclosure of the identity or business of any person.'' Section 402(b)(1)(B) as amended by the MSRA provides that confidential information may be disclosed ''to State or Marine Fisheries Commission employees as necessary to further the Department's mission, subject to a confidentiality agreement that prohibits public disclosure of the identity of business of any person.'' NMFS believes that this was a typographical error, and that Congress intended the text to say ''identity or business,'' consistent with how that phrase appears in section 402(b)(3). As such, this proposed rule uses the phrase ''identity or business'' with regard to the section 402(b)(1)(B) text.

V. Classification

The NOAA Fisheries Assistant Administrator has determined that this proposed rule is consistent with the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, as follows:

Under section 402(b)(3) of the MSA, the Secretary of Commerce is required to prescribe by regulation procedures necessary to maintain the confidentiality of information submitted in compliance with the Act. These regulations are set forth at 50 CFR part 600, subparts B and E. Certain terms used in these regulations are defined under 50 CFR part 600, subpart A. This proposed action would revise 50 CFR part 600, subparts, A, B and E to conform with requirements of the Magnuson-Stevens Act as amended by the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act and the 1996 Sustainable Fisheries Act. Specifically, this proposed action requires the confidentiality of information collected by NMFS observers, revises exceptions that authorize the disclosure of confidential information, and adds three new disclosure exceptions. In addition, this action includes proposed revisions to implement the 1996 Sustainable Fisheries Act and to update the regulations to reflect NMFS' policy on the release of MSA confidential information in an aggregate or summary form.

This proposed action applies only to agency policies and procedures for the handling of information required to be maintained as confidential under MSA section 402(b). Adoption of the proposed revisions would not have a significant economic impact on a substantial number of small entities. The proposed revisions would apply to private companies that provide observer staffing support to NMFS and to industry sponsored observer programs. Nine private companies currently provide observers on a seasonal or ongoing basis to support the collection of information in 42 fisheries. The proposed regulations require observer providers to take steps to maintain the confidentiality of information. To satisfy this requirement, observer providers must have a secure area for the storage of confidential information. Compliance costs would include purchase of a lockable filing cabinet and enhanced managerial supervision. These costs would be minimal and all observer providers that currently contract with NMFS already have appropriate measures in place. Accordingly, no initial regulatory flexibility analysis is required and none has been prepared.

Lists of Subjects in 50 CFR Part 600

Confidential business information, Fisheries, Information.

Dated: May 17, 2012.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR part 600 is proposed to be amended as follows:

PART 600—[AMENDED]

1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. In § 600.10,

a. Remove definitions of ''Confidential statistics'' and ''Data, statistics, and information'';

b. Revise the definition of ''Aggregate or summary form'' and;

c. Add new definitions for ''Business of any person'', ''Confidential information'', and ''Observer employer/observer provider'' in alphabetical order, to read as follows:

§ 600.10 Definitions.

* * * * *

Aggregate or summary form means information structured in such a way

that the identity or business of any person that submitted the information cannot be directly or indirectly determined either from the present release of the information or in combination with other releases.

* * * * *

Business of any person means:

(1) Financial information such as cash flow documents, income statements, or information that contributes to the preparation of balance sheets; or

(2) Operational information such as fishing locations, time of fishing, type and quantity of gear used, catch by species in numbers or weight thereof, number of hauls, number of employees, estimated processing capacity of, and the actual processing capacity utilized, by U.S. fish processors.

(3) Business of any person does not include the following observer information related to interactions with species protected under the Marine Mammal Protection Act and the Endangered Species Act: the date, time, and location of interactions, the type of species, and the gear involved provided that information regarding gear would not constitute a trade secret under the Freedom of Information Act, 5 U.S.C. 552(b)(4).

* * * * *

Confidential information includes any observer information as defined under 16 U.S.C. 1802(32) or any information submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission by any person in compliance with any requirement or regulation under the Magnuson-Stevens Act.

* * * * *

Observer employer/observer provider means any person that provides observers to fishing vessels, shoreside processors, or stationary floating processors under a requirement of the Magnuson-Stevens Act.

* * * * *

§ 600.130 [Amended]

3. In § 600.130 the word ''statistics'' is removed and the word ''information'' is added in place, wherever it occurs.

4. Subpart E to part 600 is revised to read as follows:

Subpart E—Confidentiality of Information

Sec.

Subpart E—Confidentiality of Information

§ 600.405 Types of information covered.

NOAA is authorized under the Magnuson-Stevens Act and other statutes to collect and maintain information. This part applies to confidential information as defined at § 600.10.

§ 600.410 Collection and maintenance of information.

(a) *General.* (1) Any information required to be submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission in compliance with any requirement or regulation under the Magnuson-Stevens Act shall be provided to the Assistant Administrator.

(2) Appropriate safeguards set forth in NOAA Administrative Order 216–100 and other NOAA/NMFS internal procedures apply to the collection, maintenance, and disclosure of any confidential information.

(b) *Collection agreements with States or Marine Fisheries Commissions.* (1) The Assistant Administrator may enter into an agreement with a State or a Marine Fisheries Commission authorizing the State or a Marine Fisheries Commission to collect confidential information on behalf of the Secretary.

(2) To enter into a cooperative collection agreement with a State or a Marine Fisheries Commission, NMFS must determine that:

(i) The State has confidentiality protection authority comparable to the Magnuson-Stevens Act and that the State will exercise this authority to prohibit public disclosure of the identity or business of any person.

(ii) The Marine Fisheries Commission has enacted policies and procedures comparable to the Magnuson-Stevens Act and that the Commission will exercise such policies and procedures to prohibit public disclosure of the identity or business of any person.

(c) *Collection services by observer employer/observer provider.* Before issuing a permit, letting a contract or grant, or providing certification to an organization that provides observer services, the Assistant Administrator shall determine that the observer employer/observer provider has:

(1) Enacted policies and procedures to protect confidential information from public disclosure;

(2) Entered into an agreement with the Assistant Administrator that prohibits public disclosure of confidential information and identifies the criminal and civil penalties for unauthorized use or disclosure of confidential information provided under 18 U.S.C. 1905 and 16 U.S.C. 1858; and

(3) Required each observer to sign an agreement with NOAA/NMFS that prohibits public disclosure of confidential information and identifies the criminal and civil penalties for unauthorized use or disclosure of confidential information provided under 18 U.S.C. 1905 and 16 U.S.C. 1858.

(4) Observer employers/observer providers that fulfill the requirements of this subsection may share observer information among observers and between observers and observer employers/observer providers as necessary for the following:

(i) Training and preparation of observers for deployments on specific vessels; or

(ii) Validating the accuracy of the observer information collected.

§ 600.415 Access to information.

(a) *General.* NMFS will determine whether a person may have access to confidential information under this section only when in receipt of a written request that provides the following information:

(1) The specific types of information requested;

(2) An explanation of why the information is necessary to fulfill a requirement of the Magnuson-Stevens Act;

(3) The duration of time that access will be required: Continuous, infrequent, or one-time; and

(4) An explanation of why aggregated or summarized information available under § 600.430 would not be sufficient.

(b) NOAA enforcement employees are presumed to qualify for access to confidential information without submission of a written request.

(c) *Federal employees.* Confidential information under this section will only be accessible by the following:

(1) Federal employees who are responsible for FMP development, monitoring, or enforcement. This includes persons that need access to confidential information to perform functions authorized under a federal contract, cooperative agreement, or grant awarded by NOAA/NMFS.

(2) NMFS employees and contractors that perform research that requires access to confidential information.

(3) Federal employees for purposes of supporting homeland and national security activities at the request of another federal agency only if:

(i) Providing the information supports homeland security or national security purposes including the Coast Guard's

homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)); and

(ii) The requesting agency has entered into a written agreement with the Assistant Administrator. The agreement shall contain a finding by the Assistant Administrator that the requesting agency has confidentiality policies and procedures to protect the information from public disclosure.

(d) *State fishery management employees.* Confidential information may be made accessible to a State employee responsible for fisheries management only by written request and only if the employee has a need for confidential information to further the Department of Commerce's mission, and the State has entered into a written agreement between the Assistant Administrator and the head of the State's agency that manages marine and/or anadromous fisheries. The agreement shall contain a finding by the Assistant Administrator that the State has confidentiality protection authority comparable to the Magnuson-Stevens Act and that the State will exercise this authority to prohibit public disclosure of the identity or business of any person.

(e) *State enforcement personnel.* Confidential information will be accessible by State employees responsible for enforcing FMPs, provided that the State for which the employee works has entered into a Joint Enforcement Agreement and the agreement is in effect.

(f) *Marine Fisheries Commission employees.* Confidential information may be made accessible to Marine Fisheries Commission employees only upon written request of the Commission and only if the request demonstrates a need for confidential information to further the Department of Commerce's mission, and the executive director of the Marine Fisheries Commission has entered into a written agreement with the Assistant Administrator. The agreement shall contain a finding by the Assistant Administrator that the Marine Fisheries Commission has enacted policies and procedures comparable to the Magnuson-Stevens Act and that the Commission will exercise such policies and procedures to prohibit public disclosure of the identity or business of any person.

(g) *Councils.* A Council, through its Executive Director, may request that access to confidential information be granted to:

(1) Council employees who are responsible for FMP development and monitoring.

(2) Council members for use by the Council for conservation and management purposes. Such a request must be approved by the Assistant Administrator. In making a decision about a request, the Assistant Administrator will consider the information described in paragraph (a) of this section and the possibility that Council members might gain personal or competitive advantage from access to the information.

(3) Council scientific and statistical committee members, who are not federal or State employees, if necessary for the Council's evaluation of statistical, biological, or economic information relevant to such Council's development and amendment of any FMP. Such a request must be approved by the Assistant Administrator. In making a decision about a request, the Assistant Administrator will consider the information described in paragraph (a) of this section and the possibility that Council members might gain personal or competitive advantage from access to the information.

(4) A contractor of the Council for use in such analysis or studies necessary for conservation and management purposes, with approval of the Assistant Administrator and execution of an agreement with NMFS as described in NOAA Administrative Order 216–100 or other NOAA/NMFS internal procedures.

(h) Vessel Monitoring System Information. Nothing in these regulations contravenes section 311(i) of the Magnuson-Stevens Act which requires NMFS to make vessel monitoring system information directly available to the following:

(1) Enforcement employees of a State which has entered into a Joint Enforcement Agreement and the agreement is in effect.

(2) State management agencies involved in, or affected by, management of a fishery if the State has entered into an agreement with NMFS that prohibits public disclosure of the information.

(i) *Prohibitions.* Persons having access to confidential information under this section may be subject to criminal and civil penalties for unauthorized use or disclosure of confidential information. See 18 U.S.C. 1905, 16 U.S.C. 1857–1858, and NOAA/NMFS internal procedures.

§ 600.420 Control system.

(a) NMFS must maintain a control system to protect any information submitted in compliance with any requirement or regulation under the Magnuson-Stevens Act. The control system must:

(1) Identify those persons who have access to confidential information;

(2) Contain procedures to limit access to confidential information to authorized users; and

(3) Provide handling and physical storage protocols for safeguarding of the information.

(b) Require persons authorized to access confidential information to certify that they:

(1) Are aware that they will be handling confidential information, and

(2) Have reviewed and are familiar with the procedures for handling confidential information.

§ 600.425 Release of confidential information.

(a) NMFS will not disclose to the public any confidential information except when:

(1) Authorized by an FMP or regulations under the authority of the North Pacific Council to allow disclosure of observer information to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification.

(2) Observer information is necessary in proceedings to adjudicate observer certifications.

(b) Information is required to be submitted to the Secretary for any determination under a limited access program. This exception applies to confidential information that NMFS has used, or intends to use, for a regulatory determination under a limited access program. For the purposes of this exception:

(1) *Limited Access Program* means a program that allocates privileges, such as a portion of the total allowable catch, an amount of fishing effort, or a specific fishing area, to a person.

(2) *Determination* means a grant, denial, or revocation of privileges; approval or denial of a transfer of privileges; or other similar regulatory determinations by NMFS applicable to a person.

(c) Required to comply with a federal court order. For purposes of this exception:

(1) Court means an institution of the judicial branch of the U.S. Federal government consisting of one or more judges who seek to adjudicate disputes and administer justice. Entities not in the judicial branch of the Federal government are not courts for purposes of this section.

(2) Court order means any legal process which satisfies all of the following conditions:

(i) It is issued under the authority of a Federal court;

(ii) A judge or magistrate judge of that court signs it; and

(iii) It commands NMFS to disclose confidential information as defined under § 600.10.

(d) Necessary for enforcement of the Magnuson-Stevens Act, or any other statute administered by NOAA; or when necessary for enforcement of any State living marine resource laws, if that State has a Joint Enforcement Agreement that is in effect.

(e) The Secretary has obtained written authorization from the person submitting such information to release it to persons for reasons not otherwise provided for in Magnuson-Stevens Act subsection 402(b) and such release does not violate other requirements of the Act. NMFS will apply this exception as follows:

(1) When a permit-holder is required to submit information in compliance with requirements of the Act, the permit-holder or designee may execute the written authorization for release of that information. Otherwise, the person who is required to submit the information and is identified in that information as the submitter may execute the written authorization for that information.

(2) For observer information, a permit-holder may execute a written authorization for release of observed catch, bycatch, incidental take data, economic data, recorded biological sample data, and other information collected for scientific and management purposes by an observer while carried aboard the permit-holder's vessel.

(3) A permit-holder or designee or other person described under paragraph (f)(1) of this section must provide a written statement authorizing the release of the information and specifying the person(s) to whom the information should be released.

(4) A permit-holder or designee or other person described under paragraph (f)(1) of this section must prove identity by a statement of identity consistent with 28 U.S.C. 1746, which permits statements to be made under penalty of perjury as a substitute for notarization. The statement of identity must be in the following form:

(i) If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)''.

(ii) If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)''.

(5) The Secretary must determine that a release under paragraph (f) of this section does not violate other requirements of the Magnuson-Stevens Act and other applicable laws.

§ 600.430 Release of information in aggregate or summary form.

The Secretary may disclose in any aggregate or summary form information that is required to be maintained as confidential under these regulations.

[FR Doc. 2012–12513 Filed 5–22–12; 8:45 am]

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Notices

Federal Register

Vol. 77, No. 100

Wednesday, May 23, 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

May 17, 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), *Pamela_Beverly_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) 720–8958.

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 Institute of Food and Agriculture

Title: NIFA Proposal Review Process.

OMB Control Number: 0524–0041.

Summary of Collection: The National Institute of Food and Agriculture (NIFA) is responsible for performing a review of proposals submitted to NIFA competitive awards programs in accordance with section 103(a) of the Agricultural Research, Extension, and Education Reform Act, of 1998, 7 U.S.C. 7613(a). Reviews are undertaken to ensure that projects supported by NIFA are of high quality and are consistent with the goals and requirements of the funding program. Proposals submitted to NIFA undergo a programmatic evaluation to determine worthiness of Federal support. The evaluations consist of a peer panel review and may also entail an assessment by Federal employees and electronically submitted (ah-hoc) reviews in the Peer Review System.

Need and Use of the Information: The collected information from the evaluations is used to support NIFA grant programs. NIFA uses the results of each proposal to determine whether a proposal should be declined or recommended for award. In order to obtain this information, an electronic questionnaire is used to collect information about potential panel and ad-hoc reviewers. If this information is not collected, it would be difficult for a review panel and NIFA staff to determine which projects warrant funding, or identify appropriate qualified reviewers. In addition, Federal grants staff and auditors could not assess the quality or integrity of the review, and the writer of the application would not benefit from any feedback on why the application was funded or not.

Description of Respondents: Not-for-profit institutions; Business or other for-profit; Individuals or households; Federal Government; State, Local or Tribal Government; Farms.

Number of Respondents: 54,600.

Frequency of Responses: Reporting: On occasion; Annually.

Total Burden Hours: 100,497.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–12425 Filed 5–22–12; 8:45 am]

BILLING CODE 3410–09–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 17, 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) 720–8958.

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.

Animal and Plant Health Inspection Service

Title: Importation of Hass Avocados from Peru.

OMB Control Number: 0579–0355.

Summary of Collection: Under the Plant Protection Act (PPA) (7 U.S.C. 7701), the Secretary of Agriculture either independently or in cooperation with the States is authorized to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests new to the United States or not known to be widely distributed throughout the United States. Regulations authorized by the PPA concerning the importation of fruits and vegetables into the United States from certain parts of the world are contained in ''Subpart—Fruit and Vegetables: (7 CFR 319.56–1 through 319.56–54). Under these regulations, Hass avocados from Peru are subject to certain conditions before entering the United States to prevent the introduction of plant pests into the United States.

Need and use of the Information: APHIS will collect information using the following: Physanitary certificate, trust fund, workplan, recordkeeping, inspection of packinghouses, box marking and shipping documents. Failure to collect this information would comprise APHIS' ability to ensure that fresh Hass avocados from Peru are not harboring destructive insect pest that could cause millions of dollars in damage to U.S. agriculture.

Description of Respondents: Business or other for-profits; Federal Government.

Number of Respondents: 2.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 308.

Animal and Plant Health Inspection Service

Title: Citrus Greening and Asian Citrus Psyllid; Quarantine and Interstate Movement Regulations.

OMB Control Number: 0579–0363.

Summary of Collection: The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture either independently or in cooperation with the States, to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests (such as citrus canker) new or widely distributed throughout the United States. The Animal and Plant Health Inspection Service (APHIS) amended the ''Domestic Quarantine Notices'' in 7 CFR part 301 by adding a new subpart, ''Citrus Greening and Asian Citrus Psyllid (ACP)'' (§§ 301.76 through 301.76–11). Citrus greening, also known as Huanglonghing disease of citrus, is considered to be one of the most serious citrus diseases in the world.

Need and use of the Information: APHIS will collect information using various forms to address the risk associated with the interstate movement of citrus nursery stock and other regulated articles from areas quarantined for citrus greening. Failing to collect this information could cause a severe economic loss to the citrus industry.

Description of Respondents: Business or other for-profit.

Number of Respondents: 621.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 1,785.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–12426 Filed 5–22–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by July 23, 2012.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA–RUS, 1400 Independence Ave. SW., STOP 1522, Room 5162, South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Fax: (202) 720–8435.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for revision.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA–RUS, STOP 1522, 1400 Independence Ave. SW., Washington, DC 20250–1522. Fax: (202) 720–8435.

Title: 7 CFR Part 1717, Settlement of Debt Owed by Electric Borrowers.

OMB Control Number: 0572–0116.

Type of Request: Extension of a currently approved information collection package.

Abstract: The Rural Utilities Service makes mortgage loans and loan guarantees to electric systems to provide and improve electric service in rural areas pursuant to the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.) (RE Act). This information collection requirement stems from passage of Public Law 104–127, on April 4, 1996, which amended section 331(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) to extend to RUS the Secretary of Agriculture's authority to settle debts with respect to loans made or guaranteed by RUS. Only those electric borrowers that are unable to fully repay their debts to the Government and who apply to RUS for relief will be affected by this information collection.

The collection will require only that information which is essential for determining: The need for debt settlement; the amount of relief that is needed; the amount of debt that can be repaid; the scheduling of debt repayment; and, the range of opportunities for enhancing the amount of debt that can be recovered. The information to be collected will be similar to that which any prudent lender would require to determine whether debt settlement is required and the amount of relief that is needed.

Since the need for relief is expected to vary substantially from case to case, so will the required information collection.

Estimate of Burden: Public reporting for this collection of information is estimated to average 2,000 hours per response.

Respondents: Not-for-profit institutions and other businesses.

Estimated Number of Respondents: 1.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2,000 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis at (202) 720–7853. Fax: (202) 720–8435.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: May 11, 2012.

Jonathan Adelstein,

Administrator, Rural Utilities Service.

[FR Doc. 2012–12549 Filed 5–22–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the United States Department of Agriculture's (USDA) Rural Utilities Service (RUS) comments on this information collection for which the Agency intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by July 23, 2012.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Ave. SW., STOP 1522, Room 5162 South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Fax: (202) 720–8435.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB as a revision to an existing collection. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, Room 5162, 1400 Independence Ave. SW., Washington, DC 20250–1522. Fax: (202) 720–8435.

Title: 7 CFR 1773, Policy on Audits of RUS Borrowers.

OMB Control Number: 0572–0095.

Type of Request: Extension of a currently approved collection.

Abstract: The Rural Utilities Service relies on the information provided by the borrowers in their financial statements to make lending decisions as to borrowers' credit worthiness and to assure that loan funds are approved, advanced and disbursed for proper RE Act purposes. These financial statements are audited by a certified public accountant to provide independent assurance that the data being reported are properly measured and fairly presented.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 7.38 hours per response.

Respondents: Business or other for-profit, Not-for-profit institutions.

Estimated Number of Respondents and Recordkeepers: 1,402.

Estimated Number of Responses per Respondent: 1.35

Estimated Total Annual Burden on Respondents: 13,927 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis, at (202) 720–7853, Fax: (202) 720–8435.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: May 11, 2012.

Jonathan Adelstein,

Administrator, Rural Utilities Service.

[FR Doc. 2012–12556 Filed 5–22–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the United States Department of Agriculture's (USDA) Rural Utilities Service (RUS) comments on this information collection for which the Agency intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by July 23, 2012.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Ave. SW., STOP 1522, Room 5162 South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Fax: (202) 720–8435.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB as a revision to an existing collection. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the

methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, Room 5162, 1400 Independence Ave. SW., Washington, DC 20250–1522. Fax: (202) 720–8435.

Title: 7 CFR Part 1786, Prepayment of Rural Utilities Service Guaranteed and Insured Loans to Electric and Telephone Borrowers.

OMB Control Number: 0572–0088.

Type of Request: Extension of a currently approved collection.

Abstract: The Rural Utilities Service relies on the information provided by the borrowers in their financial statements to make lending decisions as to borrowers' credit worthiness and to assure that loan funds are approved, advanced and disbursed for proper RE Act purposes. These financial statements are audited by a certified public accountant to provide independent assurance that the data being reported are properly measured and fairly presented.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3.20 hours per response.

Respondents: Business or other for-profit, Not-for-profit institutions.

Estimated Number of Respondents and Recordkeepers: 5.

Estimated Number of Responses per Respondent: 1.00.

Estimated Total Annual Burden on Respondents: 16 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis, at (202) 720–7853, Fax: (202) 720–8435.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: May 11, 2012.

Jonathan Adelstein,

Administrator, Rural Utilities Service.

[FR Doc. 2012–12558 Filed 5–22–12; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Maryland Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a planning and briefing meeting of the Maryland Advisory Committee to the Commission will convene at 9:30 a.m. (EDT) on Tuesday, June 5, 2012. The meeting will be held at the Legislative Services Building, Joint Hearing Room, 90 State Circle, Annapolis, MD 21401. The purpose of the briefing meeting is to gather information on the racial disparities in the incarceration rates in Maryland prisons. The purpose of the planning meeting is to discuss the Committee's next steps.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by Thursday, July 5, 2012. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 624 9th Street NW., Suite 740, Washington, DC 20425, faxed to (202) 376–7548, or emailed to *ero@usccr.gov.*

Persons needing accessibility services should contact the Eastern Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov*, or to contact the Eastern Regional Office at the above email or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, May 18, 2012.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2012–12498 Filed 5–22–12; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Dockets 60, 61 and 62–2011]

Foreign-Trade Zones 140 and 78, Applications for Subzone Authority, Dow Corning Corporation, Hemlock Semiconductor Corporation, and Hemlock Semiconductor, L.L.C.; Reopening of Comment Periods

The comment periods for the applications for subzone authority at the Dow Corning Corporation facility in Midland, Michigan (76 FR 63282–63283, 10/12/2011), at the Hemlock Semiconductor Corporation facility in Hemlock, Michigan (76 FR 63282, 10/12/2011) and at the Hemlock Semiconductor, L.L.C. facility in Clarksville, Tennessee (76 FR 63281–63282, 10/12/2011) are being reopened. Additional information containing new factual information on which there has not been a chance for public comment was submitted on behalf of the companies cited above. The comment periods for the cases referenced above are being reopened to June 22, 2012, to allow interested parties time in which to comment. Rebuttal comments may be submitted during the subsequent 15-day period, until June 7, 2012. Submissions shall be addressed to the Board's Executive Secretary at: Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2111, 1401 Constitution Ave. NW., Washington, DC 20230.

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: May 17, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–12557 Filed 5–22–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

President's Export Council; Subcommittee on Export Administration; Notice of Open Meeting

The President's Export Council Subcommittee on Export Administration (PECSEA) will meet on June 4, 2012, 10:00 a.m., at the U.S. Department of Commerce, Herbert C. Hoover Building, Room 4830, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC. The PECSEA provides advice on

matters pertinent to those portions of the Export Administration Act, as amended, that deal with United States policies of encouraging trade with all countries with which the United States has diplomatic or trading relations and of controlling trade for national security and foreign policy reasons.

Agenda

1. Opening remarks by the Chairman and Vice Chairman.
2. Export Control Reform Update.
3. Presentation of Papers or Comments by the Public.
4. Working Group Updates.
5. Deemed Export Panel.

The open session will be accessible via teleconference to 25 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than, May 30, 2012.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the PECSEA. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to PECSEA members, the PECSEA suggests that public presentation materials or comments be forwarded before the meeting to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov.*

For more information, contact Yvette Springer on 202–482–2813.

Dated: May 16, 2012.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2012–12506 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–928]

Uncovered Innerspring Units From the People's Republic of China: Initiation of Anticircumvention Inquiry

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

SUMMARY: In response to a request from Leggett & Platt Incorporated (''Petitioner''), the Department of Commerce (''the Department'') is initiating an anticircumvention inquiry to determine whether certain imports are circumventing the antidumping duty order on uncovered innerspring units from the People's Republic of China (''PRC'').[1]

DATES: *Effective Date:* May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Susan Pulongbarit or Steven Hampton, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4031, or (202) 482–0116 respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 31, 2007, Petitioner filed a petition seeking imposition of antidumping duties on imports of uncovered innerspring units from, among other countries, the PRC.[2] Following completion of an investigation by the Department and the U.S. International Trade Commission (''the Commission''), the Department imposed antidumping duties in the amounts of 234.51 percent on the mandatory respondent, Foshan Jingxin Steel & Wire Spring Co., Ltd., and 164.75 percent on seven companies that qualified for separate rates.[3]

In the second administrative review of the *Order,*[4] Petitioner requested that the Department review Reztec Industries Sdn Bhd (''Reztec'').[5] The Department initiated the review on March 31, 2011[6] and sent questionnaires to the named respondents, including Reztec. On May 19, 2011, in response to the Department's questionnaire, Reztec submitted a no-shipment letter to the Department and certified that it did not export PRC-origin uncovered innerspring units to the United States during the POR.[7] However, in its no-shipment letter, Reztec stated that it, ''does purchase some raw materials from China, some of which is {*sic*} used to produce innerspring units in Malaysia'' and that ''{t}hese Chinese raw materials are further processed in Malaysia and combined with other materials into finished innerspring units and mattresses, for sale within Malaysia and for export.''[8] On April 12, 2012, the Department determined that Reztec did not sell subject merchandise during the POR and rescinded the review with respect to Reztec.[9]

On February 29, 2012, pursuant to section 781(b) of the Tariff Act of 1930, as amended (''the Act''), and section 351.225(h) of the Department's regulations, Petitioner submitted a request for the Department to initiate an anticircumvention inquiry of Reztec to determine whether Reztec's innerspring units completed and assembled in Malaysia from PRC-origin components constitute circumvention of the *Order.*[10] In its request, Petitioner contends that Reztec, by its own admission in its no-shipment letter, imports innerspring unit components from the PRC to Malaysia, further assembles these components into uncovered innerspring units, and exports the assembled innerspring units to the United States in the form of subject merchandise.[11] Petitioner argues that Reztec's operations constitute minor further assembly in a third country, *i.e.* Malaysia. On April 2, 2012, the Department extended the deadline to initiate a circumvention inquiry by 45 days, pursuant to section 351.302(b) of the Department's regulations.[12]

Scope of the Order

The merchandise subject to the order is uncovered innerspring units composed of a series of individual metal springs joined together in sizes corresponding to the sizes of adult

[1] *See Uncovered Innerspring Units From the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 7661 (February 19, 2009) (''*Order*'').

[2] The petition also included imports of uncovered innerspring units from South Africa and the Socialist Republic of Vietnam. *See Uncovered Innerspring Units From the People's Republic of China, South Africa, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations,* 73 FR 4817 (January 28, 2008).

[3] *Order,* 74 FR at 7662.

[4] The second administrative review covered the period of review (''POR'') February 1, 2010, through January 31, 2011. *See Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011).

[5] *See also* Memorandum to the File from Steven Hampton, regarding Placing Supporting Documentation on the Record of the Anticircumvention Inquiry: Petitioner's Request from Second Administrative Review of Uncovered Innerspring Units from the People's Republic of China, dated April 13, 2012 at Attachment #1.

[6] *See Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011).

[7] *See also* Memorandum to the File from Steven Hampton, regarding Placing Supporting Documentation on the Record of the Anticircumvention Inquiry: Reztec's No Shipment Letter from the Second Administrative Review of Uncovered Innerspring Units from the People's Republic of China, dated April 13, 2012 at Attachment #1 (''No Shipment Letter'').

[8] *See* No Shipment Letter at 2.

[9] *See Uncovered Innerspring Units From the People's Republic of China: Final Results and Final Rescission, in Part, of the Antidumping Duty Administrative Review,* 77 FR 21961, 21962 (April 12, 2012).

[10] *See* Petitioner's February 29, 2012 submission (''Circumvention Request'') at 3.

[11] *See id.* at 2–3.

[12] *See* Letter from Paul Walker, Acting Program Manager, to Leggett & Platt Incorporated April 2, 2012.

mattresses (*e.g.,* twin, twin long, full, full long, queen, California king, and king) and units used in smaller constructions, such as crib and youth mattresses. All uncovered innerspring units are included in the scope regardless of width and length. Included within this definition are innersprings typically ranging from 30.5 inches to 76 inches in width and 68 inches to 84 inches in length. Innersprings for crib mattresses typically range from 25 inches to 27 inches in width and 50 inches to 52 inches in length.

Uncovered innerspring units are suitable for use as the innerspring component in the manufacture of innerspring mattresses, including mattresses that incorporate a foam encasement around the innerspring. Pocketed and non-pocketed innerspring units are included in this definition. Non-pocketed innersprings are typically joined together with helical wire and border rods. Non-pocketed innersprings are included in this definition regardless of whether they have border rods attached to the perimeter of the innerspring. Pocketed innersprings are individual coils covered by a ''pocket'' or ''sock'' of a nonwoven synthetic material or woven material and then glued together in a linear fashion.

Uncovered innersprings are classified under subheading 9404.29.9010 and have also been classified under subheadings 9404.10.0000, 7326.20.0070, 7320.20.5010, or 7320.90.5010 of the Harmonized Tariff Schedule of the United States (''HTSUS''). The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope of the order is dispositive.

Initiation of Circumvention Proceeding

Section 781(b)(1) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting circumvention inquiries, under section 781(b)(1) of the Act, the Department will also evaluate whether: (1) The process of assembly or completion in the other foreign country is minor or insignificant; (2) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (3) action is appropriate to prevent evasion of such an order or finding. As discussed below, Petitioner has provided evidence with respect to these criteria.

A. Merchandise of the Same Class or Kind

Petitioner argues that merchandise imported by Reztec from Malaysia into the United States is of the same class or kind as that subject to the *Order.* Petitioner claims that the uncovered innerspring units that Reztec completes or assembles in Malaysia, then ships to the United States, are the same class or kind of merchandise as the uncovered innerspring units that are subject to the *Order.*[13] Petitioner contends that there is no question that the uncovered innerspring units that Reztec exports to the United States meet the physical characteristics that define the scope of the order.[14] Moreover, Petitioner states that Reztec even acknowledged this in the second administrative review, where it stated: ''Reztec's products, including its uncovered innerspring units sold to the United States, are manufactured in Malaysia.'' [15]

B. Completion of Merchandise in a Foreign Country

Petitioner notes that the *Order* clearly indicates that innerspring units are assembled from three key components: Steel wire coils, helical wires, and in certain cases, border rods.[16] Petitioner argues that Reztec admitted that it imports the key inputs used in the production of innerspring units from the PRC that are then ''further processed in Malaysia and combined with other materials into finished innerspring units and mattresses, for sale within Malaysia and for export.'' [17] While Reztec asserts that it further processes these inputs in Malaysia and combines these inputs with other materials into finished innerspring units, Petitioner believes that Reztec's further processing is minor and instead involves simple assembly operations.[18] Petitioner underscores that there is no dispute that this requirement has been met: Reztec itself acknowledges that it completes innerspring units in Malaysia from innerspring components produced in the PRC.[19]

C. Minor or Insignificant Process

Under section 781(b)(2) of the Act, the Department is required to consider five factors to determine whether the process of assembly or completion is minor or insignificant. Petitioner believes that an examination of these factors indicates that Reztec's process of assembly and completion of innerspring units in Malaysia is not significant.

(1) Level of Investment

Petitioner states that the process employed to assemble innerspring components into innerspring units is relatively simple and requires only limited investment and labor, and that the start-up investment costs and the barriers to entry into this type of assembly operation (*i.e.,* manual or semi-automated) are low. Petitioner asserts that in the most basic, fully-manual operation, coils are assembled manually using a wooden or steel jig in which the coils (continuous or bonnell) [20] are hand-loaded, then hand-laced with helical wire and finished by clipping the border rods to the unit.[21] Petitioner posits that the cost of a new wooden (or steel) jig is approximately $200–$400.[22] Petitioner argues that the level of investment would also be low if Reztec relies on a semi-automated assembly operation where a machine is used to assemble the rows of coils.[23]

(2) Level of Research and Development

Petitioner is not aware that Reztec performs any research and development related to the assembly and/or production of innerspring units.[24] Moreover, Petitioner states that it would not expect Reztec to incur any research

[13] *See* Circumvention Request at 7–19.

[14] *Id.*

[15] *See* No Shipment Letter at 4.

[16] *See* Circumvention Request at 2. The Commission also noted that innerspring coils and border rods are major components of an innerspring unit. *See Uncovered Innerspring Units From South Africa and Vietnam,* USITC Pub. 4051, Inv. Nos. 731–TA–1141–1142 at I–11 (December 2008) (hereinafter, ''*USITC Uncovered Innersprings Report*''). In its final determination regarding imports of uncovered innersprings from the PRC, the Commission adopted the findings and analyses in its determinations and views regarding subject imports from South Africa and Vietnam with respect to the domestic like product, the domestic industry, cumulation, and material injury. *Uncovered Innerspring Units from China,* USITC Pub. 4061, Inv. No. 731–TA–1140 at 3 and I–1 (February 2009).

[17] *See* No Shipment Letter at 2.

[18] *See* Circumvention Request at 7–9.

[19] *See* Circumvention Request at 7–8.

[20] Bonnell coils, the most commonly used type of coils in innerspring units, have an hour-glass shape which tapers inward from top to center and then outward from the center to bottom. Bonnell coils are generally the lowest priced units and the type of coil generally used in imported innerspring units. Continuous coils have entire rows of continuous coils formed from a single piece of wire. For a more detailed description of the types of innerspring coils, *see USITC Uncovered Innersprings Report* at I–8 to I–10.

[21] *See* Circumvention Request at 9–10. A somewhat more advanced assembly operation may involve manual assembly using a wooden or steel jig in which the coils are hand-set, and a lacing machine is used to feed the helical to join the rows, and then the borders are manually clipped to the unit. *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 11.

and development expenses related to its innerspring assembly operations.[25]

(3) Nature of the Production Process

According to Petitioner, the manufacturing process for assembling innerspring units from imported components is relatively simple and does not require significant start-up costs, sophisticated machinery and inputs, or substantial labor.[26]

(4) Extent of Production in the Malaysia

Petitioner notes that Reztec's Web site indicates that it ''manufacturers in a 60,000 sq. foot plant with a 100,000 sq. foot capacity.[27] Petitioner also claims that only a portion of that facility is likely dedicated to assembly operations as Reztec claims to also produce other products such as finished mattresses.[28]

(5) Value of Processing in Malaysia as Compared to Uncovered Innerspring Units Imported Into the United States

Petitioner asserts that the value of assembly processing performed in Malaysia represents a small portion of the total value of the innerspring units imported into the United States.[29] Petitioner believes Reztec's assembly operations likely rely on relatively unskilled, low wage employees.[30] Thus, these assembly operations involve minimal additional labor costs.[31] Petitioner asserts that by any standard, the assembly operations represent an insignificant portion of the total value.[32]

D. Value of Merchandise Produced in PRC

Petitioner argues that the value of the components that Reztec sources in the PRC for further assembly in Malaysia into subject merchandise is a significant portion of the total value of the innerspring units exported to the United States.[33] As Petitioner noted previously, innerspring coils, helical and border rods are the key components of an innerspring unit. Petitioner explains that they also constitute a significant portion of the overall costs of an innerspring unit.[34] Petitioner does not have access to other PRC innerspring unit producer/exporter costs. Therefore, it conducted an analysis related to the production costs of various innerspring unit models at its own facility in Guangzhou, PRC. Petitioner believes that its operation (and costs) in the PRC are representative of the operations (and costs) of other PRC innerspring unit producers/exporters, as it is the largest producer of innersprings in the PRC.[35] According to Petitioner's analysis of its own production costs in the PRC, the total value of these innerspring components compose a significant portion of the total value of an innerspring unit.[36]

E. Additional Factors To Consider in Determining Whether Action Is Necessary

Section 781(b)(3) of the Act directs the Department to consider additional factors in determining whether to include merchandise assembled or completed in a foreign country within the scope of the *Order.* Petitioner argues that since the *Order* was imposed, imports into the United States from Malaysia of uncovered innerspring units have spiked. Malaysia's imports from the PRC of key inputs have also increased. Moreover, Petitioner believes that Reztec has close relationships with several PRC producers/exporters named in the underlying investigation.

(1) Pattern of Trade

Based on official U.S. import data, Petitioner contends that imports of uncovered innerspring units from Malaysia have increased dramatically since the *Order* was imposed.[37] Petitioner provided a chart that illustrated the U.S. annual imports from Malaysia under the relevant HTSUS subheadings.[38] Petitioner states that prior to 2009, there were virtually no imports of uncovered innerspring units from Malaysia to the U.S.[39] However, according to the table, subject imports from Malaysia to the U.S. have steadily increased: 185,917 pieces were imported in 2009, 312,181 pieces were imported in 2010, and 316,687 pieces were imported from January 2011 to November 2011 under HTSUS 9404.29.9011.[40] Petitioner claims that the actual level of imports is likely higher as innerspring units are often erroneously classified under various other classifications.[41]

Petitioner argues that in its No Shipment Letter, Reztec identified certain companies in the PRC as its suppliers of innerspring unit inputs.[42] Petitioner believes that this constitutes circumvention of the *Order,* and suggests that Reztec's operations and activities warrant additional investigation.

(2) Increase of Subject Imports From the PRC to Malaysia After the Investigation Initiation

Petitioner contends that Malaysia's official import statistics indicated that imports from the PRC of the key component in innerspring units, *i.e.,* coils, have increased substantially since the *Order* was imposed.[43] Petitioner provided a chart of import data related to Malaysia's imports of coils from the PRC over the last several years and year-to-date 2011 under HTS 7320.99.000 (other springs and leaves for springs, of iron/steel, kilograms (''kgs'')). This chart shows an increase of imported coils from 2,619,670 kgs in 2007 to 9,518.181 kgs in 2010, and 8,634,757 kgs year-to-date for 2011.[44]

Analysis of the Request

Based on our analysis of Petitioner's circumvention inquiry request, the Department determines that Petitioner has satisfied the criteria under section 781(b)(1) of the Act to warrant an initiation of a formal circumvention inquiry. In accordance with section 351.225(e) of the Department's regulations, the Department finds that the issue of whether a product is included within the scope of an order cannot be determined based solely upon the application and the descriptions of the merchandise. Accordingly, the Department will notify by mail all parties on the Department's scope service list of the initiation of a circumvention inquiry. In addition, in accordance with section 351.225(f)(1)(ii)

[25] *Id,*

[26] *Id.*

[27] *Id.* (citing *http://www.reztec.com.my*); *see also id.* at Exhibit 4.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 12–13.

[31] *Id.* at 13. There are virtually no additional energy costs given that the machines, if utilized, are quite basic. The only additional material inputs (besides the coils, which represent the single largest cost of an innerspring unit) are steel wire for lacing and border clips. *Id.* at 13 n.28.

[32] *Id.* at 13.

[33] *Id.* at 13–14.

[34] *Id.* at 14.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 14–15. Petitioner states that until 2011, U.S. imports of uncovered innerspring units were properly classified and entered the United States under harmonized tariff schedule (''HTS'') 9404.29.9010 (''uncovered innerspring units''). In 2011, the HTS classification for uncovered innerspring units was refined and further broken out to provide a separate ten-digit classification for innerspring units used in cribs and toddler beds. Thus, HTS 9409.29.9010 was eliminated and replaced with 9404.29.9005 (Uncovered innerspring units: For use in a crib or toddler bed) and 9404.29.9011 (Uncovered innerspring units: Other). Petitioner notes that the *Order* covers innerspring units in both of these HTS classifications. *Id.* at 15.

[38] *Id.* at 15 n. 31. Petitioner notes that there were no U.S. imports from Malaysia in YTD 2011 under HTS 9404.29.9005.

[39] *Id.* at 15.

[40] *Id.*

[41] *Id.* at 15 n.32 (citing *USITC Uncovered Innerspring Report* at I–6, I–7 and IV–1, IV–2).

[42] *Id.* at 16 (citing No Shipment Letter at 2).

[43] *Id.* at 16.

[44] *Id.* at 16. Petitioner also provided a description of Malaysia's relevant HTS numbers. *Id.* at Exhibit 8.

of the Department's regulations, a notice of the initiation of a circumvention inquiry issued under section 351.225(e) of the Department's regulations includes a description of the product that is the subject of the circumvention inquiry—uncovered innerspring units that contain the characteristics as provided in the scope of the *Order,* and an explanation of the reasons for the Department's decision to initiate a circumvention inquiry, as provided below.

With regard to whether the merchandise from the Malaysia is of the same class or kind as the merchandise produced in the PRC, Petitioner has presented information to the Department indicating that, pursuant to section 781(b)(1)(A) of the Act, the merchandise being produced in and/or exported from Malaysia by Reztec may be of the same class or kind as uncovered innerspring units produced in the PRC, which is subject to the *Order.* Consequently, the Department finds that Petitioner has provided sufficient information in its request regarding the class of kind of merchandise to support the initiation of a circumvention inquiry.

With regard to completion or assembly of merchandise in a foreign country, pursuant to section 781(b)(1)(B) of the Act, Petitioner has also presented information to the Department indicating that the uncovered innerspring units exported from Malaysia to the United States are assembled by Reztec in Malaysia using key components from the PRC that account for a significant portion of the total costs related to the production of uncovered innerspring units. We find that the information presented by Petitioner regarding this criterion supports its request to initiate a circumvention inquiry.

The Department finds that Petitioner sufficiently addressed the factors described in section 781(b)(1)(C) and 781(b)(2) of the Act regarding whether the assembly or completion of uncovered innerspring units in the Malaysia is minor or insignificant. Specifically, in support of its argument, Petitioner relied on its own experience and surrogate values from the less-than-fair-value investigation. Thus, we find that the information presented by Petitioner supports their request to initiate a circumvention inquiry. In particular, we find that Petitioner's submission asserts that: (1) Little investment has been made by Reztec in its uncovered innerspring unit operations in Malaysia; (2) Reztec has fully integrated production facilities in the PRC, and therefore, research and development presumably takes place in the PRC rather than the Malaysia; (3) the assembly or completion of key uncovered innerspring unit components in Malaysia does not alter the fundamental characteristics of the uncovered innerspring unit, nor does it remove it from the scope of the *Order;* (4) Reztec has a lower investment level than other companies that produce uncovered innerspring units; and (5) further assembly or completion of key uncovered innerspring unit components in Malaysia adds little value to the merchandise imported to the United States. Our analysis will focus on Reztec's assembly operations in the Malaysia and, in the context of this proceeding, we will closely examine the manner in which this company's processing materials are obtained, whether those materials are considered subject to the scope of the *Order,* and the extent of processing in Malaysia, as well as the manner in which production and sales relationships are conducted with the alleged PRC suppliers.

With respect to the value of the merchandise produced in the PRC, pursuant to section 781(b)(1)(D) of the Act, Petitioner relied on its own production experience in the PRC and arguments in the ''minor or insignificant process'' portion of its circumvention request to indicate that the value of the key components produced in the PRC may be significant relative to the total value of the finished uncovered innerspring units exported to the United States. We find that this information adequately meets the requirements of this factor, as discussed above, for the purposes of initiating a circumvention inquiry.

Finally, with respect to the additional factors listed under section 781(b)(3) of the Act, we find that imports of uncovered innerspring units from Malaysia has increased steadily since the imposition of the *Order* and that imports of uncovered innerspring units and key components from the PRC to Malaysia also have increased since the *Order* took effect.

In accordance with section 351.225(l)(2) of the Department's regulations, if the Department issues a preliminary affirmative determination, we will then instruct U.S. Customs and Border Protection to suspend liquidation and require a cash deposit of estimated duties on the merchandise. This circumvention inquiry covers Reztec. If, within sufficient time, the Department receives a formal request from an interested party regarding potential circumvention of the *Order* by other Malaysian companies, we will consider conducting additional inquiries concurrently.

The Department will establish a schedule for questionnaires and comments on the issues. In accordance with section 351.225(f)(5) of the Department's regulations, the Department intends to issue its final determination within 300 days of the date of publication of this initiation, in accordance with section 781(f) of the Act. This notice is published in accordance with section 351.225(f) of the Department's regulations.

Dated: May 17, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–12508 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–840]

Certain Orange Juice From Brazil: Notice of Rescission of Antidumping Duty Administrative Review

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

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Blaine Wiltse, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3874 or (202) 482–6345, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 2012, the Department of Commerce (the Department) published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the antidumping duty order on certain orange juice (OJ) from Brazil for a period of review (POR) of March 1, 2011, through February 29, 2012.[1]

On March 30, 2012, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), the Department received a timely request from Southern Gardens Citrus Processing Corporation (Southern Gardens), a domestic interested party, to conduct an administrative review of the sales of the following companies: Citrovita Agro Industrial Ltd. (Citrovita); Coinbra-Frutesp S.A. (Coinbra Frutesp);

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 77 FR 12559 (Mar. 1, 2012).

Fischer S.A. Comercio, Industria and Agricultura (Fischer); Montecitrus Trading S.A. (Montecitrus); and Sucocitrico Cutrale Ltda. (Cutrale). Southern Gardens was the only party to request this administrative review.

On April 13, 2012, the International Trade Commission determined that revocation of the antidumping duty order on OJ from Brazil would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to section 751(c) of the Act. Therefore, on April 20, 2012, the Department revoked the antidumping duty order on OJ from Brazil effective March 9, 2011.[2]

On April 30, 2012, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on OJ from Brazil with respect to Citrovita, Coinbra Frutesp, Cutrale, Fischer, and Montecitrus.[3] As a result of the revocation of the antidumping duty order, the POR of this administrative review is March 1, 2011, through March 8, 2011. *Id.*

On May 11, 2012, Southern Gardens timely withdrew its request for reviews of Citrovita, Coinbra Frutesp, Cutrale, Fischer, and Montecitrus.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. Southern Gardens withdrew its request for review before the 90-day deadline, and no other party requested an administrative review of the antidumping duty order on OJ from Brazil for the POR. Therefore, in response to Southern Garden's withdrawal of its request for review, and pursuant to 19 CFR 351.213(d)(1), the Department is rescinding in whole the administrative review of the antidumping duty order on OJ from Brazil for the period March 1, 2011, through March 8, 2011.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register.**

Notification to Importers

This notice serves as the only reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: May 16, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–12512 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See Revocation of Antidumping Duty Order: Certain Orange Juice From Brazil,* 77 FR 23659 (Apr. 20, 2012).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 77 FR 25401 (Apr. 30, 2012).

DEPARTMENT OF COMMERCE

International Trade Administration

Cornell University, et al.; Notice of Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave. NW., Washington, DC

Docket Number: 12–011. *Applicant:* Cornell University, Ithaca, NY 14853. *Instrument:* Pixel Array Detector. *Manufacturer:* Dectris Ltd., Switzerland. *Intended Use:* See notice at 77 FR 23660, April 20, 2012. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of order. *Reasons:* This instrument will be used to determine the composition of molecules and visualizing their interaction sat the molecular level. Pertinent characteristics of this instrument include shutterless data collection, low noise, high dynamic range, high readout speed and very fine phi slicing, not available in conventional charge-coupled device detectors.

Docket Number: 12–017. *Applicant:* Argonne National Laboratory, Lemont, IL 60439. *Instrument:* Pilatus 100K–S Detector. *Manufacturer:* Dectris Ltd., Switzerland. *Intended Use:* See notice at 77 FR 23660, April 20, 2012.

Comments: None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of order. *Reasons:* This instrument will be used to measure time evolution of x-ray diffraction signals from a variety of materials, including complex oxides and to determine the time-dependent atomic arrangements in those materials. Pertinent characteristics of this instrument include photon energy discrimination and gateable counting. The instrument also has a faster readout speed and better dynamic range than other detectors.

Dated: May 16, 2012.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2012–12577 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–BC22

Fisheries of the Caribbean, Gulf of Mexico, South Atlantic; Comprehensive Amendment

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

ACTION: Notice of intent (NOI) to prepare a draft environmental impact statement (DEIS); request for comments.

SUMMARY: The NMFS intends to prepare a DEIS to assess impacts on the natural and human environment of management measures proposed in its draft Comprehensive Ecosystem-Based Amendment 3 (CE–BA 3). CE–BA 3 would amend the Fishery Management Plan (FMP) for: the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP); Coral, Coral Reefs, Live/Hardbottom Habitats in the South Atlantic (Coral FMP); the FMP for Coastal Migratory Pelagic Resources (Coastal Migratory Pelagics FMP) in the Gulf of Mexico and Atlantic Region; the Dolphin and Wahoo Fishery of the Atlantic (Dolphin Wahoo FMP); the Golden Crab Fishery of the Atlantic (Golden Crab FMP); the Shrimp Fishery of the South Atlantic Region (Shrimp FMP); and Spiny Lobster in the Gulf of Mexico and the South Atlantic (Spiny Lobster FMP).

This NOI is intended to inform the public of the preparation of a DEIS in support of a comprehensive amendment to the South Atlantic Fishery Management Council's (Council) FMPs.

DATES: Written comments on the scope of the issues to be addressed in CE–BA 3 will be accepted until June 22, 2012, at 5 p.m.

ADDRESSES: You may submit comments on the NOI identified by NOAA–NMFS–2012–0109 by any of the following methods:

- *Electronic submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Karla Gore, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous).

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov,* click on ''submit a comment,'' then enter ''NOAA–NMFS–2012–0109'' in the keyword search field and click on ''search.'' After you locate the document ''Title,'' click the ''Submit a Comment'' link in that row. This will display the comment web form. You can then enter your submitter information (unless you prefer to remain anonymous), and type your comment on the web form. You can also attach additional files (up to 10MB) in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

To view posted comments during the comment period, enter ''NOAA–NMFS–2012–0109'' in the keyword search and click on ''search.'' Comments received through means not specified in this rule will not be considered.

FOR FURTHER INFORMATION CONTACT: Karla Gore, Southeast Regional Office, NMFS: telephone: 727–824–5305, email: *Karla.Gore@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The snapper-grouper, coral, coastal migratory pelagics, dolphin and wahoo, golden crab, shrimp and spiny lobster fisheries in the exclusive economic zone are managed under their respective FMPs. The FMPs were prepared by the Council and implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act by regulations at 50 CFR part 622.

Measures in CE–BA 3 would amend the Coral FMP to expand and modify the Stetson-Miami Terrace and Cape Lookout deepwater Coral Habitat Areas of Particular Concern (CHAPC) that were established through the implementation of CE–BA 1 in 2010. These CHAPCs were originally developed to protect known sensitive deepwater coral habitat. New information and research has identified additional areas of deepwater coral.

CE–BA 3 would amend the Snapper-Grouper FMP to modify the Oculina Habitat Area of Particular Concern (HAPC) established through Amendment 13A to the Snapper-Grouper FMP. CE–BA 3 would modify the northern and western boundaries of the present Oculina Bank HAPC based on research that has identified two newly discovered areas of high-relief *Oculina* coral mounds that lie outside of the current boundary.

CE–BA 3 would amend the Snapper-Grouper FMP to implement measures to reduce bycatch of speckled hind and warsaw grouper, which are undergoing overfishing. Amendment 17B to the Snapper-Grouper FMP, implemented a prohibition on the harvest of six deepwater snapper-grouper species (snowy grouper, blueline tilefish, yellowedge grouper, misty grouper, queen snapper, and silk snapper) in waters greater than 240 feet to reduce bycatch of speckled hind and warsaw grouper. However, there is now evidence that this prohibition is not effective at reducing bycatch of speckled hind and warsaw grouper, and different management measures are needed. As a result, Regulatory Amendment 11 to the Snapper Grouper FMP removed this harvest prohibition and the Council is considering more appropriate management measures to protect speckled hind and warsaw grouper in CE–BA 3. Options suggested thus far include modification to existing marine protected areas (MPAs) or the establishment of new MPAs.

CE–BA 3 also proposes changes to data reporting requirements in the Snapper-Grouper FMP, Coastal Migratory Pelagics FMP, Dolphin and Wahoo FMP, Golden Crab FMP, Shrimp FMP and Spiny Lobster FMP.

Public Hearings, Times, and Locations

Public hearings for the Comprehensive Ecosystem-Based Amendment 3 will be held in August 2012. Exact dates, times, and locations will be announced by the Council. The public will be informed, via a notification in the **Federal Register**, of future scoping meetings and public hearings for CE–BA 3. The meetings will be physically accessible to people with disabilities. Requests for information packets or for sign language interpretation or other auxiliary equipment should be directed to the Council (see **FOR FURTHER INFORMATION CONTACT**).

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

Dated: May 17, 2012.

Carrie Selberg,

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

[FR Doc. 2012–12436 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA847

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Exempted Fishing Permit

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

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the Louisiana Department of Wildlife and Fisheries (LDWF). If granted, the EFP would authorize the applicant to collect and retain red snapper that would otherwise be prohibited from possession and retention. This study, to be conducted in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf), is intended to better document the age structure and life history of fish associated with offshore platforms and artificial reefs in Louisiana coastal waters.

DATES: Comments must be received no later than 5 p.m., eastern time, on June 22, 2012.

ADDRESSES: You may submit comments on the application by any of the following methods:

- *Email: 0648–XA847.LDWF@noaa.gov.* Include in the subject line of the email comment the following document identifier: ALDWF_EFP@.
- *Mail:* Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

The application and related documents are available for review upon written request to any of the above addresses.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, 727–824–5305; email: *Steve.Branstetter@noaa.gov.*

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

The described research is part of a new research program by LDWF. The research is intended to involve recreational fishermen in the collection of fundamental biological information of Gulf red snapper. The proposed collection for scientific research involves activities that could otherwise be prohibited by regulations at 50 CFR part 622, as they pertain to reef fish managed by the Gulf of Mexico Fishery Management Council (Council). The applicant requires authorization through the EFP to collect these Council-managed species that may be taken as part of the normal fishing activities of the recreational sector of the Gulf reef fish fishery. LDWF has requested an EFP from July through October 2012, to monitor red snapper caught during recreational fishing tournaments held in Texas, Louisiana, Alabama, and Florida subsequent to the closure of the 2012 recreational red snapper season. LDWF is requesting that selected participants, in as many as seven recreational fishing tournaments, be allowed to retain and tag the first red snapper caught during a fishing trip. Participants would also complete and submit a data sheet regarding other red snapper caught and released during the fishing trip. Fish collected under this EFP would be surrendered to LDWF personnel or other state fishery biologists, and sampled for length, weight, otoliths, and gonads. LDWF would be responsible for providing all data collected under the EFP to NMFS for use in the next stock assessment. The intent is to better document the age structure and life history of red snapper in the Gulf of Mexico. If approved, the EFP would authorize the take of approximately 1,600 red snapper during the five-month period. Such fish collected as biological samples would not be subject to seasonal closures or size limits.

NMFS finds this application warrants further consideration. Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to, a prohibition of conducting research within marine protected areas, marine sanctuaries, or special management zones, without additional authorization. A report on the research would be due at the end of the collection period, to be submitted to NMFS and reviewed by the Council.

A final decision on issuance of the EFP will depend on NMFS's review of public comments received on the application, consultations with the affected states, the Council, and the U.S. Coast Guard, as well as a determination that it is consistent with all applicable laws.

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

Dated: May 17, 2012.

Carrie Selberg,

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

[FR Doc. 2012–12516 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC038

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Mackerel, Squid, and Butterfish Committee and Mackerel, Squid, and Butterfish Advisory Panel will hold a public meeting.

DATES: The meeting will be held on June 8, 2012 from 9 a.m. until noon.

ADDRESSES: The meeting will be held via webinar with a physical listening station also available at the Council office, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331. The webinar registration link is: *https://www1.gotomeeting.com/register/126160849.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The primary purposes of the meeting are to review the alternatives for Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan, review public comments received, and get input from the Advisory Panel. Public comment will be taken, but there is a written comment opportunity available through June 4 (*http://www.mafmc.org/fmp/msb_files/msbAm14current.htm*) and there will be an additional opportunity for public comment at the June Council meeting (agenda will be posted at *www.mafmc.org*).

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal

action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: May 18, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–12496 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB033

Marine Mammals; File No. 16991

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to James T. Harvey, Ph.D., Moss Landing Marine Laboratories, 8272 Moss Landing Road, Moss Landing, California 95039 to conduct research on harbor seals (*Phoca vitulina*).

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices: See **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Joselyd Garcia-Reyes or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On February 28, 2012, notice was published in the **Federal Register** (77 FR 12009) that a request for a permit to conduct research on harbor seals had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The permit authorizes harassment and capture of harbor seals in California, Oregon, Washington, and Alaska. Harassment is authorized during ground and vessel surveys, and playback experiments. Animals captured will have some or all of the following procedures done: mass, morphometrics, and sex determined; blubber depth and biopsy; lavage/enema; flipper and PIT tagged; blood, swabs, skin and hair sampled; and attachment of external instruments and surgical implantation of radio tags. California sea lions (*Zalophus californianus*) and northern elephant seals (*Mirounga angustirostris*) may be harassed during activities conducted under this permit. Harbor seal mortalities are authorized incidental to research. The permit expires on May 30, 2017.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Documents may be reviewed in the following locations:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376;

Northwest Region, NMFS, 7600 Sand Point Way NE., BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206) 526–6150; fax (206) 526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907) 586–7221; fax (907) 586–7249; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

Dated: May 17, 2012.

Tammy C. Adams,

Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–12514 Filed 5–22–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Open Meeting To Obtain Input for 2013 DoD 10 Key State Issues Impacting Service Members and Their Families

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: The public is invited to attend an open session to consider issues impacting Service members and their families that can best be resolved by state governments. Additionally, the public is invited to submit issues in writing to the Department of Defense in lieu of attending the open session.

DATES: Open session meeting is scheduled for 1:00 p.m. to 3:00 p.m., June 5, 2012. RSVPs for individuals who are not military or civilian personnel in the Department of Defense must be received by close of business, June 1, 2012. Individuals who have submitted an RSVP must be present at the Pentagon Visitors' Reception Area not later than 12:30 p.m., June 5, 2012. Written submissions must be received by close of business June 8, 2012.

ADDRESSES: Submit RSVPs and written responses to either *marcus.beauregard@osd.mil* or 4000 Defense Pentagon Room 5A726, Washington, DC 20301–2400. The Pentagon Visitors' Reception Area is accessible by way of the Pentagon Metro Station entrance. The open session meeting will be held in the Pentagon Conference Center, Room M–2.

FOR FURTHER INFORMATION CONTACT: Marcus Beauregard, 571–372–5357.

SUPPLEMENTARY INFORMATION: Each year, DoD selects 10 issues for states to consider that represent barriers resulting from the transience and uncertainty of military life. For example, DoD has asked states to consider remedies to improve school transition for children in active duty military families to overcome problems with records transfer, class and course placement, qualifying for extra-curricular activities, and fulfilling graduation requirements.

The RSVP must include the following information: Name, date of birth and Social Security Number. RSVPs submitted by email must be encrypted.

Individuals attending the meeting who do not have a Pentagon ID must first proceed through the Guard Station (plan approximately an additional 10 minutes to access the reception area). Individuals must have two forms of personal identification, one of which must be provided by the Government and have a photograph (such as military ID, driver's license or passport).

Written inputs should include the following information:

A. Issue title.

B. Description of the issue to include a description of the policy or practice, the impact and who is impacted by this issue.

C. Description of the potential solution to this issue, to include whether the issue can be corrected through a change in state procedures, state regulations or state statute.

D. Estimate of whether the proposed solution would cost the state additional funding, and if so an approximation of how much.

E. Your contact information so that we can follow-up if we need any clarifications.

Dated: May 16, 2012.

Patricia L. Toppings,

OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2012–12419 Filed 5–22–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice To Extend Public Comment Period for United States Air Force F–35A Operational Basing Environmental Impact Statement

AGENCY: The United States Air Force, DoD.

ACTION: Notification of Extension of Public Comment Period.

SUMMARY: The U.S. Air Force is issuing this notice to advise the public of an extension to the public comment period. The initial Notice of Availability published in the **Federal Register** on April 13, 2012 (Vol. 77, No. 72/Notices/22315) requested public comments no later than June 4, 2012. The Air Force has extended the deadline for submitting public comments to June 20, 2012. All substantive comments on the Draft EIS received during the public comment period will be considered in the preparation of the Final EIS.

FOR FURTHER INFORMATION CONTACT: Please direct any written comments or requests for information to Mr. Nicholas Germanos, ACC/A7PS, 129 Andrews St., Suite 332, Langley AFB, VA 23665, ph: 757–764–9334.

Henry Williams Jr.,

DAF, Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2012–12458 Filed 5–22–12; 8:45 am]

BILLING CODE 5001–10–P

DENALI COMMISSION

Fiscal Year 2012 Draft Work Plan

AGENCY: Denali Commission.

ACTION: Notice; Correction.

SUMMARY: The Denali Commission (Commission) is an independent federal agency based on an innovative federal-state partnership designed to provide critical utilities, infrastructure and support for economic development and training in Alaska by delivering federal services in the most cost-effective manner possible. The Commission was created in 1998 with passage of the October 21, 1998 Denali Commission Act (Act) (Title III of Public Law 105–277, 42 USC 3121). The Denali Commission Act requires that the Commission develop proposed work plans for future spending and that the annual Work Plan be published in the **Federal Register**, providing an opportunity for a 30-day period of public review and written comment. The Commission is republishing the May 17, 2012 notice in full with corrections included.

This **Federal Register** notice serves to announce the 30-day opportunity for public comment on the Denali Commission Draft Work Plan for Federal Fiscal Year 2012.

DATES: Comments and related material to be received by June 20, 2012.

ADDRESSES: Submit comments to the Denali Commission, Attention: Sabrina Hoppas, 510 L Street, Suite 410, Anchorage, AK 99501.

FOR FURTHER INFORMATION CONTACT: Ms. Sabrina Hoppas, Denali Commission, 510 L Street, Suite 410, Anchorage, AK 99501. Telephone: (907) 271–1414. Email: *shoppas@denali.gov*.

Background

The Denali Commission (Commission) is an independent federal agency based on an innovative federal-state partnership designed to provide critical utilities, infrastructure and support for economic development and training in Alaska by delivering federal services in the most cost-effective manner possible. The Commission was created in 1998 with passage of the October 21, 1998, Denali Commission Act (Act) (Title III of Pub. L. 105–277, 42 USC 3121).

The Commission's mission is to partner with tribal, federal, state, and local governments and collaborate with all Alaskans to improve the effectiveness and efficiency of government services, to develop a well-trained labor force employed in a diversified and sustainable economy, and to build and ensure the operation and maintenance of Alaska's basic infrastructure.

By creating the Commission, Congress mandated that all parties involved partner together to find new and innovative solutions to the unique infrastructure and economic development challenges in America's most remote communities.

Pursuant to the Denali Commission Act, as amended, the Commission determines its own basic operating principles and funding criteria on an annual federal fiscal year (October 1 to September 30) basis. The Commission outlines these priorities and funding recommendations in an annual Work Plan. The Work Plan is adopted on an annual basis in the following manner, which occurs sequentially as listed:

- Commissioners first forward an approved draft version of the Work Plan to the Federal Co-Chair.
- The Federal Co-Chair approves the draft Work Plan for publication in the **Federal Register** providing an opportunity for a 30-day period of public review and written comment. During this time, the draft Work Plan is also disseminated widely to Commission program partners including, but not limited to the Bureau of Indian Affairs (BIA), the Economic Development Administration (EDA), and the United States Department of Agriculture—Rural Development (USDA–RD).
- Public comment concludes and Commission staff provides the Federal Co-Chair with a summary of public comment and recommendations, if any, associated with the draft Work Plan.
- If no revisions are made to the draft, the Federal Co-Chair provides notice of approval of the Work Plan to the Commissioners, and forwards the Work Plan to the Secretary of Commerce for approval; or, if there are revisions the Federal Co-Chair provides notice of modifications to the Commissioners for their consideration and approval, and upon receipt of approval from Commissioners, forwards the Work Plan to the Secretary of Commerce for approval.
- The Secretary of Commerce approves the Work Plan.

FY 2012 Annual Work Plan (Amended)

In FY 2011, the typical annual Work Plan process was not carried out. Several factors contributed to this including continuing resolutions (CRs) passed by Congress late in the fiscal year resulting in latent consideration of the FY 2011 annual Work Plan by the Commissioners (Commissioners met on June 2, 2011 to consider the FY 2011 annual Work Plan). In addition, the final FY 2011 budget included a rescission of $15,000,000 in prior year unobligated funds and uncertainty on how the rescission may impact the FY 2011 Work Plan was not resolved until September 2011.

With concurrence from the Office of Management and Budget (OMB) and the Secretary of Commerce, the amended FY 2011 Work Plan will be processed concurrently with the FY 2012 Work

Plan. The FY 2011 Work Plan and the amended budget for the FY 2011 Work Plan are not included as part of this FY 2012 Work Plan document.

FY 2012 Appropriations Summary

The Denali Commission has historically received several federal funding sources (identified by the varying colors in the table below). These fund sources are governed by the following general principles:

- In FY 2012 no project specific earmarks were directed.
- The Energy and Water Appropriation is eligible for use in all programs, but has historically been used substantively to fund the Energy Program.
- All other funds outlined below may be used only for the specific program area and may not be used across programs. For instance, Federal Transit Administration funding, which has in the past been appropriated for the Transportation Program, may not be moved to the Energy Program.
- Final transportation funds received may be reduced due to agency modifications, reductions and fees determined by the U.S. Department of Transportation. Final program available figures may not be provided until later this spring.
- All Energy and Water Appropriation funds, including operational funds, designated as ''up to'' may be reassigned to the Legacy Energy Program, Bulk Fuel and Rural Power System Upgrades, if they are not fully expended in a program component area or a specific project.
- Total FY 2012 Budgetary Resources provided:

These are the figures that appear in the rows entitled ''FY 2012 Appropriation'' and are the original appropriations amounts which do not include Commission overhead deductions. These funds are identified by their source name (i.e., Energy and Water Appropriation, USDA–RUS, etc.). The grand total for all appropriations appears at the end of the FY 2012 Funding Table.

- Total FY 2012 Program Available Funding:

These are the figures that appear in the rows entitled ''FY 2012 Appropriations—Program Available'' and are the amounts of funding available for program(s) activities after Commission overhead has been deducted. The grand total for all program available funds appears at the end of the FY 2012 Funding Table.

- Program Funding:

These are the figures that appear in the rows entitled with the specific Program and Sub-Program area, and are the amounts of funding the Draft FY 2012 Work Plan recommends, within each program fund source for program components.

- Subtotal of Program Funding:

These are the figures that appear in rows entitled ''subtotal'' and are the subtotals of all program funding within a given fund source. The subtotal must always equal the Total FY 2012 Program Available Funding.

DENALI COMMISSION FY 2012 FUNDING TABLE

	Totals
FY 2012 Energy & Water Appropriation	$10,679,000
FY 2012 Energy & Water Appropriation—Administrative Funds	3,294,000
FY 2012 Energy & Water Appropriation—Program Available	7,385,000
Total Energy Projects	7,385,000
Health	0
Training Program	0
Economic Development	0
Solid Waste Program	0
Sponsorship Program	0
Sub-total $	7,385,000
FY 2012 USDA, Rural Utilities Service (RUS)—pending estimate	2,900,000
FY 2012 USDA, Rural Utilities Service (RUS)—Program Available (less 4% overhead)	2,784,000
Bulk Fuel/RPSU Planning, Design & Construction	2,784,000
Sub-total $	2,784,000
FY 2012 Trans Alaska Pipeline Liability (TAPL) Trust	6,800,000
FY 2012 Trans Alaska Pipeline Liability (TAPL)—Program Available (less 5% overhead)	6,460,000
Bulk Fuel Planning, Design & Construction	6,460,000
Sub-total $	6,460,000
FY 2012 Federal Transit Administration (FTA)—Estimate	5,000,000
$5,000,000 from section 3011 (FTA) for docks and harbors.	
FY 2012 Federal Highway Administration (FHWA)—Estimate	0–24,700,000
For necessary, expenses for the Denali Access System Program as authorized under Section 1960 of Public Law 109–59	
FY 2012 Transportation Program Available—(less 5%)	4,750,000–28,215,000
Transportation Program: Docks & Harbors	4,750,000
Transportation Program: Roads –Estimate	0–23,465,000
Sub-total $	4,750,000–28,215,000
Total FY 2012 Federal Program Available	21,379,000–44,844,000

FY 12 Program Details and General Information

The following section provides narrative discussion, by each of the Commission Programs identified for funding in the FY 2012 funding table above.

Energy Program

Basic Rural Energy Infrastructure

The Energy Program is the Commission's original program and focuses on bulk fuel facilities (BFU) and rural power system upgrades/power generation (RPSU) across rural Alaska. About 94% of electricity in rural communities is produced by diesel generators and about half the fuel storage in most villages is used for these power plants for distribution. Alternative means of generating power can reduce the capacity needed for fuel

storage and ultimately reduce the cost of power to the community.

Alternative/Renewable Program and Emerging Technologies

The Energy Policy Act of 2005 established new authorities for the Commission's Energy Program with an emphasis on alternative and renewable energy projects. Although the 2005 Energy Policy Act did not include appropriations, the Commission is expected to carry out the intent of the Act through a portion of its Energy and Water Appropriation funding. To date, the Commission has co-funded a number of renewable projects and each year new initiatives are considered. After providing seed funding toward the initiative, in 2007, the State of Alaska passed legislation and funded the Renewable Energy Fund (REF).

With the advent of the REF, State resources to meet commercial-ready renewable technology needs are available, yet a gap in meeting the emerging energy technology needs was identified. Similar to the REF partnership, the newly established Emerging Energy Technology Fund (EETF) was provided seed funding to support demonstration projects for applied research and further technologies focusing on deployment in rural Alaska. The EETF has since passed the State Legislature, has formed its selection process and is proceeding with project selection.

Other Renewable Initiatives

As the Renewable Energy Fund and Emerging Energy Technology Fund proceed, the Commission strives to support their success. In 2011, the Commission funded $300,000 toward Renewable Energy Technical Assistance, which resulted in match funding from the Department of Energy toward the newly established State Technical Assistance Response Team (START). The START effort provides technical assistance to a select number of communities to help assess energy needs, deal with barriers and identify funding options. To keep with the 2005 direction to fund renewable and alternative energy, the FY 2012 Work Plan includes $300,000 toward this effort in 2012.

The FY 2011 Work Plan outlines a strategy to balance the Energy Program in both legacy and renewable components, providing up to $2.4 million of available program funds specifically toward the emerging technology program pending state match. If match for this program is not provided, this funding shall be reallocated to legacy projects.

FY 2012 Program and Project Policy Issues

The approved FY 2008 Denali Commission Policy Document requires and prioritizes cost share match for funded projects. In implementing this policy, 10%, match was required in FY 2010 and FY 2011. In FY 2012 new statutory match is required in the amounts of 50% for non-distressed and 20% for distressed communities and only applies toward construction projects using Energy and Water Appropriation funding. In future funding years, the Commission will require consistent match for energy projects funded with other funding (TAPL, RUS). For FY 2012 funding, the Commission will apply the 10% match for RUS and TAPL funding and the 50% and 20% match requirements for Energy and Water Appropriation funding.

Sustainability Policy

All energy construction grants will proceed after business plans are reviewed and approved by Commission.

FY 2012 Project Selection Process

The Energy Advisory Committee (EAC) provides guidance to Commissioners and staff on the program, and is comprised of members involved in energy development in Alaska. Members include representatives of Associated General Contractors, Alaska AFL–CIO, Department of Energy National Renewable Energy Lab, the University of Alaska Institute of Northern Engineering, USDA, Kotzebue Electric Association and two public members representing rural Alaska. The EAC provided general recommendations supporting the ongoing priority for funding Bulk Fuel/Rural Power System Upgrade planning, design and construction, providing match funding for the emerging energy technology program and for renewable energy regional planning in coordination with the Alaska Energy Authority's initiative to meet statewide energy infrastructure needs for all of the above.

Legacy Program (Bulk Fuel/RPSU)

Due to the nature of the due diligence requirement of energy projects, seasonal logistics in Alaska and funding restrictions (i.e. TAPL funds may only be used for bulk fuel projects)—a project may not progress as quickly as another. Given the late timing of funding in FY 2011, summer construction grants are not anticipated. A final project list will be developed based on available funds, project readiness, available match and other due diligence. Final project lists are provided to EAC for feedback prior to final grant execution.

Transportation

Section 309 of the Denali Commission Act 1998 (amended), created the Commission's Transportation Program, including the Transportation Advisory Committee. The advisory committee is composed of nine members appointed by the Governor of the State of Alaska including the Chairman of the Denali Commission; four members who represent existing regional native corporations, native nonprofit entities, or tribal governments, including one member who is a civil engineer; and four members who represent rural Alaska regions or villages, including one member who is a civil engineer.

The Transportation Program addresses two areas of rural Alaska transportation infrastructure: roads and waterfront development. There is consensus among agencies and communities that the program is successfully addressing improvements to local and regional transportation systems. This is largely a function of the TAC's success at project selection and monitoring, and the success of the program's project development partners. The program is generally a competitively-bid contractor or materials-based project opportunity grounded in Title 23 CFR. These strict project development and construction guidelines have presented some challenges to the Commission's ability to respond quickly to targets of opportunity, but they have also had the positive effect of ensuring project design and construction is executed at a professional level. The program operates under a reimbursable payment system that requires local and program partner sponsors to pay close attention to accounting procedures prior to their payments to contractors and vendors. This system helps ensure project payments are eligible when submitted to the Commission.

In FY 2012 the program will continue its focus on barge landings and mooring points in rural communities. These projects range from one or two mooring points to secure a barge, to small dock structures, depending on community size and barge operation characteristics. The value of these structures lies in improved fuel/freight transfer operations and improved worker and environmental safety. The Commission and the U.S. Army Corps of Engineers (USACE) will continue to work through the prioritized list of barge landing and mooring point projects which were identified in a formal analysis conducted in FY 2009 and FY 2010. The

universe of need for the first generation of projects is in the range of $40,000,000.

The TAC met on January 26–27, 2012 to select waterfront projects and will meet in early summer to select road project priorities for FY 2012. Final project approvals and funding amounts have been approved by the Federal Co-Chair and are available on the Commission's Web site.

As shown in the FY 2012 Funding Table, the estimate for FHWA funding ranges from $0 to $24,700,000. In 2011 continuing resolution language, the US Secretary of Transportation was assigned the responsibility by Congress to identify FHWA projects and programs that were sufficiently funded (i.e. completed). In following this assignment, the Secretary determined that the Denali Access Program was sufficiently funded and $13,300,000 in FY 2011 FHWA funding was assigned to the Alaska Department of Transportation. At the request of the Denali Commission Inspector General, GAO is presently considering whether the Secretary had the authority to make this determination regarding the Denali Access Program. At the time of drafting this 2012 annual Work Plan, the GAO Comptroller General has not yet issued an opinion. Therefore, depending upon the forthcoming opinion the Commission may receive no FHWA funding or potentially receive both FY 2011 and FY 2012 FHWA funding – totaling $24,740,000.

Joel Neimeyer,

Federal Co-Chair.

[FR Doc. 2012–12462 Filed 5–22–12; 8:45 am]

BILLING CODE 3300–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests; Office of Planning, Evaluation and Policy Development; Strategies for Preparing At-Risk Youth for Postsecondary Success

SUMMARY: Strategies for Preparing At-Risk Youth for Postsecondary Success focuses on preventing students from dropping out and preparing them for postsecondary education or training.

DATES: Interested persons are invited to submit comments on or before July 23, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04858. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Strategies for Preparing At-Risk Youth for Postsecondary Success.

OMB Control Number: Pending.

Type of Review: New.

Total Estimated Number of Annual Responses: 132.

Total Estimated Number of Annual Burden Hours: 114.

Abstract: Educators are increasingly concerned about poor high school graduation rates, especially among at-risk youth. Many of the programs adopted by districts and schools to decrease the dropout rate traditionally set the goal of completing high school. Programs that meet the dual goals of supporting at-risk youth to graduate from high school and then enroll in and succeed in postsecondary education are not commonly found in most school districts and few studies of dropout prevention programs have a postsecondary focus. This study aims to fill a gap by conducting qualitative case studies of up to 15 sites. This study will systematically analyze qualitative data across multiple respondents to generate portraits of programs and strategies that the sites use, lessons based on implementation successes and challenges, and evidence suggesting their effectiveness in improving the outcomes of interest.

To complete the study, the U.S. Department of Education is requesting OMB approval of two related qualitative data collection activities: (1) A phone screen with local program managers to determine the final sample of case studies and (2) up to 15 site visits to a purposive case study sample. Although the lessons are not generalizable to a larger population because the sample is purposive and small, the case studies will provide rich contextual information to help practitioners assess the applicability of the lessons in their own schools or districts.

Dated: May 18, 2012.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–12536 Filed 5–22–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Native American Career and Technical Education Program; Final Waivers and Extension of Project Period

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Notice.

Overview Information: Final Waivers and Extension of Project Period for the Native American Career and Technical Education Program

Catalog of Federal Domestic Assistance (CFDA) Number: 84.101A.

SUMMARY: For 60-month projects funded in fiscal year (FY) 2007 under the Native American Career and Technical Education Program (NACTEP), the Secretary waives 34 CFR 75.250 and 75.261(c)(2) in order to extend the

project period of these current NACTEP grants for an additional 12 months. This will enable the 30 current NACTEP grantees to seek FY 2012 continuation awards for their current projects through FY 2013, and we will not announce a new NACTEP competition in FY 2012.

DATES: This notice of final waivers and extension of project period is effective May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Gwen Washington. Telephone: (202) 245–7790, or by email: *gwen.washington@ed.gov.* Linda Mayo. Telephone: (202) 245–7792, or by email: *linda.mayo@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.

SUPPLEMENTARY INFORMATION: On February 16, 2012, we published a notice in the **Federal Register** (77 FR 9216) (February 2012 notice) proposing to waive 34 CFR 75.250 and 75.261(c)(2), as they apply to NACTEP. These regulations generally limit project periods to 60 months and prohibit project period extensions involving the obligation of additional Federal funds. In that notice, the Secretary also proposed to extend the project period of NACTEP grants for an additional 12 months to enable the 30 current NACTEP grantees to seek FY 2012 continuation awards for their current projects through FY 2013; and to not announce a new NACTEP competition in FY 2012.

Public Comment: In the February 2012 notice for NACTEP, the Secretary invited comments about the potential effect the proposed waivers and extension would have on NACTEP and on applicants that may be eligible to apply for grant awards under any new NACTEP notice inviting applications, should there be one. In response, we received 82 comments. Generally, we do not address comments that raise concerns not related to the proposed waivers and extension. Of the 82 comments we received, 81 supported the waivers, extension, and continuation of current NACTEP grantees' awards, citing the benefits the NACTEP grants provide to the Native American community.

Analysis of Comments and Changes

Comments: The vast majority, 81 of the 82 comments we received supported the proposed waivers and extension of the NACTEP project period. We heard from a variety of commenters, including tribal community college deans and administrators, teachers, students, and a project evaluator. The commenters provided various reasons for their support of the waivers and extension, including: their judgment of effectiveness of work being done by current NACTEP grantees in current projects, the number of students served and placed in employment under current projects, and the great need for funding such as that provided by NACTEP in the Native American communities served by current projects.

Several commenters stated that it would be difficult for eligible entities to prepare NACTEP applications for short-term funding prior to the reauthorization of the Carl D. Perkins Career and Technical Education Act of 2006 (the Perkins Act). Other commenters stated that with potential changes in the Perkins authorizing legislation for NACTEP beyond FY 2012, it was not in the public interest to conduct a NACTEP grant competition at this time.

Several commenters expressed the view that the waivers and extension of the current project period would be necessary to allow current students sufficient time to complete their programs.

One commenter, who fully supported the proposed waivers and extension, stated that tribal colleges would not have sufficient time to plan, establish, or effectively operate viable programs within a one-year timeframe. The commenter expressed the view that continuing the projects of current NACTEP grantees would eliminate the difficulties, barriers, and inefficiencies associated with starting new programs and stated further that extending the current project period and funding of current grantees would: capitalize upon the current momentum of NACTEP grantee service delivery, since service streams were already in place and operational; allow current NACTEP grantees to support reasonable modification as a direct outgrowth of their current work without disruption to participant cohorts, partnerships, programs, or plans; and afford a greater likelihood of successful attainment, such as student attainment of associate degrees and certificates, and subsequent job placement. The commenter further stated that NACTEP evaluation requirements place an expectation for the measurement of long-term impact of each project, which would be greatly enhanced by extending the project duration beyond five years.

Response: We have considered the comments we received from individuals and from individuals representing tribes, community colleges, and tribal organizations. The vast majority of commenters supported the waivers and extension of the project period and favor our proposal to continue the current grants for an additional year under the current NACTEP authority. The vast majority of commenters agree with our overall rationale for the waivers and extending the current project period and believe that these waivers and extension are in the public interest.

Changes: None.

Comment: One commenter requested information on future NACTEP grant periods and asked whether a new NACTEP grant competition would be held in FY 2013.

Response: At this time, we do not know whether there will be a NACTEP competition in FY 2013 or future years. If there is a NACTEP competition in any future year, we will announce that competition through a **Federal Register** notice inviting applications in which we will include, among other information, the length of the grant period.

Changes: None.

Background

The current NACTEP grantees, selected based on our March 23, 2007, NACTEP **Federal Register** notice inviting applications (72 FR 13770) (March 2007 notice), operate career and technical education programs, as authorized by section 116(a) through (g) of the Perkins Act (20 U.S.C. 2326(a)–(g)). The project period for the current 30 NACTEP grantees is scheduled to end in FY 2012. For the NACTEP projects funded in 2007, the Secretary waives the requirements of 34 CFR 75.250 and 75.261(c)(2), which generally limit project periods to 60 months and prohibit project period extensions involving the obligation of additional Federal funds, in order to extend the current NACTEP project period for an additional 12 months and allow the 30 current NACTEP grantees to seek continuation awards in FY 2012.

The Secretary's waivers and extension mean that: (1) Current NACTEP grantees will be authorized to request and receive NACTEP continuation awards in FY 2012 for project periods through FY 2013, (2) we will not announce a new competition to make new awards in FY 2012, (3) the March 2007 notice will continue to govern current projects during the extension year, and (4) the 30 applications approved under the March 2007 notice will govern continuation activities.

The March 2007 notice: (1) Established a project period of up to 60 months and reiterated that funding for multi-year awards would be dependent on a grantee meeting the requirements of 34 CFR 75.253 (continuation of a

multi-year project after the first budget period); (2) explained the requirements of the program; (3) described the evaluation and reporting requirements; and (4) established the Government Performance and Results Act (GPRA) performance indicators for NACTEP.

With these waivers and extension of the project period, the current 30 NACTEP grantees may request continuation awards for one additional project year, through FY 2013, and we will consider those continuation award requests under the current NACTEP statutory authority. Any requests for continuation awards will be subject to the requirements of 34 CFR 75.253, including the requirement that each grantee demonstrate that it is making substantial progress performing its NACTEP grant activities based on the requirements in the March 2007 notice inviting applications.

We will make decisions regarding continuation awards based on information provided in NACTEP grantee requests for continuation awards, including information provided in program narratives, budgets and budget narratives, and performance reports. Any activities to be carried out during the continuation year must be consistent with, or be a logical extension of the scope, goals, and objectives of, each grantee's application as approved in the 2007 NACTEP competition.

Waiver of Delayed Effective Date

The Administrative Procedure Act requires that a substantive rule must be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). During the 30-day public comment period on the notice of proposed waivers and extension of project period, of the 82 comments we received, 81 supported the waivers and extension of the project period for current NACTEP grantees. Except for minor editorial and technical revisions, there are no differences between the proposed and final notices of waivers and extension of the project period for NACTEP. In addition, given the fact that the additional period of funding is only for a 12-month period, and in order to be able to make timely continuation grants to the 30 entities affected, the Secretary has determined that a delayed effective date is unnecessary and contrary to the public interest.

Regulatory Flexibility Act Certification

The Secretary certifies that the waivers and extension and the activities required to support an additional year of NACTEP funding will not have a significant economic impact on a substantial number of small entities.

The small entities that will be affected by the waivers and extension are the 30 currently-funded NACTEP grantees.

The Secretary certifies that the waivers and extension will not have a significant economic impact on these NACTEP entities because the waivers and extension impose minimal compliance costs to extend projects already in existence, and the activities required to support the additional year of funding will not impose additional regulatory burdens or require unnecessary Federal supervision. Furthermore, the costs of carrying out these activities could be paid for with program funds.

Paperwork Reduction Act of 1995

This notice of waivers and extension does not contain any information collection requirements.

Intergovernmental Review

The NACTEP is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to either of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

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.

Program Authority: 20 U.S.C. 2326(a) through (g).

Dated: May 18, 2012.

Johan Uvin,

Delegated Authority to Perform the Functions and Duties of the Assistant Secretary for Vocational and Adult Education.

[FR Doc. 2012–12540 Filed 5–22–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Native Hawaiian Career and Technical Education Program; Final Waiver and Extension of Project Period

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Notice.

Overview Information

Final Waiver and Extension of Project Period for the Native Hawaiian Career and Technical Education Program

Catalog of Federal Domestic Assistance (CFDA) Number: 84.259A.

SUMMARY: For 36-month projects funded in fiscal year (FY) 2009 under the Native Hawaiian Career and Technical Education Program (NHCTEP), the Secretary hereby waives 34 CFR 75.261(c)(2) in order to extend the project period of these current NHCTEP grants for an additional 12 months. This will enable the eight current NHCTEP grantees to seek FY 2012 continuation awards for their current projects through FY 2013, and we will not announce a new NHCTEP competition in FY 2012.

DATES: This notice of final waiver and extension of project period is effective May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Linda Mayo. Telephone: (202) 245–7792, or by email: *linda.mayo@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.

SUPPLEMENTARY INFORMATION: On February 16, 2012, we published a notice in the **Federal Register** (77 FR 9214) (February 2012 notice) proposing to waive 34 CFR 75.261(c)(2) as it applies to NHCTEP. This regulation restricts project period extensions involving the obligation of additional Federal funds. In that notice, the Secretary also proposed to extend the project period of NHCTEP grants for an additional 12 months to enable the eight current NHCTEP grantees to seek FY 2012 continuation awards for their projects through FY 2013.

Public Comment: In the February 2012 notice, the Secretary invited comments about the potential effect that this proposed project period waiver and extension would have on NHCTEP and on applicants that may be eligible to apply for grant awards under any new NHCTEP notice inviting applications, should there be one. We received three comments in response. Generally, we do not address comments that raise concerns not related to the proposed waiver and extension.

Analysis of Comments and Changes

Comment: Two commenters wrote in support of the proposed waiver and extension, discussed the benefits and accomplishments of current NHCTEP projects, and suggested that an extension of the current project period would allow grantees to continue their work and expand on their accomplishments.

Response: We agree with the commenters that extending the current NHCTEP grant period will allow current NHCTEP grantees to request continuation awards with which they could continue to work toward accomplishing the goals and objectives stated in their 2009 NHCTEP grant applications.

Change: None.

Comment: One commenter, while not addressing the Department's proposed waiver and extension, expressed a concern about the Department's use of the term ''Native Hawaiian'' in NHCTEP, asserting that the term ''Native Hawaiian'' is a racial or ethnic classification that the Department should not be using, in light of applicable U.S. Supreme Court rulings the commenter cited. The commenter requested that, unless the Department was following statutory terms explicitly requiring the use of what the commenter referred to as the ''Native Hawaiian classification,'' it should not apply that classification in NHCTEP. The commenter requested that the Department instead make NHCTEP grants available to all Hawaiians who meet certain socioeconomic or other criteria.

Response: Although this comment is not germane to the Department's proposed waiver and extension, we choose to address it in order to provide further clarification on the NHCTEP grant award authority. As stated in our February 2012 notice, the Department awards NHCTEP grants under authority of section 116(h) of the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins Act or Act) (20 U.S.C. 2326(h)). Section 116(h) of the Act states that: ''the Secretary shall award grants or enter into contracts with community-based organizations *primarily serving and representing Native Hawaiians* to plan, conduct and administer programs, or portions thereof, which are authorized by and consistent with the provisions of [section 116(h) of the Act,] *for the benefit of Native Hawaiians''* (20 U.S.C. 2326(h)) (Emphasis added). In accordance with this statutory authority, in its March 24, 2009, notice inviting applications published in the **Federal Register** (74 FR 12333) (March 2009 notice), the Department announced the availability of grants for community-based organizations primarily serving and representing Native Hawaiians for the benefit of Native Hawaiians. Subject to the availability of funds for this program, the Department will continue to make NHCTEP awards to community-based organizations primarily serving and representing Native Hawaiians for the benefit of Native Hawaiians, as specifically mandated by statute.

Change: None.

Background

NHCTEP funds support grants to community-based organizations primarily serving and representing Native Hawaiians to plan, conduct, and administer career and technical education programs, or portions thereof, as authorized by section 116(h) of the Perkins Act. The eight current NHCTEP grantees were selected based on the March 2009 notice. The project period for the eight NHCTEP grantees is scheduled to end in FY 2012. For these NHCTEP projects, the Secretary waives the requirement of 34 CFR 75.261(c)(2), the regulation that generally prohibits project period extensions involving the obligation of additional Federal funds, in order to extend the current NHCTEP project period for an additional 12 months. This waiver and extension will allow the eight current NHCTEP grantees to seek continuation awards in FY 2012 for project periods through FY 2013.

The Secretary's waiver of 34 CFR 75.261(c)(2) and extension of the current NHCTEP project period means that: (1) Current NHCTEP grantees will be authorized to request and receive NHCTEP continuation awards in FY 2012 for project periods through FY 2013; (2) we will not announce a new NHCTEP competition to make new awards in FY 2012; (3) the March 2009 notice will continue to govern current projects during the extension year; and (4) the eight currently-approved applications selected based on the March 2009 notice will govern NHCTEP continuation activities.

The March 2009 notice: (1) Established a project period of up to 36 months and reiterated that funding for multi-year awards would be dependent on a grantee meeting the requirements of 34 CFR 75.253 (continuation of a multi-year project after the first budget period); (2) explained the requirements of the program; (3) described the evaluation and reporting requirements; and (4) established the Government Performance and Results Act (GPRA) performance indicators for NHCTEP.

With this waiver and extension of the project period, the current eight NHCTEP grantees may request continuation awards for one additional project year, through FY 2013, with FY 2012 funds Congress has appropriated under the current statutory authority. We will consider these continuation award requests under the current statutory authority. Any requests for continuation awards will be subject to the requirements of 34 CFR 75.253, including the requirement that each grantee demonstrate that it is making substantial progress performing its NHCTEP grant activities based on the requirements in the March 2009 notice.

We will make decisions regarding continuation awards based on information provided in grantee requests for continuation awards, including information provided in program narratives, budgets and budget narratives, and performance reports. Any activities to be carried out during the continuation year must be consistent with, or be a logical extension of the scope, goals, and objectives of, each grantee's application as approved in the 2009 NHCTEP competition.

Waiver of Delayed Effective Date

The Administrative Procedure Act requires that a substantive rule must be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). During the 30-day public comment period on the notice of proposed waivers and extension of project period, two of the three comments submitted supported the proposed waiver and extension of the project period, and one commenter did not address the issue. Except for minor editorial and technical revisions, there are no differences between the proposed and final notices of waiver and extension of the project period for NHCTEP. In addition, given the fact that the additional period of funding is only for a 12-month period, and to be able to make timely continuation grants to the eight entities affected, the Secretary has determined that a delayed effective date would be unnecessary and contrary to the public interest.

Regulatory Flexibility Act Certification

The Secretary certifies that the waiver and extension and the activities required to support an additional year of funding will not have a significant economic impact on a substantial number of small entities.

The small entities that will be affected by this waiver and extension are the eight currently-funded NHCTEP grantees.

The Secretary further certifies that the waiver and extension will not have a significant economic impact on these NHCTEP entities because the waiver and extension impose minimal compliance costs to extend projects already in existence, and the activities required to support the additional year of funding will not impose additional regulatory burdens or require unnecessary Federal supervision. Furthermore, the costs of carrying out these activities could be paid for with program funds.

Paperwork Reduction Act of 1995

This notice of waiver and extension does not contain any information collection requirements.

Intergovernmental Review

The NHCTEP is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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.

Program Authority: 20 U.S.C. 2326(h).

Dated: May 18, 2012.

Johan Uvin,

Delegated Authority to Perform the Functions and Duties of the Assistant Secretary for Vocational and Adult Education.

[FR Doc. 2012–12537 Filed 5–22–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Tribally Controlled Postsecondary Career and Technical Institutions Program; Final Waivers and Extension of Project Period

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Notice.

Overview Information; Final Waivers and Extension of Project Period for the Tribally Controlled Postsecondary Career and Technical Institutions Program

Catalog of Federal Domestic Assistance (CFDA) Number: 84.245A.

SUMMARY: For 60-month projects funded in fiscal year (FY) 2007 under the Tribally Controlled Postsecondary Career and Technical Institutions Program (TCPCTIP), the Secretary waives 34 CFR 75.250 and 75.261(c)(2) in order to extend the project period of these current TCPCTIP grantees through FY 2013, or longer, if Congress continues to appropriate funds under the existing TCPCTIP program authority. This action will enable the two current TCPCTIP grantees to seek continuation awards in FY 2012 for their current projects, and we will not announce a new TCPCTIP competition in FY 2012.

DATES: This notice of final waivers and extension of project period is effective May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Gwen Washington. Telephone: (202) 245–7790 or by email: *gwen.washington@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.

SUPPLEMENTARY INFORMATION: On February 16, 2012, we published a notice in the **Federal Register** (77 FR 9218) (February 2012 notice) proposing to waive 34 CFR 75.250 and 75.261(c)(2) as they apply to TCPCTIP. These regulations generally limit project periods to 60 months and restrict project period extensions involving the obligation of additional Federal funds. In that notice, the Secretary also proposed (1) to extend the project period for current TCPCTIP grantees through FY 2013, or longer if Congress continues to appropriate funds under the existing program authority; and (2) to not announce a new TCPCTIP competition in FY 2012.

Public Comment

In the February 2012 notice for TCPCTIP, the Secretary invited comments about the potential effect the proposed waivers and extension would have on TCPCTIP and on applicants that may be eligible to apply for grant awards under any new TCPCTIP notice inviting applications, should there be one. We did not receive any comments.

Background

TCPCTIP funds are used by TCPCTIP grantees to provide career and technical education programs as authorized by section 117 of the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2327). The two current TCPCTIP grantees were selected based on our May 15, 2007, TCPCTIP **Federal Register** notice inviting applications (72 FR 27297) (May 2007 notice). The project period for the two TCPCTIP grantees is scheduled to end in FY 2012. For these TCPCTIP projects, the Secretary waives the requirements of 34 CFR 75.250 and 75.261(c)(2), which limit project periods to 60 months and restrict project period extensions that involve the obligation of additional Federal funds. The Secretary also extends the current project period for the two current TCPCTIP grantees through FY 2013, or longer if Congress continues to appropriate funds under the existing program authority. This will allow the two current TCPCTIP grantees to request continuation awards in FY 2012.

The Secretary's final waiver of 34 CFR 75.250 and 75.261(c)(2) and project period extension means that: (1) Current TCPCTIP grantees may request TCPCTIP continuation awards in FY 2012 for project periods through FY 2013, and may be able do so in future years, if Congress continues to appropriate funds under the existing program authority; (2) we will not announce a new TCPCTIP competition or make new awards in FY 2012, or subsequent years if the existing program authority remains in effect; (3) the May 2007 notice will continue to govern current projects during the extension year or years; and (4) the two applications approved under the May 2007 notice will govern TCPCTIP continuation activities.

The May 2007 notice (1) Established a project period of up to 60 months and reiterated that funding for multi-year awards would be dependent on a grantee meeting the requirements of 34 CFR 75.253 (continuation of a multi-year project after the first budget period); (2) explained the requirements of the program; (3) described the

evaluation and reporting requirements; and (4) established the Government Performance and Results Act (GPRA) indicators for TCPCTIP.

With these waivers and extension of the project period, the current two TCPCTIP grantees may request continuation awards for FY 2013. We will consider continuation award requests under the current TCPCTIP statutory authority, subject to the requirements of 34 CFR 75.253, including the requirement that each grantee demonstrate that it is making substantial progress performing its TCPCTIP grant activities based on the requirements in our May 2007 notice inviting applications.

We will make decisions regarding continuation awards based on information provided in grantee requests for continuation awards, including information provided in program narratives, budgets and budget narratives, and performance reports. Any activities to be carried out during the continuation year must be consistent with, or be a logical extension of the scope, goals, and objectives of, each grantee's application as approved in the 2007 TCPCTIP competition.

Waiver of Delayed Effective Date

The Administrative Procedure Act requires that a substantive rule must be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). During the 30-day public comment period on the notice of proposed waivers and extension of project period, no comments were submitted. Therefore, except for minor editorial and technical revisions, there are no differences between the proposed and final notices of waivers and extension of the project period for TCPCTIP. In addition, given the fact that the additional period of funding is only for a 12-month period, or longer if Congress continues to appropriate funds for TCPCTIP under the existing program authority, and to be able to make timely continuation grants to the two entities affected, the Secretary has determined that a delayed effective date is unnecessary and contrary to the public interest.

Regulatory Flexibility Act Certification

The Secretary certifies that these waivers and extension will not have a significant economic impact on a substantial number of small entities.

The small entities that will be affected by these waivers and extension are the two current TCPCTIP grantees.

The Secretary certifies that these waivers and extension will not have a significant economic impact on these TCPCTIP entities because these waivers and extension impose minimal compliance costs to extend projects already in existence, and the activities required to support the additional year or years of funding will not impose additional regulatory burdens or require unnecessary Federal supervision. Furthermore, the costs of carrying out these activities could be paid for with program funds.

Paperwork Reduction Act of 1995

This notice of final waivers and extension does not contain any information collection requirements.

Intergovernmental Review

The TCPCTIP is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: Individuals with disabilities can obtain this document 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**.

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.

Program Authority: 20 U.S.C. 2327.

Dated: May 18, 2012.

Johan Uvin,

Delegated Authority to Perform the Functions and Duties of the Assistant Secretary for Vocational and Adult Education.

[FR Doc. 2012–12542 Filed 5–22–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Electricity Subsector Cybersecurity Risk Management Process

AGENCY: Office of Electricity Delivery and Energy Reliability, Department of Energy.

ACTION: Notice of publication.

SUMMARY: This serves as public notification of the publication, by the Department of Energy (DOE) of the Electricity Subsector Cybersecurity Risk Management Process guideline. The guideline describes a risk management process that is targeted to the specific needs of electricity sector organizations. The objective of the guideline is to build upon existing guidance and requirements to develop a flexible risk management process tuned to the diverse missions, equipment, and business needs of the electric power industry. The document was posted on May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Request for additional information should be directed to Matthew Light at *matthew.light@hq.doe.gov,* phone 202–316–5115.

SUPPLEMENTARY INFORMATION: DOE has published the document entitled: Electricity Subsector Cybersecurity Risk Management Process. The primary goal of this guideline is to describe a risk management process that is targeted to the specific needs of electricity sector organizations. The objective of the guideline is to build upon existing guidance and requirements to develop a flexible risk management process tuned to the diverse missions, equipment, and business needs of the electric power industry.

The Electricity Subsector Cybersecurity Risk Management Process guideline was developed by the DOE, in collaboration with the National Institute of Standards and Technology (NIST), the North American Electric Reliability Corporation (NERC), and representatives from both the public and private sector. Additionally, the document was provided to the public during two public comment periods. The NIST Special Publication 800–39, Managing Information Security Risk provides the foundational methodology for this document.

The Electricity Sector Cybersecurity Risk Management Process Guideline is available at: *http://energy.gov/node/368191*.

Authority: Homeland Security Presidential Directive 7 (HSPD–7).

Issued at Washington, DC on May 18, 2012.

Patricia A. Hoffman,

Assistant Secretary, Electricity Delivery and Energy Reliability.

[FR Doc. 2012–12484 Filed 5–22–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Support of Deployment of Prototype Small Modular Reactors at the Savannah River Site

AGENCY: Savannah River Operations Office, Department of Energy (DOE).

ACTION: Notice of availability.

SUMMARY: DOE–Savannah River Operations Office (SR), in conjunction with the Savannah River National Laboratory (SRNL), announces the availability of support for deployment of Small Modular Reactors (SMR) on the Savannah River Site (SRS).

DATES: DOE–SR is available to discuss a program of support to domestic SMR developers until May 23, 2013.

ADDRESSES: The anticipated specific support available is outlined in a separate Document, ''Products and Services Available to Small Modular Reactor (SMR) Vendors at the Savannah River Site (SRS).'' Copies of that document may be obtained by contacting Sandra Johnson, the lead point of contact for siting SMRs at SRS. Ms. Johnson may be reached at 803–725–8997 or *Sandra.Johnson@srs,gov.*

FOR FURTHER INFORMATION CONTACT: Helen Belencan, DOE–SR, at 803–952–8696 or *Helen.Belencan@srs.gov;* or Ron Schroder, SRNL, at 803–952–6527 or *Ronald.Schroder@srs.gov.*

SUPPLEMENTARY INFORMATION: Support, via specific agreements between DOE–SR, SRNL and vendors, may include access to the SRS's real property, energy facilities, and nuclear expertise to support potential private sector development, testing and licensing of prototype SMR technologies for siting at SRS. DOE–SR welcomes inquiries from domestic SMR developers regarding the support that is available.

This Notice is not intended to create or remove any rights or duties, nor is it intended to affect any other aspect of DOE regulations. Furthermore, this Notice does not, and is not intended to, have the force and effect of law.

Issued in Aiken, South Carolina, on May 14, 2012.

David C. Moody,

Manager.

[FR Doc. 2012–12486 Filed 5–22–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9648–018]

Town of Springfield, Vermont and Siemens Westinghouse Technical Services, Inc., One Hundred River Street, LLC; Notice of Application for Transfer of License, and Soliciting Comments and Motions To Intervene

On November 15, 2011 and supplemented on April 27, 2012, the Town of Springfield, Vermont and Siemens Westinghouse Technical Services, Inc. (transferors) and One Hundred River Street, LLC (transferee) filed an application to transfer the license for the Fellows Dam Project No. 9648, located on the Black River in Windsor County, Vermont.

Applicants seek Commission approval to transfer the license for the Fellows Dam Project from the transferors to the transferee.

Applicants' Contacts: Transferors: Mr. Robert J. Forguites, Town Manager, Town of Springfield, 96 Main Street, Springfield, VT 05156, (802) 885–2104. Transferee: Mr. Richard Genderson, Managing Member, One Hundred River Street, LLC, 300 Massachusetts Ave. NE., Washington, DC 20002.

FERC Contact: Patricia W. Gillis (202) 502–8735, *patricia.gillis@ferc.gov*.

Deadline for filing comments and motions to intervene: *30 days* from the issuance date of this notice. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1) and the instructions on the Commission's Web site under *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. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original plus seven copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. More information about this project 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–9648) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Dated: May 16, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–12446 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–403]

Grand River Dam Authority; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No.:* 1494–403.

c. *Date Filed:* April 11, 2012.

d. *Applicant:* Grand River Dam Authority.

e. *Name of Project:* Pensacola Hydroelectric Project.

f. *Location:* The docking facilities will be located at Patricia Island on the west edge of Grove, Oklahoma in Delaware County, along the shoreline of the Grand Lake O' Cherokees.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Tamara E. Jahnke, Assistant General Counsel, Grand River Dam Authority, P.O. Box 409, Vinita, Oklahoma 74301, (918) 256–5545.

i. *FERC Contact:* Lorance Yates at (678) 245–3084; or email: lorance.yates@ferc.gov.

j. *Deadline for filing comments, motions to intervene, and protests:* June 15, 2012.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *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: Secretary,

Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–1494–403) on any comments, motions, or recommendations filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears 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. *Description of the Application:* The Grand River Dam Authority has filed a request for Commission approval to authorize Shoreline, L.L.C., a/k/a Patricia Island Estates (applicant) to install six covered docks and two breakwaters to accommodate 263 watercraft consisting of 166 boats and 97 personal watercraft (PWC). The applicant proposed facilities are to be located in three different areas of the development at Patricia Island Estates. These areas are named Blue Heron Cove, Deer Trail and North Shore. The Blue Heron Cove development would consist of two docks. Dock 1 would be 115 feet long and 36 feet wide and accommodate eight boats. Dock 2 would be 92 feet long and 31 feet wide and accommodate six boats and 12 PWC. The Deer Trail construction would consist of three docks. Dock 3 would be 333 feet long and 36 feet wide and accommodate 25 boats. Dock 4 would be 105 feet long and 36 feet wide and accommodate seven boats and nine PWC. Dock 5 would be 90 feet long and 36 feet wide and accommodate six boats and two PWC. Dock 6 at the North Shore location would consist of one large dock system with six wings attached to a main 25 feet wide walkway that would allow for golf carts to park on the dock structure. This dock system would accommodate 104 boats and 74 PWC. There would be one breakwater on each side of the North Shore dock system. The east side wave attenuator would be eight feet by 150 feet and the west side would be eight feet by 200 feet. The dock structures being requested are intended to accommodate watercraft for Patricia Island Estates property owners. No other services are being planned for the sites.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also 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. You may also 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, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* 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, respectively. 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.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (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 commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor 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 385.2010.

Dated: May 16, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–12449 Filed 5–22–12; 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 exempt wholesale generator filings:

Docket Numbers: EG12–67–000.
Applicants: Pacific Wind, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Pacific Wind, LLC.
Filed Date: 5/16/12.
Accession Number: 20120516–5102.
Comments Due: 5 p.m. ET 6/6/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–1179–001.
Applicants: Southwest Power Pool, Inc.
Description: Integrated Marketplace Amendatory Filing to be effective 3/1/2014.
Filed Date: 5/16/12.
Accession Number: 20120516–5000.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1403–001.
Applicants: Consolidated Edison Company of New York, Inc.
Description: Deferral Request and Amendment PASNY/EDDS RY3 to be effective 12/31/9998.
Filed Date: 5/16/12.
Accession Number: 20120516–5087.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1408–001.
Applicants: Consolidated Edison Company of New York, Inc.
Description: Request for Deferral and Amendment WDS RY3 to be effective 12/31/9998.
Filed Date: 5/16/12.
Accession Number: 20120516–5091.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1798–000.
Applicants: PJM Interconnection, LLC.
Description: Original Service Agreement No. 3310; Queue No. T155 to be effective 4/23/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5046.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1799–000.
Applicants: Cleco Evangeline LLC.
Description: Compliance Filing per ER12–1116–000 to be effective 5/1/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5057.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1800–000.
Applicants: Public Service Company of New Mexico.

Description: OATT Attachment R Reliability Redispatch Costs and Methodology to be effective 7/15/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5094.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1801–000.
Applicants: Tucson Electric Power Company.
Description: TEP Attachment C Revisions to be effective 7/16/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5100.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1802–000.
Applicants: Southwest Power Pool, Inc.
Description: 2234R1 Osage Wind and Public Service Co. of OK. Affected Systems Agreement to be effective 4/16/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5106.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1803–000.
Applicants: Cleco Power LLC.
Description: Amendment of Delivery Points in RS12—ESIA with Lafayette, Louisiana to be effective 5/14/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5114.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1804–000.
Applicants: Pacific Wind, LLC.
Description: Pacific Wind Baseline MBR Application Filing to be effective 6/25/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5115.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1805–000.
Applicants: Arizona Public Service Company.
Description: Amendment 1 to Service Agreement No. 318; NTUA NITS to be effective 5/1/2012.
Filed Date: 5/16/12.
Accession Number: 20120516–5116.
Comments Due: 5 p.m. ET 6/6/12.

Docket Numbers: ER12–1806–000.
Applicants: New York Power Authority.
Description: Request for Waiver of New York Power Authority.
Filed Date: 5/16/12.
Accession Number: 20120516–5142.
Comments Due: 5 p.m. ET 5/23/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 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: May 16, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–12465 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–1170–002.
Applicants: Imperial Valley Solar Company (IVSC) 1, LLC.
Description: Amendment to Market-Based Rate Tariff Application to be effective 6/29/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5233.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1782–001.
Applicants: Duke Energy Carolinas, LLC.
Description: Amendment to Filing ER12–1782 to be effective 6/1/2011.
Filed Date: 5/15/12.
Accession Number: 20120515–5065.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1786–000.
Applicants: California Independent System Operator Corporation.
Description: 2012–05–15 Desert Sunlight LGIA Amendment to be effective 9/7/2011.
Filed Date: 5/15/12.
Accession Number: 20120515–5038.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1787–000.
Applicants: California Independent System Operator Corporation.
Description: 2012–05–15 North Sky River LGIA to be effective 8/9/2011.
Filed Date: 5/15/12.
Accession Number: 20120515–5043.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1788–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3283; Queue No. X1–037 to be effective 4/11/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5044.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1789–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3315; Queue No. X3–007 to be effective 4/24/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5061.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1790–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3314; Queue No. X1–090 to be effective 4/24/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5076.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1791–000.
Applicants: Public Service Company of Colorado.
Description: 2012–5–15–NEW Schedule-4B–PSCo to be effective 6/15/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5091.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1792–000.
Applicants: Community Energy, Inc.
Description: Baseline MBR Tariff to be effective 7/14/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5136.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1793–000.
Applicants: PJM Interconnection, L.L.C., Commonwealth Edison Company, Commonwealth Edison Company of Indiana.
Description: ComEd submits revisions to PJM Tariff Attachment H–13A to be effective 6/1/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5154.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1794–000.
Applicants: Hartford Steam Company, LLC.
Description: Notice of Succession to be effective 5/16/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5179.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1795–000.
Applicants: ISO New England Inc.
Description: ISO–NE Files Quarterly Capital Budget Report.
Filed Date: 5/14/12.
Accession Number: 20120514–5197.
Comments Due: 5 p.m. ET 6/4/12.

Docket Numbers: ER12–1796–000.
Applicants: Northern States Power Company, a Wisconsin corporation.
Description: 2012_5_15_NSPW TREMP Const Intercon Fac Agrmt-117 to be effective 5/9/2012.

Filed Date: 5/15/12.
Accession Number: 20120515–5213.
Comments Due: 5 p.m. ET 6/5/12.

Docket Numbers: ER12–1797–000.
Applicants: San Diego Gas & Electric Company.
Description: Amended & Restated Quail Brush E&P Agreement to be effective 5/16/2012.
Filed Date: 5/15/12.
Accession Number: 20120515–5221.
Comments Due: 5 p.m. ET 6/5/12.

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 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: May 16, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–12469 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1792–000]

Community Energy, Inc.; 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 Community Energy, Inc.'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 June 6, 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: May 17, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–12467 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1804–000]

Pacific Wind, 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 Pacific Wind, 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 June 6, 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: May 17, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–12468 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1764–000]

Amplified Power & Gas, 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 Amplified Power & Gas, 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 June 5, 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: May 16, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–12447 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–35–000]

Midwest Independent Transmission System Operator, Inc.; ALLETE, Inc.; Ameren Illinois Company; Ameren Transmission Company of Illinois; American Transmission Company, LLC; Big Rivers Electric Corporation; Board of Water, Electric and Communications Trustees of the City of Muscatine, Iowa; Central Minnesota Municipal Power Agency; City of Columbia, Missouri, Water & Light Company; City Water, Light & Power (Springfield, Illinois); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest, LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; Michigan South Central Power Agency; MidAmerican Energy Company; Missouri River Energy Services; Montana-Dakota Utilities Company; Montezuma Municipal Light & Power; Municipal Electric Utility of the City of Cedar Falls, Iowa; Muscatine Power and Water; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota Corporation; Northern States Power Company, a Wisconsin Corporation; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Tipton Municipal Utilities; Union Electric Company; Wabash Valley Power Association, Inc.; Wolverine Power Supply Cooperative, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

On May 17, 2012, the Commission issued an order that initiated a proceeding in Docket No. EL12–35–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2006), to determine whether the formula rate protocols under the Midwest Independent Transmission System Operator, Inc. Tariff are sufficient to ensure just and reasonable rates. *Midwest Independent Transmission System Operator, Inc., et al.,* 139 FERC ¶ 61,127 (2012).

The refund effective date in Docket No. EL12–35–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Dated: May 17, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–12466 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR12–16–000]

Sunoco Pipeline L.P., West Texas Gulf Pipe Line Company, Mobil Pipe Line Company; Notice of Petition for Declartaory Order

Take notice that on May 14, 2012, pursuant to Rule 207(a)(2) of the Commission's Rules of Practices and Procedure, 18 CFR 385.207(a)(2) (2012), Sunoco Pipeline L.P., West Texas Gulf Pipe Line Company, and Mobil Pipe Line Company (collectively, Petitioners) filed a petition for a declaratory order approving priority service and the overall tariff and rate structure for the proposed West Texas—Nederland Access Project.

Any person desiring to intervene or to protest in this proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioners.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling

link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on Wednesday, June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–12448 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14387–000]

Albany Engineering Corporation; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On April 18, 2012, Albany Engineering Corporation filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of hydropower at the New York State Canal Corporation's Lock C1 Dam located on the Hudson River in Saratoga and Rensselaer Counties, New York. 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 Waterford Hydroelectric Project would consist of the following: (1) An existing 672-foot-long and 15-foot-high ogee-shaped concrete gravity dam with a 356-foot-long tainter-gated structure forming the eastern portion of the dam; (2) an existing impoundment having a surface area of 400 acres and a storage capacity of 5,000 acre-feet at the spillway crest elevation of 28.3 feet National Geodetic Vertical Datum (NGVD); (3) either a new powerhouse at the east end of the tainter-gated structure with two identical turbine generator units with a total installed capacity of 10.2 megawatts (MW) (Scenario 1), or two new identical powerhouses at the west end of the tainter-gated structure housing 18 turbine generator units with a total installed capacity of 6.0 MW (Scenario 2); (4) a proposed 10,000-foot-long, 34.5-kilovolt transmission line; and (5) appurtenant facilities. The proposed project would have an annual generation of 39,000 megawatt-hours (MWh) (Scenario 1) or 16,000 MWh (Scenario 2).

Applicant Contact: Wendy Jo Carey, Albany Engineering Corporation, 5 Washington Square, Albany, NY 12205; phone: (518) 456–7712.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

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 the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14387–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 16, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–12450 Filed 5–22–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2011–0923; FRL–9517–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; RCRA Definition of Solid Waste (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before June 22, 2012.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–RCRA–2011–0923, to (1) EPA, either online using *www.regulations.gov* (our preferred method), or by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Richard Huggins, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, (5304P), Environmental Protection Agency, 2733 South Crystal Drive, Arlington, VA 22202; telephone number: 703–308–0017; fax number: 703–308–0514; email address: *huggins.richard@EPA.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On December 6, 2011 (76 *FR* 76159),

EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No EPA–HQ–RCRA–2011–0923, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Resource Conservation and Recovery Act (RCRA) Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC 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 Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

Use EPA's electronic docket and comment system at *www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: RCRA Definition of Solid Waste (Renewal).

ICR numbers: EPA ICR No. 2310.02, OMB Control No. 2050–0202.

ICR Status: This ICR is scheduled to expire on May 31, 2012. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The U.S. Environmental Protection Agency (EPA) has published final revisions to the definition of solid waste that exclude certain hazardous secondary materials from regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA), as amended. The information requirements help ensure that (1) entities operating under the regulatory exclusions contained in today's action are held accountable to the applicable requirements; (2) state inspectors can verify compliance with the restrictions and conditions of the exclusions when needed; and (3) hazardous secondary materials exported for recycling are actually handled as commodities abroad.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average .13 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Private business or other for-profit; State, Local, or Tribal governments.

Estimated Number of Respondents: 4,915

Frequency of Response: On occasion, Annual, Biannual, or Once.

Estimated Total Annual Hour Burden: 20,403 hours.

Estimated Total Annual Cost: $1,559,149, which includes $1,002,587 annualized labor costs and $556,562 annualized capital or O&M costs.

Changes in the Estimates: There is no change hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2012–12460 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2012–0012; FRL–9347–7]

Pesticide Products; Receipt of Applications To Register New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this notice of such applications, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before June 22, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2012–0012 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), Mail Code: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: A contact person is listed at the end of each registration application summary and may be contacted by telephone or email. The mailing address for each contact person listed is: Biopesticides and Pollution Prevention Division (7511P) or Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural

producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or 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 EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number). If you are commenting on a docket that addresses multiple products, please indicate to which registration number(s) your comment applies. If you are commenting on a docket that addresses multiple products, please indicate to which registration number(s) your comment applies.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications for New Uses

EPA received applications as follows to register pesticide products containing currently publishing this notice of such applications pursuant to section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

1. *Registration Numbers:* 100–864 and 100–1226. *Docket Number:* EPA–HQ–OPP–2012–0177. *Company name and address:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Cyproconazole. *Proposed Classification/Use:* peanuts. Contact: Shaunta Hill, (703) 347–8961, email address: *hill.shaunta@epa.gov.*

2. *Registration Numbers:* 100–907, 100–909, and 100–1173. *Docket Number:* EPA–HQ–OP–2012–0202. *Company name and address:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Clodinafop-propargyl. *Proposed Classification/Use:* Wheat grain. Contact: Tracy White, (703) 308–0042, email address: *white.tracy@epa.gov.*

3. *Registration Numbers:* 100–921 and 100–1363. *Docket Number:* EPA–HQ–OPP–2012–0215. *Company name and address:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Acibenzolar-S-Methyl. *Proposed Classification/Use:* Sunflower seed treatment. Contact: Rose Kearns, (703) 305–5611, email address: *kearns.rosemary@epa.gov.*

4. *Registration Numbers:* 100–1098, 100–1119, 100–1120, and 100–1220. *Docket Number:* EPA–HQ–OPP–2012–0282. *Company name and address:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Azoxystrobin. *Proposed Classification/Uses:* Oats and Rye. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

5. *Registration Numbers:* 100–1178 and 100–1324. *Docket Number:* EPA–HQ–OPP–2012–0282. *Company name and address:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Azoxystrobin/Propiconazole. *Proposed Classification/Uses:* Oats and rye. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

6. *Registration Numbers:* 100–1119 and 100–1120. *Docket Number:* EPA–HQ–OPP–2012–0283. *Company name and address:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Azoxystrobin. *Proposed Classification/Use:* Barley. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

7. *Registration Numbers:* 264–1049, 264–1050, 264–1051, and 264–065. *Docket Number:* EPA–HQ–OPP–2012–0107. *Company name and address:* Bayer CropScience, P.O. Box 12014, 2 T. W. Alexander Drive, Research Triangle Park, NC 27709. *Active ingredient:* Spirotetramat. *Proposed Classification/Uses:* Banana and plantain; bushberry subgroup, crop subgroups 13–07B and 13–07H including aronia berry, bearberry, bilberry, blueberry (highbush and lowbush), Chilean guava, cloudberry, cranberry, currant (black, buffalo, native, and red), elderberry, European barberry, gooseberry, edible honeysuckle, jostaberry, juneberry, muntries, lingonberry, partridgeberry, salal, sea buckthorn, including cultivars, varieties and/or hybrids of these; additional citrus fruits, crop group 10–10 including Australian lime (desert, finger, and round), Brown River finger lime, Japanese summer grapefruit, Mediterranean mandarin, Mount White lime, New Guinea wild lime, Russell River lime, sweet lime, tachibana orange, Tahiti lime, trifoliate orange, uniq fruit including cultivars, varieties, and/or hybrids of these; coffee; pineapple; additional pome fruits, crop group 11–10 including azarole, Chinese quince, Japanese quince, medlar, tejocote including cultivars, varieties, and/or hybrids of these; pomegranate; bulb vegetables, crop subgroup 3–07A including daylily (bulb), fritillaria (bulb), garlic (bulbs of common, great-headed, serpent), lily (bulb), onion (bulbs of common, Chinese, pearl, potato), shallot (bulb) plus cultivars, varieties and/or hybrids of these; bulb vegetables, crop subgroup 3–07B including Chinese chive (fresh leaves), chive (fresh leaves), elegans hosta, fritillaria (leaves), kurrat, wild leek, lady's leek, Beltsville bunching onion, fresh onion, green onion, macrostem

onion, tree onion tops, Welsh onion tops, shallot fresh leaves plus cultivars, varieties and/or hybrids of these; additional fruiting vegetables, crop group 8–10 including African eggplant, bush tomato, cocona, currant tomato, garden huckleberry, goji berry, martynia, naranjilla, okra, pea eggplant, roselle, scarlet eggplant, sunberry, tree tomato, pepper (cayenne, chili, habanero, jalapeno, pablano, pimento, serrano), including cultivars, varieties and/or hybrids of these; globe artichoke; taro leaves; and watercress. Contact: Rita Kumar, (703) 308–8291, email address: *kumar.rita@epa.gov.*

8. *Registration Numbers:* 499–526, 499–527, 499–531, and 86203–8. *Docket Number:* EPA–HQ–OPP–2012–0092. *Company name and address:* Whitmire Micro-Gen Research Laboratories, Inc., 3568 Tree Court Industrial Blvd., St. Louis, MO 63122; and Mitsui Chemicals Agro, Inc., c/o Landis International, Inc., P. O. Box 5126, Valdosta, GA 31603. *Active ingredient:* Dinotefuran. *Proposed Classification/Use:* Food/Feed Handling Establishments. Contact: Rita Kumar, (703) 308–8291, email address: *kumar.rita@epa.gov.*

9. *Registration File Symbols:* 7969–EOI and 7969–EOO. *Docket Number:* EPA–HQ–OPP–2012–0185. *Company name and address:* BASF Corporation, 26 Davis Dr., Research Triangle Park, NC 27709. *Active ingredient:* Alpha-cypermethrin. *Proposed Classification/Uses:* Alfalfa, cotton, tree nut crop group, citrus fruits crop group, cereal grains crop group, *Brassica* (cole) leafy vegetables, leafy vegetables, fruiting vegetables, cucurbit vegetables, legume vegetables (succulent or dried), foliage of legume vegetables, root and tuber vegetables. Contact: Bewanda Alexander, (703) 305–7560, email address: *alexander.bewanda@epa.gov.*

10. *Registration File Symbol:* 7969–GET. *Docket Number:* EPA–HQ–OPP–2012–0310. *Company name and address:* BASF Corporation, 26 Davis Dr., Research Triangle Park, NC 27709. *Active ingredient:* Topramezone, *Proposed Classification/Use:* Turf (Golf Courses, Sod Farms, and Residential Turf Sites). Contact: Kathryn Montague, (703) 305–1243, email address: *montague.kathryn@epa.gov.*

11. *Registration Numbers:* 59639–97, 59639–99, and 59639–119. *Docket Number:* EPA–HQ–OPP–2012–0139. *Company name and address:* Valent U.S.A. Corporation, 1600 Riviera Ave., Suite 200, Walnut Creek, CA 94596. *Active ingredient:* Flumioxazin. *Proposed Classification/Uses:* For formulation into technical and end-use herbicide products used on: Artichoke, Cabbage, and Chinese cabbage (tight headed varieties only), Cactus (Agave and Prickly Pear), Olive, and Pomegranate. Contact: Grant Rowland, (703) 347–0254, email address: *rowland.grant@epa.gov.*

12. *Registration Number and Registration File Symbol:* 62719–640 and 62719–AUO. *Docket Number:* EPA–HQ–OPP–2011–0835. *Company name and address:* Dow AgroSciences LLC, 9330 Zionsville Rd., Indianapolis, IN 46268. *Active ingredients:* 2,4=D choline salt and glyphosate. *Proposed Classification/Use:* Enlist AAD–1 Corn (Trait Code: DAS–40278–9). Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

13. *Registration File Symbol:* 62719–AGO. *Docket Number:* EPA–HQ–OPP–2011–0835. *Company name and address:* Dow AgroSciences LLC, 9330 Zionsville Rd., Indianapolis, IN 46268. *Active ingredient:* 2, 4,D= choline salt. *Proposed Classification/Use:* Enlist AAD–1 Corn (Trait Code: DAS–40278–9). Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

14. *Registration File Symbol:* 62719–AUU. *Docket Number:* EPA–HQ–OPP–2012–0306. *Company name and address:* Dow AgroSciences LLC, 9330 Zionsville Rd., Indianapolis, IN 46268. *Active ingredient:* 2, 4,D=choline salt. *Proposed Classification/Use:* Enlist AAD–12 Soybeans (Trait Code: DAS–68416–4). Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

15. *Registration Numbers:* 63588–91, 63588–92, and 63588–93. *Docket Number:* EPA–HQ–OPP–2012–0308. *Applicant:* K–I Chemical U.S.A., Inc., c/o Landis International, Inc., 3185 Madison Highway, P.O. Box 5126, Valdosta, GA 31603–5126. *Active Ingredient:* Pyroxasulfone. *Proposed Classification/Use:* Soybeans. Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

16. *Registration File Symbols:* 69969–G. *Docket Number:* EPA–HQ–OPP–2011–0276, *Applicant:* Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W., Princeton, NJ 08540 on behalf of Arkion Life Sciences, 551 Mews Dr., Suite J, New Castle, DE 19720. *Product Name:* Avipel. *Active Ingredient:* Biochemical Bird Repellent with 9, 10–Anthraquinone at 50%. *Proposed Classification/Use:* End Use product applied as a seed treatment to corn to repel blackbirds, cranes, geese, grackles and pheasants. Contact: Chris Pfeifer, Biopesticides and Pollution Prevention Division, (703) 308–0031, email address: *pfeifer.chris@epa.gov.*

17. *Registration Numbers:* 71512–11 and 71512–12. *Docket Number:* EPA–HQ–OPP–2012–0297. *Applicant:* ISK Biosciences Corporation, 7470 Auburn Rd., Suite A, Concord, OH 44077. *Active Ingredient:* Flazasulfuron herbicide. *Proposed Classification/Use:* Residential Use (spot treatment). Contact: Hope Johnson, (703) 305–5410, email address: *johnson.hope@epa.gov.*

18. *Registration Numbers:* 86203–8 and 86203–25. *Docket Number:* EPA–HQ–OPP–2012–0060. *Company name and address:* Mitsui Chemicals Agro, Inc., c/o Landis International, Inc., P. O. Box 5126, Valdosta, GA 31603. *Active ingredient:* Dinotefuran. *Proposed Classification/Use:* Rice. Contact: Rita Kumar, (703) 308–8291, email address: *kumar.rita@epa.gov.*

19. *Registration File Symbols:* 88867–E and 88867–R. *Docket Number:* EPA–HQ–OPP–2012–0204. *Company name and address:* Willapa-Grays Harbor Oyster Growers Association, P.O. Box 3, Ocean Park, WA 98640. *Active ingredient:* Imidacloprid. *Proposed Classification/Use:* Intertidal oyster beds to control burrowing shrimp. Contact: Jennifer Urbanski, (703) 347–0156, email address: *urbanski.jennifer@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pest.

Dated: April 27, 2012.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2012–12492 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0014; FRL–9347–3]

Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrant and accepted by the Agency, of the products listed in Table 1 of Unit II., pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows a September 7, 2011 and June 16, 2010 **Federal Register** Notice of Receipt of Request from the registrants listed in Table 2 of Unit II. to voluntarily cancel these product

registrations. In the September 7, 2011 and June 16, 2010 notices, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 180 day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency received comments on the notices but none merited its further review of the requests. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Jolene Trujillo, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0103; fax number: (703) 308–8005; email address: *trujillo.jolene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0014, is available either electronically through *http://www.regulations.gov* or in hard copy at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. 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 OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of 33 products registered under FIFRA section 3, or 24(c). These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

EPA registration No.	Product name	Chemical name
000264–00438	Bronate Herbicide	MCPA,2-ethylhexyl ester. Bromoxynil octanoate.
000264–00477	Buctril + Atrazine Herbicide	Bromoxynil octanoate Atrazine.
000264–00586	Sedagri Batril 20W Herbicide	Bromoxynil octanoate.
000264–00650	Silverado Herbicide	Fenoxaprop-p-ethyl.
000264–00699	Rhino Brand Herbicide	MCPA,2-ethylhexyl ester Bromoxynil octanoate Hepatonic acid, 2,6-dibromo-4-cyanophenyl ester.
000264–00799	Weco Max Brand Herbicide	2-4-D, 2-ethylhexyl ester Hepatonic acid, 2,6-dibromo-4-cyanophenyl ester Bromoxynil octanoate.
000264–00803	Spiroxamine Technical	1,4-Dioxaspiro? 4,5Udecane-2-methanamine,8-(1,1-dimethylethyl)-N-ethyl-N-propyl-.
000264–00804	Accrue Fungicide	1,4-Dioxaspiro? 4,5Udecane-2-methanamine,8-(1,1-dimethylethyl)-N-ethyl-N-propyl-.
000264–00842	Silverado LQ Wild Oat Herbicide	Mesosulfuron-methyl.
000264–01071	Wolverine Power Pak	Hepatonic acid, 2,6-dibromo-4-cyanophenyl ester Bromoxynil octanoate Puyrasulfotole Technical; Fenoxaprop-p-ethyl.
001043–00060	T.B. Q. Germicidal Detergent	Alkyl* dimethyl benzyl ammonium chloride *(50%C14, 40%C12, 10%C16).
001719–00043	Cop-R-Tox Wood Preservative	Copper naphthenate.
004822–00394	Raid Yard Guard Outdoor Fogger Formula VII	Bioallethrin Permethrin.
004822–00450	OFF! Yard & Deck Area Repellent II	Bioallethrin Permethrin.
008278–00004	Metro That's It Dry	Metaldehyde.
009444–00138	Time-Mist Metered Insecticide II	MGK 264 Piperonyl butoxide Pyrethrins.
009444–00159	Purge After Hours Plus DS	MGK 264 Piperonyl butoxide Pyrethrins.
053883–00174	Propicinazole 14.3	Propiconazole.
062451–00003	Ant Guard for Hummingbird Feeders	Piperonyl butoxide Pyrethrins.
071992–00001	Cunap-8 Wood Preservative	Copper naphthenate.
071992–00002	Cunap-2	Copper naphthenate.
071992–00003	CU Nap-5W Wood Preservative	Copper naphthenate.
086203–00013	Dinotefuran TK	Dinotefruran.
086203–00017	Dinotefuran 20SG TK	Dinotefruran.
CA050014	Admire Pro Systemic Protectant	Imidacloprid.
MN070007	Dinotefuran 20% Turf, Ornamental & Vegetable Transplant.	Dinotefruran.
NC910011	Drexel Sucker Plucker Concentrate	Alcohols, Cx—Cxx.
OH080002	Tree-Age	Emamectin benzoate.
OR100006	Dual Magnum Herbicide	S–Metolachlor.
SC910006	Drexel Sucker Plucker Concentrate	Alcohols, Cx—Cxx.

TABLE 1—PRODUCT CANCELLATIONS—Continued

EPA registration No.	Product name	Chemical name
VA910011	Drexel Sucker Plucker Concentrate	Alcohols, Cx—Cxx.
WA060012	DuPont Velpar DF Herbicide	Hexazinone.
WA060013	DuPont Velpar L Herbicide	Hexazinone.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS OF CANCELLED PRODUCTS

EPA company No.	Company name and address
1043	Steris Corporation, P.O. Box 147, St. Louis, MO 63166–0147.
1719	Mobile Paint Manufacturing Company Inc., P.O. Box 717, Theodore, AL 36582.
4822	S.C. Johnson & Son Inc., 1525 Howe St., Racine, WI 53403.
8278	Metro Biological Laboratory, 583 Canyon Rd., Redwood City, CA 94062.
9444	Waterbury Companies Inc., 129 Calhoun St., P.O. Box 640, Independence, LA 70443.
53883	Control Solutions, Inc., 5903 Genoa-Red Bluff Rd., Pasadena, TX 77507–1041.
62451	Lineguard Inc., Attn: E.H. Roberts, P.O. Box 839, Elyria, OH 44036.
71992	Merichem Company, 5455 Old Spanish Trail, Houston, TX 77023.
86203; MN070007	Mitsui Chemicals Agro, Inc., AGENT: Landis International, Inc., P.O. Box 5126, Valdosta, GA 31603–5126.
264; CA050014	Bayer CropScience LP, 2 T.W. Alexander Dr., P.0. Box 12014, Research Triangle Park, NC 27709.
NC910011; SC910006; VA910011	Drexel Chemical Company, 1700 Channel Ave., P.0. Box 13327, Memphis,TN 38113–0327.
OH080002; OR100006	Syngenta Crop Protection, LLC D/B/A Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300.
WA060012; WA060013	E.I. DuPont De Nemours and Co., Inc. (S300/419), ATTN: Manager, U.S. Registration, DuPont Crop Protection, 1007 Market St., Wilmington, DE 19898–0001.

III. Summary of Public Comments Received and Agency Response to Comments

EPA received one comment that was not substantive. Therefore, the Agency does not believe that the comment submitted during the comment period merits further review or a denial of the requests for voluntary cancellation.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Table 1 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit II. are cancelled. The effective date of the cancellations that are the subject of this notice is May 23, 2012. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be cancelled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** issue of September 7, 2011 (76 FR 55385) (FRL–8887–1) and the issue of June 16, 2010 (75 FR 34117) (FRL–8827–1). The comment periods closed on March 5, 2012 and December 13, 2010, respectively.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II. until May 23, 2013, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1, except for export in accordance with FIFRA section 17, or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II. until existing stocks are exhausted, provided that such sale, distribution, or, use is consistent with the terms of the previously approved labeling on, or, that accompanied, the cancelled products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: May 10, 2012.

Michael Goodis,

Acting Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2012–12488 Filed 5–22–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9675–4]

Notification of a Public Teleconference of the Science Advisory Board; Libby Amphibole Asbestos Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office

announces a public teleconference of the SAB Libby Amphibole Asbestos Panel to discuss the Panel's revised draft review report of EPA's Toxicological Review of Libby Amphibole Asbestos *(August 2011 Draft).*

DATES: The public teleconference will take place on July 25, 2012 from 1:00 p.m. to 4:00 p.m. (Eastern Daylight Time).

ADDRESSES: The public teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning the public teleconference may contact Dr. Diana Wong, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2049 or via email at *wong.diana-M@epa.gov.* General information concerning the EPA Science Advisory Board can be found at the EPA SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDAA) codified at 42 U.S.C. 4365, to provide independent scientific and technical peer review, advice, consultation, and recommendations to the EPA Administrator on the technical basis for EPA actions. As a Federal Advisory Committee, the SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. Pursuant to FACA and EPA policy, notice is hereby given that the SAB Libby Amphibole Asbestos Panel will hold a public teleconference to discuss its revised draft review report of EPA's draft Toxicological Review of Libby Amphibole Asbestos *(August 2011).* The Panel previously held a public meeting on February 6–8, 2012 (**Federal Register** 76, Number 247, Page 80368), and public teleconferences on May 1 and May 8, 2012 (**Federal Register** 77, Number 60, Page 18808) to discuss its review comments and draft report, respectively. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Background information about this SAB review can be found on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Libby%20Cancer%20Assessment?OpenDocument.*

Availability of the review materials: Agendas and materials in support of the teleconference will be placed on the SAB Web site at *http://www.epa.gov/sab* in advance of the teleconference. For technical questions and information concerning EPA's Draft Toxicological Review of Libby Amphibole Asbestos *(August 2011),* please contact Dr. Danielle DeVoney, of EPA's National Center for Environmental Assessment (NCEA), by phone (703) 347–8558, or via email at *devoney.danielle@epa.gov;* or Dr. Bob Benson, of EPA Region 8, by phone (303) 312–7070, or via email at *benson.bob@epa.gov.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments for a federal advisory committee to consider as it develops advice for EPA. Input from the public to the SAB will have the most impact if it consists of comments that provide specific scientific or technical information or analysis for the SAB panel to consider or if it relates to the clarity or accuracy of the technical information.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes per speaker. Interested parties should contact Dr. Diana Wong, DFO, in writing (preferably via email), at the contact information noted above, by July 18, 2012 to be placed on the list of public speakers for the July 25, 2012 public teleconference. *Written Statements:* Written statements should be received in the SAB Staff Office by July 18, 2012 so that the information may be made available to the SAB Panel for their consideration. Written statements should be supplied to the DFO in electronic format via email (acceptable file formats: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). It is the SAB Staff Office general policy to post written comments on the web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Procedures for Registration to Listen to the Teleconference: Members of the public who would like to listen to the conference call should contact Dr. Diana Wong, DFO, via email at the contact information noted above by July 23, 2012.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Diana Wong at the phone number or email address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: May 16, 2012.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–12499 Filed 5–22–12; 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: 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; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; 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 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 July 23, 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: 3060–0259.

Title: Section 90.263, Substitution of Frequencies Below 25 MHz.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities and state, local or tribal government.

Number of Respondents: 35 respondents; 35 responses.

Estimated Time per Response: .50 hours (30 minutes).

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 154(i), 161, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended.

Total Annual Burden: 18 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality:

Needs and Uses: The Commission is seeking an extension of this expiring information collection in order to obtain the full three year approval from OMB. There is no change to the reporting requirement. There is no change to the Commission's previous burden estimates of 2009.

Section 90.263 requires applicants proposing operations in certain frequency bands below 25 MHz to submit supplemental information showing such frequencies are necessary from a safety of life standpoint, and information regarding minimum necessary hours of operation.

The information will be used by Commission personnel in evaluating the applicant's need for such frequencies and the interference potential to other stations operating on the proposed frequencies.

OMB Control Number: 3060–0264.

Title: Section 80.413, On-Board Station Equipment Records.

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: 1,000 respondents; 1,000 responses.

Estimated Time per Response: 2 hours

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 154, 303, 307(e), 309 and 332 and 151–155 and sections 301–609 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,000 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 an extension of this expiring information collection in order to obtain the full three year approval from OMB. There is no change to the recordkeeping requirement. There is no change to the Commission's previous burden estimates of 2009.

Section 80.413 requires the licensee of an on-board station to keep equipment records which show:

(1) The ship name and identification of the on-board station;

(2) The number of and type of repeater and mobile units used on-board the vessel; and

(3) The date the type of equipment which is added or removed from the on-board station.

The information is used by FCC personnel during inspections and investigations to determine what mobile units and repeaters are associated with on-board stations aboard a particular vessel. If this information were not maintained, no means would be available to determine if this type of radio equipment is authorized or who is responsible for its operation. Enforcement and frequency management programs would be negatively affected if the information were not retained.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–12502 Filed 5–22–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 008493–029.

Title: Trans-Pacific American Flag Berth Operators Agreement.

Parties: American President Lines, Ltd., and A.P. Moller-Maersk A/S.

Filing Party: Howard A. Levy, Esq.; 120 Wall Street, Suite 2020; New York, NY 10005–4001.

Synopsis: The amendment adds Australia and New Zealand to the geographic scope of the agreement.

Dated: May 18, 2012.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–12529 Filed 5–22–12; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at

(202) 523–5843 or by email at *OTI@fmc.gov.*

101 Shipping Inc (NVO & OFF), 2018 Pacific Coast Highway, #200, Lomita, CA 90717, Officers: Hyung K. Shin, President/CFO (Qualifying Individual), Yung H. Cho, Secretary, Application Type: New NVO & OFF License.

A. & A. Trading, Inc. (NVO & OFF), 409 Blue Bell Road, Houston, TX 77037, Officers: Mohammad J. Warsi, Secretary (Qualifying Individual), Mohammad Ahmed, President, Application Type: New NVO & OFF License.

CAP Worldwide, Inc. (NVO & OFF), 3226 Lodestar Road, Building 7, Suite 200, Houston, TX 77032, Officers: Jair Pitty, Treasurer (Qualifying Individual), Rebecca J. Kersting, President/Director/Stockholder, Application Type: QI Change.

Coreana Express (Seattle), Inc. (NVO & OFF), 6858 South 220th Street, Building A, Kent, WA 98032, Officer: Mi Kyung (A.K.A. Megan) Yoo, Pres/CEO/Sec/Treas/CFO (Qualifying Individual), Application Type: New NVO & OFF License.

Cruises Logistic USA, Inc. dba Italian Seaways USA (NVO & OFF), 11825 NW 100th Road, Medley, FL 33178, Officers: Ivonne Zani, Vice President (Qualifying Individual), Marcello Ferri, Stockholder, Application Type: Trade Name Change.

Danzas Corporation dba DHL Global Forwarding, dba Danmar Lines Ltd, dba DHL Danzas Air & Ocean, dba Danmar Lines (NVO & OFF), 1200 South Pine Island Road, Plantation, FL 33324, Officers: Ahmet Erener, Vice President (Head of Ocean Freight U.S.) (Qualifying Individual), Mathieu Floreani, Director/President-CEO, Application Type: QI Change.

Evastar LLC (NVO), 230 Ponce De Leon Blvd., Daytona Beach, FL 32114, Officer: Eva M. Piper, Member/President/CEO (Qualifying Individual), Application Type: New NVO License.

Global Wine Logistics, Inc. (NVO & OFF), 197 Route 19 South, Suite 3000, East Brunswick, NJ 08816, Officer: Anita McNeil, President (Qualifying Individual), Application Type: Name Change.

HTNS America, Inc. dba UKO Logis, Inc. (NVO & OFF), 17258 South Main Street, Carson, CA 90248, Officers: Wong Sang Jang, President/CEO/Secretary (Qualifying Individual), Dong M. Kim, Shareholder/Director, Application Type: QI Change.

Interfreight Harmonized Logistics Inc. (NVO & OFF), 221 Sheridan Blvd., Inwood, NY 11096, Officers: Thomas E. Staub, President (Qualifying Individual), Application Type: QI Change.

Kuehne + Nagel Inc. dba Blue Anchor America Line (NVO), 10 Exchange Place, Jersey City, NJ 07302, Officers: Peter Hofmann, Vice President—Export Compliance (Qualifying Individual), John Hextall, President/CEO, Application Type: Add NVO Service/Trade Name Change.

M & D Global Logistics, Inc. (NVO & OFF), 2211 S. Hacienda Blvd., Suite 201, Hacienda Heights, CA 91745, Officers: Jeffrey Wu, Treasurer/CFO/Director (Qualifying Individual), Jun (Alex) Zhong, Secretary, Application Type: Add OFF Service.

Metro Freight Services, Inc. dba Maritime Express Lines (M.E.L.) (NVO & OFF), 1225 W. St. George Avenue, Linden, NJ 07036, Officers: Paola C. Samaha, President (Qualifying Individual), Zahir Mahmud, Vice President Operations/Secretary, Application Type: QI Change.

Relaciones Cibaeno Express Inc. (NVO), 93–16 37th Avenue, Jackson Heights, NY 11372, Officer: Ygnacio Valdez, President/VP/Treasurer/Secretary (Qualifying Individual), Application Type: New NVO License.

Ruky International Shipping Line LLC (NVO & OFF), 100 Menlo Park, Suite 310, Edison, NJ 08837, Officers: Amarasena A. Rupasinghe, Member/Manager (Qualifying Individual), Application Type: New NVO & OFF License.

Sigmai (Asia) Limited (NVO), Unit A, 23/F, Tower A, Billion Centre, 1 Wang Kwong Road, Kowloon Bay, Kowloon, Hong Kong, China, Officers: Amir Demri, Director/CEO/Secretary/Treasurer (Qualifying Individual), Application Type: New NVO License.

SOS International Shipping Corporation (OFF), 7260 Hidden Cove Court, Weeki Wachee, FL 34607, Officers: Anthony Cavaliere, Secretary (Qualifying Individual), Barbara A. Romer, President/Owner, Application Type: New OFF License.

Transportes Zuleta, Inc. (NVO), 844 W. Flagler Street, Miami, FL 33130, Officers: Carmen L. Rodriguez, Treasurer (Qualifying Individual), Jaqueline Morales, President, Application Type: QI Change.

Welcome Freight Forwarding, Inc. (OFF), 8424 NW 56th Street, Miami, FL 33166, Officer: Gustavo T. Navarro, President/Secretary, Application Type: New OFF License.

Dated: May 18, 2012.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–12532 Filed 5–22–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
004626F	J.B.R. Marine Inc., 1163 Fairway Drive, Suite 106, City of Industry, CA 91789	March 16, 2012.
105941F	Cargo Plus, Inc., 8333 Wessex Drive, Pennsauken, NJ 08109	April 25, 2012.
017524F	Natco International Transports, USA, L.L.C., 12415 SW 136th Avenue, Bay 4, Miami, FL 33186	April 8, 2012.
019398NF	Copacabana Enterprises Group, Inc., 6500 NW 84th Avenue, Miami, FL 33166	April 17, 2012.
019808N	Centro America Envios, Inc., 1741 W. Flagler Street, Miami, FL 33135	April 19, 2012.
020784NF	Matson Global Distribution Services, Inc., 555 12th Street, Suite 700, Oakland, CA 94607	April 16, 2012.
020849N	Master Freight America, Corp., 8925 NW 26th Street, Miami, FL 33172	March 14, 2012.

Vern W. Hill,

Director, Bureau of Certification and Licensing.

[FR Doc. 2012–12530 Filed 5–22–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocation

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 004626N.
Name: J.B.R. Marine Inc.
Address: 1163 Fairway Drive, Suite 106, City of Industry, CA 91789.
Date Revoked: March 16, 2012.
Reason: Voluntarily surrendered license.

License Number: 015941N.
Name: Cargo Plus, Inc.
Address: 8333 Wessex Drive, Pennsauken, NJ 08109.
Date Revoked: April 25, 2012.
Reason: Failed to maintain a valid bond.

License Number: 16743F.
Name: Courtney International Forwarding Inc.
Address: 372 Doughty Blvd., 2nd Floor, Inwood, NY 11096.
Date Revoked: April 30, 2012.
Reason: Failed to maintain a valid bond.

License Number: 019562N.
Name: Maximo Martinez Inc. dba M & M Shipping.
Address: 1656 5th Avenue, Unit A, Bay Shore, NY 11706.
Date Revoked: April 28, 2012.
Reason: Failed to maintain a valid bond.

License Number: 019878NF.
Name: Unity Logistics and Transportation, Inc.
Address: 2116 Merrick Avenue, Suite 4004–B, Merrick, NY 11566.
Date Revoked: April 23, 2012.
Reason: Failed to maintain valid bonds.

License Number: 020376NF.
Name: Unity Container, Inc.
Address: 6105 NW 18th Street, Building 716–C, Suite 402, Miami, FL 33126.
Date Revoked: April 28, 2012.
Reason: Failed to maintain valid bonds.

License Number: 020535N.
Name: Destiny Global Export Corp.
Address: 12 Kingsberry Drive, Somerset, NJ 08873.
Date Revoked: April 27, 2012.
Reason: Failed to maintain a valid bond.

License Number: 021303N.
Name: Guzal Cargo Express Corp.
Address: 5561 NW 72nd Avenue, Miami, FL 33166.
Date Revoked: April 28, 2012.
Reason: Failed to maintain a valid bond.

License Number: 023145NF.
Name: Frontline Cargo Logistics, LLC.
Address: 2980 West 84th Street, Bay #3, Hialeah, FL 33018.
Date Revoked: April 28, 2012.
Reason: Failed to maintain valid bonds.

License Number: 023149N.
Name: Balkans Air Corporation.
Address: 1703 Bath Avenue, Brooklyn, NY 11214.
Date Revoked: April 25, 2012.
Reason: Failed to maintain a valid bond.

License Number: 023172NF.
Name: Miami Freight & Logistics Services, Inc. dba Miami Global Lines.
Address: 3630 NW 76th Street, Miami, FL 33143.
Date Revoked: April 23, 2012.
Reason: Failed to maintain valid bonds.

License Number: 023469NF.
Name: Ramin Razi dba Acorn International Inc.
Address: 20501 Ventura Blvd., Suite 248, Woodland Hills, CA 91364.
Date Revoked: April 30, 2012.
Reason: Failed to maintain valid bonds.

Vern W. Hill,

Director, Bureau of Certification and Licensing.

[FR Doc. 2012–12533 Filed 5–22–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), pursuant to 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR part 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before July 23, 2012.

ADDRESSES: You may submit comments, identified by FR 2900, FR 2910a, FR 2915, FR 2930, FR 3052, or FR 3053, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form

and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public Web site at: *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Cynthia Ayouch—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

Request for Comment on Information Collection Proposals

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Proposal to approve under OMB delegated authority the extension for three years, without revision, of the following reports:

1. *Report title:* Report of Transaction Accounts, Other Deposits and Vault Cash.

Agency form number: FR 2900.

OMB control number: 7100–0087.

Frequency: Weekly and quarterly.

Reporters: Depository institutions.

Estimated annual reporting hours: 549,878 hours.

Estimated average time per response: 3.50 hours.

Number of respondents: 2,669 weekly and 4,580 quarterly.

General description of report: This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a), 461, 603, and 615) and Regulation D (12 CFR part 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: Institutions with net transaction accounts greater than the exemption amount are called nonexempt institutions. Institutions with total transaction accounts, savings deposits, and small time deposits greater than or equal to the reduced reporting limit, regardless of the level of their net transaction accounts, are also referred to as nonexempt institutions. Nonexempt institutions submit FR 2900 data either weekly or quarterly. An institution is required to report weekly if its total transaction accounts, savings deposits, and small time deposits are greater than or equal to the nonexempt deposit cutoff. If the nonexempt institution's total transaction accounts, savings deposits, and small time deposits are less than the nonexempt deposit cutoff then the institution must report quarterly or may elect to report weekly. U.S. branches and agencies of foreign banks and banking Edge and agreement corporations submit the FR 2900 data weekly, regardless of their size. These mandatory data are used by the Federal Reserve for administering Regulation D (Reserve Requirements of Depository Institutions) and for constructing, analyzing, and monitoring the monetary and reserve aggregates.

2. *Report title:* Annual Report of Deposits and Reservable Liabilities.

Agency form number: FR 2910a.

OMB control number: 7100–0175.

Frequency: Annually.

Reporters: Depository institutions.

Annual reporting hours: 3,503 hours.

Estimated average time per response: 45 minutes.

Number of respondents: 4,670.

General description of report: This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a) and 461) and Regulation D (12 CFR part 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: The FR 2910a is an annual report generally filed by depository institutions that are exempt from reserve requirements under the Garn-St. Germain Depository Institutions Act of 1982 and whose total deposits, measured from depository institutions' December quarterly condition reports, are greater than the exemption amount but less than the reduced reporting limit. The report contains three data items that are to be submitted for a single day, June 30: (1) Total transaction accounts, savings deposits, and small time deposits; (2) reservable liabilities; and (3) net transaction accounts. The data collected on this report serves two purposes. First, the data are used to determine which depository institutions will remain exempt from reserve requirements and consequently eligible for reduced reporting for another year. Second, the data are used in the annual indexation of the low reserve tranche, the exemption amount, the nonexempt deposit cutoff, and the reduced reporting limit. These mandatory data are used by the Federal Reserve for administering Regulation D and for constructing, analyzing, and monitoring the monetary and reserve aggregates.

3. *Report title:* Report of Foreign (Non-U.S.) Currency Deposits.

Agency form number: FR 2915.

OMB control number: 7100–0237.

Frequency: Quarterly.

Reporters: Depository institutions.

Annual reporting hours: 284 hours.

Estimated average time per response: 30 minutes.

Number of respondents: 142.

General description of report: This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a) and 347(d)) and Regulation D (12 CFR part 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: All FR 2900 respondents, both weekly and quarterly, that offer deposits denominated in foreign currencies at their U.S. offices file the FR 2915. FR 2915 data are used to remove foreign currency deposits from aggregated FR 2900 data in constructing the monetary aggregates. All weekly and quarterly FR 2900 respondents offering foreign currency deposits file the FR 2915 quarterly, on the same reporting schedule as quarterly FR 2900 respondents. The FR 2915 is the only source of data on such deposits.

4. *Report title:* Allocation of Low Reserve Tranche and Reservable Liabilities Exemption.

Agency form number: FR 2930.

OMB control number: 7100–0088.

Frequency: Annually and on occasion.

Reporters: Depository institutions.

Annual reporting hours: 32 hours.

Estimated average time per response: 15 minutes.

Number of respondents: 126.

General description of report: This information collection is mandatory by

the Federal Reserve Act (12 U.S.C. 248(a), 461, 603, and 615) and Regulation D (12 CFR part 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: The FR 2930 provides information on the allocation of the low reserve tranche and the reservable liabilities exemption for depository institutions with offices in more than one state or Federal Reserve District or for those operating under operational convenience. For calculation of required reserves on net transaction accounts, there is a low reserve tranche within which deposits are reserved at a lower reserve requirement ratio than are amounts in excess of the low reserve tranche. Within the low reserve tranche, deposits under the reservable liabilities exemption amount are reserved at zero. All U.S. offices of the same parent depository institution share one low reserve tranche and one reservable liabilities exemption. This report provides the basis for allocating these amounts across separate reporting offices.

5. *Report title:* Supervisory and Regulatory Survey.

Agency form number: FR 3052.

OMB control number: 7100–0322.

Frequency: On occasion.[1]

Reporters: Financial businesses.

Estimated annual reporting hours: 60,000 hours.

Estimated average time per response: 30 minutes.

Estimated number of respondents: 5,000.

General description of report: This information collection is authorized pursuant to the: Federal Reserve Act, (12 U.S.C. 225a, 324, 263, 602, and 625); Bank Holding Company Act, (12 U.S.C. 1844(c)); International Banking Act of 1978, (12 U.S.C. 3105(c)(2)); and Federal Deposit Insurance Act, (12 U.S.C. 1817(a)). Generally, respondent participation is voluntary. However, with respect to collections of information from state member banks, bank holding companies (and their subsidiaries), Edge and agreement corporations, and U.S. branches and agencies of foreign banks supervised by the Federal Reserve, the Federal Reserve could make the surveys mandatory. The ability of the Federal Reserve to maintain the confidentiality of information provided by respondents to the FR 3052 surveys is determined on a case-by-case basis depending on the type of information provided for a particular survey. Depending upon the survey questions, confidential treatment could be warranted under subsections (b)(4), (b)(6), and (b)(8) of the Freedom of Information Act (5 U.S.C. 552(b)(4), (6), and (8)).

Abstract: The supervision and policy functions of Federal Reserve have occasionally needed to gather data on an ad-hoc basis from the banking and financial industries on their financial condition (outside of the standardized regulatory reporting process) and decisions that organizations have made to adjust to the changes in the economy. Further, the data may relate to a particular business activity that requires a more detailed presentation of the information than is available through regulatory reports [such as the (FFIEC 031 and FFIEC 041; OMB No. 7100–0036) (FFIEC 002; OMB No. 7100–0032) (FR 2886b; OMB No. 7100–0086), and (FR Y–9C; OMB No. 7100–0128)]. These data may be particularly needed in times of critical economic or regulatory changes or when issues of immediate supervisory concern arise from Federal Reserve supervisory initiatives and working groups or requests from Board Members and the Congress. The Federal Reserve uses this event-driven survey to obtain information specifically tailored to the Federal Reserve's supervisory, regulatory, operational, and other responsibilities. The Federal Reserve conducts the survey as needed up to 24 times per year. The frequency and content of the questions depend on changing economic, regulatory, supervisory, or legislative developments.

6. *Report title:* Consumer Financial Stability Surveys.

Agency form number: FR 3053.

OMB control number: 7100–0323.

Frequency: On occasion.[2]

Reporters: Individuals, households, and financial and non-financial businesses.

Estimated annual reporting hours: 6,550 hours.

Estimated average time per response:

Consumer studies: Quantitative and general studies, 0.5 hours; financial institution consumers, .5 hours; qualitative studies, 1.5 hours;

Financial institution study: Financial institution staff, 1.5 hours; and

Stakeholder studies: Stakeholder clientele, 0.5 hours; stakeholder staff, 1.5 hours.

Estimated number of respondents:

Consumer studies: Quantitative and general studies, 2,000; financial institution consumers, 500; qualitative studies, 100;

Financial institution study: Financial institution staff, 25; and

Stakeholder studies: Stakeholder clientele, 500; stakeholder staff, 100.

General description of report: This information collection is authorized pursuant to the: Community Reinvestment Act, (12 U.S.C. 2905); Competitive Equality Banking Act, (12 U.S.C. 3806); Expedited Funds Availability Act, (12 U.S.C. 4008); Truth in Lending Act, (15 U.S.C. 1604); Fair Credit Reporting Act, (15 U.S.C. 1681s(e)); Equal Credit Opportunity Act, (15 U.S.C. 1691b); Electronic Funds Transfer Act, (15 U.S.C. 1693b); Gramm-Leach-Bliley Act, (15 U.S.C. 6801(b)); and Flood Disaster Protections Act of 1973, (42 U.S.C. 4012a). Additionally, depending upon the survey respondent, the information collection may be authorized under a more specific statute. Specifically, this information collection is authorized pursuant to the: Federal Reserve Act, Sections 2A, 9, 12A, 25, and 25A (12 U.S.C. 225a, 324, 263, 602, and 625); Bank Holding Company Act, Section 5(c) (12 U.S.C. 1844(c)); International Banking Act of 1978, Section 7(c)(2) (12 U.S.C. 3105(c)(2)); and Federal Deposit Insurance Act, Section 7(a) (12 U.S.C. 1817(a)). Respondent participation in these surveys is voluntary. The ability of the Federal Reserve to maintain the confidentiality of information provided by respondents to the FR 3053 surveys will be determined on a case-by-case basis depending on the type of information provided for a particular survey. Depending upon the survey questions, confidential treatment could be warranted under the Freedom of Information Act (5 U.S.C. 552(b)(4) and (6)).

Abstract: The Federal Reserve uses this event-driven survey to obtain information specifically tailored to the Federal Reserve's supervisory, regulatory, operational, informational, and other responsibilities. The studies are used to gather qualitative and quantitative information directly from: consumers (consumer studies), financial institutions and other financial companies offering consumer financial products and services (financial institution study), and other stakeholders, such as state or local agencies, community development organizations, brokers, appraisers, settlement agents, software vendors, and consumer groups (stakeholder studies). The Federal Reserve conducts the FR 3053 up to 20 times per year, although the survey may not be conducted that frequently. The frequency and content of the questions depends on changing economic, regulatory, or legislative developments as well as changes in the financial services industry itself.

[1] The Federal Reserve conducts the survey as needed up to 24 times per year.

[2] The Federal Reserve conducts the survey as needed up to 20 times per year.

Board of Governors of the Federal Reserve System, May 18, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–12473 Filed 5–22–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 18, 2012.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Mercantile Bancorp, Inc.,* Quincy, Illinois; to merge with The Royal Palm Bancorp, Inc., and thereby indirectly acquire The Royal Palm Bank of Florida, both in Naples, Florida.

Board of Governors of the Federal Reserve System, May 18, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–12474 Filed 5–22–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–12–12LA]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to Kimberly S. Lane, at CDC, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (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. Written comments should be received within 60 days of this notice.

Proposed Project

Evaluation of the Communities Putting Prevention to Work National Media Initiative—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The American Recovery and Reinvestment Act of 2009 (ARRA) allotted $650 million to the Department of Health and Human Services (HHS) to support evidence-based prevention and wellness strategies. The cornerstone of the initiative is the Communities Putting Prevention to Work (CPPW) Community Program, administered by the CDC. In March 2010, HHS made 44 CPPW awards for community-based obesity and tobacco preventions efforts, followed in September 2010 by additional awards made possible by Affordable Care Act (ACA) funding. Between the two funding sources, there are 50 communities that are part of CPPW: 28 are obesity only-funded communities; 11 are dual-funded for both obesity and tobacco initiatives; and 11 are tobacco only-funded.

CPPW awardees are implementing interventions that they have selected from a preselected group of evidence-based strategies that have been defined for physical activity, nutrition, and tobacco use. CPPW program efforts are supported by a 30-month National Prevention Media Initiative. Although originally planned as a national campaign, CDC determined that the best support for the CPPW communities would be to shift to a localized approach. Thus, rather than a national campaign, CDC and an evaluation contractor worked with the communities to develop media buy plans and to place local media buys from an approved pool of creative materials. The media plans are being tailored to best support each awardee's local efforts, including tailored media mix, creative and timing. Each community has a different schedule for when the ads are running, but overall, ads placed by the CPPW National Media Initiative will run between February 2012 and December 2012.

CDC plans to conduct two cycles of information collection to evaluate the local media campaigns in 39 CPPW communities that are addressing obesity. Although we placed ads in all 50 communities, the Office on Smoking and Health is already evaluating the impact of tobacco media throughout the United States, including in CPPW communities. Therefore, the evaluation study described in this information collection request will concentrate on the 39 CPPW communities addressing obesity. Communities were initially provided the opportunity to select from twelve obesity prevention ads. Additionally, some communities requested CDC support in placing their own ads to strengthen their locally-branded marketing efforts. The topics addressed in all the ads that CDC placed are childhood obesity, nutrition, physical activity, and physical activity and physical education in schools. The intended audiences for these ads are the general public, with many communities focusing on parents, and specifically on mothers.

CDC plans to conduct two cycles of information collection: in Fall 2012 and Winter/Spring 2013. Information will be collected through brief telephone interviews with adults in the 39 CPPW communities that are focusing on

obesity, after a brief screening process to obtain the respondent's consent and to determine eligibility. A separate sample will be drawn for each community. CDC plans to obtain a total of 6,000 complete responses for each cycle of data collection. Interview questions will assess: (1) Awareness (aided and unaided) of the local community media efforts/campaigns about obesity; (2) beliefs about and attitudes toward the issue of obesity in their communities; and (3) behaviors and behavioral intentions that encourage active living and healthy eating. The evaluation plan specifically seeks to identify and describe changes in beliefs and behaviors as a function of exposure to the media campaign.

The long-term goals of CPPW are to modify the environmental determinants of risk factors for chronic diseases; prevent or delay chronic diseases; promote wellness in children and adults; and provide positive, sustainable health change in communities. The insights to be gained from this information collection will be valuable to assessing the impact that CPPW has achieved in taking on the obesity epidemic and may be used to inform the design and delivery of future media campaigns.

OMB approval is requested for one year. Participation in the telephone interviews is voluntary and there are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)	Total burden (in hr)
Adult General Public	Screener for the Community Telephone Interview.	22,400	1	5/60	187
	Community Telephone Interview (incomplete).	400	1	5/60	33
	Community Telephone Interview (complete).	12,000	1	10/60	2,000
Total					2,220

Kimberly S. Lane,

Deputy Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–12479 Filed 5–22–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Final Notice Regarding Updates and Clarifications of the Implementation of the Scholarships for Disadvantaged Students Program

AGENCY: Health Resources and Services Administration, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) announces updates and clarifications for the implementation of the Scholarships for Disadvantaged Students (SDS) program under authority of Section 737 of the Public Health Service Act (PHS Act). This notice supersedes all previous notices regarding the SDS program.

A notice which proposed updates and clarified implementation of the SDS program was published in the **Federal Register** on March 20, 2012 (77 FR 16244). A period of 30 days was established to allow public comment concerning the proposed updates and implementation. Twenty-two letters were received, each with multiple comments. This notice discusses the comments and sets forth the final updates and implementation to the SDS program.

DATES: *Effective Date:* The program clarifications described in this notice will be implemented in fiscal year (FY) 2012 and beyond and will become effective for SDS funds awarded to schools in FY 2012 and beyond.

Purpose: HRSA is updating the SDS program to increase the impact of the program in the areas addressed in the program's authorizing statute. Specifically, the authorizing statute allows the Secretary to make grants to eligible entities that are carrying out a program for recruiting and retaining students from disadvantaged backgrounds, including students who are members of racial and ethnic minority groups (PHS Act, Sec. 737(d)(1)(B)). In addition, grantees provide scholarships to individuals who meet the following requirements: (1) Are from disadvantaged backgrounds; (2) have a financial need for a scholarship; and (3) are enrolled (or accepted for enrollment) at an eligible health professions or nursing school as a full-time student in a program leading to a degree in nursing or a health profession (PHS Act, Sec. 737(d)(2)(A–C)). Under the statute, priority is given to eligible entities based on the proportion of graduating students going into primary care, the proportion of underrepresented minority students, and the proportion of graduates working in medically underserved communities (PHS Act, Sec. 737(c)). There is also a requirement to award at least 16 percent of the available funds to schools of nursing (PHS Act, Sec. 740(a)).

The SDS Program required updating, because the program grantee population had grown from 401 schools in FY 2000 to almost 700 health profession schools in FY 2011. Since all SDS eligible schools received grant awards, the funding had been divided into ever decreasing amounts per school over the years. Many of the schools, in an effort to provide funding to each of their disadvantaged students, spread the award equally among the disadvantaged students and the smaller school award amounts resulted in smaller student scholarship amounts. While the student scholarship amounts decreased, the tuition rates increased. For many students with insufficient financial resources, the small award size was unlikely to provide enough funding to continue in school. Also, the primary care and underrepresented minority student priority weights used were too small to adequately incentivize and reward schools that were successful in graduating primary care underrepresented minority students or who had excellent plans to improve their programs to recruit and retain students from disadvantaged

backgrounds, including students who are members of racial and ethnic minority groups. The primary care weights were also not enough to incentivize schools to increase the proportion of graduating students going into primary care. Additionally, the practice of awarding grants for 1 year at a time did not allow the schools to select financially disadvantaged applicants with greater assurance that a student would receive SDS financial aid for the entire time the student is enrolled.

Changes: To provide larger award amounts to schools and to increase the retention and graduation of disadvantaged students, including students who are members of racial and ethnic minority groups, HRSA's Bureau of Health Professions (BHPr) announces the following changes to the SDS program:

(1) Convert the formula-based SDS program to a competitive peer-reviewed grant program.

Comments: Four comments were received regarding the use of peer review in the grant award process. The first ''welcomed'' the change to a peer review process. The second comment was concerned that the peer review process did not include peer review of priority points. The third commenter believed that the application process for peer review would be a burden, and the fourth commenter gave no readily discernible reason for not supporting peer review.

In response, HRSA points out that the base score totals 100 points and is determined by the results of the peer review. The additional priority points are calculated based on set numeric standards. Therefore, the majority of an applicant's score (100 out of 111 points total) will be derived from peer reviewers. The priority points (a maximum of 11 points, in addition to the maximum of 100 base points) will be based on an applicant's successful past performance and points will be designated using data provided by the applicant (percent of graduates entering service in medically underserved communities or primary care and the percent of students that are underrepresented minorities). The calculation of set numeric standards for the awarding of priority points does not require the judgment of a peer reviewer. The priority point evaluation process described is, in HRSA's consideration, the most objective means of evaluating applicants for the SDS program. Regarding the third comment about the application being burdensome, narrative grant applications are commonly used by HRSA health professions programs. The narrative grant application allows peer reviewers and HRSA to understand the applicant's approach and proposal more fully. The overall grant application format has been reviewed and approved for general use. In addition, since the grants will be awarded for multiple years, applicants will only apply once every four years instead of annually.

(2) Convert the grant award from a current 1-year project period to a project period of 4-years. A successful institutional applicant would be awarded a 4-year project period with funding provided annually subject to appropriations, the availability of funds and successful progress.

Comments: Eight comments were received on the project period. Two comments support the 4-year project period. One of them said, ''The 4-year commitment will be key in incentivizing students to enter one of these much needed professions and allow the student to have a firm financial plan in tackling the cost of the education.'' Other comments included two that were concerned that Congress might not fund the full 4-year project period; another was interested in knowing how a 2-year school would fare in funding with a 4-year cycle; another worried that a student's economic status might change over the 4-year period, and another provided no readily discernible reason for not supporting the change.

In response, the multi-year project period has historically been used by many HRSA health profession training programs. There is no concern that the SDS program would encounter any special difficulties. Grants are awarded with a multiyear project period which allows grantees the opportunity to plan for long-term activities. Regarding the remaining comments on the project period, there appears to be a misunderstanding regarding the school award project period and the student award. The SDS school 4-year project period assures the school of SDS funding each year, pending availability of funding and dependent upon the school's performance. The school has the responsibility to select the SDS students each year and the school must ensure recipients comply with all eligibility requirements each year. Schools may not provide a student with all four years of funding in the first year, however; the school may fund the same student each year if the school has the funds and the student meets the eligibility requirements. Having a 2-, 3- or 4-year curriculum should not be an issue.

(3) Add a new requirement that individual student awards must be at least 50 percent of the student's annual tuition costs, for tuition $30,000 or less, but no student can be awarded over $15,000 SDS funds per year. Individual student awards must be $15,000 for students whose tuitions are over $30,000 per year. The use of funds have not changed and the amount of the scholarship still may not exceed a recipient's cost of tuition expenses, other reasonable educational expenses, and reasonable living expenses incurred in attendance at the SDS eligible health professions school. As before, the scholarship may be expended by the student only for such allowable costs.

Comments: There were 11 comments on the tuition award amounts. Three comments supported the change. Six comments said they prefer to provide scholarships to more students rather than increase scholarship amounts to fewer students and there was concern that they would not be able to fund as many students as they usually do. One of the six said her preference was to leave the scholarship amount entirely up to the grantee. Another comment suggested lowering the minimum scholarship amount and another suggested having a minimum per semester rather than per year.

In response, HRSA maintains that providing small amounts to more students is unlikely to affect student outcomes in a way consistent with the statutory aims. The requirement of 50 percent of the tuition up to $15,000 per year will provide a significant award amount to allow disadvantaged students with financial need to better complete their health profession education. A 50 percent tuition per year award minimum provides more flexibility than a per semester minimum. Regarding the concern that a school may have to select fewer SDS students due to the changes being made, HRSA points out that the total grant award to a school will be based on the disadvantaged students' need up to $650,000 rather than basing it on a formula that determines the portion of shared available funds.

(4) Increase the weight and provide a range of points for primary care and underrepresented minority priorities.

Comments: There were 4 comments regarding the weights for the priority points. Two comments supported the priority point weights. One comment that supported the weights also said attaining high percentages of graduates entering primary care service would be difficult. One commenter did not like the high weight on primary care and the other did not like the high weight given for applicants with high percentages of underrepresented minority students, or for graduates serving in primary care.

Both said that this would increase primary care at the expense of other disciplines.

In response, service in primary care and having high percentages of students from underrepresented minority backgrounds are two of the priorities required by the authorizing statute. Increasing primary care practitioners and increasing the diversity of the health professions are emphasized in the statute. They are also both initiatives of HRSA and the priority points are weighted to meet these initiatives.

(5) Expand the disciplines eligible for the primary care priority (currently allopathic and osteopathic medicine, dentistry, graduate nurse practitioners, and physician assistants) to also include dental hygiene and behavioral and mental health discipline (clinical psychology, clinical social work, professional counseling, marriage and family therapy).

Comments: There were six comments regarding the primary care priority disciplines. Two supported the expansion. Another comment said they did not support the expansion, because it would decrease funds to those already receiving the primary care priority. Three additional commentors wanted HRSA to also add pharmacy as a primary care discipline, because in ''three states,'' there is ''* * * a second level of pharmacist licensure known as the pharmacist clinician (Ph.C.). Under protocol with a physician, a Ph.C. acts as a mid-level provider with similar rights and responsibilities to that of a Nurse Practitioner or Physician Assistant.''

In response to the comment that disciplines eligible for the primary care priority should not be expanded, because the change might decrease the amount of funds to current primary care priority recipients, HRSA points out that the identified primary care priority disciplines can rationally and consistently be defined as primary care across the states following the IOM definition. Possible funding scenarios should not be a criterion for deciding whether a discipline is primary care. In response to those commentors who wanted to expand the primary care definition to include disciplines that had a primary care role in three states, HRSA points out that the expanded list of disciplines proposed were those with fairly consistent licensure and duties nationally. Seven states offer prescribing privileges and many other states support collaborative drug therapy management, thereby expanding scope of practice and allowing pharmacists to work in a team environment to initiate, modify or continue drug therapy for a specific patient. HRSA will continue to assess the pharmacist clinician occupation for possible inclusion in the primary care discipline category in the future.

(6) Use the Institute of Medicine's primary care definition to identify primary care service for the primary care priority within the eligible primary care disciplines:

Primary Care is the provision of integrated, accessible health care services by clinicians who are accountable for addressing a large majority of personal health care needs, developing a sustained partnership with patients, and practicing in the context of family and community. (Institute of Medicine. *Primary Care: America's Health in a New Era.* Washington, DC: National Academy Press, 1996).

Comments: There were three comments regarding the use of the IOM definition. Two supported the use of the definition. Another comment did not support the use of the IOM definition unless there would be full disclosure that other health professions, authorized to participate in the SDS program, were also included in the primary care priority.

In response, the primary care definition as written does not mention specific disciplines but describes tasks to better define primary care activities.

(7) Increase the school eligibility requirement for disadvantaged students enrolled and disadvantaged students graduated to 20 percent each.

Comments: There were six comments regarding the increase in the eligibility requirements. One comment said that the change ''seems reasonable'' though it may be difficult to maintain. Another said that its school would likely be able to attain the 20 percent levels but worried about what would happen if after receiving the grant, the school fell below 20 percent for one of the years. Four other comments said that raising the eligibility to 20 percent would eliminate the school from the program and two of those who said they would be eliminated, went on to say that the discipline itself as a whole didn't have near the 20 percent level of disadvantaged students or practitioners.

In response, the proposed increase in eligibility that will occur in FY 2012 was designed in order to focus funds on schools that have a strong commitment to educating and graduating disadvantaged students. Based on an analysis of FY 2010 grantees, over 400 programs met the 20 percent eligibility criteria. The SDS program eligibility criteria could help drive improvement in disciplines with low percentages of disadvantaged enrollees and graduates. Prior to the FY 2012 increase, the level had not been increased since 1999.

Eligibility Requirements: Eligible entities are: schools of allopathic and osteopathic medicine; dentistry; optometry; pharmacy; podiatric medicine; veterinary medicine; nursing (associate, diploma, baccalaureate, and graduate degree); public health; chiropractic; allied health (baccalaureate and graduate degree programs of dental hygiene, medical laboratory technology, radiology technology, speech pathology, audiology, registered dieticians, and occupational therapy and physical therapy); mental and behavioral health (graduate degree programs in clinical psychology, clinical social work, professional counseling, marriage and family therapy); and entities providing physician assistant training programs. (PHS Act, Sec. 737(d)(1)(A)).

There are five requirements a school must meet in order to be eligible for the SDS grant program. The requirements, starting in FY 2012, are as follows:

(1) Twenty (20) percent of enrolled students must be disadvantaged;

(2) Twenty (20) percent of graduates must be disadvantaged;

(3) Schools must have a recruitment program for disadvantaged students;

(4) Schools must have a retention program for disadvantaged students; and

(5) Student award must be at least 50 percent of the annual tuition cost with a $15,000 maximum award per year, when annual tuition is $30,000 or below—above $30,000 annual tuition equals $15,000 award.

Student Eligibility Requirements: To qualify for the SDS program, a student must:

(1) Meet the following definition of an individual from a disadvantaged background. For the purposes of the SDS program, an individual from a disadvantaged background is defined as one who: (a) Comes from an environment that has inhibited the individual from obtaining the knowledge, skills, and abilities required to enroll in and graduate from a health profession or nursing school, or from a program providing education or training in allied health professions; or (b) comes from a family with an annual income below the established Census Bureau low-income thresholds, adjusted by the Secretary for health professions and nursing programs eligibility;

(2) Have a financial need for a scholarship, in accordance with a need analysis procedure approved by the Department of Education (20 U.S.C. 1087kk–1087vv). In addition, any student who is enrolled (or accepted for enrollment) in a health profession school or program must provide

information on his or her parents' financial situation or his or her own depending upon the tax status of the student; and

(3) Be enrolled (or accepted for enrollment), as a full-time student, at an eligible health professions or nursing school in a program leading to a degree in nursing or a heath profession (PHS Act, Sec. 737).

Comments: There was one comment regarding financial information required on graduate students. That comment requested that HRSA change its policy requesting that graduate students provide parental financial information to determine financial need, because it may be burdensome to the students. The commenter noted that some Department of Education loan programs do not require parental information.

In response, HRSA points out that SDS is a scholarship program, and strong documentation is needed for the student scholarship selection process. The consequence of providing a scholarship to a non-eligible student is the loss of funds, whereas with loans, students repay the funds with interest. During technical assistance meetings, many grantees were very favorable to the SDS financial-need documentation policy and said that the information was needed to both make appropriate student selections and the policy helpful when explaining financial document requests to students. SDS policy is for the parental income to be used to determine a student's eligibility for economically disadvantaged status in all cases except in those cases where the student is considered independent by being at least 24 years old and has *not* been listed as a dependent on his or her parents' income tax for 3 or more years. In those cases, the student's family income will be used instead of parental family income.

Student Award Selection: The law requires that in providing SDS scholarships, the school or program must give ''preference to students for whom the cost of attending an SDS school or program would constitute a severe financial hardship.'' Severe financial hardship is to be determined by the school or program in accordance with standard need analysis procedures prescribed by the Department of Education for its Federal student aid programs. The school or program has discretion in deciding how to determine which students have ''severe financial hardship,'' as long as the standard is applied consistently to all eligible students.

The law also requires that schools give awards to students who were former recipients of scholarships under PHS Act sections 736 (Exceptional Financial Need Scholarships) and 740(d)(2)(B) (Financial Assistance for Disadvantaged Health Professions Students Scholarships), as such sections existed on November 13, 1998, if such recipients are still students in financial need.

Elements of Peer Review: Peer reviewers will assess a school's allocations based on accomplishment of, or commitment to, the following criteria:

(1) Degree to which applicant demonstrates its commitment to the education of disadvantaged students, including underrepresented minorities (10 points);

(2) Degree to which applicant demonstrates its commitment to increasing primary care practitioners (10 points);

(3) Degree to which applicant demonstrates its commitment to increasing graduates working in medically underserved communities (MUCs) (10 points);

(4) Level of achievements and successes in educating disadvantaged students, including underrepresented minorities, in a way that eliminates barriers along the educational pipeline for disadvantaged students and assures graduates practice in primary care and serve in MUCs (30 points); and

(5) Level of adequacy of proposed plan to increase and educate disadvantaged students, including underrepresented minorities, and retain students in their academic programs, and encourage them to enter primary care and serve in MUCs (40 points).

Comments: There were 17 different comments regarding the review criteria. One comment said that the school liked the focus on recruitment and retention programs. Three comments indicated that they would prefer that HRSA provide administrative costs to acquire the data needed to apply and report on students. Eight comments requested that the changes not be implemented this year for the following reasons: in order to complete a study of the likely outcomes of these changes, to provide time for institutions to gather information to write better applications, and to assure the SDS scholarship funds can be provided to students this year and be a recruitment tool despite the later than normal grantee award date this year. Two comments said that the MUC service review criterion was problematic since service was a student decision and beyond the school's control. One comment said that the goal of increasing disadvantaged students in primary care would destroy the SDS program as it currently exists. Two comments were that the school disagreed with the focus on primary care.

In response, HRSA is unable to fund administrative costs for this program at this time. Regarding the request for an impact study, HRSA will base the programmatic changes on information it has gathered from grantees about program operations and analysis of grantee data. HRSA will assess the impact of these changes after they are implemented to determine if they had the intended effect. In regard to the additional application burden, HRSA points out that the applications for the SDS will include much of the same information requested in the past, but will have additional opportunities for applicants to describe their programs in narrative and check-box format. Program has determined that the time allocated to complete the application will be appropriate to satisfy any new requirements. Regarding timing of the awards in FY 2012, HRSA grantees (in meetings with HRSA) said that schools will be able to award the funds requested for FY 2012 even if the awards come out in September. In response to the comments regarding the MUC review criteria, the SDS program already awards funds to schools that have programs and activities to support and encourage students to provide service in MUCs and grantees have been tracking students' service in MUCs for years. The mission of the SDS program is to provide funding to disadvantaged students, including students from racial and ethnic minority backgrounds in financial need, so they may study at and graduate from a health professions school and enter a health profession, preferably in primary care in a medically underserved community, as per the statutory preferences. The review criteria focus on program activities that will produce those results.

Priority Scoring: Additional points ranging from two through four will be given for having a high percentage of the following priorities: (1) Underrepresented minority students and (2) graduates entering primary care service. Additional points ranging from one through three will be given for having a high percentage of graduates serving in medically underserved communities. The number of points awarded to each applicant for meeting the priorities will be determined by the applicant's percentage in meeting these priorities. A higher number of points will be assigned to applicants with higher percentages of meeting these priorities. There will be no institutional or discipline preferences.

Additional Letters: There were three additional letters that did not contain comments. They asked questions that were answered in the text of this Notice or required very detailed responses that were more appropriate for response in technical assistance meetings.

Dated: May 17, 2012.

Mary K. Wakefield,

Administrator.

[FR Doc. 2012–12568 Filed 5–22–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Cognitive Testing of Instrumentation and Materials for the Population Assessment of Tobacco and Health (PATH) Study

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Institute on Drug Abuse (NIDA), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Cognitive Testing of Instrumentation and Materials for Population Assessment of Tobacco and Health (PATH) Study. *Type of Information Collection Request:* Generic Clearance. *Need and Use of Information Collection:* The PATH study will establish a population-based framework for monitoring and evaluating the behavioral and health impacts of regulatory provisions implemented as part of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) by the Food and Drug Administration (FDA). NIDA is requesting generic approval from OMB for cognitive testing of the PATH study's instrumentation, materials to support data collection (e.g., advance mailings, reminder letters, etc.), consent forms, and methods of administration (e.g., computer assisted personal interviews [CAPI], audio computer assisted self-interviews [ACASI], web-based interviews). Cognitive testing of these materials and methods will help to ensure that their design and content are valid and meet the PATH study's objectives. Additionally, results from cognitive testing will inform the feasibility (scientific robustness), acceptability (burden to participants and study logistics) and cost of the information collection to help minimize its estimated cost and public burden.

Frequency of Response: Annual [As needed on an on-going and concurrent basis]. *Affected Public:* Members of the public. *Type of Respondents:* Youth (ages 12–17) and Adults (ages 18+). *Annual Reporting Burden:* See Table 1. The annualized cost to respondents is estimated at: $11,861. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN SUMMARY—COGNITIVE TESTING OF INSTRUMENTATION AND MATERIALS FOR THE PATH STUDY

Instruments/Documents to be tested	Type of respondent	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response*	Estimated total annual burden hours requested
Materials to Support Data Collection	Adult	100	1	1 30/60	150
Assent Forms	Youth	98	1	2	196
Consent Forms	Adult	98	1	2	196
PATH Study Questionnaires	Youth	40	1	2	80
	Adult	130	1	2	260
Total		466			882

* Calculations include one hour of travel time per respondent.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans contact Kevin P. Conway, Ph.D., Deputy Director, Division of Epidemiology, Services, and Prevention Research, National Institute on Drug Abuse, 6001 Executive Blvd., Room 5185, Rockville, MD 20852, or call non-toll free number 301–443–8755 or Email your request, including your address to: *PATHprojectofficer@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: May 17, 2012.

David Shurtleff,

Acting Deputy Director, NIDA.

[FR Doc. 2012–12489 Filed 5–22–12; 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; PAR Panel: Selected Topics in Transfusion Medicine.
Date: June 12–13, 2012.
Time: 11 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: Bukhtiar H Shah, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, (301) 301 806–7314, *shahb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Regulatory Genomics.
Date: June 13, 2012.
Time: 12 p.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Richard A Currie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1108, MSC 7890, Bethesda, MD 20892, (301) 435–1219. *currieri@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Drug Discovery for the Nervous System: Quorum.
Date: June 14–15, 2012.
Time: 8 a.m. to 10 a.m.
Agenda: To review and evaluate grant applications.
Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.
Contact Person: Mary Custer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892, (301) 435–1164, *custerm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Collaborative Applications: Sleep and Mood Disorders.
Date: June 15, 2012.
Time: 9 a.m. to 10 a.m.
Agenda: To review and evaluate grant applications.
Place: Morrison Clark Hotel,1015 L Street NW., Washington, DC 20001.
Contact Person: Maribeth Champoux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7848, Bethesda, MD 20892, 301–594–3163, *champoum@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR12–010: RES. Relevant to the Family Smoking, Prevention/Tobacco Control Act.
Date: June 15, 2012.
Time: 10 a.m. to 12 p.m.
Agenda: To review and evaluate grant applications.
Place: Marriott Copley Place Hotel, 110 Huntington Avenue, Boston, MA 02116.
Contact Person: Everett E Sinnett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, 301–435–1016, *sinnett@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Molecular Probes.
Date: June 15, 2012.
Time: 10:30 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: Mary Custer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892, (301) 435–1164, *custerm@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Hemostasis and Thrombosis Study Section.
Date: June 18, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: InterContinental Chicago Hotel, 505 North Michigan Avenue, Chicago, IL 60611.
Contact Person: Bukhtiar H Shah, Ph.D., DVM, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, (301) 435–1233, *shahb@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Kidney Molecular Biology and Genitourinary Organ Development.
Date: June 18, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Avenue Hotel Chicago, 160 E. Huron Street, Chicago, IL 60611.
Contact Person: Ryan G Morris, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, 301–435–1501, *morrisr@csr.nih.gov*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Child Psychopathology and Developmental Disabilities Study Section.
Date: June 18–19, 2012.
Time: 8 a.m. to 11 a.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, DC, 2401 M Street NW., Washington, DC 20037.
Contact Person: Jane A Doussard-Roosevelt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 435–4445, *doussarj@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Community-Level Health Promotion Study Section.
Date: June 18–19, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Ritz Carlton Hotel, 1150 22nd Street NW., Washington, DC 20037.
Contact Person: Jacinta Bronte-Tinkew, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892, (301) 806–0009, *brontetinkewjm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Genitourinary Organ Development.
Date: June 18, 2012.
Time: 12 p.m. to 1 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.
Contact Person: Patricia Greenwel, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, 301–435–1169, *greenwep@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: May 17, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–12519 Filed 5–22–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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: Heart, Lung, and Blood Initial Review Group; Heart, Lung, and Blood Program Project Review Committee.
Date: June 15, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Jeffrey H Hurst, Ph.D., Scientific Review Officer, Office of Scientific

Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7208, Bethesda, MD 20892–7924, 301–435–0303, *hurstj@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: May 17, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–12518 Filed 5–22–12; 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, NHLBI Career Enhancement Grants for Stem Cell Research

Date: June 13, 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: Melissa E Nagelin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Rm. 7202, Bethesda, MD 20892, 301–435–0297, *nagelinmh2@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Mentored Career Transition Scientist Award.

Date: June 14–15, 2012.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/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: May 17, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–12517 Filed 5–22–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2012–0460]

Notice of a Public Meeting To Prepare for the Twenty-Second Session of the Assembly of the International Mobile Satellite Organization (IMSO)

AGENCY: Coast Guard, DHS.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Coast Guard will hold a public meeting on subject matters that will be addressed at the Twenty-Second Session of the Assembly of the International Mobile Satellite Organization (IMSO).

DATES: A public meeting will be held on Thursday, May 31st, 2012, from 11 a.m. to 12 p.m.

ADDRESSES: The meeting will be held at Coast Guard Headquarters, 2100 Second Street SW., Washington, DC, Room 1200.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Matthew Frazee at (202) 372–1376 or by email to *imo@uscg.mil.*

SUPPLEMENTARY INFORMATION: The purpose of this public meeting is to prepare for the Twenty-Second Session of the International Mobile Satellite Organization (IMSO) Assembly to be held June 25–28, 2012 in London, United Kingdom. The primary topics that will be considered at the public meeting include:

- Oversight and performance of the Global Maritime Distress and Safety System (GMDSS);
- Oversight, performance, audits, charging formulas and proposals for the Long Range Identification and Tracking (LRIT) System;
- Directorate matters, including succession planning and the term of the current Director General;
- Financial matters, including arrangements for the development, endorsement and agreement of the IMSO budget.

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the security process related to building access, or to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, LCDR Matthew Frazee, by email at *imo@uscg.mil,* by phone at (202) 372–1376, or in writing at Commandant (CG–52), U.S. Coast Guard, 2100 2nd Street SW., Stop 7126, Washington, DC 20593–7126, not later than May 24th, 2012. Requests made after May 24, 2012, may not be able to be accommodated. Please note that due to building security requirements, each visitor must present two valid, government-issued photo identifications in order to gain entrance to the Coast Guard Headquarters building. The Coast Guard Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, public parking in the vicinity of the building is extremely limited.

Members of the public are encouraged to participate and join in discussions, subject to the discretion of the moderator. Persons wishing to make formal presentations should provide advance notice to Lieutenant Commander Matthew Frazee at (202) 372–1376 or by email at *imo@uscg.mil* as soon as possible.

Dated: May 17, 2012.

F.J. Sturm,

Acting Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2012–12457 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket Nos. TSA–2004–19515 and TSA–2009–0018]

RIN 1652–AA64

Air Cargo Screening Fees

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of fees.

SUMMARY: This notice establishes user fees for certain security threat assessments (STAs) performed by the Transportation Security Administration (TSA). In the Air Cargo Screening final rule published on August 18, 2011, TSA proposed a fee range for security threat

assessments of between $31 and $51 and sought comment on the fee range and on the methodology used to calculate the fee. The final rule stated that TSA would announce the final fee amount in a notice in the **Federal Register**. This notice establishes a fee of $41 for certain security threat assessments in the air cargo program and responds to public comments made regarding the fee range.

DATES: Effective June 22, 2012.

FOR FURTHER INFORMATION CONTACT: Michael Gambone, Director of Revenue, TSA–14, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6014; telephone (571) 227–2323; facsimile (571) 227–2904; email *tsa-fees@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Document

You can get an electronic copy using the Internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) web page at *http://www.regulations.gov*;

(2) Accessing the Government Printing Office's web page at *http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR* to view the daily published **Federal Register** edition; or accessing the ''Search the **Federal Register** by Citation'' in the ''Related Resources'' column on the left, if you need to do a Simple or Advanced search for information, such as a type of document that crosses multiple agencies or dates; or

(3) Visiting TSA's Security Regulations web page at *http://www.tsa.gov* and accessing the link for ''Research Center'' at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Background

On May 26, 2006, TSA issued the Air Cargo Security Requirements final rule (2006 rulemaking),[1] which, in part, required certain cargo workers of aircraft operators, foreign air carriers, and indirect air carriers (IACs) to undergo an STA conducted by TSA. TSA checks a variety of government databases to verify the individual's identity and determine that he or she does not pose a security threat to transportation or national security. TSA is authorized to collect fees to offset the cost of conducting STAs. 6 U.S.C. 469. The 2006 rulemaking established a fee for STAs of $28, and incorporated the fee amount in the civil aviation security regulation. 49 CFR 1540.209.

On September 16, 2009, TSA published the Air Cargo Screening interim final rule (IFR) (2009 IFR),[2] which establishes requirements for certain additional individuals to obtain an STA. These individuals are certified cargo screening facilities (CCSF) employees and authorized representatives that screen cargo, and have unescorted access to screened cargo or carry out certain other cargo security duties.

The 2009 IFR amended § 1540.209 to remove the specific fee amount from the regulatory text. In the preamble to the 2009 IFR, we described how TSA would calculate the fee for STAs and stated that the fee would be between $13 and $21, depending on the size of the population and whether there are changes to the costs involved in the calculation. TSA explained that TSA would publish specific fee amounts and changes to fee amounts as a notice in the **Federal Register**.[3] We invited comment on the new proposed fee, and the methodology and population estimates we used to arrive at the proposed fee. Since the issuance of the IFR, TSA has not charged a fee for STA processing, because the specific fee amount was removed from the regulatory text and was not published elsewhere.

TSA has further reviewed costs and population data since the IFR was issued. On August 18, 2011, TSA published the Air Cargo Screening final rule (2011 rule)[4] that responded to comments received on the IFR. The 2011 rule also explained that due to significant decreases in the population estimate, the fee necessary to recover TSA's costs of conducting threat assessments would increase. TSA proposed a new fee range between $31 and $51. We invited comment on the new proposed fee, and the methodology we used to arrive at the new proposed fee range. The 2011 rule stated that TSA would publish specific fee amounts and changes to fee amounts as a notice in the **Federal Register**.[5]

The 2011 rule also stated that the ''Air Cargo Screening Security Threat Assessment Fee Development Report'' (Fee Report) provided additional detailed information regarding the fee. However, TSA inadvertently omitted to place the report in the public docket. Accordingly, on August 25, 2011, TSA published a correction notice in the **Federal Register** (August 25 notice)[6] explaining the omission and indicating that TSA placed the Fee Report in the public docket and reopened the comment period on the fee for an additional 30 days. TSA responds to comments submitted on the fee below.

Fee Amount

By this notice, TSA announces the final fee of $41 for STAs for employees of aircraft operators, foreign air carriers, IACs, and CCSFs who have or are applying for unescorted access to cargo to be transported on passenger aircraft, screen cargo, supervise the screening of cargo, or perform certain other security functions as provided for in § 1540.201(a).

As TSA explained in the 2011 rule,[7] changes in the population estimates necessitated that TSA propose an increase in the fee range to $31 to $51.[8] In summarizing the changes from the 2009 IFR to the 2011 rule, the five-year cost estimate for threat assessment services increased by approximately $4.2 million, and the five-year population estimate decreased significantly by approximately 551,000. Because of the substantial decrease in population, there will be fewer applicants from which fixed costs of threat assessment services can be recovered, thereby increasing the per applicant fee. To recover the full cost of the STA services from the estimated population described in § 1540.201, TSA is announcing a fee of $41.

Pursuant to the Chief Financial Officers Act of 1990 (Pub. L. 101–576, 104 Stat. 2838, Nov. 15, 1990), TSA is required to review fees no less than every two years. 31 U.S.C. 3512. Upon review, if TSA finds that the fees are either too high (that is, total fees exceed the total cost to provide the services) or too low (that is, total fees do not cover the total costs to provide the services), TSA will adjust the fee accordingly.

Comments on the STA Fee Calculation and Other Issues Relating to STAs

TSA received comments from 13 commenters on the 2011 rule and the August 25 notice relating to the STA fee. These comments are addressed below.

[1] 71 FR 30478.

[2] 74 FR 47672.

[3] 74 FR 47684.

[4] 76 FR 51848. Section 1540.209 of the 2006 rulemaking stated that a fee of $28 is required for TSA to conduct an STA. The 2009 IFR, however, revised § 1540.209 so that the regulation no longer contains a specific fee amount. Section 1540.209 now states that TSA will publish fee amounts and any revisions to the fee amounts as a notice in the **Federal Register**.

[5] 76 FR 51857.

[6] 76 FR 53080.

[7] 76 FR 51857.

[8] In the 2009 IFR, the fee range was $13 to $21.

STA Fees

Comment: Several commenters expressed the concern that the proposed fee range is excessive and too expensive for industry to bear, especially at this time of economic downturn. One commenter stated that the fee amount for the name checks component of the fee was disproportionate to the level of administrative costs the agency incurs by checking names against terrorists data bases. Additional commenters believed that an average annual personnel cost of $134,000 is overstated.

Another commenter maintained that the information technology platform/systems component of the fee was unnecessary, as this system has been in place since 2006, and the commenter believes that TSA should not charge for the development of a system already in place.

One commenter asserted that a search of the applicant's name through various databases is primarily conducted by electronic means, not requiring a large amount of personnel, and that other necessary functions for the STA are carried out by IACs/CCSFs' Security Coordinators, further reducing TSA's need for personnel in the STA process. A commenter suggested that if TSA would allow submission of names in batch format, versus one at a time, less staff would be needed for the name check.

TSA Response: While TSA recognizes the STA fee will impose a new financial burden on the industry during a period of economic stress, TSA is required by statute to collect fees to recover all costs of conducting vetting and credentialing services. 6 U.S.C. 469. As part of this Congressional mandate, TSA works within Federal guidelines to ensure the most efficient use of resources to minimize the cost of vetting services. The STA fee is set to recover only the cost of vetting services being provided to STA applicants, and better aligns cost recovery from those that directly benefit from this unique security service. Further, TSA conducts regular reviews to ensure that fees are set to recover the full cost of vetting services.

TSA used actual cost data from 2009 to determine that the average annual fully burdened [9] cost of personnel necessary for this vetting service was $134,000. TSA used this actual figure to estimate future personnel costs accurately over the five-year period of the cost model.

While TSA can accomplish a portion of the vetting process using information technology, there is a substantial need for human resources to ensure timely, complete, and accurate vetting results. On average, TSA expects to process over 300 applicants each and every calendar day over the next five years. Such volume necessitates that various personnel carry out the multitude of threat assessment functions during the vetting process.

- Vetting Managers—establish, implement, operate, and monitor best practices necessary for efficient threat assessments.
- Vetting Analysts—provide a wide range of communications, operations, and administrative activities, including written correspondence, budgetary formulation and execution, programmatic standards and procedures.
- Transportation Security Specialists—provide analysis of vetting results and remediation of incomplete data or incorrect data.
- Technology Specialists—manage data ingest, processing, and reporting for the STA process. Duties include program architecture, requirements development and implementation, data information assurances and procedures, and completion of risk and vulnerability assessments.
- Business Management Specialists—manage administrative services that include budget formulation/execution, human resource management, training, and day-to-day office needs.

TSA estimates that personnel costs will average approximately $2.6 million in each of the first five years of the program. Over that same period, TSA estimates that over 130,000 individuals will apply for STA services annually. Accordingly, TSA will need to recover approximately $20 from each applicant to recover personnel costs fully.

A robust technical platform ensures accurate and efficient threat assessment services. While TSA will capitalize on infrastructure investments already made to implement prior STA services, new technology investments are necessary to modify existing capacity and to develop further capabilities. For example, the technology platform needs to be enhanced to integrate an STA with a five-year duration and to provide sustained operational redundancy.

With regard to the comment that TSA should allow submission of names in batch, the current system will only allow submission of information for one individual at a time.

Comment: One association feared that a large percentage of their freight forwarders that are small businesses would pass the cost to their shipper clients, thereby increasing the cost of transportation. Another commenter complained that STA fees are particularly burdensome to the trucking industry that CCSP participants rely on to transport their cargo. According to this commenter, given the high employee turnover that trucking companies often experience, high STA fees may cause truck drivers transporting cargo to opt out of the business thereby reducing competition.

One commenter was concerned that they not only have to submit and pay STAs for their direct employees but also for those of any of their authorized agents. This commenter suggested TSA should allow an authorized agent to submit and pay for their own STAs, and that TSA should regulate all non-IAC entities, such as haulers and ground handling agents, so that they can share in the costs of securing transportation.

TSA Response: TSA agrees that some entities may pass on the costs of STA fees to their customers. However, since the STA requirement applies to all populations included in this fee calculation, TSA believes small businesses will not be put at a competitive disadvantage. For more information, see Appendix A (page 153), Economic Impacts on Existing CCSFs by Size, in the Regulatory Evaluation accompanying the 2011 rule.

TSA believes STA fees will not be overly burdensome to the trucking industry. The STA requirement does not produce a competitive advantage for any specific firm because the STA requirement applies to all trucking entities carrying screened cargo for CCSFs. TSA does not prescribe how companies must finance STA costs. A firm may decide to pay for the STAs, charge employees, or pass on the costs to the CCSFs. In addition, an STA is valid for five years regardless of place of employment, so drivers will not have to undergo an additional STA until their current STA expires.

TSA is currently developing enhancements to the existing Indirect Air Carrier Management System (IACMS) that will enable the authorized agent to process and pay for their own STAs. At this time, TSA has no plans to expand the scope of the regulations to include other entities beyond the air carriers, IACs, and CCSFs.

Comment: An association commented that the cost of the STA fee is high because the current STA system is highly flawed and redundant. For example, IACs provide TSA names for STAs, many of which have been supplied several times over by other IACs. This association recommends that

[9] The fully burdened employee cost is comprised of salary and benefits that include such items as the Government's contributions to an employee's health insurance, life insurance, and retirement.

TSA build a ''hosting portal'' through which IACs can access a database to determine whether an additional filing by a particular IAC is needed.

TSA Response: The existing TSA portal for validating an STA enables any regulated party with access to the IACMS to view and validate a current STA in their profile without the need to resubmit payment and process a new STA. Thus, TSA does not require that an individual obtain more than one STA. Rather, the decision of whether to require an individual to obtain more than one STA is a business decision made by regulated parties.

Comments: Several commenters believe that TSA grossly underestimated the population of those subject to STAs by limiting the population to IACs and certified cargo screening program (CCSP) participants. These commenters indicated that TSA must include all entities that are subject to STA requirements, not merely those in the CCSP. These commenters stated that other components of the aviation and cargo industry, such as employees of full all-cargo carriers, passenger air carriers, airports, and trucking companies, requiring STAs should be included in this fee calculation. According to these commenters, TSA would be able to leverage existing technology and infrastructure and thereby process fees at lower costs.

One commenter was concerned that TSA did not include direct air carrier employees subject to the STA requirements, but who receive them at no extra cost, as part of the requirement to obtain Security Identification Display Area (SIDA) IDs.

Another commenter requested that if TSA intends to limit the population to IACs and other CCSP participants, then TSA should clearly limit applicability of the proposed fees to those persons engaged in the CCSP. Another commenter submitted that even within the IAC and CCSP groups, the fee report estimates of 1,000 STAs that would be needed for ''super'' [10] shippers was too low.

TSA Response: TSA appreciates the questions regarding which populations are included in the STA fee, and provides clarification of TSA's population estimates below. In the 2011 rule, TSA combined populations from the 2006 rule including personnel of aircraft operators, foreign air carriers, and IACs with unescorted access to cargo, with the CCSF population. To estimate the size of the ''IAC'' population for the 2011 rule, TSA used the actual historical number of STA enrollments of aircraft operator, foreign air carrier, and IAC personnel. Thus, the population estimate in the 2011 rule properly considers not only IAC personnel, but also personnel of aircraft operators handling cargo off airport, all-cargo operators, foreign air carriers, and CCSFs.[11] Therefore, since the STA fee takes into account all the population segments noted above, it is not limited to IACs and CCSFs.

The cost and population estimates for airport personnel required to obtain SIDA IDs were not included in the fee models for this rulemaking because STAs for holders of SIDA IDs require different processes within TSA and it would not be appropriate to include these STA holders in the population estimates for determining the STA fee. TSA may address this population in a future rulemaking.

CCSF STA projections in the 2011 rule, including those for ''super'' shippers, were based on expected firm enrollment into the CCSP. The 1,000 STAs per super shipper was TSA's best estimate at the time the 2011 rule was completed. This estimate is an average, with some super shippers requiring more and some requiring fewer STAs.

Comment: One commenter stated that it did not make sense that a decrease in the population results in an increase in the STA fee.

TSA Response: The STA fee is set to recover fully the cost of the services provided to STA applicants. As such, the fee reflects both the service costs and the number of beneficiaries receiving services. It is important to note that a large portion of the estimated service costs are fixed and do not vary based on the number of estimated applicants. In addition, there are half as many applicants in the 2011 rule from which the sustained service costs must be recovered. This, in turn, caused the fee per person to increase.

Comment: A number of commenters stated that it is incorrect for TSA to assume that the private sector should bear 100 percent of all costs related to the STA process. According to such commenters, security is an inherently governmental function, and it is reasonable to assume that public funds should cover at least some portion of the STA costs. Another commenter argued that the private sector is already bearing a significant portion of the costs of the STA by managing the process to provide and update information on its employees.

TSA Response: TSA is required to collect fees to offset all costs of providing credentialing and background investigations in accordance with 6 U.S.C 469. As part of this mandate, TSA will work within Federal guidelines to ensure the most efficient use of resources to minimize the cost of vetting services. Further, TSA is mandated by statute to review fees no less than every two years to ensure that fees are set to recover the full cost of vetting services. If the fees are too high or too low, TSA will adjust the fee.

Comment: One commenter alleges that TSA has violated the terms of Executive Order 13563 (EO 13563) because the Regulatory Evaluation for the 2011 rule does not separately address the costs and benefits of the STA fee. This same commenter argues that TSA never considered alternative methods of conducting STAs, as required by EO 13563, including the use of outside contractors that might perform the required checks for substantially less.

TSA Response: TSA does not agree that it violated the terms of EO 13563. The STA fee is an integral part of the implementation of the 2011 rule as it provides the funding to offset the costs of vetting services being provided to STA applicants. As we have previously discussed, TSA is required to recover all costs of conducting vetting and credentialing services by 6 U.S.C. 469. Consequently, the benefits of the fee include providing the full funding TSA needs to operate the program and allowing TSA to comply with the requirement to recover all costs of providing this unique service. TSA's Regulatory Evaluation included an analysis of alternatives to achieving 100 percent screening of cargo transported on passenger aircraft; TSA compared the alternative of 100 percent screening solely by air carriers to the alternative of screening by participants of the CCSP program as well as air carriers, as established in the 2009 IFR. Both alternatives encompass a requirement that personnel with unescorted access to cargo successfully complete an STA conducted by TSA.

Finally, only the Federal Government can access the consolidated Terrorist Screening Database (TSDB), and must first enter into a Memorandum of Understanding with the Federal Bureau of Investigation (FBI) with very specific

[10] For further information on the categorization of shippers, refer to the Fee Report. In the Fee Report on page 13, TSA describes the categorization of shippers as small, medium, large, and super.

[11] While the 2011 rule and the Fee Report used the terms ''IACs'' and ''CCSFs'' to describe the populations used to determine the fee, TSA has verified that the actual populations used to calculate the fee include personnel of aircraft operators, foreign air carriers, and all-cargo operators, as well as CCSFs. TSA also notes that the Regulatory Evaluation only considers the STA costs imposed by the 2009 IFR and 2011 rule, and thus only addresses the costs of an STA for CCSFs.

access privileges and justifications. Private entities such as outside contractors are not provided access. Checking applicants against the TSDB is a central feature of the STA that TSA conducts.

Comment: Some commenters submitted that TSA should not base such fees on inexact estimates of the actual costs or the number of STAs that will be required, and should hold the STA fee in abeyance until TSA has further dialogue with industry. Other commenters recommended that TSA wait to charge an STA fee until issuance of the Standardized Vetting, Adjudication, and Redress rule that TSA is developing.

TSA Response: Under 6 U.S.C. 469, TSA is currently required to fund vetting and credentialing programs through user fees. The STA fee is an important part of TSA's compliance with this Congressional mandate. Moreover, TSA does have sufficient information to make a reasonable estimate and has shared that information in the 2011 rule. For these reasons, TSA concludes that it would be inappropriate to delay implementation of the STA fee.

With regard to the Standardized Vetting, Adjudication, and Redress Services rulemaking to which the commenter refers, TSA notes that this initiative is still in the developmental stages, and is not, therefore, a reasonable basis for delaying any part of this rulemaking.

Finally, in addition to the extensive dialogue and industry outreach that TSA conducted in the development of air cargo security policy, industry has had the opportunity to comment on this STA fee through notice-and-comment rulemaking.

Other STA Issues

Comment: A commenter stated that their organization conducts Criminal History Background Checks on all prospective employees, and that although these checks are not fingerprint-based checks, they are exhaustive. Accordingly, to avoid duplication of time, effort, and cost, the commenter requested that TSA accept such background checks in lieu of STAs.

TSA Response: TSA does not believe that the name-based criminal check that the commenter's organization conducts is comparable to the STA TSA conducts on this population and is not sufficient to provide the necessary level of security needed in this industry. The STA TSA conducts includes matching names against the consolidated TSDB and other Government data sources, to which private entities do not have access. These databases contain information relating to terrorist activity, most of which is not criminal history information.

Comment: One commenter stated that the TSA criminal history records check (CHRC) provides a greater degree of security than the STA requirements, and that to bring congruency among the STA requirements, TSA ought to require CHRCs immediately for workers with unescorted access to cargo.

TSA Response: As TSA stated in the response to comments in the 2011 rule,[12] TSA agrees that CHRCs add a level of security to the name-based STA requirement. TSA intends to address the CHRC requirement in the broader context of all TSA programs.

Comment: One commenter appreciated TSA's recognition that the STAs performed under the SIDA, Commercial Driver's License-Hazardous Material Endorsement, Transportation Workers Identification Card, and Free and Secure Trade programs have been deemed comparable to STAs performed under the CCSP. This commenter states that it is not clear whether a CCSP facility operator is relieved of the burden to submit personal identifying information for each individual who has been vetted under these comparable programs, because the CCSP is designed on a facility-specific basis rather than an individual enrollment basis. This commenter believes that TSA should be moving toward a common program platform for security vetting programs and should grant full reciprocity to individuals who have been vetted against the TSDB, no matter what program the STA was first required under.

TSA Response: When an individual asserts that he or she has successfully completed an STA comparable to the STA required under the 2011 rule, TSA requires that the individual present the credential that corresponds to the comparable STA to the operator so that the operator may retain a copy, and that the individual notify the operator when the credential expires. 49 CFR 1540.203(i)(1) and (2). TSA does not require the submission of personal identifying information to TSA for an individual who has been vetted under a comparable STA.

As we understand this comment, the commenter suggests that TSA should implement a system for conducting and administering STAs that is focused on the individual rather than the employer for which, or the facility in which, he or she currently works. TSA may consider such a process in a future rulemaking.

Issued in Arlington, Virginia, on May 17, 2012.

John S. Pistole,

Administrator.

[FR Doc. 2012–12555 Filed 5–22–12; 8:45 am]

BILLING CODE 9110–05–P

[12] 76 FR 51854.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5604–N–06]

Notice of Proposed Information Collection: Comment Request; Form HUD–40221(rev) ''LOCCS/VRS Self-Help Homeownership Opportunity Program Payment Voucher''

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comment Due Date:* July 23, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Rudene Thomas, Reports Liaison Officer, U.S. Department or Housing and Urban Development, 451 Seventh Street SW., Room 7233, Washington, DC 20410–4500.

FOR FURTHER INFORMATION CONTACT: Ginger Macomber, SHOP Program Manager, Office of Affordable Housing Programs, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Room 7162, Washington, DC 20410–4500; telephone 202–402–4605 (this is not a toll-free number) or by email at *ginger.macomber@hud.gov.*

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper

performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The Self-Help Homeownership Opportunity Program (SHOP) is authorized by the Housing Opportunity Program Extension Act of 1996, Section 11. The purpose of SHOP is to provide grant funds to national and regional non-profit organizations to facilitate and encourage innovative homeownership opportunities on a national, geographically diverse basis through the provision of self-help homeownership housing programs. HUD uses the Line of Credit Control System (LOCCS) to disburse SHOP Grant funds from the U.S. Treasury to SHOP Grantees. SHOP Grantees use HUD's Voice Response System (VRS) to request a drawdown of SHOP Grant funds from LOCCS via a touchtone telephone. Grantees must complete a ''LOCCS/VRS Self-help Homeownership Opportunity Program Payment Voucher'' prior to requesting a drawdown of funds through LOCCS/VRS.

Title of Proposal: Form HUD–40221(rev) ''LOCCS/VRS Self-help Homeownership Opportunity Program Payment Voucher''.

OMB Control Number: 2506–0157.

Description of the Need for the Information and Proposed Use: An extension of the existing PRA approval is needed to permit SHOP Grantees to use a revised and updated SHOP Form HUD–40221(rev) ''LOCCS/VRS Self-help Homeownership Opportunity Program Payment Voucher'' to drawdown SHOP Grant funds through LOCCS/VRS.

Agency Form Numbers: Form HUD–40221(rev) ''LOCCS/VRS Self-help Homeownership Opportunity Program Payment Voucher.''

Members of Affected Public: National and regional non-profit self-help housing organizations (including consortia) that have been awarded SHOP grant funds (the ''Grantee'').

Estimation of the total number of hours needed to prepare the information collection including number of respondents, hours per response, frequency of response, and total hours of response for all respondents. Information will be collected once per Grantee for each request to drawdown SHOP Grant funds. The total estimated average hourly burden for this information collection is 30 minutes to prepare each Form HUD–40221(rev) ''LOCCS/VRS Self-help Homeownership Opportunity Program Payment Voucher,'' including signatures. The frequency of the information collection will vary based on the size of the Grantee's SHOP Grant award and the Grantee's use of its Grant funds. Assuming biweekly drawdown requests and a three year Grant term, the average number of collections is 72 per Grantee. Hourly burden estimates are based on Grantee input and HUD's experience.

Paperwork requirement	Number of respondents	Frequency	Hours per response	Total annual hours
HUD–424	6	varies	.5	varies
Total Annual Hour Burden	6	72	36	216

Frequency of Submission: As needed by the SHOP Grantee to drawdown SHOP Grant funds through LOCCS/VRS.

Status of the Proposed Information Collection: Extension of a currently approved collection OMB control number 2506–0157.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: May 17, 2012.

Clifford Taffet,

General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 2012–12546 Filed 5–22–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2012–N127: FXIA16710900000P5–123–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before June 22, 2012.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments

delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: Snow Leopard Conservancy, Sonoma, CA; PRT–66148A

The applicant requests a permit to import hair samples from snow leopards (*Uncia uncia*) collected non-invasively from the wild for the purpose of enhancement of the survival of the species and scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Duke Lemur Center, Durham, NC; PRT–65708A

The applicant requests a permit to import biological samples from wild specimens of Crossley's dwarf lemur (*Cheirogaleus crossleyi*), Sibree's dwarf lemur (*Cheirogaleus sibreei*), fat-tailed dwarf lemur (*Cheirogaleus medius*), and brown mouse lemur (*Microcebus rufus*) for the purpose of enhancement of the survival of the species.

Applicant: University of Illinois, Urbana, IL; PRT–73881A

The applicant requests a permit to import biological samples from wild specimens of chimpanzee (*Pan troglodytes*) for the purpose of enhancement of the survival of the species.

Applicant: James Bruner, Comfort, TX; PRT–72932A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: James Bruner, Comfort, TX; PRT–72933A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Carol Neunhoffer, Kerrville, TX; PRT–71497A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Carol Neunhoffer, Kerrville, TX; PRT–71496A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Randall Cupp, Desdemona, TX; PRT–70436A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Randall Cupp, Desdemona, TX; PRT–70438A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Selah Springs Ranch, Brady, TX; PRT–67084A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Selah Springs Ranch, Brady, TX; PRT–67083A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: JX2, LLC, Colorado City, TX; PRT–69145A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) and addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: JX2, LLC, Colorado City, TX; PRT–70234A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) and addax (*Addax nasomaculatus*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: DMK Ranching, Junction, TX; PRT–71317A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: DMK Ranching, Junction, TX; PRT–71316A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Brad Blevins, Edmond, OK; 804095

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the radiated tortoise (*Astrochelys radiata*) and Galapagos tortoise (*Chelonoidis nigra*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Twisted Oaks Ranch, LLC, Hallettsville, TX; PRT–73610A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Twisted Oaks Ranch, LLC, Hallettsville, TX; PRT–73612A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Frank Deel, Kaufman, TX; PRT–73856A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the barasingha (*Rucervus duvaucelii*) and scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Frank Deel, Kaufman, TX; PRT–73857A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*) and scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Columbus Zoo and Aquarium, Powell, OH; PRT–690989

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the following families, genus, and species, to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Families:

Bovidae
Bradypodidae
Camelidae
Cebidae
Cercopithecidae
Cervidae
Dasyuridae
Equidae
Felidae (*does not* include jaguar, margay or ocelot)
Hominidae
Hyaenidae
Hylobatidae
Lemuridae
Macropodidae
Rhinocerotidae
Sciuridae
Solenodontidae
Tapiridae
Ursidae
Rheidae

Species:

Asian elephant (*Elephas maximus*)
Koala (*Phascolarctos cinereus*)
brush-tailed rat kangaroo (*Bettongia penicillata*)
Komodo monitor (*Varanus komodoensis*)

Applicant: Carson Springs Wildlife Conservation Foundation, Gainesville, FL; PRT–56870A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include Grevy's zebra (*Equus grevyi*), scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), dama gazelle (*Nanger dama*), and red lechwe (*Kobus leche*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Richard Noble, Sheridan, OR; PRT–750150

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the mhorr gazelle (*Gazella dama mhorr*), slender-horned gazelle (*Gazella leptoceros*), and bontebok (*Damaliscus pygargas pygargus*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Center for Conservation of Tropical Ungulates, Punta Gorda, FL; PRT–018969

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the following families, genus, and species, to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Families:

Bovidae
Rhinocerotidae
Tapiridae

Species:

Buru Babirusa (*Babyrousa babyrussa*)
Galapagos tortoise (*Chelonoides nigra*)

Applicant: Sharbutt Land & Cattle, Cross Cut, TX; PRT–71664A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: University of South Carolina, Columbia, SC; PRT–73008A

The applicant requests a permit to import biological specimens collected from nesting female hawksbill sea turtles (*Eretmochelys imbricata*) on or near Long Island, Antigua, for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 1-year period.

Applicant: American Museum of Natural History, New York, NY; PRT–761887

The applicant requests a renewal of their permit to export and re-import non-living museum specimens of endangered and threatened species previously accessioned into the applicant's collection for scientific

research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Dana Kirk, Kerrville, TX; PRT–73864A

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2012–12481 Filed 5–22–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal—State Class III Gaming Compact.

SUMMARY: This notice publishes approval by the Department of an extension to the Class III Gaming Compact between the Pyramid Lake Paiute Indian Tribe and the State of Nevada.

DATES: *Effective Date:* May 23, 2012.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary, Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710(d)(8)(D), the Secretary of the Interior shall publish in the **Federal Register** notice of approved tribal-state compacts for the purpose of engaging in Class III gaming activities on Indian lands. The existing Class III Gaming Compact between the Pyramid Lake Paiute Indian Tribe and the State of Nevada became effective upon publication of the Notice of Approval in the **Federal Register** on February 23, 2010 (47 FR 44678). This agreement allows for the extension of the existing Tribal-State Compact for a period of one (1) year.

Dated: May 11, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–12510 Filed 5–22–12; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF INTERIOR

Bureau of Land Management

[LLCO956000 L14200000.BJ0000]

Notice of Filing of Plats

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the intent to file the land survey plats listed below, and to afford all affected parties a proper period of time to protest this action, prior to the plat filing.

DATES: Unless there are protests of this action, the filing of the plats described in this notice will happen on June 22, 2012.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

SUPPLEMENTARY INFORMATION: The supplemental plat of Section 12, in 4 sheets, in Township 3 South, Range 73 West, Sixth Principal Meridian, Colorado, was accepted on April 6, 2012.

The plat and field notes of the dependent resurvey and survey, in 3 sheets, in Township 25 South, Range 73 West, Sixth Principal Meridian, Colorado, were accepted on April 6, 2012.

The plat and field notes of the dependent resurvey and survey, in 4 sheets, in Township 8 South, Range 78 West, Sixth Principal Meridian, Colorado, were accepted on April 13, 2012.

The plat and field notes of the dependent resurvey and survey in Township 15 South, Range 97 West, Sixth Principal Meridian, Colorado, were accepted on April 30, 2012.

The plat and field notes of the dependent resurvey and survey in Township 48 North, Range 68 West, New Mexico Principal Meridian, Colorado, were accepted on May 3, 2012.

The supplemental plat of Section 18, in Township 1 North, Range 71 West, Sixth Principal Meridian, Colorado, was accepted on May 9, 2012.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2012–12454 Filed 5–22–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTB07900 09 L10100000 PH0000 LXAMANMS0000]

Notice of Public Meeting; Western Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Western Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held June 12–13, 2012. The meeting on June 12 will begin at 9 a.m. with a 30-minute public comment period and will adjourn at 3 p.m. The meeting on June 13 will start at 9 a.m. and conclude at 3 p.m. with no public comment period.

ADDRESSES: The June 12 meeting will be in the BLM's Missoula Field Office, 3255 Fort Missoula Road, in Missoula, MT. The June 13 meeting will visit sites of interest on BLM land near Missoula, MT.

SUPPLEMENTARY INFORMATION: This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public land management in Montana. During these meetings the council will participate in/discuss/act upon several topics, including reports from the RAC's timber and recreation fee subgroups, and updates from the Butte, Missoula and Dillon field offices. All RAC meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

FOR FURTHER INFORMATION CONTACT: David Abrams, Western Montana Resource Advisory Council Coordinator, Butte Field Office, 106 North Parkmont, Butte, MT 59701, 406–533–7617, *dabrams@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.

Scott Haight,

District Manager, Western Montana District.

[FR Doc. 2012–12461 Filed 5–22–12; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2012–0009]

Commercial Renewable Energy Transmission on the Outer Continental Shelf (OCS) Offshore Rhode Island, Notice of Proposed Grant Area and Request for Competitive Interest (RFCI) in the Area of the Deepwater Wind Block Island Transmission System Proposal

AGENCY: Bureau of Ocean Energy Management, Department of the Interior.

ACTION: Public Notice of an Unsolicited Request for a Transmission Cable Right-of-Way Grant Supporting Renewable Energy, Request for Submission of Indications of Competitive Interest, and Request for Public Comment.

SUMMARY: The purpose of this public notice is to: (1) Describe the Deepwater Wind Block Island LLC (Deepwater Wind) Transmission System (BITS) proposal submitted to the Bureau of Ocean Energy Management (BOEM); (2) solicit submissions of indications of competitive interest for a right-of-way (ROW) grant for renewable energy purposes for the area identified in this notice; and (3) solicit public input regarding the proposal, its potential environmental consequences, and other uses of the area in which the proposal would be located.

On November 30, 2011, BOEM received an application from Deepwater Wind for a ROW grant on the OCS offshore Rhode Island. Deepwater Wind's proposed project, the BITS, would entail the construction and installation of a bi-directional submerged transmission cable between Block Island and the Rhode Island mainland. Deepwater Wind has requested a ROW grant for the portion of the BITS cable that is proposed on the OCS. Deepwater Wind proposes that the BITS would serve two purposes: (1) Transmit electrical power from Deepwater Wind's proposed 30 megawatt (MW) offshore wind energy project located in Rhode Island State waters off Block Island to the Rhode Island mainland; and (2) transmit electrical power from the existing transmission grid on the Rhode Island mainland to Block Island.

This RFCI is published pursuant to subsection 8(p)(3) of the OCS Lands Act, as amended by section 388 of the Energy Policy Act of 2005 (EPAct) (43 U.S.C. 1337(p)(3)), and the implementing regulations at 30 CFR part 585. Subsection 8(p)(3) of the OCS Lands Act requires that OCS renewable energy leases, easements, and rights-of-way be issued ''on a competitive basis unless the Secretary determines after public notice of a lease, easement, or right-of-way that there is no competitive interest.'' This RFCI provides such public notice for the proposed ROW grant area requested by Deepwater Wind and invites the submission of indications of competitive interest. BOEM will consider the responses to this public notice to determine whether competitive interest exists for the area requested by Deepwater Wind, as required by 43 U.S.C. 1337(p)(3). Parties wishing to obtain a grant for the area requested by Deepwater Wind should submit detailed and specific information as described in the section entitled, ''Required Indication of Interest Information.'' This announcement also requests that interested and affected parties comment and provide information about site conditions and existing and future uses of the area identified in this notice that would be relevant to the proposed project or its impacts. The information that BOEM is requesting is described in the section entitled, ''Requested Information from Interested or Affected Parties.''

DATES: If you are submitting an indication of interest in acquiring a ROW grant for the area requested by Deepwater Wind, your submission must be sent by mail, postmarked no later than June 22, 2012 for your submission to be considered. If you are providing comments or other submissions of information, you may send them by mail, postmarked by this same date, or you may submit them through the Federal Rulemaking Portal at *http://www.regulations.gov,* also by this same date.

Submission Procedures: If you are submitting an indication of competitive interest for a ROW grant, please submit it by mail to the following address: Bureau of Ocean Energy Management, Office of Renewable Energy Programs, 381 Elden Street, HM 1328, Herndon, Virginia 20170. Submissions must be postmarked by June 22, 2012 to be considered by BOEM for the purposes of determining competitive interest. In addition to a paper copy of your submission, include an electronic copy on a compact disc. BOEM will list the parties that submit indications of competitive interest in the area requested by Deepwater Wind on the BOEM Web site after the 30-day comment period has closed.

If you are submitting comments and other information concerning the proposed grant area, you may use either of the following two methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* In the entry titled ''Enter Keyword or ID,'' enter BOEM–2012–0009, and then click ''search.'' Follow the instructions to submit public comments and view supporting and related materials available for this notice.

2. Alternatively, comments may be submitted by mail to the following address: Bureau of Ocean Energy Management, Office of Renewable Energy Programs, 381 Elden Street, HM 1328, Herndon, Virginia 20170.

If you wish to protect the confidentiality of your submissions or comments, clearly mark the relevant sections and request that BOEM treat them as confidential. Please label privileged or confidential information ''Contains Confidential Information'' and consider submitting such information as a separate attachment. Treatment of confidential information is addressed in the section of this notice entitled, ''Privileged or Confidential Information.'' BOEM will post all comments on regulations.gov unless labeled as confidential. Information that is not labeled as privileged or confidential will be regarded by BOEM as suitable for public release.

FOR FURTHER INFORMATION CONTACT: Ms. Jessica Bradley, Project Coordinator, BOEM, Office of Renewable Energy Programs, 381 Elden Street, HM 1328, Herndon, Virginia 20170, (703) 787–1300.

SUPPLEMENTARY INFORMATION:

Purpose of the RFCI

Responses to this public notice will allow BOEM to determine, pursuant to 30 CFR 585.306, whether or not there is competitive interest in acquiring the ROW area requested by Deepwater Wind as described in this notice. In addition, this notice provides an opportunity for interested stakeholders to provide comments on the Deepwater

Wind ROW request, including information relating to potential environmental consequences.

If, in response to this notice, BOEM receives one or more indications of competitive interest for offshore transmission development from qualified entities that wish to compete for the proposed BITS ROW grant area, it may decide to move forward with the ROW grant issuance process using competitive procedures pursuant to 30 CFR Part 585. However, if BOEM receives no qualified competing indications of interest, BOEM may decide to move forward with the ROW grant issuance process using the noncompetitive procedures contained in 30 CFR Part 585. Should BOEM decide to issue a ROW grant in the area, whether competitively or non-competitively, it may provide the public with additional opportunities to comment.

Background

Energy Policy Act of 2005 (EPAct)

The EPAct amended the OCS Lands Act by adding subsection 8(p), which authorizes the Secretary of the Interior to grant leases, easements, and ROWs on the OCS for activities that are not otherwise authorized by law and that produce or support production, transportation, or transmission of energy from sources other than oil or gas. The EPAct also required the issuance of regulations to carry out the new authority pertaining to renewable energy on the OCS. The Secretary delegated this authority to issue leases, easements, and ROWs, and to promulgate regulations, to the Director of BOEM. On April 29, 2009, BOEM promulgated renewable energy regulations, at 30 CFR Part 585, which can be found at: *http://www.boem.gov/uploadedFiles/FinalRenewableEnergyRule.pdf.*

Executive Order 13547: Stewardship of the Ocean, Our Coasts, and the Great Lakes

In July 2010, the President signed an Executive Order (EO) establishing the National Ocean Council. The EO establishes a comprehensive, integrated national policy for the stewardship of the oceans, our coasts and the Great Lakes. Where BOEM actions affect the ocean, the EO requires BOEM to take such action as necessary to implement this policy, the stewardship principles and national priority objectives adopted by the EO, and guidance from the National Ocean Council.

BOEM appreciates the importance of coordinating its planning endeavors with other OCS users and regulators and intends to follow the ecosystem-based management principles of coastal and marine spatial planning, and coordinate with the regional planning bodies as established by the National Ocean Council to inform its leasing processes. BOEM anticipates that continued coordination with the BOEM State Renewable Energy Intergovernmental Task Forces will help inform comprehensive coastal and marine spatial planning efforts.

BOEM Rhode Island Renewable Energy Intergovernmental Task Force

BOEM established the BOEM Rhode Island Renewable Energy Intergovernmental Task Force (Task Force) in November 2009, at the request of the Governor, to facilitate coordination among affected Federal agencies and state, local, and tribal governments relating to renewable energy development on the OCS offshore Rhode Island. BOEM has coordinated with the Task Force on potential commercial wind energy development within an Area of Mutual Interest established through a July 2010 Memorandum of Understanding between the Governors of Rhode Island and Massachusetts. BOEM coordination efforts to date with the Task Force and meeting materials are available on the BOEM Web site at: *http://www.boem.gov/Renewable-Energy-Program/State-Activities/Rhode-Island.aspx.*

Determination of Competitive Interest and Granting Process

BOEM will evaluate indications of competitive interest for the ROW grant area requested by Deepwater Wind to install cables for the transmission of electricity and will determine whether there is competitive interest in accordance with 30 CFR 585.307. At the conclusion of the comment period for this public notice, BOEM will review the submissions received and undertake a completeness review and a qualification review to make this required determination.

Under BOEM's regulations at 30 CFR 585.302(b)(1), the rights accorded in a ROW grant do not prevent the issuance of other rights in the same area, provided that any subsequent ROW grant issued by BOEM in the area of a previously-issued ROW grant does not unreasonably interfere with activities approved under the previously-issued ROW grant. BOEM may find that competitive interest exists if it receives a proposal to acquire an OCS ROW grant that matches the proposed grant area.

If BOEM determines that competitive interest exists, it may decide to proceed with the competitive granting process outlined in 30 CFR 585.308. If BOEM determines that there is no competitive interest in the proposed grant area, it will publish in the **Federal Register** a notice that there is no competitive interest. At that point BOEM may decide to proceed with the noncompetitive grant issuance process pursuant to 30 CFR 585.306(b), and Deepwater Wind would be required to submit a General Activities Plan (GAP). Whether following competitive or noncompetitive procedures, BOEM will consult with the Task Force and will comply with all applicable requirements prior to making a decision on whether or not to issue a grant and/or GAP approval, disapproval, or approval with modifications. BOEM would coordinate and consult, as appropriate, with relevant Federal agencies, affected tribes, and affected state and local governments, in issuing a grant and developing grant terms and conditions.

Environmental Review Process

The U.S. Army Corps of Engineers (USACE) New England District and BOEM both have jurisdiction by law for portions of the BITS. The BITS would support Deepwater Wind's proposed Block Island Wind Farm (BIWF), a proposed 30 MW offshore wind energy project located in Rhode Island State waters approximately 2.5 nautical miles (nmi) southeast of Block Island. Since the majority of the activities and permanent structures related to the BIWF and the BITS will be sited in state waters and on state lands, the USACE will be the lead agency for the NEPA environmental analysis of both projects. BOEM has jurisdiction for the portion of the BITS that will be located on the OCS, for which it requires issuance of a ROW grant, and will be a cooperating agency in the NEPA process led by the USACE. BOEM will consider all relevant information produced from the NEPA process and, if appropriate, adopt the USACE's NEPA document prior to the issuance of any ROW grant.

BOEM and the USACE intend to conduct consultations required by Federal law jointly during the NEPA process. These consultations include, but are not limited to, those required by the CZMA, the ESA, the Magnuson-Stevens Fishery Conservation and Management Act, the NHPA, and Executive Order 13175—''Consultation and Coordination with Tribal Governments.''

Description of the Proposal

Deepwater Wind proposes to construct and install a 34.5-kilovolt (kV) alternating current (AC) bi-directional submerged transmission cable between Block Island and the Rhode Island mainland. Deepwater Wind proposes that the BITS would: (1) Transmit electrical power from Deepwater Wind's proposed BIWF to the Rhode Island mainland; and (2) transmit electrical power from the existing transmission grid on the Rhode Island mainland to Block Island. Deepwater Wind proposes to connect an onshore substation on Block Island (New Shoreham, Rhode Island) northeast approximately 19.2 nmi to an onshore substation in South Kingstown, Rhode Island, or an additional approximately 7 nmi to an onshore substation in Narragansett, Rhode Island. Deepwater Wind is requesting a ROW grant for a 200-foot corridor associated with an 8 nmi portion of the BITS that is on the OCS.

All cables would be installed in a manner that considers factors such as the type of seafloor (hard bottom or soft bottom), the potential presence of sandwaves and sediment megaripples, and the marine uses that take place in a given cable area.

Description of the Proposed Grant Area

The area under consideration is located on the OCS off the coast of Rhode Island, between Block Island and the mainland. A ROW grant is a corridor 200 feet in width centered on the cable or pipeline (30 CFR 585.301). The area requested crosses the following portions of the following OCS blocks in Official Protraction Diagram Providence NK 19–07:

Block No.	Sub block
6711	H,L,P.
6761	D,H,K,L,N,O.
6810	A,B,E.
6811	G,H,K,L.

We request public comments and indications of competitive interest in the actual ROW grant area requested. The ROW grant area requested by Deepwater Wind consists of an area 100 feet to either side of the centerline. The centerline of the ROW can be determined by interconnecting the points indicated by the centerline coordinates. This area may be adjusted based on the results of future surveys or new information obtained from stakeholder outreach and public input. Coordinates for the centerline follow an order from north to south (points 1–27) and are provided in X, Y (eastings, northings) UTM Zone 18N, NAD 83 and geographic (longitude, latitude), NAD83.

Point number	UTM X (easting)	UTM Y (northing)	Longitude	Latitude
1	297579.86	4577806.25	−71.418731	41.326331
2	297764.90	4576627.63	−71.416129	41.315771
3	297948.74	4575456.74	−71.413546	41.305279
4	297948.90	4575455.09	−71.413543	41.305264
5	297962.50	4575166.08	−71.413285	41.302667
6	297976.03	4574878.48	−71.413028	41.300082
7	297976.04	4574877.33	−71.413028	41.300071
8	297960.78	4574347.66	−71.413034	41.295301
9	297945.47	4573816.13	−71.413040	41.290513
10	297945.18	4573813.60	−71.413043	41.290490
11	297888.18	4573526.78	−71.413628	41.287895
12	297831.47	4573241.41	−71.414210	41.285312
13	297831.38	4573241.03	−71.414211	41.285309
14	297792.88	4573070.56	−71.414614	41.283765
15	297754.21	4572899.35	−71.415018	41.282214
16	297753.91	4572898.25	−71.415021	41.282204
17	297700.90	4572725.11	−71.415596	41.280633
18	297647.43	4572550.46	−71.416176	41.279048
19	297646.70	4572548.55	−71.416184	41.279030
20	297517.00	4572266.46	−71.417638	41.276459
21	297387.73	4571985.30	−71.419087	41.273896
22	297387.72	4571985.28	−71.419087	41.273896
23	297197.85	4571573.97	−71.421215	41.270147
24	297006.74	4571159.97	−71.423357	41.266373
25	297003.33	4571155.24	−71.423396	41.266330
26	294240.98	4568561.35	−71.455469	41.242287
27	291458.78	4565948.75	−71.487750	41.218063

The following multiple use issues were identified through consultation with the Task Force:

The Department of Defense (DoD) conducts offshore testing, training, and operations on the OCS. BOEM will consult with the DoD on all proposed ROW grant projects to ensure that projects are compatible with DoD activities on the OCS. The U.S. Navy operates the Narragansett Bay Operating Area which overlaps portions of the proposed ROW grant area. The Naval Undersea Warfare Center (NUWC) also uses a restricted area located adjacent to the proposed ROW grant area as a testing area. The restricted area begins within the northern precautionary area approach to Narragansett Bay and extends south, coinciding with the Traffic Separation Scheme (TSS) as indicated on NOAA nautical chart 13218 (Martha's Vineyard to Block Island). The proposed ROW grant area does not cross the testing area. However, due to the close proximity of the proposed ROW grant area to the testing area and the Outbound Traffic Lane of the Narragansett Bay TSS, we welcome input concerning ways to coordinate cable installation and maintenance activities in the proposed ROW area in a manner that eliminates or reduces conflicts with NUWC testing and shipping in the vicinity to the extent that such conflicts exist.

The Rhode Island Ocean Special Area Management Plan (SAMP) has identified portions of the proposed ROW grant area as important for commercial and recreational fishing activities, as well as important marine

fish habitat. Specifically, the SAMP identified the area as important for a range of commercial fishing activities, including scallop dredging, gillnetting, lobster trapping, bottom trawling and recreational activities. Specific information on fishery resources, fishing activities and important marine habitats can be found at: *http://www.crmc.ri.gov/samp_ocean.html.*

There are several species of birds, marine mammals, sea turtles, and fish in the area off Rhode Island that are listed as threatened or endangered under the jurisdiction of the U.S. Fish and Wildlife Service or the NOAA National Marine Fisheries Service (NMFS). Such species may occur permanently or seasonally in the proposed ROW grant area. In addition to ESA-listed species, seabirds protected under the Migratory Bird Treaty Act and marine mammals protected under the Marine Mammal Protection Act may occur in the area. NMFS has not designated any ESA critical habitat within the proposed ROW grant area. Information on essential fish habitat and protected species within the proposed ROW grant area as designated under the Magnuson-Stevens Fishery Conservation and Management Act can be found at: *http://www.nero.noaa.gov/hcd/and http://www.nero.noaa.gov/prot_res/.*

Map of the Area

A map of the area proposed for a ROW grant can be found at the following URL: *http://www.boem.gov/Renewable-Energy-Program/State-Activities/Rhode-Island.aspx.*

A large scale map of the RFCI area showing boundaries of the area is available from BOEM at the following address: Bureau of Ocean Energy Management, Office of Renewable Energy Programs, 381 Elden Street, HM 1328, Herndon, Virginia 20170, Phone: (703) 787–1300, Fax: (703) 787–1708.

Required Indication of Interest Information

If you intend to submit an indication of competitive interest for a ROW grant for the area identified in this notice for the purposes of transmitting electricity supporting renewable energy, you must provide the following:

(1) Documentation demonstrating that you are legally qualified to hold a ROW grant as set forth in 30 CFR 585.106–107. Guidance and examples of the documentation appropriate for demonstrating your legal qualifications can be found in Chapter 2 and Appendix B of the BOEM Renewable Energy Framework Guide Book available at: *http://www.boemre.gov/offshore/renewableenergy/PDFs/REnGuidebook_03August2009_3_.pdf.*

Legal qualification documents will be placed in an official file that may be made available for public review. If you wish that some part of your legal qualification documentation be kept confidential, clearly identify what should be kept confidential, and submit it under separate cover (*see* Protection of Privileged or Confidential Information Section, below).

(2) Documentation demonstrating that you are technically and financially qualified to hold a lease as set forth in 30 CFR 585.106–107, including documentation demonstrating that you are technically and financially capable of constructing, operating, maintaining, and decommissioning the facilities described in (4), below. Guidance regarding the documentation that you may submit to demonstrate your technical and financial qualifications can be found at: *http://www.boemre.gov/offshore/RenewableEnergy/PDFs/QualificationGuidelines.pdf.*

(3) A statement that you wish to acquire a renewable energy ROW grant for the proposed grant area requested by Deepwater Wind for the BITS project and a description of how your proposal would interfere with, or suffer interference from, the BITS proposed project. Any request for a ROW grant located outside of the proposed grant area should be submitted separately pursuant to 30 CFR 585.305.

(4) A description of your objectives, including:

- Devices and infrastructure involved (if your project would require the use of offshore platforms, please indicate where those platforms would be located);
- Anticipated capacity;
- How the project would support renewable energy; and
- A statement that the proposed activity conforms with state and local energy planning requirements, initiatives or guidance, as applicable.

(5) A schedule of proposed activities, including those leading to commercial operations; and;

(6) Available and pertinent data and information concerning environmental conditions in the area, including any energy and resource data and information used to evaluate the area. Where applicable, spatial information should be submitted in a format compatible with ArcGIS 9.3 in a geographic coordinate system (NAD 83).

Your complete submission, including the items identified in (1) through (6) above, must be provided to BOEM in both paper and electronic formats. BOEM considers an Adobe PDF file stored on a compact disc (CD) to be an acceptable format for submitting an electronic copy.

It is critical that you provide a complete submission of competitive interest so that BOEM may consider your submission in a timely manner. If BOEM reviews your submission and determines that it is incomplete, BOEM will inform you of this determination in writing and describe the information that BOEM wishes you to provide in order for BOEM to deem your submission complete. You will be given 15 business days from the date of the letter to provide the information that BOEM found to be missing from your original submission. If you do not meet this deadline, or if BOEM determines your second submission is also insufficient, BOEM reserves the right to deem your submission invalid. In such a case, BOEM would not consider your submission.

Requested Information From Interested or Affected Parties

BOEM is also requesting from the public and other interested or affected parties specific and detailed comments regarding the following:

(1) Geological and geophysical conditions (including bottom and shallow hazards) in the area described in this notice;

(2) Known archaeological, historic, and/or cultural resource sites on the seabed in the area described in this notice;

(3) Multiple uses of the area described in this notice, including navigation (in particular, commercial and recreational vessel usage, and commercial and recreational fisheries);

(4) Potential impacts to existing communication cables;

(5) Department of Defense operational, training and testing activities (surface and subsurface) that occur in the area described in this notice that may be impacted by the proposed project;

(6) Impacts to potential future uses of the area;

(7) Advisable setback distance for other offshore structures, including other cables, renewable energy structures, oil and gas structures, etc.;

(8) The potential risk posed by anchors or other factors, and burial depths that would be required to mitigate such risks;

(9) Other relevant environmental and socioeconomic information.

Protection of Privileged or Confidential Information

Freedom of Information Act

BOEM will protect privileged or confidential information that you submit as required by the Freedom of Information Act (FOIA). Exemption 4 of FOIA applies to trade secrets and commercial or financial information that you submit that is privileged or confidential. If you wish to protect the confidentiality of such information, clearly mark it and request that BOEM treat it as confidential. BOEM will not disclose such information, subject to the requirements of FOIA. Please label privileged or confidential information, ''Contains Confidential Information,'' and consider submitting such information as a separate attachment.

However, BOEM will not treat as confidential any aggregate summaries of such information or comments not containing such information. Additionally, BOEM will not treat as confidential: (1) The legal title of the nominating entity (for example, the name of your company); or (2) the geographic location of nominated facilities and the types of those facilities. Information that is not labeled as privileged or confidential will be regarded by BOEM as suitable for public release.

National Historic Preservation Act (16 U.S.C. 470w–3(a))

BOEM is required, after consultation with the Secretary, to withhold the location, character, or ownership of historic resources if it determines that disclosure may, among other things, risk harm to the historic resources or impede the use of a traditional religious site by practitioners. Tribal entities should designate information that falls under Section 304 of NHPA as confidential.

Dated: May 10, 2012.

Tommy P. Beaudreau,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2012–12485 Filed 5–22–12; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on May 16, 2012, a proposed Consent Decree in *United States et al.* v. *Questar Gas Management Co.,* Civil Action No. 2:08–cv–00167–TS–PMW, was lodged with the United States District Court for the District of Utah.

In this action the United States seeks civil penalties and injunctive relief for alleged violations of the Clean Air Act (''CAA''), 42 U.S.C. 7401 *et seq.,* at five compressor stations Questar Gas Management Co., now known as QEP Field Services Co. (''QEPFS'') owns and operates in Uintah County, Utah. Specifically, the United States alleges that QEPFS constructed, modified, and operated the compressor stations in northeastern Utah without complying with: (a) The National Emissions Standards for Hazardous Air Pollutants applicable to oil and natural gas production facilities, 40 CFR part 63, Subpart HH and Subpart ZZZZ; (b) the pre-construction Prevention of Significant Deterioration program, set forth at 42 U.S.C. 7470–7492 and 40 CFR 52.21; and (c) the post-construction federal operating permits program set forth at Title V of the CAA, 42 U.S.C. 7661–7661f and 40 CFR part 71. The proposed consent decree would require QEPFS to pay a civil penalty of $3,650,000, pay $350,000 to a Tribal Clean Air Trust Fund, and perform other specified injunctive relief.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed settlement agreement. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States et al.* v. *Questar Gas Management Co.,* Civil Action No. 2:08–cv–00167–TS–PMW, and D.J. Ref. No. 90–5–2–1–08432.

During the public comment period, the settlement agreement may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the settlement agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.enrd@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5271. If requesting a copy from the Consent Decree Library by mail, please enclose a check in the amount of $11.00 ($.25 per page) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the address given above.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–12476 Filed 5–22–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR Part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below to modify the application of existing mandatory safety standards codified in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before June 22, 2012.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: George F. Triebsch, Director, Office of Standards, Regulations and Variances. Persons delivering documents are required to check in at the receptionist's desk on the 21st floor. Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations and Variances at 202–693–

9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

(1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

(2) That the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2012–074–C.

Petitioner: Brooks Run Mining Company, 208 Business Street, Beckley, West Virginia 25801.

Mine: Marianna No. 1 Mine, MSHA I.D. No. 46–09391, located in Wyoming County, West Virginia.

Regulation Affected: 30 CFR 75.1914(a) (Maintenance of diesel-powered equipment) .

Modification Request: The petitioner requests a modification of the existing standard for the Marianna No. 1 Mine for duration of the approved slope development plan. The petitioner states that:

(1) Development of a slope from the surface to the Pocahontas No. 3 coal seam is currently in process at its Marianna No. 1 Mine operation. A proposed change to the existing approved slope plan has been reviewed by MSHA. This proposal entails making two 90-degree turns in the projection of the slope as identified in drawing No. 1 attached to the petition.

(2) Benefits of this change would include eliminating the necessity for developing vertical shafts through old works of the Sewell coal seam, a task that involves drilling and developing the shaft into a pillar block identified as left from the previous mining. Additionally, the current proposal allows for the construction of a shaft with elevator access and portal facilities, constituting a significant and permanent safety benefit.

(3) This proposed change would require the installation of two belt drives, one located at each of the turns. These drives and associated control units would have to be permissible under the current standard. Time allowances for acquisition of the necessary permissible motors currently prohibit the execution of this proposal due to the development schedule and the need to obtain a coinciding projection approval from MSHA before committing to the new projection.

(4) To alleviate the conflict noted above and facilitate approval and implementation of the alternative plan and its associated safety benefits, insofar, as it requires that permissible equipment be employed in the slope and that the drives and associated control units be permissible, the petitioner proposes to:

(a) Install each nonpermissible drive on a separate air-split as shown in drawing No. 2 attached to the petition.

(b) Install methane monitors at the locations identified in drawing No. 2 attached to the petition (mirror image for second turn would apply). The monitors will be set to alarm both visually and audibly upon detection of methane concentration of 0.8 percent or more. If an alarm occurs, all power will be removed from the slope until ventilation adjustments are made and the methane concentration is below 0.5 percent.

To examine or obtain a copy of the petition and drawings, contact MSHA using the information in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

The petitioner asserts that the proposed alternative method would achieve the results of the existing standard insofar as it requires that permissible equipment be employed in the slope and requires that the drives and associated control units be permissible.

Docket Number: M–2012–075–C.

Petitioner: Mountain Coal Company, LLC, P.O. Box 591, 5174 Highway 133, Somerset, Colorado 81434.

Mine: West Elk Mine, MSHA I.D. No. 05–03672, located in Gunnison County, Colorado.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

Modification Request: The petitioner requests that Stipulation #1 of the Proposed Decision and Order for its previous petition for modification, docket number M–95–184–C, be amended. The petitioner states that:

(1) Stipulation #1 limits the nonpermissible low-voltage or battery-powered electronic testing and diagnostic equipment to laptop computers, oscilloscopes, vibration analysis machines, insulation testers (meggers), and cable fault detectors (impulse generators and detectors).

(2) Since the Proposed Decision and Order was granted, additional and more technologically advanced low-voltage and/or battery-powered electronic testing and diagnostic equipment has been developed. Such equipment can and has been safely used in or by the last open crosscut in underground coal mines, thereby enhancing the safety of the miners.

(3) With the advance of this proven and effective technology, the petitioner proposes to amend Stipulation #1 of its previous petition to include point temperature probes; infrared temperature devices and recorders; insulation testers (meggers); voltage, current, and power measurement devices; ultrasonic measuring devices; electronic component testers and electronic tachometers in addition to the currently approved equipment.

The petitioner asserts that with the existing terms and conditions of the petition for modification, the use of additional nonpermissible electronic testing and diagnostic equipment will at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2012–076–C.

Petitioner: Mountain Coal Company, LLC, P.O. Box 591, 5174 Highway 133, Somerset, Colorado 81434.

Mine: West Elk Mine, MSHA I.D. No. 05–03672, located in Gunnison County, Colorado.

Regulation Affected: 30 CFR 75.1002 (Installation of electric equipment and conductors; permissibility); Previously 30 CFR 75.1002–1(a) (Location of other electric equipment; requirements for permissibility).

Modification Request: The petitioner requests that Stipulation #1 of the Proposed Decision and Order for its previous petition for modification, docket number M–97–148–C, be amended. The petitioner states that:

(1) Stipulation #1 limits the nonpermissible low-voltage or battery-powered electronic testing and diagnostic equipment to laptop computers, oscilloscopes, vibration analysis machines, insulation testers (meggers), and cable fault detectors (impulse generators and detectors).

(2) Since the Proposed Decision and Order was granted, additional and more technologically advanced low-voltage and/or battery-powered electronic testing and diagnostic equipment has been developed. Such equipment can

and has been safely used within 150 feet of pillar workings in underground coal mines, thereby enhancing the safety of the miners.

(3) With the advance of this proven and effective technology, the petitioner proposes to amend Stipulation #1 of its previous petition to include point temperature probes; infrared temperature devices and recorders; insulation testers (meggers); voltage, current, and power measurement devices; ultrasonic measuring devices; electronic component testers and electronic tachometers in addition to the currently approved equipment.

The petitioner asserts that with the existing terms and conditions of the petition for modification, the use of additional nonpermissible electronic testing and diagnostic equipment will at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2012–077–C.

Petitioner: CEI Anthracite, 603 South Church Street, Hazelton, Pennsylvania 18201.

Mine: CEI Anthracite Mine, MSHA I.D. No. 36–08598, located in Luzerne County, Pennsylvania.

Regulation Affected: 30 CFR 77.308 (Structures housing other facilities; use of partitions).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of explosion-proof enclosures for their thermal dryer units. The petitioner states that:

(1) Anthracite dust has consistently proven to be non-explosive and to have low volatility.

(2) The indirect heat thermal dryer provides protection by eliminating the risk of explosion.

(3) The thermal dryer is equipped with safety devices that automatically shut the heat source off while allowing airflow to continue, effectively cooling the entire system.

(4) All of these devices are monitored prior to start up each day and controls are calibrated every month to assure correct reading by sensors.

(5) Given the sensitivity of these safety devices, greater protection would be provided than if an explosion-proof enclosure is used.

(6) The Carmen Dryer was originally installed in January 1996. In 1997, the question of an enclosure was raised and it was decided at that point that an enclosure was not necessary.

(7) In 2006, the petitioner purchased the assets of Lang Filter Media (previous owner) and continued operating until the present. This system has never malfunctioned or presented any safety issues, and has operated through MSHA inspections during the past 14 years without any risk of explosion.

(8) The petitioner has always kept the safety of the employees at the forefront and will continue to do so. There is no likelihood of an explosion based on research provided.

The petitioner further states that this plant has run over 200,000 tons of material since its construction. Safety is the first consideration, and the petitioner believes that this regulation is inappropriate for their system.

Docket Number: M–2012–078–C.

Petitioner: Mountaintop Anthracite Inc., 1550 Crestwood Drive, Mountaintop, Pennsylvania 18707.

Mine: Mountaintop Anthracite Inc. Mine, MSHA I.D. No. 36–09445, located in Luzerne County, Pennsylvania.

Regulation Affected: 30 CFR 77.307 (Thermal dryer; location and installation; general).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of explosion-proof enclosures for their thermal dryer units. The petitioner states that:

(1) The indirect heat thermal dryer (manufactured by Carmen Industries) used in the dryer process provides protection with the equipped safety features and controls on the dryer unit. The biggest feature eliminates the risk of explosion by automatically shutting off the heat sources while allowing airflow to continue, effectively cooling the entire system.

(2) All of the controls are checked each day at start up and monitored throughout the day. The controls are calibrated monthly ensuring that the sensors are representing accurate readings.

The petitioner further states that anthracite dust is considered non-explosive and, given the sensitivity of the safety devices and the close monitoring of the controls, protection of the dryer process meets and potentially exceeds that of an explosion-proof enclosure.

Docket Number: M–2012–079–C.

Petitioner: CEI Anthracite, 603 South Church Street, Hazelton, Pennsylvania 18201.

Mine: CEI Anthracite Mine, MSHA I.D. No. 36–08598, located in Luzerne County, Pennsylvania.

Regulation Affected: 30 CFR 77.307 (Thermal dryer; location and installation; general).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of explosion-proof enclosures for their thermal dryer units. The petitioner states that:

(1) The indirect heat thermal dryer provides protection by eliminating the risk of explosion.

(2) The thermal dryer is equipped with safety devices that automatically shut the heat source off while allowing airflow to continue, effectively cooling the entire system.

(3) All of these devices are monitored prior to start up each day, and controls are calibrated every month to assure correct reading by sensors.

(4) Given the sensitivity of the safety devices, greater protection would be provided than if an explosion-proof enclosure is used.

(5) The Carmen Dryer was originally installed in January 1996. In 1997, the question of an enclosure was raised and it was decided at that point that an enclosure was not necessary.

(6) In 2006, the petitioner purchased the assets of Lang Filter Media (previous owner) and continued operating until present. This system has never malfunctioned or presented any safety issues and has operated through MSHA inspections during the past 14 years without any violation referring to risk of explosion.

(7) The petitioner has always kept the safety of the employees at the forefront and will continue to do so. There is no likelihood of an explosion based on research provided.

The petitioner further states that this plant has run over 200,000 tons of material since its construction. Safety is the first consideration, and the petitioner believes that this regulation is inappropriate for their system.

Docket Number: M–2012–080–C.

Petitioner: Mountaintop Anthracite Inc., 1550 Crestwood Drive, Mountaintop, Pennsylvania 18707.

Mine: Mountaintop Anthracite Inc. Mine, MSHA I.D. No. 36–09445, located in Luzerne County, Pennsylvania.

Regulation Affected: 30 CFR 77.308 (Thermal dryer; location and installation; general).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of explosion-proof enclosures for their thermal dryer units. The petitioner states that:

(1) The indirect heat thermal dryer (manufactured by Carmen Industries) used in the dryer process provides protection with the equipped safety features and controls on the dryer unit. The biggest feature eliminates the risk of explosion by automatically shutting off the heat sources while allowing airflow to continue, effectively cooling the entire system.

(2) All of the controls are checked each day at start up and monitored throughout the day. The controls are calibrated monthly ensuring that the sensors are representing accurate readings.

The petitioner further states that anthracite dust is considered non-explosive and, given the sensitivity of these safety devices and the close monitoring of the controls, protection of the dryer process meets and potentially exceeds the protection provided by an explosion-proof enclosure.

Dated: May 17, 2012.

George F. Triebsch,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 2012–12417 Filed 5–22–12; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before June 22, 2012. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: *request.schedule@nara.gov.*

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, National Records Management Program (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Defense, Office of the Under Secretary of Defense Personnel and Readiness, (N1–330–10–3, 1 item, 1 temporary item). Records of outpatient medical and dental care of all service members, including summaries of inpatient care. Records that support compensation claims are retained permanently in Department of Veteran Affairs claims files.

2. Department of Health and Human Services, Administration on Aging (N1–439–11–1, 5 items, 4 temporary items). Records documenting a discontinued program created to provide a long-term health insurance program, such as correspondence, working papers, and administrative records. Proposed for permanent retention are final reports and appendices produced to recommend suspending the program

3. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–9–4, 4 items, 3 temporary items). Master files of electronic systems containing prescription drug coverage information including individual enrollment information, prescription drug cost and claims, and payment rate records. Proposed as permanent are outputs containing summary of annual prescription approvals and expenditure data.

4. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–9–15, 1

item, 1 temporary item). Master files of an electronic system containing final actions related to prescription drug coverage, including expenditures and administrative records.

5. Department of Health and Human Services, Centers for Medicare & Medicaid Services (DAA–0440–2012–0005, 9 items, 8 temporary items). Master files of electronic systems related to private health insurance programs, including product information, consumer outreach records, trending and analysis data, pre-existing condition insurance plan enrollment records, and information on various markets and providers. Proposed for permanent retention are statistical reports pertaining to pre-existing condition plans and enrollment.

6. Department of Health and Human Services, Centers for Medicare & Medicaid Services (DAA–0440–2012–0007, 1 item, 1 temporary item). Master files of an electronic information system containing data on Medicare payments recouped during the audit process.

7. Department of Health and Human Services, Office of the Assistant Secretary for Administration (DAA–0468–2012–0001, 3 items, 2 temporary items). Records relating to the Federal Real Property Assistance Program, including case files for proposed applications and general administrative records not related to a specific case. Proposed for permanent retention are case files relating to awarded properties.

8. Department of the Interior, Office of Financial Management (DAA–0048–2011–0002, 1 item, 1 temporary item). Master files of an electronic information system used to track, analyze, and report cases of great financial loss resulting from litigation or expected litigation.

9. Department of the Interior, Office of the Secretary (N1–48–11–3, 3 items, 3 temporary items). Master files of electronic information systems used to monitor email and web traffic to prevent the disclosure of personally identifiable information and other sensitive personal information to unauthorized parties.

10. Department of State, Bureau of Diplomatic Security (DAA–0059–2011–0008, 2 items, 2 temporary items). Records documenting security inspections of facilities and certifications of secure shipping materials for construction overseas.

11. Department of State, Office of Commissary and Recreation (DAA–0059–2011–0012, 8 items, 8 temporary items). Records related to the oversight and operations of employee associations abroad, including by-laws, charters, copies of legal opinions, license agreements, financial statements, insurance and procurement waivers, and compliance certifications.

12. Department of Transportation, National Highway Traffic Safety Administration (N1–416–09–5, 6 items, 4 temporary items). Records of the Office of Rulemaking, including rulemaking, non-rulemaking, and working files. Proposed for permanent retention are public docket files.

13. Department of the Treasury, Internal Revenue Service (N1–58–11–4, 4 items, 4 temporary items). Master files, audit data, and documentation of an electronic information system used to track usage of tax filing processes.

14. Department of the Treasury, Internal Revenue Service (N1–58–11–11, 2 items, 2 temporary items). Master files and documentation of an electronic information system used to process electronic tax payments.

15. Department of the Treasury, Internal Revenue Service (N1–58–11–26, 6 items, 6 temporary items). Master files and system documentation of an electronic information system used to assign and track tax returns assigned to examiners.

16. Department of the Treasury, Internal Revenue Service (N1–58–11–27, 2 items, 2 temporary items). Master files and system documentation of an electronic information system used to analyze Federal benefit information.

17. Federal Retirement Thrift Investment Board, Office of Finance (N1–474–12–2, 1 item, 1 temporary item). Records documenting separated employees' eligibility for unemployment benefits.

18. National Aeronautics and Space Administration, Agency-wide (DAA–255–2011–0005, 5 items, 5 temporary items). Records relating to industrial hygiene surveys. Included are beryllium exposure records, all other exposure records, and supporting documentation.

19. Social Security Administration, Office of General Counsel (N1–47–10–4, 26 items, 25 temporary items). Records of general law case files including unemployment, labor, tort claims, and general litigation; monthly reports; and master files of electronic information systems used to track dockets and process Freedom of Information Act requests. Proposed for permanent retention are precedent-setting legal opinions.

Dated: May 15, 2012.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2012–12424 Filed 5–22–12; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On April 12, 2012, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on May 17, 2012 to: William R. Fraser, Permit No. 2013–001.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2012–12480 Filed 5–22–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–293–LR; ASLBP No. 12–921–08–LR–BD01]

Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register,** 37 FR 28,710 (1972), and the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)

A Licensing Board is being established to consider a petition filed on May 14, 2012 by Jones River Watershed Association and by Pilgrim Watch seeking leave to reopen the record and request a hearing. The petition pertains to the January 25, 2006 application from Entergy Nuclear Operations, Inc. to renew for an additional twenty years the current operating license for Pilgrim Nuclear Power Station, which expires on June 8, 2012.

The Board is comprised of the following administrative judges:

Ann Marshall Young, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Richard F. Cole, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 17th day of May 2012.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2012–12477 Filed 5–22–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0204]

Proposed Generic Communication; Generic Letter on Seismic Risk Evaluations for Operating Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Generic letter; withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is withdrawing draft Generic Letter 2011–XX, ''Seismic Risk Evaluations for Operating Reactors'' published on September 1, 2011 (76 FR 54507). The draft Generic Letter, ''Seismic Risk Evaluations for Operating Reactors,'' regarding Generic Issue (GI)–199 is subsumed and entirely captured within the request for information letters addressing the Fukushima Near-Term Task Force Recommendations 2.1 and 2.3. The request for information letters were issued on March 12, 2012, and are available electronically in a package under Agencywide Documents Access and Management System (ADAMS) Accession Number ML12056A046. In addition, on March 13, 2012, the NRC issued a correction to the request for information letters, which is available electronically under ADAMS Accession Number ML12073A366.

DATES: This generic letter is withdrawn May 23, 2012.

ADDRESSES: Please refer to Docket ID NRC–2011–0204 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0204. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's ADAMS:* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Andrea Russell, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–8553, email: *Andrea.Russell@nrc.gov.*

SUPPLEMENTARY INFORMATION: On September 1, 2011 (76 FR 54507), the NRC published for public comment Draft Generic Letter 2011–XX, ''Seismic Risk Evaluations for Operating Reactors,'' to inform addressees [1] that the NRC requests addressees to evaluate their facilities to determine the current level of seismic risk and to submit the requested information to facilitate the NRC's determination if there is a need for additional regulatory action. The public comment period was scheduled to expire on October, 31, 2011; however, on September 16, 2011 (76 FR 57767), the NRC issued a correction and extended the public comment period to November 15, 2011. On November 8, 2011 (76 FR 69294), the NRC extended the comment period to December 15, 2011. On March 8, 2012, the NRC issued a memorandum from the Office of Nuclear Reactor Regulation to the Office of New Reactors that (1) dispositioned the public comments received on the draft generic letter; and (2) stated that the GI–199 generic letter (i.e., the generic letter on seismic risk evaluations for operating reactors) is subsumed and entirely captured within the proposed Title 10 of the Code of Federal Regulations (10 CFR) 50.54(f) letter addressing the Fukushima Near-Term Task Force Recommendations 2.1 and 2.3. The memorandum is available electronically under ADAMS Accession Number ML12032A001.

The NRC has now issued the 10 CFR 50.54(f) letter addressing the Fukushima Near-Term Task Force Recommendations 2.1 and 2.3 (ADAMS Accession Number ML12056A046), as corrected by ADAMS Accession Number ML12073A366. With the issuance of this letter, the Draft Generic Letter 2011–XX need not be finalized and issued. Accordingly, the NRC is withdrawing Draft Generic Letter 2011–XX.

Dated at Rockville, Maryland, this 14th day of May 2012.

For the Nuclear Regulatory Commission.

Kimyata Morgan-Butler,

Acting Chief, Generic Communications Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–12478 Filed 5–22–12; 8:45 am]

BILLING CODE 7590–01–P

[1] All holders of an operating license or construction permit for a nuclear power reactor issued under 10 CFR Part 50, ''Domestic Licensing of Production and Utilization Facilities,'' except those who have permanently ceased operation and have certified that fuel has been removed from the reactor vessel.

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, June 6, 2012, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.* A period for public comment will be offered following consideration of the last numbered item in the open session.

MATTERS TO BE CONSIDERED: The agenda for the Commission's June 6, 2012 meeting includes the items identified below.

Portions Open to the Public

1. Report on legislative activities.
2. Report on communications with the public.

3. Report on status of Commission dockets.

4. Report from the Office of the Secretary and Administration.

5. Report from the Office of Accountability and Compliance.

6. Report on international activities.

Chairman's public comment period.

Portion Closed to the Public

7. Discussion of pending litigation.

CONTACT PERSON FOR MORE INFORMATION: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at 202–789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at 202–789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, access for handicapped or disabled persons, the audiocast, or similar matters).

By the Commission.

Dated: May 21, 2012.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–12659 Filed 5–21–12; 4:15 pm]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67012; File No. SR–BX–2012–035]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Remove the BOX Fee Schedule In Effect While BOX Was a Facility of the Exchange

May 17, 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 May 14, 2012, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) 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 from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX'') which was in effect when BOX was a facility of the Exchange. The text of the proposed changes is attached as Exhibit 5 [sic]. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room, and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX operated an options trading platform as a facility of the Exchange. BOX filed an application with the Commission for registration as a national securities exchange under Section 6 of Act. *See* Securities Exchange Act Release No. 66242 (January 26, 2012), 77 FR 4841 (January 31, 2012). The application has been granted. *See* Securities Exchange Act Release No. 66871 (April 27, 2012), 77 FR 86 [sic] (May 3, 2012). BOX is no longer a facility of the Exchange. Therefore, the Exchange proposes to remove the BOX Fee Schedule, which was in effect while BOX was a facility of the Exchange. BOX Options Participants will be assessed applicable fees pertaining to activities occurring through May 11, 2012.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[5] in general, and 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 its members and other persons using its facilities. The Exchange believes the proposed change, removing the fee schedule is reasonable because BOX is no longer trading as a facility of the Exchange. BOX Options Participants will be assessed applicable fees pertaining to activities occurring through May 11, 2012.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is filed for immediate effectiveness pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[7] and Rule 19b-4(f)(2) thereunder,[8] because it establishes or changes a due, fee, or other charge applicable only to a member. As such, the proposed rule change is effective upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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:

[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] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2)

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–2012–035 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–2012–035. 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 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–2012–035 and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12444 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67013; File No. SR–OCC–2012–04]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Relating to Stock Loan Buy-In and Sell-Out Rules

May 17, 2012.

I. Introduction

On March 22, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2012–04 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on April 6, 2012.[3] The Commission received no comment letters regarding the proposal. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

As detailed in the Commission's notice, the proposed rule change would make three procedural changes to certain OCC rules relating to the Market Loan Program [4] and the Stock Loan/Hedge Program.[5] The changes include: (i) Amending the buy-in and sell-out processes under the Market Loan Program, (ii) amending the rules governing the Stock Loan/Hedge Program to add a sell-out process, and (iii) amending OCC's rules governing the Stock Loan/Hedge Program to add a cash settlement process.

III. Discussion

Section 19(b)(2)(B) of the Act 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.[6] Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency, among other things, be designed to remove impediments to and perfect the mechanism of a national system for the clearance and settlement of securities transactions.[7]

The Commission finds that the proposed rule change as described is consistent with OCC's obligation under Section 17A(b)(3)(F) of the Act's requirement that the rules of OCC be designed to remove impediments and perfect the mechanism of a national system for the clearance and settlement of securities transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) [8] of the Act, that the proposed rule change (File No. SR–OCC–2012–04) be, and hereby is, approved.[9]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12445 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 34–66715 (April 2, 2012), 77 FR 20861 (April 6, 2012).

[4] The Market Loan Program, governed by Article XXIA of OCC's By-Laws and Chapter XXIIA of OCC's Rules, provides a framework that accommodates securities lending transactions executed through electronic trading systems (''Loan Markets'').

[5] The Stock Loan/Hedge Program, governed by Article XXI of OCC's By-Laws and Chapter XXII of OCC's Rules, allows approved clearing members to register their privately negotiated securities lending transactions with OCC.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78s(b)(2).

[9] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67011; File No. SR–EDGA–2012–09]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Order Approving a Proposed Rule Change Relating to Amendments to Rule 2.11 That Establish the Authority To Cancel Orders and Describe the Operation of an Error Account

May 17, 2012.

I. Introduction

On March 22, 2012, EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities

Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend EDGA Rule 2.11 to (1) add a new subparagraph (a)(6) that addresses the authority of EDGA and its routing broker-dealer, Direct Edge ECN LLC d/b/a DE Route (''DE Route'') to cancel orders if and when a systems, technical, or operational issue occurs, and (2) amend subparagraph (a)(4) and add new subparagraph (a)(7) to describe the operation of an error account for DE Route. The proposed rule change was published for comment in the **Federal Register** on April 6, 2012.[3] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

DE Route, a broker-dealer that is a facility and an affiliate of the Exchange, provides outbound routing services from the Exchange to other market centers pursuant to Exchange rules.[4] In its proposal, the Exchange states that a systems, technical, or operational issue may occur at EDGA, DE Route, or a Trading Center[5] that causes EDGA or DE Route to cancel orders, if the Exchange or DE Route determines that such action is necessary to maintain a fair and orderly market.[6] The Exchange also states that systems, technical, or operational issues that occur at EDGA, DE Route, or a Trading Center may result in DE Route acquiring an error position that it must resolve.[7]

New subparagraph (a)(6) to EDGA Rule 2.11 provides EDGA or DE Route with general authority to cancel orders to maintain fair and orderly markets when a systems, technical, or operational issue occurs at EDGA, DE Route, or a Trading Center. EDGA or DE Route will be required to provide notice of the cancellation of orders to Members[8] as soon as practicable.[9]

New subparagraphs (a)(4) and (a)(7) provide authority for DE Route to maintain an error account for the purpose of addressing, and sets forth the procedures for resolving, error positions. Specifically, DE Route will maintain an error account for the purpose of liquidating an error position acquired in connection with its role as an Outbound Router[10] when such position, in the judgment of DE Route subject to the factors described in EDGA Rule 2.11(a)(7) (and as set forth below), cannot be fairly and practicably assigned to one or more Members in its entirety.[11]

In determining whether an entire error position can be fairly and practicably assigned to one or more Members, DE Route will consider (i) whether DE Route has accurate and sufficient information to assign the entire amount of an error position to all affected Members; and (ii) whether DE Route is able to evaluate available information in order to assign the entire amount of an error position to all affected Members by the first business day following the trade date on which the error position was established.[12] If DE Route determines that an error position can be assigned to one or more Members by the first business day following the trade date on which the error position was incurred, DE Route will (i) assign the entire amount of the error position to all affected Members, and (ii) make and keep records to document the rationale for the assignment to those Members.[13] All determinations and assignments will be made in a non-discriminatory manner.[14]

If, however, DE Route reasonably concludes, due to the number of erroneous executions or the number of members potentially impacted, that it would not be able to trace each erroneous execution comprising an error position back to the affected Members in a timely manner, then DE Route will assume the entire amount of the error position into the error account.[15] DE Route will make and keep records of the factors considered in determining whether to acquire an error position into the error account.[16]

If DE Route determines to acquire an error position into the error account, DE Route will liquidate the error position as soon as practicable.[17] DE Route will be required to provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer, and would be prohibited from attempting to exercise any influence or control over the timing or methods of such trading.[18] Further, DE Route will be required to establish and implement written policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer, on one hand, and the Exchange and DE Route, on the other, associated with the liquidation of the error positions.[19] DE Route will make and keep records associated with the liquidation of the error position through a third-party broker-dealer.[20]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act[21] and the rules and regulations thereunder applicable to a national securities exchange.[22] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 66714 (April 2, 2012), 77 FR 20863 (April 6, 2012) (SR–EDGA–2012–09) (''Notice'').

[4] *See* Notice, 77 FR at 20864, n.3 and accompanying text, and text accompanying n.4. *See also* EDGA Rule 2.11; and Securities Exchange Act Release No. 61698 (March 12, 2010) 75 FR 13151 (March 18, 2010) at 13165.

The Exchange also receives equities orders routed inbound to the Exchange by DE Route from EDGX Exchange, Inc. under a pilot period ending on June 30, 2013. *See* Notice, 77 FR at 20864. *See also* Securities Exchange Act Release No. 64362 (April 28, 2011), 76 FR 25386 (May 4, 2011) (SR–EDGA–2011–13); and Securities Exchange Act Release No. 66643 (March 22, 2012), 77 FR 18876 (March 28, 2012) (SR–EDGA–2012–10) (filing to extend the pilot period through June 30, 2013).

[5] EDGA Rule 2.11(a) defines ''Trading Center'' as ''other securities exchanges, facilities of securities exchanges, automated trading systems, electronic communications networks or other brokers or dealers.'' *See also* Notice, 77 FR at 20864, n.5 (stating that ''Trading Centers'' is as defined in EDGA Rule 2.11(a) and Rule 600(b)(78) of Regulation NMS under the Act, 17 CFR 242.600(b)(78)).

[6] *See* Notice, 77 FR at 20864. For examples of some of the circumstances in which EDGA or DE Route may decide to cancel orders, see *id.*

[7] *See id.* For examples of some of the circumstances that may lead to error positions, see *id.*

[8] EDGA Rule 1.5(n) defines ''Member'' to mean ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange'' and states that ''[a] Member will have the status of a 'member' of the Exchange as that term is defined in Section 3(a)(3) of the [Exchange] Act.''

[9] *See* EDGA Rule 2.11(a)(6).

[10] EDGA Rule 2.11(a) defines DE Route, in its function providing outbound routing of orders from the Exchange to other Trading Centers as the ''Outbound Router.''

[11] *See* EDGA Rule 2.11(a)(7). An error position can be acquired as a result of a systems, technical, or operational issue experienced by EDGA, DE Route, or a Trading Center to which DE Route directed an outbound order. *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See* Notice, 77 FR at 20865.

[16] *See* EDGA Rule 2.11(a)(7).

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] 15 U.S.C. 78f(b).

[22] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 15 U.S.C. 78f(b)(5).

trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission believes the proposed rule change is consistent with Section 11A(a)(1)(C) of the Act[24] in that it seeks to assure economically efficient execution of securities transactions.

The Commission recognizes that a systems, technical, or operational issue may occur, and believes that EDGA Rule 2.11, in allowing EDGA or DE Route to cancel orders affected by a systems, technical, or operational issue, should provide a reasonably efficient means for the Exchange to handle such orders, and appears reasonably designed to permit EDGA to maintain fair and orderly markets.[25]

The Commission also believes that allowing DE Route to maintain an error account to resolve error positions acquired in connection with its role as an Outbound Router pursuant to the procedures set forth in the rule, and as described above, is consistent with the Act. The Commission notes that the rule establishes criteria for determining which positions are error positions that may be acquired into the error account, and which will be assigned to Members.[26] DE Route, in connection with a particular systems, technical, or operational issue, will be required to either (i) assign the entire amount of a resulting error position to Members or (ii) liquidate such position.[27] Also, DE Route will assign an error position that results from a particular systems, technical, or operational issue to Members only if the entire amount of such error position can be assigned to all of the affected Members.[28] If DE Route cannot fairly and practically assign the entire amount of an error position to all affected Members, DE Route will liquidate such error position.[29] In this regard, the Commission believes that the new rule appears reasonably designed to further just and equitable principles of trade and the protection of investors and the public interest, and to help prevent unfair discrimination, in that it should help assure the handling of error positions will be based on clear and objective criteria, and that the resolution of those positions will occur promptly through a transparent process.

Additionally, the Commission notes that it has previously expressed concern about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members.[30] The Commission is also concerned about the potential for misuse of confidential and proprietary information. The Commission believes that the requirement that DE Route provide complete time and price discretion for the liquidation of an error position to a third-party broker-dealer, including that DE Route not attempt to exercise any influence or control over the timing or methods of such trading, combined with the requirement that DE Route establish and implement policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information to the third-party routing broker liquidating such positions, should help mitigate the Commission's concerns. In particular, the Commission believes that these requirements should help assure that none of EDGA, DE Route, or the third-party broker-dealer is able to misuse confidential or proprietary information obtained in connection with the liquidation of error positions for its own benefit. The Commission also notes that DE Route would be required to make and keep records documenting the rationale for assignment of error positions to Members, documenting the factors considered in determining to acquire error positions into the error account, and associated with the liquidation of error positions through the third-party broker-dealer.[31]

Finally, the Commission notes that the proposed procedures for canceling orders and handling of error positions are consistent with procedures the Commission has approved for another exchange.[32]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[33] that the proposed rule change (SR–EDGA–2012–09) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12443 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

[24] 15 U.S.C. 78k–1(a)(1)(C).

[25] The Commission notes that EDGA states that the proposed amendments to EDGA Rule 2.11 are designed to maintain fair and orderly markets, ensure full trade certainty for market participants, and avoid disrupting the clearance and settlement process. *See* Notice, 77 FR at 20866. The Commission also notes that EDGA states that a decision to cancel orders due to a systems, technical, or operational issue may not cause the Exchange to declare self-help against a Trading Center pursuant to Rule 611 of Regulation NMS, in which case the Exchange would continue to be subject to the order protection requirements of Rule 611 with respect to that Trading Center. *See* 17 CFR 242.611(b). *See also* Notice, 77 FR at 20865, n.12.

[26] *See* EDGA Rule 2.11(a)(7).

[27] *See id.*

[28] *See id.*

[29] *See id.*

[30] *See, e.g.,* Securities Exchange Act Release No. 65455 (September 30, 2011), 76 FR 62119 (October 6, 2011) at 62120, n.16 and accompanying text.

[31] *See* EDGA Rule 2.11(a)(7).

[32] *See* Securities Exchange Act Release No. 66963 (May 10, 2012), 77 FR 28919 (May 16, 2012) (SR–NYSEArca–2012–22).

[33] 15 U.S.C. 78s(b)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67010; File No. SR–EDGX–2012–08]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Order Approving a Proposed Rule Change Relating to Amendments to Rule 2.11 That Establish the Authority To Cancel Orders and Describe the Operation of an Error Account

May 17, 2012.

I. Introduction

On March 22, 2012, EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend EDGX Rule 2.11 to (1) add a new subparagraph (a)(6) that addresses the authority of EDGX and its routing broker-dealer, Direct Edge ECN LLC d/b/a DE Route (''DE Route'') to cancel orders if and when a systems, technical, or operational issue occurs, and (2) amend subparagraph (a)(4) and add new subparagraph (a)(7) to describe the operation of an error account for DE Route. The proposed rule change was published for comment in the **Federal Register** on April 6, 2012.[3] The Commission received no comment letters regarding the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 66713 (April 2, 2012), 77 FR 20854 (April 6, 2012) (SR–EDGX–2012–08) (''Notice'').

change. This order approves the proposed rule change.

II. Description of the Proposal

DE Route, a broker-dealer that is a facility and an affiliate of the Exchange, provides outbound routing services from the Exchange to other market centers pursuant to Exchange rules.[4] In its proposal, the Exchange states that a systems, technical, or operational issue may occur at EDGX, DE Route, or a Trading Center[5] that causes EDGX or DE Route to cancel orders, if the Exchange or DE Route determines that such action is necessary to maintain a fair and orderly market.[6] The Exchange also states that systems, technical, or operational issues that occur at EDGX, DE Route, or a Trading Center may result in DE Route acquiring an error position that it must resolve.[7]

New subparagraph (a)(6) to EDGX Rule 2.11 provides EDGX or DE Route with general authority to cancel orders to maintain fair and orderly markets when a systems, technical, or operational issue occurs at EDGX, DE Route, or a Trading Center. EDGX or DE Route will be required to provide notice of the cancellation of orders to Members[8] as soon as practicable.[9]

New subparagraphs (a)(4) and (a)(7) provide authority for DE Route to maintain an error account for the purpose of addressing, and sets forth the procedures for resolving, error positions. Specifically, DE Route will maintain an error account for the purpose of liquidating an error position acquired in connection with its role as an Outbound Router[10] when such position, in the judgment of DE Route subject to the factors described in EDGX Rule 2.11(a)(7) (and as set forth below), cannot be fairly and practicably assigned to one or more Members in its entirety.[11]

In determining whether an entire error position can be fairly and practicably assigned to one or more Members, DE Route will consider (i) whether DE Route has accurate and sufficient information to assign the entire amount of an error position to all affected Members; and (ii) whether DE Route is able to evaluate available information in order to assign the entire amount of an error position to all affected Members by the first business day following the trade date on which the error position was established.[12] If DE Route determines that an error position can be assigned to one or more Members by the first business day following the trade date on which the error position was incurred, DE Route will (i) assign the entire amount of the error position to all affected Members, and (ii) make and keep records to document the rationale for the assignment to those Members.[13] All determinations and assignments will be made in a non-discriminatory manner.[14]

If, however, DE Route reasonably concludes, due to the number of erroneous executions or the number of members potentially impacted, that it would not be able to trace each erroneous execution comprising an error position back to the affected Members in a timely manner, then DE Route will assume the entire amount of the error position into the error account.[15] DE Route will make and keep records of the factors considered in determining whether to acquire an error position into the error account.[16]

If DE Route determines to acquire an error position into the error account, DE Route will liquidate the error position as soon as practicable.[17] DE Route will be required to provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer, and would be prohibited from attempting to exercise any influence or control over the timing or methods of such trading.[18] Further, DE Route will be required to establish and implement written policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer, on one hand, and the Exchange and DE Route, on the other, associated with the liquidation of the error positions.[19] DE Route will make and keep records associated with the liquidation of the error position through a third-party broker-dealer.[20]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act[21] and the rules and regulations thereunder applicable to a national securities exchange.[22] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission believes the proposed rule change is consistent with Section 11A(a)(1)(C) of the Act[24] in that it seeks to assure economically efficient execution of securities transactions.

The Commission recognizes that a systems, technical, or operational issue may occur, and believes that EDGX Rule 2.11, in allowing EDGX or DE Route to cancel orders affected by a systems,

[4] *See* Notice, 77 FR at 20855, n.4 and accompanying text, and text accompanying n.6. *See also* EDGX Rule 2.11; and Securities Exchange Act Release No. 61698 (March 12, 2010) 75 FR 13151 (March 18, 2010) at 13165.

The Exchange also receives equities orders routed inbound to the Exchange by DE Route from EDGA Exchange, Inc. under a pilot period ending on June 30, 2013. *See* Notice, 77 FR at 20855. *See also* Securities Exchange Act Release No. 64361 (April 28, 2011), 76 FR 25388 (May 4, 2011) (SR–EDGX–2011–12); and Securities Exchange Act Release No. 66644 (March 22, 2012), 77 FR 18877 (March 28, 2012) (SR–EDGX–2012–09) (filing to extend the pilot period through June 30, 2013).

[5] EDGX Rule 2.11(a) defines ''Trading Center'' as ''other securities exchanges, facilities of securities exchanges, automated trading systems, electronic communications networks or other brokers or dealers.'' *See also* Notice, 77 FR at 20855, n.5 (stating that ''Trading Centers'' is as defined in EDGX Rule 2.11(a) and Rule 600(b)(78) of Regulation NMS under the Act, 17 CFR 242.600(b)(78)).

[6] *See* Notice, 77 FR at 20855. For examples of some of the circumstances in which EDGX or DE Route may decide to cancel orders, see *id.*

[7] *See id.* For examples of some of the circumstances that may lead to error positions, see *id.*

[8] EDGX Rule 1.5(n) defines ''Member'' to mean ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange'' and states that ''[a] Member will have the status of a 'member' of the Exchange as that term is defined in Section 3(a)(3) of the [Exchange] Act.''

[9] *See* EDGX Rule 2.11(a)(6).

[10] EDGX Rule 2.11(a) defines DE Route, in its function providing outbound routing of orders from the Exchange to other Trading Centers, as the ''Outbound Router.''

[11] *See* EDGX Rule 2.11(a)(7). An error position can be acquired as a result of a systems, technical, or operational issue experienced by EDGX, DE Route, or a Trading Center to which DE Route directed an outbound order. *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See* Notice, 77 FR at 20856.

[16] *See* EDGX Rule 2.11(a)(7).

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] 15 U.S.C. 78f(b).

[22] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78k–1(a)(1)(C).

technical, or operational issue, should provide a reasonably efficient means for the Exchange to handle such orders, and appears reasonably designed to permit EDGX to maintain fair and orderly markets.[25]

The Commission also believes that allowing DE Route to maintain an error account to resolve error positions acquired in connection with its role as an Outbound Router pursuant to the procedures set forth in the rule, and as described above, is consistent with the Act. The Commission notes that the rule establishes criteria for determining which positions are error positions that may be acquired into the error account, and which will be assigned to Members.[26] DE Route, in connection with a particular systems, technical, or operational issue, will be required to either (i) assign the entire amount of a resulting error position to Members or (ii) liquidate such position.[27] Also, DE Route will assign an error position that results from a particular systems, technical, or operational issue to Members only if the entire amount of such error position can be assigned to all of the affected Members.[28] If DE Route cannot fairly and practically assign the entire amount of an error position to all affected Members, DE Route will liquidate such error position.[29] In this regard, the Commission believes that the new rule appears reasonably designed to further just and equitable principles of trade and the protection of investors and the public interest, and to help prevent unfair discrimination, in that it should help assure the handling of error positions will be based on clear and objective criteria, and that the resolution of those positions will occur promptly through a transparent process.

Additionally, the Commission notes that it has previously expressed concern about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members.[30] The Commission is also concerned about the potential for misuse of confidential and proprietary information. The Commission believes that the requirement that DE Route provide complete time and price discretion for the liquidation of an error position to a third-party broker-dealer, including that DE Route not attempt to exercise any influence or control over the timing or methods of such trading, combined with the requirement that DE Route establish and implement policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information to the third-party routing broker liquidating such positions, should help mitigate the Commission's concerns. In particular, the Commission believes that these requirements should help assure that none of EDGX, DE Route, or the third-party broker-dealer is able to misuse confidential or proprietary information obtained in connection with the liquidation of error positions for its own benefit. The Commission also notes that DE Route would be required to make and keep records documenting the rationale for assignment of error positions to Members, documenting the factors considered in determining to acquire error positions into the error account, and associated with the liquidation of error positions through the third-party broker-dealer.[31]

Finally, the Commission notes that the proposed procedures for canceling orders and handling of error positions are consistent with procedures the Commission has approved for another exchange.[32]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[33] that the proposed rule change (SR–EDGX–2012–08) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12442 Filed 5–22–12; 8:45 am]

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[25] The Commission notes that EDGX states that the proposed amendments to EDGX Rule 2.11 are designed to maintain fair and orderly markets, ensure full trade certainty for market participants, and avoid disrupting the clearance and settlement process. *See* Notice, 77 FR at 20857. The Commission also notes that EDGX states that a decision to cancel orders due to a systems, technical, or operational issue may not cause the Exchange to declare self-help against a Trading Center pursuant to Rule 611 of Regulation NMS, in which case the Exchange would continue to be subject to the order protection requirements of Rule 611 with respect to that Trading Center. *See* 17 CFR 242.611(b). *See also* Notice, 77 FR at 20856, n.12.

[26] *See* EDGX Rule 2.11(a)(7).

[27] *See id.*

[28] *See id.*

[29] *See id.*

[30] *See, e.g.,* Securities Exchange Act Release No. 65455 (September 30, 2011), 76 FR 62119 (October 6, 2011) at 62120, n.16 and accompanying text.

[31] *See* EDGX Rule 2.11(a)(7).

[32] *See* Securities Exchange Act Release No. 66963 (May 10, 2012), 77 FR 28919 (May 16, 2012) (SR–NYSEArca–2012–22).

[33] 15 U.S.C. 78s(b)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67009; File No. SR–BX–2012–036]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Grandfathered Rules, BOX Trading Rules, BX By-Laws, BX Rules and Remove the BOXR Operating Agreement and By-Laws

May 17, 2012.

Pursuant to Section 19(b)(1) under the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 14, 2012, NASDAQ OMX BX (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 Substance of the Proposed Rule Change

The Exchange proposes to amend proposal [sic] to amend the Grandfathered Rules, the Boston Options Exchange Group LLC (''BOX'') Trading Rules, remove the Boston Options Exchange Regulation LLC (''BOXR'') By-Laws and the Amended and Restated Limited Liability Company Agreement (''BOXR Operating Agreement''), and amend the BX By-Laws and the BX Rules. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

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

Boston Options Exchange LLC (''BOX'') is ceasing to operate as an options trading facility of the Exchange.[4] BX and BOX have entered into a Regulatory Services Agreement which specifies, among other matters, that BX will terminate its responsibility for fulfilling certain obligations and cease performing certain regulatory functions as of the effective date of June 1, 2012, or sooner if BOX satisfies all of the conditions required for BOX to operate as a national securities exchange (''the facility termination effective date'').[5] As proposed, the BOX Trading Rules will no longer be operative to permit options trading on BX as of the facility termination effective date. If BOX meets the requirements and operates as an exchange, it will be a self-regulatory organization responsible for the activities occurring on BOX after the facility termination effective date. BX is not the Designated Options Examining Authority (''DOEA'') for any BOX Options Participant.

BX will continue to have certain responsibility for the trading activities and the actions of the BOX Options Participants for the time period during which BOX was operating as a facility of the Exchange (''BOX legacy matters'').[6] BX has always retained the ultimate authority and responsibility for the rules and regulations and the activities of the BOX facility. However, BX had delegated to BOXR the authority to act on behalf of the Exchange regarding regulatory matters relating to the BOX facility. The sole purpose of BOXR has been to regulate the BOX facility. As such, after BOX ceases to be a facility of the Exchange, the delegation of regulatory authority to BOXR will be terminated and BX will retain all such responsibilities for BOX legacy matters. Currently, for matters pertaining to BOX Options Participants, BOXR utilizes procedural rules regarding discipline and arbitration found in the ''Grandfathered Rules,'' which will be defined below. As proposed, rather than have two sets of procedural rules for discipline and arbitration, BX will utilize the procedural rules governing disciplinary matters and arbitrations which currently exist in the BX Rules[7] and are used for the Equity market. Currently, there are no formal disciplinary proceedings or arbitrations pending against BOX Options Participants.[8] As such, there is no need for temporary rules to be implemented.[9] All formal proceedings, if any are commenced, will utilize the new procedural rules.

These proposed changes are not intended to change any underlying rules, rather these proposed changes and the reliance on existing BX Rules are intended to permit the use of BX's current discipline and arbitration procedures for BOX legacy matters. These procedures are substantially similar to those in the Grandfathered Rules. These BX disciplinary procedures provide fair procedures for the discipline of the former BOX Options Participants and persons who were associated persons of former BOX Options Participants and for arbitration proceedings stemming from activities which occurred while BOX was a facility of the Exchange.

There are also some amendments updating outdated references. Finally, references to BOX and BOX related matters (i.e. BOX, BOXR) which are no longer needed in the BX By-Laws and Rules, once BOX is no longer a facility of the Exchange, are being removed. For these reasons, as will be explained more fully below, BX proposes to amend the Grandfathered Rules and the BOX Trading Rules, and to remove the BOXR By-Laws and BOXR Operating Agreement, in their entirety, and the BX By-Laws, the BX Rules, with an effective date of the facility termination effective date.

Grandfathered Rules

First, BX is proposing to amend the ''Grandfathered Rules.'' The Grandfathered Rules are the Rules of Board of Governors of the Boston Stock Exchange as in effect on the date of the closing of the acquisition of the Exchange by The NASDAQ OMX Group, Inc. Currently, as set forth in BX Rules 0210(r), the Grandfathered Rules are operative to the extent that such rules are applicable to BOX and to Options Participants and to activities of members, members organizations, persons associated with members, and other persons subject to the jurisdiction of the Exchange that occurred prior to the adoption of the Equity Rules. As proposed, the Grandfathered Rules will be amended, as explained below, to apply to the activities of BOX and the BOX Options Participants and associated persons subject to the jurisdiction of the Exchange. These rules, however, will not be operative to permit trading.

The Grandfathered Rules currently consist of two sections: The Provisions of the Former Constitution of the Boston Stock Exchange, Inc. That Have Been Incorporated Into the Grandfathered Rules; and the Rules of the Board of Governors. A heading will be added to refer to these as the Grandfathered BSE Rules. As will be described more fully below, BX also proposes to incorporate the BOX Trading Rules, as amended in the manner described below, (''The Grandfathered BOX Rules'') into the Grandfathered Rules. For this new third section, a heading will be added to refer to these as the Grandfathered Trading Rules of the Boston Options Exchange Group, LLC. The Grandfathered Rules will remain posted on the BX Web site.

[4] Currently, BOX is a facility of the Exchange under Section 3(a)(2) of the Act. *See* Securities Exchange Act Release Nos. 49066 (January 13, 2004), 69 FR 2773 (January 20, 2004) (SR–BSE–2003–17); 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (SR–BSE–2003–04) (''BOXR Order''); and 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR–BSE–2002–15). *See also* Release No. 34–58324; 73 FR 46936 (August 7, 2008) (File Nos. SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01) (''Order approving the Acquisition of the Boston Stock Exchange, Incorporated by The NASDAQ OMX Group, Inc.'').

[5] BOX has filed an application with the Commission for registration as a national securities exchange under Section 6 of Act. *See* Securities Exchange Act Release No. 66242 (January 26, 2012), 77 FR 4841 (January 31, 2012). The application has been granted and is conditioned on the satisfaction of certain requirements. *See* Securities Exchange Act Release No. 66871 (April 27, 2012), 77 FR 86 (May 3, 2012).

[6] For example, potential BOX legacy matters may include disciplinary matters and arbitrations.

[7] These Rules are also known as the Equity Rules. The definition of Equity Rules is found at BX Rule 0120(p).

[8] Currently, formal proceedings are commenced by a notice of specific charges set forth in a charge memorandum. *See* current Grandfathered Rules, Chapter XXX, Section 2(a). *See also* BX Rule 9211. A disciplinary proceeding shall begin when the complaint is served and filed. Although there are currently no formal proceedings that have been commenced, there is one Options Participant reviewing a Letter of Acceptance, Waiver and Consent. *See* Chapter XXX, Section 10 and Chapter XXXIV.

[9] Compare to American Stock Exchange (''AMEX''), which implemented temporary rules to avoid potential confusion to respondents where formal proceedings had commenced by AMEX and were still pending at the Transaction date, on which date new procedural disciplinary rules were to be effective. *See* Securities Exchange Act Release Nos. 58286 (August 1, 2008), 73 FR 46097 (August 7, 2008); and 35678 (September 29, 2008), 73 FR 57705 (October 3, 2008) (SR–Amex–2008–64) (''Amex Proposal'').

The opening explanatory paragraph to the Grandfathered Rules is being amended to reflect that the rules apply to activities of former BOX Options Participants and associated persons subject to the jurisdiction of the Exchange; in addition, the rules continue to apply to activities of members, members organizations, persons associated with members, and other persons subject to the jurisdiction of the Exchange that occurred prior to the adoption of the post-acquisition Equity Rules. In Chapter I, Section I, BX is also clarifying that references to the Board of Governors, where appropriate for the affected rules, mean the Board of Directors of the Exchange and that references to the Constitution shall mean the BX By-Laws where applicable. There are also references to the Constitution that will be renamed as ''Incorporated Constitution Provision'' to refer to the provisions of the Former Constitution which were incorporated into the Grandfathered Rules.[10] As proposed, in other sections where there is an applicable rule with a reference to a specific provision of the former Constitution, sections will be amended to replace the term Constitution with the term BX By-Laws. For example, Chapter II, Sections 14 and 25 have references to penalties provided for in Article XIV, Section 4 of the Constitution. Article XIV, Section 4 was not incorporated into the rules, as the By-Laws replaced this section of the former Constitution; this section will now reflect that penalties are provided for in the BX By-Laws. These amendments do not substantially alter the rules in their current format, but rather provide the correct reference.

Chapter IA is being removed, because, as noted above and discussed in more detail in the paragraph below, the procedural rules for disciplinary proceedings will be the current BX Rule 9000 Series. Similarly, Section 4 (Imposition of Fines for Minor Violation(s) of Rule and Floor Decorum Policies) of Chapter XVIII (Conduct) is being amended to reflect that Chapter XXX is being removed, as described below, as proceedings involving discipline will be governed by the BX Rule 9000 Series. In particular, in subsection (a), it will be referenced that BX Rule 9216 governs when BX imposes a fine for a minor rule violation. Sections 4(b) through (d) and 4(f) are being removed as they relate to disciplinary proceedings, which, as proposed, will be governed by the BX Rule 9000 Series. In addition, a cross reference to the Grandfathered BOX Rules Chapter X, Section 2 is being added to note that it will provide for rule violations that may be considered minor in nature. Section 4(e) is being removed as unnecessary, because it is almost identical to Chapter X, Section 2(e) of the current BOX Trading Rules and proposed Grandfathered BOX Rules. Grandfathered Chapter XVIII, Section 6 is being removed as is it no longer applicable.

BX is proposing to remove Chapter XXX, Disciplining Members, Denial of Membership. The Principal Considerations in Determining Sanctions found in Chapter XXX have been incorporated in the BOXR Sanctioning Guidelines.[11] BX will continue to follow the Guidelines. The remainder of Chapter XXX sets forth the procedural rules to be followed for disciplining members. As proposed, in its place, BX will utilize the 9000 Series of the BX Rules,[12] which is the Code of Procedure that sets forth the rules regarding disciplining a member or person associated with a member and will now govern the disciplinary process for any legacy disciplinary matter. Under Chapter XXX, an explanatory sentence is being added stating the 9000 Series of BX Rules will now govern the disciplinary process. BX is removing Chapter XXXII regarding Arbitration Rules from the Grandfathered Rules because it has proposed utilizing the BX 10000 Series, which is the Code of Arbitration Procedure. As proposed, in its place will be a sentence that reflects that arbitrations will be governed by the BX 10000 Series.

Chapter XXXIV (Minor Rule Violations) is being amended to add a reference to Chapter X of the proposed, Grandfathered BOX Trading Rules. This section provides for rule violations deemed minor in nature. In addition, for the reasons noted above, references to the 9000 Series governing discipline and BX Rule 9216 regarding Acceptance, Waiver and Consent are being amended, as appropriate.

BX is terminating its delegation of authority to BOXR, and as such is proposing to remove the Delegation of Authority language from the Grandfathered Rules. Chapter XXXVI of the Grandfathered Rules sets forth the Rules under which BX has granted BOXR authority to carry out certain regulatory responsibilities over the BOX facility. BX has always retained the ultimate regulatory responsibility for the oversight of the BOX facility with oversight conducted by BX's Regulatory Oversight Committee. For any BOX legacy matter, all regulatory responsibilities will be carried out in the manner set forth in the BX By-Laws and the BX Rules, and with continued oversight by the BX Regulatory Oversight Committee. Finally, Chapter XXXIX, Affiliation with NASDAQ OMX Group, Inc., Section 2(c) is being removed, as BOX will no longer be a facility of the Exchange.

BOX Trading Rules

BX also proposes to incorporate the Trading Rules of the Boston Options Exchange Group LLC, with the amendments described below, (''BOX Trading Rules'') into the Grandfathered Rules and locate them at end of current Grandfathered Rules by creating a new section of the Grandfathered Rules called Grandfathered BOX Trading Rules. As stated above, these rules apply to activities of the BOX Options Participants and associated persons subject to the jurisdiction of the Exchange, during the time period that BOX was a facility of the Exchange. As proposed, a new paragraph will be added to the Grandfathered BOX Trading Rules section, before the General Provisions, to set forth that BOX is no longer a facility of the Exchange. These Grandfathered BOX Trading Rules and the applicable Grandfathered BSE Rules continue to apply to the activities of BOX and Options Participants and associated persons subject to the jurisdiction of the Exchange that occurred during the time that BOX was a facility of the Exchange. Terms below must be read in context regarding activities which occurred when BOX was a facility of the Exchange and also regarding activities relating to continued Exchange jurisdiction, such as disciplinary matters.

As proposed, certain definitions found in Section 1 of the Grandfathered BOX Trading Rules will be amended to reflect that BOX is no longer a facility of the Exchange: (6) The term ''BOX'' will mean the Boston Options Exchange or Boston Stock Exchange Options Exchange, *formerly* an options trading facility of the Exchange under Section 3(a)(2) of the Act; (7) the term ''BOX Rules'' or ''Rules of BOX'' will mean the Rules of the former Boston Options Exchange Facility. Where applicable, it may mean Grandfathered BOX Rules, in

[10] *See e.g.,* Chapter XXXIII, Section 7 regarding BEACON Liability.

[11] The BOXR Sanctioning Guidelines are not set forth in the rules, but are part of the policies and procedures that are followed once a determination has been made that sanctions are to be imposed.

[12] Not every section of these procedures may apply to former BOX Participants. For example, because there will be no on-going activities, there may be no reason for a former BOX Participant to avail itself of the 9600 Series regarding exemptions.

context, but it may also mean the rules in place while BOX was a facility of the Exchange; (9) the term ''BOXR'' or ''BOX Regulation'' will mean Boston Options Exchange Regulation LLC, which was a wholly-owned subsidiary of the Exchange; where applicable for the Grandfathered BOX Rules, it may mean the Exchange; (10) the term ''BSE Rules'' will mean the Grandfathered Rules; (24) the term ''Exchange'' will mean the Boston Stock Exchange, now known as NASDAQ OMX BX, Inc.; (42) the term ''Options Participant'' or ''Participant'' or ''Former BOX Options Participant'' is being amended to reflect that the Participants *were* registered with the Exchange pursuant to the BOX Trading Rules; (61) the term ''Rules of the Exchange'' will mean the BX By-Laws, where applicable, the BX Rules and the Grandfathered Rules, including these Grandfathered BOX Rules.

Prior to being granted BOX Options Participant status, by executing the Options Market Participation Agreement, every Participant acknowledged that the Participant and its associated persons are subject to the oversight and jurisdiction of the Exchange. Rather than solely relying upon an open ended contractual jurisdiction provision, as proposed Chapter II, Section I (h) is being added to codify that acknowledgment in the Rules and add a two year provision for filing a complaint that is similar to that set forth in the BX Rules, providing as follows: ''A Participant or an person associated with a Participant that has had its Participant status terminated or revoked shall continue to be subject to the filing of a complaint under these Rules based upon conduct that commenced prior to the effective date of the Participant's termination of its Participation. Any such complaint, however, shall be filed within two years after the effective date of resignation, cancellation, or revocation.'' This provision is similar to that found in BX Rules 1012 and 1031.

Outdated references to the specific sections of the Constitution that are unnecessary are being removed. To avoid confusion, now that certain sections of the BX Rules are being relied upon, certain references to the ''Rules of the Exchange'' will be referred to as the BSE Rules. For the reasons described above, references to Grandfathered BSE Chapter XXX will be removed and instead the BX Rule 9000 Series will apply.[13] References to Grandfathered BSE Rules, Chapter XXX in proposed Grandfathered BOX Trading Rules, Chapter X, Section 1, regarding the procedures to be followed for imposing a Minor Rule Violation Plan fine will be replaced by BX Rule 9216, and, where appropriate, BX Rule 9000 Series, which will govern this process going forward. The Minor Rule Violation penalties and the references to underlying Grandfathered BOX Trading Rules governed by the Minor Rule Violation Plan will remain in the proposed Grandfathered BOX Trading Rules, Chapter X, Section 2 and will not be added into the BX Rules. Similarly, procedures to be followed for letters of Acceptance, Waiver and Consent will be set forth in BX Rule 9216; therefore, the section regarding Acceptance, Waiver and Consent procedures found in Grandfathered BOX Trading Rules, Chapter X, Section 3 is being removed. In addition, the Appendix is being amended to reflect that BOX will no longer be facility of the Exchange, to remove outdated references to the former Constitution, to refer to the the former Incorporated Constitution Provisions where appropriate, and to reflect that the disciplinary and arbitration procedures will be found in the 9000 and 1000 Series of the BX Rules.

BOXR Operating Agreement and BOXR By-Laws

BX is proposing to eliminate the BOXR By-Laws and Operating Agreement in their entirety. As stated above, once BOX ceases to be a facility of the Exchange, BOXR will no longer have a purpose, as BOXR's sole purpose was to regulate the BOX facility. BOXR LLC will be merged into its parent, BX.

NASDAQ OMX BX Rules and By-Laws

In addition, BX proposes to amend the Rules of BX. Specifically, Rule 0015 (b) provides that the Options Rules (including the Grandfathered Rules) shall apply to all Options Participants, and will be amended to: (i) Remove the reference to Options Rules as there will no longer be a set of rules called Options Rules; (ii) reflect that the 9000 Series and the 10000 Series of these Rules (meaning the BX Rules) and the Grandfathered Rules shall apply to former BOX Options Participants and associated persons for activities that occurred during the time that BOX was a facility of the Exchange; and (iii) remove the provision that ''[t]he Equity Rules shall apply to Options Participants only if they are also members of the Exchange,'' because, as will be explained below, as proposed, the term Options Participant is being removed from the rules.

As proposed, the following definitions found in Rule 0120 will be amended. Specifically, Definition (q) ''Options Rules'' will be reserved. Definition (r) ''Grandfathered Rules'' will be amended to mean the Rules of the Board of Governors of the Boston Stock Exchange, as in effect on the date of the closing of the acquisition of the Exchange by The NASDAQ OMX Group, Inc. and as such rules may be subsequently amended, to the extent that such rules are applicable to BOX and to Options Participants that occurred while BOX was a facility of the Exchange. The Grandfathered Rules shall also apply to activities of members, members organizations, persons associated with members, and other persons subject to the jurisdiction of the Exchange that occurred prior to the adoption of the Equity Rules. Definitions (s) Options Participant, (t) BOXR, (u) BOX LLC, (v) BOX and (w) BOX Rules will be reserved, because BOX will no longer be a facility of the Exchange. Similarly, as proposed, Article I of the BX By-Laws will be amended to reflect that BOX will no longer be a facility of the Exchange. Specifically, Sections (d) through (h) will now be reserved, as these definitions are no longer needed once BOX ceases to be a facility of BX. Section 4.3(a) regarding qualifications for the Board of Directors will be amended to remove the requirement that one Industry Director shall represent BOX Participants as that is no longer needed. Subsection (b) will be removed as it references actions which occurred after the adoption of the By-Laws after the NASDAQ OMX Group, Inc. acquired the Boston Stock Exchange. Finally, Section 4.14, Committees Not Composed Solely of Directors, will be amended to remove the manner in which an Industry Director who is a representative of BOX Participants is nominated to the Board as it is no longer needed.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[14] in general, and Section 6(b)(5) of the Act,[15] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free

[13] *See* Proposed Grandfathered BOX Trading Rules, Chapter III, Sections 8(c) and 13, Chapter VI, Section 4, and Chapter VIII, Section 5.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

and open market and a national market system and, in general, to protect investors and the public interest. Further, BX believes that the proposal is consistent with Sections 6(b)(1) of the Act, which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the exchange. Specifically, the proposal is intended to address the relationship between BX and the former BOX Participants that will exist for BOX legacy matters once BOX is no longer a facility of BX. The disciplinary procedures provide for fair procedures for the discipline of the former BOX Participants and persons who were associated persons of former BOX Participants for activities which occurred while BOX was a facility of the Exchange, consistent with Section 6(b)(7) of the Act.[16] BX believes that with the removal of the BOX-related provisions the composition and selection of the BX Board of Directors will continue to satisfy the requirement in Section 6(b)(3) of the Act[17] that the rules of the Exchange provide for the fair representation of members in the selection of directors and administration of the Exchange.

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)[18] of the Act and Rule 19b–4(f)(6)[19] thereunder. The proposed rule change effects a change that (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) 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; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.[20]

The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon the facility termination effective date. The Exchange believes that it will avoid potential confusion for BOX Options Participants that may result from a new set of rules pertaining to the new BOX Exchange, to have to the changes described above in effect on the facility termination effective date.

Because the new BOX Exchange is now operating as a national securities exchange and BOX is now a facility of the new BOX Exchange and not of BX,[21] the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and allow the Exchange to reflect this change in its rules on the facility termination effective date.[22]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2012–036 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–2012–036. 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 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–2012–036 and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12441 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78f(b)(7).

[17] 15 U.S.C. 78f(b)(7).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii). BX provided the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which the Exchange filed the proposed rule change, or such shorter time as designated by the Commission.

[21] *See supra* note 5. The new BOX Exchange became operational on May 14, 2012.

[22] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67008; File No. SR–C2–2012–011]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to the Adoption of a Disaster Recovery Rule

May 17, 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 May 14, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

C2 proposes to adopt a disaster recovery facility. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt new Rule 6.45, which would allow for the operation of a Disaster Recovery Facility (''DRF'') in the event a disaster or other unusual circumstance renders the C2 trading system inoperable. The purpose of the DRF is to allow C2 to continue to trade exclusively-listed option classes until the Exchange's main trading system is again available (currently, only one exclusively-listed product trades on C2: Standard & Poor's 500 Index options with third-Friday-of-the-month expiration dates for which the exercise settlement value is based on the index value derived from the closing prices of component securities (SPXPM)). An exclusively-listed option is an option that trades exclusively on C2 because C2 has an exclusive license to list and trade such option, or has proprietary rights in the interest underlying the option.[3] The DRF will provide a venue for exclusively-listed options to continue to trade so investors may open and close positions in those options in the event the main C2 system becomes inoperable.

C2 intends to utilize hardware located in the Chicago Board Options Exchange, Incorporated (''CBOE'') building in Chicago, IL to run the DRF. C2's main trade engine is currently located on the East coast. As proposed, trading on the DRF would be identical to trading on C2. All C2 trading rules would continue to apply (including rules applicable to market-making) and the C2 fee schedule would continue to apply. Thus, the transition to the DRF would be relatively seamless for users. The Exchange is conducting testing with C2 Trading Permit Holders (''TPHs'') to facilitate their readiness to trade on the DRF (a certification process is also employed). To that end, DRF test plan documents are currently available to all TPHs.[4]

The Exchange expects the DRF to be continuously usable and available, as needed. In connection with the commencement of trading on the DRF, C2 would announce its activation and identify the classes that would be available for trading. As previously mentioned, all classes traded via the DRF would be subject to all applicable C2 rules including non-trading rules. As soon as C2's main trading system becomes operable, the Exchange would resume trading on the main C2 platform and cease trading on the DRF.

Proposed Rule 6.45 also provides that TPHs shall take such action as instructed by the Exchange to accommodate the Exchange's ability to trade options via the DRF. As mentioned above, such actions will include an Exchange certification process to ensure that TPHs are prepared to migrate to the DRF when necessary. All C2 TPHs, including those that may only be a C2 TPH (and not a CBOE trading permit holder) will have access to the DRF.

The Exchange expects the DRF to be operational shortly, and it will be continuously maintained so that it would always be available if needed. The Exchange has written supervisory procedures that cover activation and use of the DRF. To the extent trading on the DRF is ever necessary, those procedures will help ensure that the transition to the DRF is handled efficiently and effectively. Lastly, the Exchange represents that it and CBOE have the necessary systems capacity to handle trading associated with the DRF including the extra quotation traffic that would be processed through the hardware located in the CBOE building.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') for this proposed rule change is the requirement under Section 6(b)(5)[5] that an exchange have rules that are designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to promote just and equitable principles of trade, and 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 providing a venue for C2 TPHs to continue to trade options that are only available for trading on C2 in the event the C2 system is rendered inoperable, facilitates transactions in securities and helps remove impediments to a free and open market and a national market system. This protects investors and serves the public interest in that investors with open positions will have the ability to trade out of those positions if C2 is unavailable, which is also consistent with Section 6(b) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exclusively-listed options are different than ''singly-listed options'' which are options that are not exclusively-listed options but that are listed by an exchange and by not any other national securities exchange. C2 does not currently trade any singly-listed options and will take measures to ensure that it does not trade singly-listed options in the future.

[4] Completion of the test plan generally prepares a TPH to be ready to trade on the DRF if necessary.

[5] 15 U.S.C. 78f(b)(5).

appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–C2–2012–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2012–011. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2012–011 and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12440 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67006; File No. SR–NYSEAmex–2012–30]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending Its Program That Allows Transactions To Take Place at a Price That Is Below $1 Per Option Contract Until May 31, 2013

May 17, 2012.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on May 10, 2012, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend its program that allows transactions to take place at a price that is below $1 per option contract until May 31, 2013. The text of the proposed rule change is available at the Exchange, *www.nyse.com,* the Commission's Public Reference Room, and *www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the Pilot Program[4] under Rule 968NY to allow accommodation transactions (''Cabinet Trades'') to take place at a price that is below $1 per option contract to May 31, 2013. The Exchange proposes to extend the program for one year.

An ''accommodation'' or ''cabinet'' trade refers to trades in listed options on the Exchange that are worthless or not actively traded. Cabinet trading is generally conducted in accordance with the Exchange Rules, except as provided in Exchange Rule 968NY Accommodation Transactions (Cabinet Trades), which sets forth specific procedures for engaging in cabinet trades. Rule 968NY currently provides for cabinet transactions to occur via open outcry at a cabinet price of a $1 per option contract in any options series open for trading in the Exchange, except that the Rule is not applicable to trading in option classes participating in the Penny Pilot Program. Under the procedures, bids and offers (whether opening or closing a position) at a price of $1 per option contract may be

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 63475 (December 8, 2010), 75 FR 77932 (December 14, 2010) (SR–NYSEAmex–2010–114).

represented in the trading crowd by a Floor Broker or by a Market-Maker or provided in response to a request by a Trading Official, a Floor Broker or a Market-Maker, but must yield priority to all resting orders in the Cabinet (those orders held by the Trading Official, and which resting cabinet orders may be closing only). So long as both the buyer and the seller yield to orders resting in the cabinet book, opening cabinet bids can trade with opening cabinet offers at $1 per option contract.

The Exchange has temporarily amended the procedures through June 1, 2012 to allow transactions to take place in open outcry at a price of at least $0 but less than $1 per option contract. These lower priced transactions are permitted to be traded pursuant to the same procedures applicable to $1 cabinet trades, except that (i) bids and offers for opening transactions are only permitted to accommodate closing transactions in order to limit use of the procedure to liquidations of existing positions, and (ii) the procedures are also made available for trading in option classes participating in the Penny Pilot Program.[5] The Exchange believes that allowing a price of at least $0 but less than $1 better accommodates the closing of options positions in series that are worthless or not actively traded, particularly due to recent market conditions which have resulted in a significant number of series being out-of-the-money. For example, a market participant might have a long position in a call series with a strike price of $100 and the underlying stock might be trading at $30. In such an instance, there might not otherwise be a market for that person to close-out the position even at the $1 cabinet price (e.g., the series might be quoted no bid).

As with other accommodation liquidations under Rule 968NY, transactions that occur for less than $1 will not be disseminated to the public on the consolidated tape. In addition, as with other accommodation liquidations under Rule 968NY the transactions will be exempt from the Consolidated Options Audit Trail (''COATS'') requirements of Exchange Rule 955NY Order Format and System Entry Requirements. However, the Exchange will maintain quotation, order and transaction information for the transactions in the same format as the COATS data is maintained. In this regard, all transactions for less than $1 must be reported to the Exchange following the close of each business day.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[6] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5)[7] in particular in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that allowing for liquidations at a price less than $1 per option contract will better facilitate the closing of options positions that are worthless or not actively trading, especially in Penny Pilot issues where Cabinet Trades are not otherwise permitted.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii)[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving operative delay as of June 1, 2012 is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative on June 1, 2012.[14]

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

[5] Currently the $1 cabinet trading procedures are limited to options classes traded in $0.05 or $0.10 standard increment. The $1 cabinet trading procedures are not available in Penny Pilot Program classes because in those classes an option series can trade in a standard increment as low as $0.01 per share (or $1.00 per option contract with a 100 share multiplier). Because the temporary procedures allow trading below $0.01 per share (or $1.00 per option contract with a 100 share multiplier), the procedures are available for all classes, including those classes participating in the Penny Pilot Program.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

No. SR–NYSEAmex–2012–30 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 No. SR–NYSEAmex–2012–30. 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 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–NYSEAmex–2012–30 and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12439 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67005; File No. SR–NYSEArca–2012–43]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending Its Program That Allows Transactions To Take Place at a Price That Is Below $1 Per Option Contract Until May 31, 2013

May 17, 2012.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on May 10, 2012, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend its program that allows transactions to take place at a price that is below $1 per option contract until May 31, 2013. The text of the proposed rule change is available at the Exchange, *www.nyse.com*, the Commission's Public Reference Room, and *www.sec.gov*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the Pilot Program[4] under Rule 6.80 to allow accommodation transactions (''Cabinet Trades'') to take place at a price that is below $1 per option contract to May 31, 2013. The Exchange proposes to extend the program for one year.

An ''accommodation'' or ''cabinet'' trade refers to trades in listed options on the Exchange that are worthless or not actively traded. Cabinet trading is generally conducted in accordance with the Exchange Rules, except as provided in Exchange Rule 6.80 Accommodation Transactions (Cabinet Trades), which sets forth specific procedures for engaging in cabinet trades. Rule 6.80 currently provides for cabinet transactions to occur via open outcry at a cabinet price of a $1 per option contract in any options series open for trading in the Exchange, except that the Rule is not applicable to trading in option classes participating in the Penny Pilot Program. Under the procedures, bids and offers (whether opening or closing a position) at a price of $1 per option contract may be represented in the trading crowd by a Floor Broker or by a Market-Maker or provided in response to a request by a Trading Official, a Floor Broker or a Market-Maker, but must yield priority to all resting orders in the Cabinet (those orders held by the Trading Official, and which resting cabinet orders may be closing only). So long as both the buyer and the seller yield to orders resting in the cabinet book, opening cabinet bids can trade with opening cabinet offers at $1 per option contract.

The Exchange has temporarily amended the procedures through June 1, 2012 to allow transactions to take place in open outcry at a price of at least $0 but less than $1 per option contract. These lower priced transactions are permitted to be traded pursuant to the same procedures applicable to $1 cabinet trades, except that (i) bids and offers for opening transactions are only permitted to accommodate closing transactions in order to limit use of the procedure to liquidations of existing positions, and (ii) the procedures are also made available for trading in option classes participating in the Penny Pilot

[4] *See* Securities Exchange Act Release No. 63476 (December 8, 2010), 75 FR 77930 (December 14, 2010) (SR–NYSE Arca–2010–109).

Program.[5] The Exchange believes that allowing a price of at least $0 but less than $1 better accommodates the closing of options positions in series that are worthless or not actively traded, particularly due to recent market conditions which have resulted in a significant number of series being out-of-the-money. For example, a market participant might have a long position in a call series with a strike price of $100 and the underlying stock might be trading at $30. In such an instance, there might not otherwise be a market for that person to close-out the position even at the $1 cabinet price (e.g., the series might be quoted no bid).

As with other accommodation liquidations under Rule 6.80, transactions that occur for less than $1 will not be disseminated to the public on the consolidated tape. In addition, as with other accommodation liquidations under Rule 6.80, the transactions will be exempt from the Consolidated Options Audit Trail (''COATS'') requirements of Exchange Rule 6.67 Order Format and System Entry Requirements. However, the Exchange will maintain quotation, order and transaction information for the transactions in the same format as the COATS data is maintained. In this regard, all transactions for less than $1 must be reported to the Exchange following the close of each business day.

2. Statutory Basis

The Exchange believes that this proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act'')[6], in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 Exchange believes that allowing for liquidations at a price less than $1 per option contract will better facilitate the closing of options positions that are worthless or not actively trading, especially in Penny Pilot issues where Cabinet Trades are not otherwise permitted.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b-4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii)[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving operative delay as of June 1, 2012 is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative on June 1, 2012.[14]

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 No. SR–NYSEArca–2012–43 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 No. SR–NYSEArca–2012–43. 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

[5] Currently the $1 cabinet trading procedures are limited to options classes traded in $0.05 or $0.10 standard increment. The $1 cabinet trading procedures are not available in Penny Pilot Program classes because in those classes an option series can trade in a standard increment as low as $0.01 per share (or $1.00 per option contract with a 100 share multiplier). Because the temporary procedures allow trading below $0.01 per share (or $1.00 per option contract with a 100 share multiplier), the procedures are available for all classes, including those classes participating in the Penny Pilot Program.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 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–NYSEArca–2012–43 and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12438 Filed 5–22–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67014; File No. SR–BX–2012–034]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change With Respect to the Authority of the Exchange or NASDAQ Execution Services to Cancel Orders When a Technical or System Issue Occurs and To Describe the Operation of an Error Account

May 17, 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 May 11, 2012, NASDAQ OMX BX, Inc. (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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.

[15] 17 CFR 200.30–3(a)(12).

[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

BX proposes a rule change with respect to the authority of the Exchange or NASDAQ Execution Services (''NES'') to cancel orders when a technical or system issue occurs and to describe the operation of an error account for NES. BX will implement the proposed change upon approval by the Commission. The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com/,* at BX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4758 by adding a new paragraph (d) that addresses the authority of the Exchange or NES to cancel orders when a technical or systems issue occurs and to describe the operation of an error account for NES.[3]

NES is the approved routing broker of the Exchange, subject to the conditions listed in Rule 4758. The Exchange relies on NES to provide outbound routing services from itself to routing destinations of NES (''routing destinations'').[4] When NES routes orders to a routing destination, it does so by sending a corresponding order in its own name to the routing destination. In the normal course, routed orders that are executed at routing destinations are submitted for clearance and settlement in the name of NES, and NES arranges for any resulting securities positions to be delivered to the member that submitted the corresponding order to the Exchange. From time to time, however, the Exchange and NES encounter situations in which it becomes necessary to cancel orders and resolve error positions.[5]

Examples of Circumstances That May Lead to Canceled Orders

A technical or systems issue may arise at NES, a routing destination, or the Exchange that may cause the Exchange or NES to take steps to cancel orders if the Exchange or NES determines that such action is necessary to maintain a fair and orderly market. The examples set forth below describe some of the circumstances in which the Exchange or NES may decide to cancel orders.

Example 1. If NES or a routing destination experiences a technical or systems issue that results in NES not receiving responses to immediate or cancel (''IOC'') orders that it sent to the routing destination, and that issue is not

[3] NES is a facility of the Exchange. Accordingly, under Rule 4758, the Exchange is responsible for filing with the Commission rule changes and fees relating to NES's functions. In addition, the Exchange is using the phrase ''NES or the Exchange'' in this rule filing to reflect the fact that a decision to take action with respect to orders affected by a technical or systems issue may be made in the capacity of NES or the Exchange depending on where those orders are located at the time of that decision.

From time to time, the Exchange also uses non-affiliate third-party broker-dealers to provide outbound routing services (*i.e.,* third-party Routing Brokers). In those cases, orders are submitted to the third-party Routing Broker through NES, the third-party Routing Broker routes the orders to the routing destination in its name, and any executions are submitted for clearance and settlement in the name of NES so that any resulting positions are delivered to NES upon settlement. As described above, NES normally arranges for any resulting securities positions to be delivered to the member that submitted the corresponding order to the Exchange. If error positions (as defined in proposed Rule 4758(d)(2)) result in connection with the Exchange's use of a third-party Routing Broker for outbound routing, and those positions are delivered to NES through the clearance and settlement process, NES would be permitted to resolve those positions in accordance with proposed Rule 4758(d). If the third-party Routing Broker received error positions in connection with its role as a routing broker for the Exchange, and the error positions were not delivered to NES through the clearance and settlement process, then the third-party Routing Broker would resolve the error positions itself, and NES would not be permitted to accept the error positions, as set forth in proposed Rule 4758(d)(2)(B).

[4] The Exchange has authority to receive inbound routes of equities orders by NES from The NASDAQ Stock Market (''NASDAQ'') and the NASDAQ OMX PSX (''PSX'') facility of NASDAQ OMX PHLX. *See* Securities Exchange Act Release Nos. 64090 (March 17, 2011), 76 FR 16462 (March 23, 2011) (SR–BX–2011–007); 65514 (October 7, 2011), 76 FR 63969 (October 14, 2011) (SR–BX–2011–066).

[5] The examples described in this filing are not intended to be exclusive. Proposed Rule 4758(d) would provide general authority for the Exchange or NES to cancel orders in order to maintain fair and orderly markets when technical and systems issues are occurring, and Rule 4758(d) also would set forth the manner in which error positions may be handled by the Exchange or NES. The proposed rule change is not limited to addressing order cancellation or error positions resulting only from the specific examples described in this filing.

resolved in a timely manner, NES or the Exchange would seek to cancel the routed orders affected by the issue.[6] For instance, if NES experiences a connectivity issue affecting the manner in which it sends or receives order messages to or from routing destinations, it may be unable to receive timely execution or cancellation reports from the routing destinations, and NES or the Exchange may consequently seek to cancel the affected routed orders. Once the decision is made to cancel those routed orders, any cancellation that a member submitted to the Exchange on its initial order during such a situation would be honored.[7]

Example 2. If the Exchange experiences a systems issue, the Exchange may take steps to cancel all outstanding orders affected by that issue and notify affected members of the cancellations. In those cases, the Exchange would seek to cancel any routed orders related to the members' initial orders.

Examples of Circumstances That May Lead to Error Positions

In some instances, the technical or systems issue at NES, a routing destination, the Exchange, or a non-affiliate third party Routing Broker may also result in NES acquiring an error position that it must resolve. The examples set forth below describe some of the circumstances in which error positions may arise.

Example A. Error positions may result from routed orders that the Exchange or NES attempts to cancel but that are executed before the routing destination receives the cancellation message or that are executed because the routing destination is unable to process the cancellation message. Using the situation described in Example 1 above, assume that the Exchange seeks to cancel orders routed to a routing destination because it is not receiving timely execution or cancellation reports from the routing destination. In such a situation, NES may still receive executions from the routing destination after connectivity is restored, which it would not then allocate to members because of the earlier decision to cancel the affected routed orders. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example B. Error positions may result from an order processing issue at a routing destination. For instance, if a routing destination experienced a systems problem that affects its order processing, it may transmit back a message purporting to cancel a routed order, but then subsequently submit an execution of that same order (*i.e.,* a locked-in trade) to The Depository Trust & Clearing Corporation (''DTCC'') for clearance and settlement. In such a situation, the Exchange would not then allocate the execution to the member because of the earlier cancellation message from the routing destination. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example C. Error positions may result if NES receives an execution report from a routing destination but does not receive clearing instructions for the execution from the routing destination. For instance, assume that a member sends the Exchange an order to buy 100 shares of ABC stock, which causes NES to send an order to a routing destination that is subsequently executed, cleared, and closed out by that routing destination, and the execution is ultimately communicated back to that member. On the next trading day (T+1), if the routing destination does not provide clearing instructions for that execution, NES would still be responsible for settling that member's purchase, but would be left with a short position in its error account.[8] NES would resolve the position in the manner described below.

Example D. Error positions may result from a technical or systems issue that causes orders to be executed in the name of NES that are not related to NES's function as the Exchange's routing broker and are not related to any corresponding orders of members. As a result, NES would not be able to assign any positions resulting from such an issue to members. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example E. Error positions may result from a technical or systems issue through which the Exchange does not receive sufficient notice that a member that has executed trades on the Exchange has lost the ability to clear trades through DTCC. In such a situation, the Exchange would not have valid clearing information, which would prevent the trade from being automatically processed for clearance and settlement on a locked-in basis. Accordingly, NES would assume that member's side of the trades so that the counterparties can settle the trades. NES would post those positions into its error account and resolve the positions in the manner described below.

Example F. Error positions may result from a technical or systems issue at the Exchange that does not involve routing of orders through NES. For example, a situation may arise in which a posted quote/order was validly cancelled but the system erroneously matched that quote/order with an order that was seeking to access it. In such a situation, NES would have to assume the side of the trade opposite the order seeking to access the cancelled quote/order. NES would post the position in its error account and resolve the position in the manner described below.

In the circumstances described above, neither the Exchange nor NES may learn about an error position until T+1, either: (1) during the clearing process when a routing destination has submitted to DTCC a transaction for clearance and settlement for which NES never received an execution confirmation; or (2) when a routing destination does not recognize a transaction submitted by NES to DTCC for clearance and settlement. Moreover, the affected members' trade may not be nullified absent express authority under Exchange rules.[9]

Proposed Amendments to Rule 4758

The Exchange proposes to amend Rule 4758 to add new paragraph (d) to address the cancellation of orders due to technical or systems issues and the use of an error account by NES.

Specifically, under paragraph (d)(1) of the proposed rule, the Exchange or NES would be expressly authorized to cancel orders as may be necessary to maintain fair and orderly markets if a technical or systems issue occurred at the Exchange, NES, or a routing destination.[10] The

[6] In a normal situation (*i.e.,* one in which a technical or systems issue does not exist), NES should receive an immediate response to an IOC order from a routing destination, and would pass the resulting fill or cancellation on to the Exchange member. After submitting an order that is routed to a routing destination, if a member sends an instruction to cancel that order, the cancellation is held by the Exchange until a response is received from the routing destination. For instance, if the routing destination executes that order, the execution would be passed on to the member and the cancellation instruction would be disregarded.

[7] If a member did not submit a cancellation to the Exchange, however, that initial order would remain ''live'' and thus be eligible for execution or posting on the Exchange, and neither the Exchange nor NES would treat any execution of that initial order or any subsequent routed order related to that initial order as an error.

[8] To the extent that NES incurred a loss in covering its short position, it would submit a reimbursement claim to that routing destination.

[9] *See, e.g.,* Rule 11890 (regarding clearly erroneous executions).

[10] Such a situation may not cause the Exchange to declare self-help against the routing destination pursuant to Rule 611 of Regulation NMS. If the Exchange or NES determines to cancel orders

Continued

Exchange or NES would be required to provide notice of the cancellation to affected members as soon as practicable.

Paragraph (d)(2) of the proposed rule would permit NES to maintain an error account for the purpose of addressing positions that result from a technical or systems issue at NES, the Exchange, a routing destination, or a non-affiliate third-party Routing Broker that affects one or more orders (''error positions''). By definition, an error position would not include any position that results from an order submitted by a member to the Exchange that is executed on the Exchange and automatically processed for clearance and settlement on a locked-in basis. NES also would not be permitted to accept any positions in its error account from an account of a member and could not permit any member to transfer any positions from the member's account to NES's error account under the proposed rule.[11] However, if a technical or systems issue results in the Exchange not having valid clearing instructions for a member to a trade, NES may assume that member's side of the trade so that the trade can be processed for clearance and settlement on a locked-in basis.[12]

Under paragraph (d)(3), in connection with a particular technical or systems issue, NES or the Exchange would be permitted to either (i) assign all resulting error positions to members, or (ii) have all resulting error positions liquidated, as described below. Any determination to assign or liquidate error positions, as well as any resulting assignments, would be required to be made in a nondiscriminatory fashion.

NES or the Exchange would be required to assign all error positions resulting from a particular technical or systems issue to the applicable members affected by that technical or systems issue if NES or the Exchange:

- Determined that it has accurate and sufficient information (including valid clearing information) to assign the positions to all of the applicable members affected by that technical or systems issue;
- Determined that it has sufficient time pursuant to normal clearance and settlement deadlines to evaluate the information necessary to assign the positions to all of the applicable members affected by that technical or systems issue; and
- Had not determined to cancel all orders affected by that technical or systems issue.

For example, a technical or systems issue of limited scope or duration may occur at a routing destination, and the resulting trades may be submitted for clearance and settlement by such routing destination to DTCC. If there were a small number of trades, there may be sufficient time to match positions with member orders and avoid using the error account.

There may be scenarios, however, where NES determines that it is unable to assign all error positions resulting from a particular technical or systems issue to all of the affected members, or determines to cancel all affected routed orders. For example, in some cases, the volume of questionable executions and positions resulting from a technical or systems issue might be such that the research necessary to determine which members to assign those executions to could be expected to extend past the normal settlement cycle for such executions. Furthermore, if a routing destination experiences a technical or systems issue after NES has transmitted IOC orders to it that prevents NES from receiving responses to those orders, NES or the Exchange may determine to cancel all routed orders affected by that issue. In such a situation, NES or the Exchange would not pass on to the members any executions on the routed orders received from the routing destination.

The proposed rule also would require NES to liquidate error positions as soon as practicable.[13] In liquidating error positions, NES would be required to provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer and could not attempt to exercise any influence or control over the timing or methods of trading to liquidate the error positions.[14] NES also would be required to establish and enforce policies and procedures reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer and NES/the Exchange associated with the liquidation of the error positions.

Under proposed paragraph (d)(4), NES and the Exchange would be required to make and keep records to document all determinations to treat positions as error positions and all determinations for the assignment of error positions to members or the liquidation of error positions, as well as records associated with the liquidation of error positions through the third-party broker-dealer.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[15] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange believes that this proposal is in keeping with those principles since NES's or the Exchange's ability to cancel orders during a technical and systems issue and to maintain an error account

routed to a routing destination under proposed Rule 4758(d), but does not declare self-help against that routing destination, the Exchange would continue to be subject to the trade-through requirements in Rule 611 with respect to that routing destination.

[11] The purpose of this provision is to clarify that NES may address error positions under the proposed rule that are caused by a technical or systems issue, but that NES may not accept from a member positions that are delivered to the member through the clearance and settlement process, even if those positions may have been related to a technical or systems issue at NES, the Exchange, a routing destination of NES, or a non-affiliate third-party Routing Broker. This provision would not apply, however, to situations like the one described in Example C in which NES incurred a short position to settle a member's purchase, as the member did not yet have a position in its account as a result of the purchase at the time of NES's action (i.e., NES's action was necessary for the purchase to settle into the member's account). Similarly, the provision would not apply to situations like the one described in Example F, where a system issue caused one member to receive an execution for which there was not an available contraparty, in which case action by NES would be necessary for the position to settle into that member's account. Moreover, to the extent a member receives locked-in positions in connection with a technical or systems issue, that member may seek to rely on BX Rule 4626 if it experiences a loss. That rule provides members with the ability to file claims against the Exchange for ''losses directly resulting from the [NASDAQ OMX BX Equities Market] System's actual failure to correctly process an order, Quote/Order, message, or other data, provided the NASDAQ OMX BX Equities Market has acknowledged receipt of the order, Quote/Order, message, or data.''

[12] *See* Example E above.

[13] If NES determines in connection with a particular technical or systems issue that some error positions can be assigned to some affected members but other error positions cannot be assigned, NES would be required under the proposed rule to liquidate all such error positions (including those positions that could be assigned to the affected members).

[14] This provision is not intended to preclude NES from providing the third-party broker with standing instructions with respect to the manner in which it should handle all error account transactions. For example, NES might instruct the broker to treat all orders as ''not held'' and to attempt to minimize any market impact on the price of the stock being traded.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

facilitates the smooth and efficient operations of the market. Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets. Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 4758, would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange. Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process. The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members. The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2012–034 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2012–034. 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 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–2012–034, and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12472 Filed 5–22–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67007; File No. SR–BX–2012–033]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Institute an Excess Order Fee

May 17, 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 May 14, 2012, NASDAQ OMX BX, Inc. (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

BX proposes to institute an excess order fee. BX will implement the proposed change on June 1, 2012. The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com/*, at BX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BX is concerned that the inefficient order entry practices of certain market participants may be placing excessive burdens on the systems of BX and its members and may negatively impact the usefulness and life cycle cost of market data.[3] Market participants that flood the market with orders that are rapidly cancelled or that are priced away from the inside market do little to support meaningful price discovery, and in fact may create investor confusion about the extent of trading interest in a stock. In extreme instances, inefficient order entry may constitute ''layering,'' the manipulative practice of using multiple orders at different price levels to move the price of a stock. While BX has an active program to detect and prosecute manipulative schemes, including layering,[4] it also believes that market quality can be improved through the imposition of a fee on market participants that engage in extremely inefficient order entry practices. Because BX believes that inefficient order entry is a problem associated with a relatively small number of market participants, and is therefore not a pervasive characteristic of today's markets, the impact of the fee will be narrow. In fact, it is BX's expectation that the fee will encourage potentially affected market participants to modify their order entry practices in order to avoid the fee, thereby improving the market for all participants. Accordingly, BX does not expect to earn significant revenues from the fee.

The fee will be imposed on market participant identifiers (''MPID'') that have characteristics indicative of inefficient order entry practices. In general, the determination of whether to impose the fee on a particular MPID will be made by calculating the ratio between (i) entered orders, weighted by the distance of the order from the national best bid or offer (''NBBO''), and (ii) orders that execute in whole or in part. The fee is imposed on MPIDs with an ''Order Entry Ratio'' of more than 100. The Order Entry Ratio is calculated, and the Excess Order Fee imposed, on a monthly basis.

For each MPID, the Order Entry Ratio is the ratio of (i) the MPID's ''Weighted Order Total'' to (ii) the greater of one (1) or the number of displayed, non-marketable orders[5] sent to BX through the MPID that execute in full or in part.[6] The Weighted Order Total is the number of displayed, non-marketable orders sent to BX through the MPID, as adjusted by a ''Weighting Factor.'' The applicable Weighting Factor is applied to each order based on its price in comparison to the NBBO at the time of order entry:

Order's price versus NBBO at entry	Weighting factor
Less than 0.20% away	0x
0.20% to 0.99% away	1x
1.00% to 1.99% away	2x
2.00% or more away	3x

Thus, in calculating the Weighted Order Total, an order that was more than 2.0% away from the NBBO would be equivalent to three orders that were 0.50% away. Due to the applicable Weighting Factor of 0x, orders entered less than 0.20% away from the NBBO would not be included in the Weighted Order Total, but would be included in the ''executed'' orders component of the Order Entry Ratio if they execute in full or part.[7] MPIDs with a daily average Weighted Order Total of less than 100,000 during the month will not be subject to the Excess Order Fee.[8]

The following example illustrates the calculation of the Order Entry Ratio:

- A member enters 15,000,000 displayed, liquidity-providing orders:
  - 10,000,000 ororders are entered at the NBBO. The Weighting Factor for these orders is 0x.
  - 5,000,000 orders are entered at a price that is 1.50% away from the NBBO. The Weighting Factor for these orders is 2x.
- Of the 15,000,000 orders, 90,000 are executed.
- The Weighted Order Total is $(10{,}000{,}000 \times 0) + (5{,}000{,}000 \times 2) = 10{,}000{,}000$. The Order Entry Ratio is 10,000,000/90,000 = 111.

If an MPID has an Order Entry Ratio of more than 100, the amount of the Order Entry Fee will be calculated by determining the MPID's ''Excess Weighted Orders.'' Excess Weighted Orders are calculated by subtracting (i) the Weighted Order Total that would result in the MPID having an Order Entry Ratio of 100 from (ii) the MPID's actual Weighted Order Total. In the example above, the Weighted Order Total that would result in an Order Entry Ratio of 100 is 9,000,000, since 9,000,000/90,000 = 100. Accordingly, the Excess Weighted Orders would be $10{,}000{,}000 - 9{,}000{,}000 = 1{,}000{,}000$.

The Excess Order Fee charged to the member will then be determined by multiplying the ''Applicable Rate'' by the number of Excess Weighted Orders. The Applicable Rate is determined based on the MPID's Order Entry Ratio:

Order entry ratio	Applicable rate
101–1,000	$0.005
More than 1,000	0.01

In the example above, the Applicable Rate would be $0.005, based on the MPID's Order Entry Ratio of 111. Accordingly, the monthly Excess Order Fee would be $1{,}000{,}000 \times \$0.005 = \$5{,}000$.

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which BX operates or controls, is not designed to

[3] See generally Recommendations Regarding Regulatory Reponses to the Market Events of May 6, 2010, Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, at 11 (February 18, 2011) (''The SEC and CFTC should also consider addressing the disproportionate impact that [high frequency trading] has on Exchange message traffic and market surveillance costs * * *. The Committee recognizes that there are valid reasons for algorithmic strategies to drive high cancellation rates, but we believe that this is an area that deserves further study. At a minimum, we believe that the participants of those strategies should properly absorb the externalized costs of their activity.'').

[4] *Cf.* FINRA Sanctions Trillium Brokerage Services, LLC, Director of Trading, Chief Compliance Officer, and Nine Traders $2.26 Million for Illicit Equities Trading Strategy (September 13, 2010) (available at *http://www.finra.org/Newsroom/NewsReleases/2010/P121951*). The fee proposed in this filing will not in any way substitute for, or result in a diminution of, BX's surveillance program for market manipulation.

[5] The fee focuses on displayed orders since they have the most significant impact on investor confusion and the quality of market data.

[6] Thus, in an extreme case where no orders entered through the MPID executed, this component of the ratio would be assumed to be 1, so as to avoid the impossibility of dividing by zero.

[7] An analogous fee that was recently filed by The NASDAQ Stock Market LLC (''NASDAQ'') includes an exclusion from both components of the ratio for orders sent by market makers in securities in which they are registered, through the MPID applicable to the registration. Although BX rules currently allow for market maker registration, BX does not currently have any registered market makers. Accordingly, BX has not deemed it necessary to adopt a comparable exclusion. In the event that market maker participation in BX increases, BX will evaluate the advisability of adopting an exclusion.

[8] BX believes that this exclusion is reasonable because an MPID with an extremely low volume of entered orders has only a *de minims* impact on the market.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

permit unfair discrimination between customers, issuers, brokers, or dealers.

BX believes that the Order Entry Fee is reasonable because it is designed to achieve improvements in the quality of displayed liquidity and market data that will benefit all market participants. In addition, although the level of the fee may theoretically be very high, the fee is reasonable because market participants may readily avoid the fee by making improvements in their order entry practices that reduce the number of orders they enter, bring the prices of their orders closer to the NBBO, and/or increase the percentage of their orders that execute. For similar reasons, the fee is consistent with an equitable allocation of fees, because although the fee may apply to only a small number of market participants, the fee would be applied to them in order to encourage better order entry practices that will benefit all market participants. Ideally, the fee will be applied to no one, because market participants will adjust their behavior in order to avoid the fee. Finally, BX believes that the fee is not unfairly discriminatory. Although the fee may apply to only a small number of market participants, it will be imposed because of the negative externalities that such market participants impose on others through inefficient order entry practices. Accordingly, BX believes that it is fair to impose the fee on these market participants in order to incentivize them to modify their behavior and thereby benefit the market.

Finally, BX believes that the fee will help to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the fee is designed to reduce the extent of non-actionable orders in the market, thereby promoting greater order interaction, increasing the quality of market data, and inhibiting potentially abusive trading practices.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, BX believes that the fee will constrain market participants from pursuing certain inefficient and potentially abusive trading strategies. To the extent that this change may be construed as a burden on competition, BX believes that it is appropriate in order to further the purposes of Section 6(b)(5) of the Act.[11]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] 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–BX–2012–033 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–2012–033. 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–2012–033, and should be submitted on or before June 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12452 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(a)(ii).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67004; File No. SR–Phlx–2012–64]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Institute an Excess Order Fee

May 17, 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 May 11, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Phlx proposes to institute an Excess Order Fee. Phlx will implement the proposed change on June 1, 2012. The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/phlx/*, at Phlx's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III 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

Phlx is concerned that the inefficient order entry practices of certain market participants may be placing excessive burdens on Phlx's NASDAQ OMX PSX (''PSX'') system and the member organizations that trade on it and may negatively impact the usefulness and life cycle cost of market data.[3] Market participants that flood the market with orders that are rapidly cancelled or that are priced away from the inside market do little to support meaningful price discovery, and in fact may create investor confusion about the extent of trading interest in a stock. In extreme instances, inefficient order entry may constitute ''layering,'' the manipulative practice of using multiple orders at different price levels to move the price of a stock. While Phlx has an active program to detect and prosecute manipulative schemes, including layering,[4] it also believes that market quality can be improved through the imposition of a fee on market participants that engage in extremely inefficient order entry practices. Because Phlx believes that inefficient order entry is a problem associated with a relatively small number of market participants, and is therefore not a pervasive characteristic of today's markets, the impact of the fee will be narrow. In fact, it is Phlx's expectation that the fee will encourage potentially affected market participants to modify their order entry practices in order to avoid the fee, thereby improving the market for all participants. Accordingly, Phlx does not expect to earn significant revenues from the fee.

The fee will be imposed on market participant identifiers (''MPID'') that have characteristics indicative of inefficient order entry practices. In general, the determination of whether to impose the fee on a particular MPID will be made by calculating the ratio between (i) entered orders, weighted by the distance of the order from the national best bid or offer (''NBBO''), and (ii) orders that execute in whole or in part. The fee is imposed on MPIDs with an ''Order Entry Ratio'' of more than 100. The Order Entry Ratio is calculated, and the Excess Order Fee imposed, on a monthly basis.

For each MPID, the Order Entry Ratio is the ratio of (i) the MPID's ''Weighted Order Total'' to (ii) the greater of one (1) or the number of displayed, non-marketable orders[5] sent to PSX through the MPID that execute in full or in part.[6] The Weighted Order Total is the number of displayed, non-marketable orders sent to PSX through the MPID, as adjusted by a ''Weighting Factor.'' The applicable Weighting Factor is applied to each order based on its price in comparison to the NBBO at the time of order entry:

Order's Price versus NBBO at entry	Weighting factor
Less than 0.20% away	0x
0.20% to 0.99% away	1x
1.00% to 1.99% away	2x
2.00% or more away	3x

Thus, in calculating the Weighted Order Total, an order that was more than 2.0% away from the NBBO would be equivalent to three orders that were 0.50% away. Due to the applicable Weighting Factor of 0x, orders entered less than 0.20% away from the NBBO would not be included in the Weighted Order Total, but would be included in the ''executed'' orders component of the Order Entry Ratio if they execute in full or part.[7] MPIDs with a daily average Weighted Order Total of less than 100,000 during the month will not be subject to the Excess Order Fee.[8]

The following example illustrates the calculation of the Order Entry Ratio:

- A member enters 15,000,000 displayed, liquidity-providing orders:
  - 10,000,000 orders are entered at the NBBO. The Weighting Factor for these orders is 0x.
  - 5,000,000 orders are entered at a price that is 1.50% away from the NBBO. The Weighting Factor for these orders is 2x.
- Of the 15,000,000 orders, 90,000 are executed.
- The Weighted Order Total is $(10{,}000{,}000 \times 0) + (5{,}000{,}000 \times 2) = 10{,}000{,}000$. The Order Entry Ratio is $10{,}000{,}000/90{,}000 = 111$

If an MPID has an Order Entry Ratio of more than 100, the amount of the Order Entry Fee will be calculated by determining the MPID's ''Excess Weighted Orders.'' Excess Weighted Orders are calculated by subtracting (i) the Weighted Order Total that would result in the MPID having an Order Entry Ratio of 100 from (ii) the MPID's actual Weighted Order Total. In the example above, the Weighted Order Total that would result in an Order Entry Ratio of 100 is 9,000,000, since 9,000,000/90,000 = 100. Accordingly,

[3] *See generally* Recommendations Regarding Regulatory Reponses to the Market Events of May 6, 2010, Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, at 11 (February 18, 2011) (''The SEC and CFTC should also consider addressing the disproportionate impact that [high frequency trading] has on Exchange message traffic and market surveillance costs. * * *. The Committee recognizes that there are valid reasons for algorithmic strategies to drive high cancellation rates, but we believe that this is an area that deserves further study. At a minimum, we believe that the participants of those strategies should properly absorb the externalized costs of their activity.'').

[4] *Cf.* FINRA Sanctions Trillium Brokerage Services, LLC, Director of Trading, Chief Compliance Officer, and Nine Traders $2.26 Million for Illicit Equities Trading Strategy (September 13, 2010) (available at *http://www.finra.org/Newsroom/News Releases/2010/P121951*). The fee proposed in this filing will not in any way substitute for, or result in a diminution of, Phlx's surveillance program for market manipulation.

[5] The fee focuses on displayed orders since they have the most significant impact on investor confusion and the quality of market data.

[6] Thus, in an extreme case where no orders entered through the MPID executed, this component of the ratio would be assumed to be 1, so as to avoid the impossibility of dividing by zero.

[7] An analogous fee that was recently filed by The NASDAQ Stock Market LLC (''NASDAQ'') includes an exclusion from both components of the ratio for orders sent by market makers in securities in which they are registered, through the MPID applicable to the registration. Because Phlx rules governing PSX currently do not allow for market maker registration, Phlx is not proposing a comparable exemption.

[8] Phlx believes that this exclusion is reasonable because an MPID with an extremely low volume of entered orders has only a *de minimis* impact on the market.

the Excess Weighted Orders would be 10,000,000 − 9,000,000 = 1,000,000.

The Excess Order Fee charged to the member will then be determined by multiplying the ''Applicable Rate'' by the number of Excess Weighted Orders. The Applicable Rate is determined based on the MPID's Order Entry Ratio:

Order entry ratio	Applicable rate
101–1,000	$0.005
More than 1,000	0.01

In the example above, the Applicable Rate would be $0.005, based on the MPID's Order Entry Ratio of 111. Accordingly, the monthly Excess Order Fee would be 1,000,000 × $0.005 = $5,000.

2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Phlx operates or controls, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Phlx believes that the Order Entry Fee is reasonable because it is designed to achieve improvements in the quality of displayed liquidity and market data that will benefit all market participants. In addition, although the level of the fee may theoretically be very high, the fee is reasonable because market participants may readily avoid the fee by making improvements in their order entry practices that reduce the number of orders they enter, bring the prices of their orders closer to the NBBO, and/or increase the percentage of their orders that execute. For similar reasons, the fee is consistent with an equitable allocation of fees, because although the fee may apply to only a small number of market participants, the fee would be applied to them in order to encourage better order entry practices that will benefit all market participants. Ideally, the fee will be applied to no one, because market participants will adjust their behavior in order to avoid the fee. Finally, Phlx believes that the fee is not unfairly discriminatory. Although the fee may apply to only a small number of market participants, it will be imposed because of the negative externalities that such market participants impose on others through inefficient order entry practices. Accordingly, Phlx believes that it is fair to impose the fee on these market participants in order to incentivize them to modify their behavior and thereby benefit the market.

Finally, Phlx believes that the fee will help to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the fee is designed to reduce the extent of non-actionable orders in the market, thereby promoting greater order interaction, increasing the quality of market data, and inhibiting potentially abusive trading practices.

B. Self-Regulatory Organization's Statement on Burden on Competition

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, Phlx believes that the fee will constrain market participants from pursuing certain inefficient and potentially abusive trading strategies. To the extent that this change may be construed as a burden on competition, Phlx believes that it is appropriate in order to further the purposes of Section 6(b)(5) of the Act.[11]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–64 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–64. 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–Phlx–2012–64, and should be submitted on or before June 13, 2012.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(a)(ii).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–12451 Filed 5–22–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Public Notice 7893]

Notice of Termination of United States—Bolivia Bilateral Investment Treaty

AGENCY: Department of State and Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The Government of Bolivia has delivered to the United States a notice of termination for the bilateral investment treaty between the two countries, a termination that will take effect on June 10, 2012. As of June 10, 2012, the treaty will cease to have effect except that it will continue to apply for another 10 years to covered investments existing at the time of termination (June 10, 2012).

FOR FURTHER INFORMATION CONTACT: Michael Tracton, Senior Negotiator for Investment Treaties at the Department of State, at (202) 736–4060, or Jai Motwane, Director for Services and Investment at the Office of the United States Trade Representative, at (202) 395–9580.

SUPPLEMENTARY INFORMATION: Bolivia delivered notice on June 10, 2011, that it was terminating the ''Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment'' (''the Treaty''). Pursuant to the terms of the Treaty, termination is to take effect one year from the date of that notice.

The Treaty was signed in Santiago, Chile on April 17, 1998, and entered into force on June 6, 2001. Under the terms of the Treaty, either Party may terminate the Treaty at the end of an initial ten-year period, or any time thereafter, by giving one year's written notice to the other Party. The provisions of the Treaty will continue to apply for an additional 10 years to all covered investments existing at the time of termination. The Treaty provides protections to cross-border investment between the two countries and the option to resolve investment disputes through international arbitration. The Department of State and the Office of the U.S. Trade Representative, which co-lead the U.S. bilateral investment treaty program, are providing this notice so that existing or potential U.S. investors in Bolivia can factor the termination of the Treaty into their business planning, as appropriate.

Dated: May 14, 2012.

Todd Kushner,

Deputy Director, Department of State.

Dated: May 14, 2012.

Jonathan Kallmer,

Deputy Assistant U.S. Trade Representative, Office of the U.S. Trade Representative.

[FR Doc. 2012–12494 Filed 5–22–12; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Thirtieth Meeting: RTCA Special Committee 206, Aeronautical Information and Meteorological Data Link Services

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

ACTION: Meeting Notice of RTCA Special Committee 206, Aeronautical Information and Meteorological Data Link Services.

SUMMARY: The FAA is issuing this notice to advise the public of the thirtieth meeting of RTCA Special Committee 206, Aeronautical Information and Meteorological Data Link Services.

DATES: The meeting will be held June 11–15, 2012, from 8:30 a.m.–4:00 p.m.

ADDRESSES: The meeting will be held at FAA William J. Hughes Technical Center, Atlantic City, NJ, 08405. Contact Tom Helms by telephone at (202) 747–4396 or email *Helms@avmet.com.*

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. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 206. The agenda will include the following:

June 11, 2012

11 June—Monday

8:30 a.m.
- Opening Plenary
- Chairmen's remarks and host's comments
- Introductions
- Approval of previous meeting minutes
- Review and approve meeting agenda
- Action item review
- RTCA Workspace Update
- Discussion on setting up the MASPS Sub-Group (#4) and a preliminary roadmap
- SG1 report
- SG2 report
- SG3 report
- SAE G–10 AI ARP Briefing to SC–206 Plenary

12:30 p.m. Review ConUse Changes

12 June—Tuesday

08:30 a.m.
- SG1, SG2, and SG3 meetings

13 June—Wednesday

08:30 a.m.
- SG1, SG2, and SG3 meetings

02:00 p.m.
- SG1, SG2, and SG3 meetings or demonstration tour(s)

14 June–Thursday

08:30 a.m.
- SG1, SG2, and SG3 meetings

02:00 p.m.
- SG1, SG2, and SG3 meetings or demonstration tour(s)

15 June—Friday

08:30 a.m.
- Closing Plenary
- SG1 report
- SG2 report
  - Decision to approve the ConUse document for release to the PMC
- SG3 report
- PMC decision on TOR revision
- Action item review
- Future meeting plans and dates
- Other business

01:00 p.m.
- Adjourn (no lunch break)

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.

[13] 17 CFR 200.30–3(a)(12).

Issued in Washington, DC, on May 17, 2012.

John Raper,

Manager, Business Operations Branch, Federal Aviation Administration.

[FR Doc. 2012–12553 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2008–25755]

Operating Limitations at New York LaGuardia Airport; Technical Amendment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Order; Technical Amendment.

SUMMARY: The FAA is correcting a notice of extension to the order published on April 4, 2011 (76 FR 18616). In that notice, the FAA extended the order limiting operations at LaGuardia Airport until the final Congestion Management Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport becomes effective but not later than October 26, 2013. This document corrects errors in the amended order text of that document.

DATES: Effective immediately.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this Order contact: Patricia Bynum, System Operations Services, Air Traffic Organization, Federal Aviation Administration, 600 Independence Avenue SW., Washington, DC 20591; telephone (202) 385–8704; fax (202) 493–4306; email *patricia.bynum@faa.gov.*

For legal questions concerning this Order contact: Robert Hawks, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–7240; facsimile: (202) 267–7971; email: *rob.hawks@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On April 4, 2011, the FAA published a Notice of Extension to the Order Limiting Operations at New York LaGuardia Airport (LGA).[1] As a result of the extension, the Order remains effective until the final Congestion Management Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport (RIN 2120–AJ89) becomes effective but not later than October 26, 2013.[2]

In that notice of extension, the FAA inadvertently amended paragraph (A)(1) of the amended order to remove the hourly operational authorization (OA) limits for LGA. Additionally, the notice preamble erroneously stated the FAA ''maintains the current hourly limit on scheduled (75) * * * operations.'' The FAA previously reduced the hourly limit on scheduled operations to 71.[3]

Technical Amendment

This technical amendment will revise paragraph (A)(1) of the amended order to include an hourly limit of 71 OAs, which is the current limit on scheduled operations at LGA.

The Amended Order

In consideration of the foregoing, the Order, as amended, is recited below in its entirety:

A. Scheduled Operations

With respect to scheduled operations at LaGuardia:

1. The final Order governs scheduled arrivals and departures at LaGuardia from 6 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday. Seventy-one (71) Operating Authorizations are available per hour and will be assigned by the FAA on a 30-minute basis. The FAA will permit additional, existing operations above this threshold; however, the FAA will retire Operating Authorizations that are surrendered to the FAA, withdrawn for non-use, or unassigned during each affected hour until the number of Operating Authorizations in that hour reaches seventy-one (71).

2. The final Order takes effect on January 1, 2007, and will expire when the final Congestion Management Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport becomes effective but not later than October 26, 2013.

3. The FAA will assign operating authority to conduct an arrival or a departure at LaGuardia during the affected hours to the air carrier that holds equivalent slot or slot exemption authority under the High Density Rule of FAA slot exemption rules as of January 1, 2007; to the primary marketing air carrier in the case of AIR–21 small hub/nonhub airport slot exemptions; or to the air carrier operating the flights as of January 1, 2007, in the case of a slot held by a non carrier. The FAA will not assign operating authority under the final Order to any person or entity other than a certificated U.S. or foreign air carrier with appropriate economic authority under 14 CFR part 121, 129 or 135. The Chief Counsel of the FAA will be the final decision maker regarding the initial assignment of Operating Authorizations.

4. For administrative tracking purposes only, the FAA will assign an identification number to each Operating Authorization.

5. An air carrier may lease or trade an Operating Authorization to another carrier for any consideration, not to exceed the duration of the Order. Notice of a trade or lease under this paragraph must be submitted in writing to the FAA Slot Administration Office, facsimile (202) 267–7277 or email *7-AWASlotadmin@faa.gov*, and must come from a designated representative of each carrier. The FAA must confirm and approve these transactions in writing prior to the effective date of the transaction. However, the FAA will approve transfers between carriers under the same marketing control up to 5 business days after the actual operation. This post-transfer approval is limited to accommodate operational disruptions that occur on the same day of the scheduled operation.

6. Each air carrier holding an Operating Authorization must forward in writing to the FAA Slot Administration Office a list of all Operating Authorizations held by the carrier along with a listing of the Operating Authorizations actually operated for each day of the two-month reporting period within 14 days after the last day of the two-month reporting period beginning January 1 and every two months thereafter. Any Operating Authorization not used at least 80 percent of the time over a two-month period will be withdrawn by the FAA except:

[1] 76 FR 18616. That notice amended the Order that was published at 71 FR 77854 (Dec. 27, 2006) and amended by 72 FR 48428 (Nov. 8, 2007) (transfer, minimum usage, and withdrawal amendments), 72 FR 48428 (Aug. 19, 2008) (reducing unscheduled operations from 6 to 3), 74 FR 845 (Jan. 8, 2009) (extending expiration to October 24, 2009), 74 FR 2646 (Jan. 15, 2009) (reducing scheduled operations from 75 to 71), and 74 FR 51654 (Oct. 7, 2009) (extending expiration to October 29, 2011).

[2] This rulemaking project has been renamed to Slot Management and Transparency Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, but the RIN has remained the same. This notice uses language consistent with the previously published notice.

[3] 74 FR 2646 (Jan. 15, 2009).

A. The FAA will treat as used any Operating Authorization held by an air carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Saturday in January.

B. The FAA will treat as used any Operating Authorization obtained by an air carrier through a lottery under paragraph 7 for the first 120 days after allocation in the lottery.

C. The Administrator of the FAA may waive the 80 percent usage requirement in the event of a highly unusual and unpredictable condition which is beyond the control of the air carrier and which affects carrier operations for a period of five consecutive days or more.

7. In the event that Operating Authorizations are withdrawn for nonuse, surrendered to the FAA or are unassigned, the FAA will determine whether any of the available Operating Authorizations should be reallocated. If so, the FAA will conduct a lottery using the provisions specified under 14 CFR 93.225. The FAA may retime an Operating Authorization prior to reallocation in order to address operational needs. When the final Order expires, any Operating Authorizations reassigned under this paragraph, except those assigned to new entrants or limited incumbents, will revert to the FAA for reallocation according to the reallocation mechanism prescribed in the final rule that succeeds the final Order.

8. If the FAA determines that a reduction in the number of allocated Operating Authorizations is required to meet operational needs, such as reduced airport capacity, the FAA will conduct a weighted lottery to withdraw Operating Authorizations to meet a reduced hourly or half-hourly limit for scheduled operations. The FAA will provide at least 45 days' notice unless otherwise required by operational needs. Any Operating Authorization that is withdrawn or temporarily suspended will, if reallocated, be reallocated to the air carrier from which it was taken, provided that the air carrier continues to operate scheduled service at LaGuardia.

9. The FAA will enforce the final Order through an enforcement action seeking a civil penalty under 49 U.S.C. 46301(a). An air carrier that is not a small business as defined in the Small Business Act, 15 U.S.C. 632, would be liable for a civil penalty of up to $25,000 for every day that it violates the limits set forth in the final Order. An air carrier that is a small business as defined in the Small Business Act would be liable for a civil penalty of up to $10,000 for every day that it violates the limits set forth in the final Order. The FAA also could file a civil action in U.S. District Court, under 49 U.S.C. 46106, 46107, seeking to enjoin any air carrier from violating the terms of the final Order.

B. Unscheduled Operations:[4]

With respect to unscheduled flight operations at LaGuardia, the FAA adopts the following:

1. The final order applies to all operators of unscheduled flights, except helicopter operations, at LaGuardia from 6 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday.

2. The final Order takes effect on January 1, 2007, and will expire when the final Congestion Management Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport becomes effective but not later than October 26, 2013.

3. No person can operate an aircraft other than a helicopter to or from LaGuardia unless the operator has received, for that unscheduled operation, a reservation that is assigned by the David J. Hurley Air Traffic Control System Command Center's Airport Reservation Office (ARO). Additional information on procedures for obtaining a reservation will be available via the Internet at *http://www.fly.faa.gov/ecvrs.*

4. Three (3) reservations are available per hour for unscheduled operations at LaGuardia. The ARO will assign reservations on a 30-minute basis.

5. The ARO receives and processes all reservation requests. Reservations are assigned on a ''first-come, first-served'' basis, determined as of the time that the ARO receives the request. A cancellation of any reservation that will not be used as assigned would be required.

6. Filing a request for a reservation does not constitute the filing of an instrument flight rules (IFR) flight plan, as separately required by regulation. After the reservation is obtained, an IFR flight plan can be filed. The IFR flight plan must include the reservation number in the ''remarks'' section.

7. Air Traffic Control will accommodate declared emergencies without regard to reservations. Nonemergency flights in direct support of national security, law enforcement, military aircraft operations, or public use aircraft operations will be accommodated above the reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate reservation for such flights are available via the Internet at *http://www.fly.faa.gov/ecvrs.*

8. Notwithstanding the limits in paragraph 4, if the Air Traffic Organization determines that air traffic control, weather, and capacity conditions are favorable and significant delay is not likely, the FAA can accommodate additional reservations over a specific period. Unused operating authorizations can also be temporarily made available for unscheduled operations. Reservations for additional operations are obtained through the ARO.

9. Reservations cannot be bought, sold, or leased.

Issued in Washington, DC, on May 18, 2012.

Rebecca B. MacPherson,

Assistant Chief Counsel for Regulations.

[FR Doc. 2012–12552 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–13–P

[4] Unscheduled operations are operations other than those regularly conducted by an air carrier between LaGuardia and another service point. Unscheduled operations include general aviation, public aircraft, military, charter, ferry, and positioning flights. Helicopter operations are excluded from the reservation requirement. Reservations for unscheduled flights operating under visual flight rules (VFR) are granted when the aircraft receives clearance from air traffic control to land or depart LaGuardia. Reservations for unscheduled VFR flights are not included in the limits for unscheduled operators.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs; Fixed Residential Moving Cost Schedule

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: The purpose of this notice is to publish changes in the Fixed Residential Moving Cost Schedule for the States and Territories of Alabama, Arkansas, California, Colorado, Delaware, Guam, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming as provided for by section 202(b) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as

amended (Uniform Act), 42 U.S.C. 4622(b). The schedule amounts for the States and Territories not listed above remain unchanged from the amounts published on July 23, 2008, at 73 FR 42895. The Uniform Act applies to all programs or projects undertaken by Federal agencies or with Federal financial assistance that cause the displacement of any person.

DATES: The provisions of this notice are effective June 22, 2012 or on such earlier date as an agency elects to begin operating under this schedule.

FOR FURTHER INFORMATION CONTACT: Ms. Carolyn Winborne James, Office of Real Estate Services, (202) 493–0353, *Carolyn.James@dot.gov,* Ms. JoAnne Robinson, Office of the Chief Counsel, (202) 366–1346, *JoAnne.Robinson@dot.gov;* Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from Office of the Federal Register's home page at: *http://www.archives.gov/federal_register* and the Government Printing Office's Web page at: *http://www.fdsys.gov.*

Background

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601–4655 (Uniform Act), establishes a program that includes the payment of moving and related expenses to assist persons who are displaced because of Federal or federally assisted projects. The FHWA is the lead agency for implementing the provisions of the Uniform Act and has issued government-wide implementing regulations at 49 CFR part 24.

The following 17 Federal departments and agencies have, by cross-reference, adopted the government-wide regulations: Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Homeland Security; Environmental Protection Agency; Federal Emergency Management Agency; General Services Administration; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Justice; Department of Labor; Department of Veterans Affairs; National Aeronautics and Space Administration; Tennessee Valley Authority.

Section 202(b) of the Uniform Act provides that, as an alternative to being paid for actual residential moving and related expenses, a displaced person may elect payment for moving expenses on the basis of a moving expense schedule established by the head of the lead agency. The government-wide regulations at 49 CFR 24.302 provide that the FHWA will develop, approve, maintain, and update this schedule, as appropriate.

The purpose of this notice is to update the schedule published on July 23, 2008, at 73 FR 42895. The schedule is being updated to reflect the increased costs associated with moving personal property and was developed from data provided by State highway agencies. This update increases the schedule amounts in the States and Territories of Alabama, Arkansas, California, Colorado, Delaware, Guam, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. The schedule amounts for the States and Territories not listed above remain unchanged. The payments listed in the table below apply on a State-by-State basis. Two exceptions and limitations apply to all States and Territories. Payment is limited to $100.00 if either of the following conditions applies:

(a) A person has minimal possessions and occupies a dormitory style room, or

(b) A person's residential move is performed by an agency at no cost to the person.

The schedule continues to be based on the ''number of rooms of furniture'' owned by a displaced person. In the interest of fairness and accuracy, and to encourage the use of the schedule (and thereby simplify the computation and payment of moving expenses), an agency should increase the room count for the purpose of applying the schedule if the amount of possessions in a single room or space actually constitutes more than the normal contents of one room of furniture or other personal property. For example, a basement may count as two rooms if the equivalent of two rooms worth of possessions is located in the basement. In addition, an agency may elect to pay for items stored outside the dwelling unit by adding the appropriate number of rooms.

Authority: 42 U.S.C. 4622(b) and 4633(b); 49 CFR 1.48 and 24.302.

Issued on: May 10, 2012.

Victor M. Mendez,

Administrator.

The payments listed in the table below apply on a state-by-state basis. Two exceptions and limitations apply to all States and Territories. Payment is limited to $100.00 if either of the following conditions apply:

(a) A person has minimal possessions and occupies a dormitory style room, or

(b) A person's residential move is performed by an agency at no cost to the person.

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970, AS AMENDED—FIXED RESIDENTIAL MOVING COST SCHEDULE (2012)

State	Occupant owns furniture								Occupant does not own furniture		
	Number of rooms of furniture										
	1 room	2 rooms	3 rooms	4 rooms	5 rooms	6 rooms	7 rooms	8 rooms	addt'l room	1 room/ no furn.	Addt'l room no furn.
Alabama	600	750	900	1050	1200	1350	1500	1650	150	400	50
Alaska	700	900	1125	1350	1550	1725	1900	2075	300	500	200
American Samoa	282	395	508	621	706	790	875	960	85	226	28
Arizona	700	800	900	1000	1100	1200	1300	1400	100	395	60
Arkansas	550	825	1100	1350	1600	1825	2050	2275	200	300	70
California	685	880	1100	1295	1570	1815	2090	2365	250	450	85
Colorado	600	800	1000	1150	1300	1450	1600	1750	150	350	50
Connecticut	620	810	1000	1180	1425	1670	1910	2150	150	225	60

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970, AS AMENDED—FIXED RESIDENTIAL MOVING COST SCHEDULE (2012)—Continued

State	Occupant owns furniture								Occupant does not own furniture		
	Number of rooms of furniture										
	1 room	2 rooms	3 rooms	4 rooms	5 rooms	6 rooms	7 rooms	8 rooms	addt'l room	1 room/ no furn.	Addt'l room no furn.
Delaware	500	710	880	1110	1260	1410	1560	1710	160	400	60
DC	500	650	800	950	1100	1250	1400	1650	150	300	50
Florida	550	700	875	1050	1200	1350	1500	1650	200	450	125
Georgia	600	975	1300	1600	1875	2125	2325	2525	200	375	100
Guam	450	800	1150	1450	1750	2000	2250	2500	100	200	0
Hawaii	550	900	1250	1550	1850	2100	2350	2600	200	300	100
Idaho	500	650	800	950	1100	1200	1300	1400	100	300	50
Illinois	700	850	1000	1100	1250	1450	1600	1900	300	500	75
Indiana	500	700	900	1100	1300	1500	1700	1900	200	400	100
Iowa	550	700	800	900	1000	1100	1225	1350	125	500	50
Kansas	400	600	800	1000	1200	1400	1600	1800	200	250	50
Kentucky	500	700	900	1100	1300	1500	1700	1900	200	350	50
Louisiana	500	700	900	1100	1300	1500	1700	1900	200	375	60
Maine	650	900	1150	1400	1650	1900	2150	2400	250	400	100
Maryland	650	850	1050	1250	1450	1650	1850	2050	200	500	100
Massachusetts	700	850	1000	1150	1300	1450	1600	1750	200	400	100
Michigan	700	950	1150	1300	1450	1600	1750	1900	300	500	200
Minnesota	550	700	900	1100	1300	1500	1700	1900	250	425	100
Mississippi	750	850	1000	1200	1400	1550	1700	1850	300	400	100
Missouri	800	900	1000	1100	1200	1300	1400	1500	200	400	100
Montana	500	700	800	900	1100	1300	1500	1700	200	350	50
Nebraska	390	545	700	855	970	1075	1205	1325	120	310	40
Nevada	500	700	900	1100	1300	1500	1700	1900	200	350	60
New Hampshire	500	700	900	1100	1300	1500	1700	1900	200	200	150
New Jersey	625	725	825	975	1125	1275	1375	1525	250	300	50
New Mexico	650	850	1050	1250	1450	1650	1850	2050	200	400	60
New York	600	800	1000	1200	1400	1600	1800	2000	200	350	100
North Carolina	550	750	1050	1200	1350	1600	1700	1900	150	350	50
North Dakota	465	670	845	1015	1190	1330	1420	1595	175	405	60
N. Mariana Is	282	395	508	621	706	790	875	960	85	226	28
Ohio	600	800	1000	1150	1300	1450	1600	1750	150	400	100
Oklahoma	600	750	900	1100	1250	1450	1650	1850	175	300	50
Oregon	600	800	1000	1200	1400	1600	1800	2000	200	350	100
Pennsylvania	500	750	1000	1200	1400	1600	1800	2000	200	400	70
Puerto Rico	500	700	850	950	1150	1300	1450	1600	150	425	100
Rhode Island	450	625	800	900	1000	1200	1350	1500	150	300	50
South Carolina	685	790	1075	1260	1575	1735	1890	2075	225	500	75
South Dakota	500	650	800	950	1050	1200	1400	1600	200	300	40
Tennessee	500	750	1000	1250	1500	1750	2000	2250	250	400	100
Texas	600	800	1000	1200	1400	1600	1750	1900	150	400	50
Utah	600	750	900	1050	1200	1350	1500	1650	150	500	100
Vermont	400	550	650	850	1000	1100	1200	1300	150	300	75
Virgin Islands	500	700	850	950	1150	1300	1450	1600	150	425	100
Virginia	600	800	1000	1200	1400	1600	1800	2000	200	400	75
Washington	600	800	1000	1200	1400	1600	1800	2000	200	300	50
West Virginia	750	900	1050	1200	1350	1500	1650	1800	150	350	50
Wisconsin	550	700	900	1100	1300	1500	1700	1900	250	425	100
Wyoming	480	590	750	910	1070	1180	1400	1500	160	300	50

[FR Doc. 2012–12380 Filed 5–22–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35116]

R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Construction and Operation Exemption—In Clearfield County, PA

AGENCY: Surface Transportation Board.

ACTION: Notice of construction and operation exemption.

SUMMARY: The Board grants an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for R.J. Corman Railroad Company/Pennsylvania Lines Inc. (RJCP) to construct and operate 10.8 miles of previously abandoned rail right-of-way between Wallaceton Junction, PA., and Winburne, PA., subject to environmental mitigation.

The rail line would be used with another segment by RJCP to serve a new waste-to-ethanol facility, quarry, and industrial park currently being developed by Resource Recovery, LLC near Gorton, PA., as well as several other shippers located along the line that are interested in the availability of rail service.

DATES: The exemption will be effective on June 20, 2012; petitions for reconsideration must be filed by June 11, 2012.

ADDRESSES: An original and 10 copies of all pleadings, referring to Docket No. FD 35116, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each filing in this proceeding must be served on petitioner's representative: Ronald A. Lane, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm, (202) 245–0391. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1–800–877–8339].

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: May 17, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–12570 Filed 5–22–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35622]

SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, SteelRiver Infrastructure Fund North America LP, and Patriot Funding LLC—Control Exemption—Patriot Rail Corp., et al.

SteelRiver Infrastructure Partners LP (SRIP LP), SteelRiver Infrastructure Associates LLC (SRIA LLC), SteelRiver Infrastructure Fund North America LP (SRIFNA LP), and Patriot Funding LLC (Patriot Funding) have filed a verified notice of exemption to acquire control of Patriot Rail Corp. (Patriot) and its rail carrier subsidiaries.

The proposed transaction is scheduled to be consummated on or after June 6, 2012 (30 days after the notice of exemption was filed).

Patriot Funding and Patriot Rail Holdings LLC, owner of Patriot, entered a Stock Purchase Agreement (the Agreement) dated May 4, 2012. Under the Agreement, Patriot Funding will acquire all of the common stock of Patriot from Patriot Rail Holdings LLC, and thereby indirect control of the railroad subsidiaries of Patriot.

Patriot is a noncarrier holding company that controls the following 13 Class III railroads (together, Subsidiary Railroads): (1) Tennessee Southern Railroad Company (TSRR); (2) Rarus Railway Company; (3) Utah Central Railway Company; (4) Sacramento Valley Railroad, Inc.; (5) The Louisiana and North West Railroad Company LLC; (6) Temple & Central Texas Railway, Inc.; (7) Piedmont & Northern Railway, Inc.; (8) Columbia & Cowlitz Railway, LLC; (9) DeQueen and Eastern Railroad, LLC; (10) Golden Triangle Railroad, LLC; (11) Patriot Woods Railroad, LLC; (12) Texas, Oklahoma & Eastern Railroad, LLC; and (13) Mississippi & Skuna Valley Railroad, LLC. On April 27, 2012, Kingman Terminal Railroad, LLC (KTRR) filed a notice of exemption to operate over about 3 miles of railroad owned by the Kingman Airport Authority, Inc., located in Mojave County, Ariz.[1] Concurrently, a notice of exemption was filed by TSRR, Patriot Rail, LLC, Patriot Rail Holdings, LLC, and Patriot to continue in control of KTRR once it becomes a railroad.[2] KTRR intends to commence railroad operations and TSRR, et al., intend to continue in control of KTRR prior to Patriot Funding's acquisition of control of Patriot. Therefore, because Patriot Funding, SRIFNA LP, SRIA LLC, and SRIP LP are seeking authority to control Patriot, they also seek authority to control KTRR.

Patriot Funding is 100% owned by SRIFNA LP. SRIFNA LP is a limited partnership and its general partner is SRIA LLC, which is 100% owned by SRIP LP. Patriot Funding, SRIFNA LP, SRIA LLC, and SRIP LP are noncarriers. None of these entities controls any railroads and none is commonly controlled with any railroads.

Applicants represent that: (1) The Subsidiary Railroads and KTRR do not connect with any Patriot Funding, SRIFNA LP, SRIA LLC, and SRIP LP railroads; (2) the proposed transaction is not part of a series of anticipated transactions to connect the Subsidiary Railroads and KTRR with any railroads in the corporate family of Patriot Funding, SRIFNA LP, SRIA LLC, and SRIP LP; and (3) the proposed transaction does not involve a Class I rail carrier. The proposed transaction is therefore exempt from the prior approval requirements of 49 U.S.C. 11323 pursuant to 49 CFR 1180.2(d)(2). Applicants state that the purpose of the transaction is to promote the investment objectives of Patriot Funding, SRIFNA LP, SRIA LLC, and SRIP LP and to improve the Subsidiary Railroads' and KTRR's efficiency, financial strength, and ability to meet the needs of shippers.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed by May 30, 2012 (at least seven days before the exemption becomes effective).

An original and ten copies of all pleadings, referring to Docket No. FD 35622 must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on: Ahren S. Tryon, Cozen O'Connor; 1627 I Street NW., Suite 1100, Washington, DC 20006.

Board decisions and notices are available on our Web site at: *www.stb.dot.gov.*

Decided: May 17, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2012–12511 Filed 5–22–12; 8:45 am]

BILLING CODE 4915–01–P

[1] *Kingman Terminal R.R.—Operation Exemption—Kingman Airport Auth.,* FD 35618 (STB served May 11, 2012).

[2] *Tenn. S. R.R., Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance In Control Exemption—Kingman Terminal R.R.,* FD 35619 (STB served May 11, 2012).

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to the Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury,

ACTION: Notice.

SUMMARY: The Department of the Treasury 's Office of Foreign Assets Control (''OFAC'') is publishing the name of 1 individual whose property and interests in property have been unblocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. Section 1182).

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the 1 individual identified in this notice whose property and interests in property were blocked pursuant to the Kingpin Act, is effective on May 17, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation Department of the Treasury Office of Foreign Assets Control Washington, DC 20220. Tel: (202) 622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC s Web site at *www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On December 3, 1999, the Kingpin Act was signed into law by the President of the United States. The Kingpin Act provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. persons and entities.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property or interests in property, subject to U.S. jurisdiction, of persons or entities found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; and/or (3) playing a significant role in international narcotics trafficking.

On May 17, 2012, the Director of OFAC removed from the SDN List the 1 individual listed below, whose property and interests in property were blocked pursuant to the Kingpin Act:

Individual: TORO OSORIO, Julio Alberto, c/o RENTA CAMPEROS URABA LTDA., Apartado, Antioquia, Colombia; c/o VIGILAR COLOMBIA LTDA., Apartado, Antioquia, Colombia; c/o CENTRO DE DIAGNOSTICO AUTOMOTRIZ EJE BANANERO S.A., Apartado, Antioquia, Colombia; c/o REPUESTOS EL NATO Y CIA LTDA., Medeilin, Colombia; Colombia; POB Colombia; citizen Colombia; nationality Colombia; Cedula No. 15367370 (Colombia) (individual) [SDNTK]

Dated: May 17, 2012.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2012–12423 Filed 5–22–12; 8:45 am]

BILLING CODE 4810–AL–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, June 20, 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, June 20, 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12428 Filed 5–22–12; 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, June 5, 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, June 5, 2012, from 8:00 a.m.–4:30 p.m. and on Wednesday, June 6, 2012, from 8:00

a.m.–12:00 p.m. Eastern Time. The meeting will be held at IRS 7850 SW 6th Court, Plantation, FL 33324. 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12429 Filed 5–22–12; 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, June 19, 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, June 19, 2012, at 1:00 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. 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12430 Filed 5–22–12; 8:45 am]

BILLING CODE 4830–01–P

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, June 27, 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, June 27, 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12431 Filed 5–22–12; 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, June 13, 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, June 13, 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12432 Filed 5–22–12; 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 Thursday, June 7 from 8:00 a.m.–5:00 p.m. Eastern Time and Friday, June 8 from 8:00 a.m.–1:00 p.m. Eastern Time.

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 Thursday, June 7, 2012 8:00 a.m.–5:00 p.m. and Friday, June 8, 2012 from 8:00 a.m. until 1:00 p.m. Eastern Time. The meeting will be held at IRS 7850 SW 6th Court, Plantation, FL 33324. The public is invited to make oral comments or submit written statements for consideration. 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12433 Filed 5–22–12; 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 Thursday, June 28 and Friday, June 29, 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 Thursday, June 28th at 8:00 a.m. to 4:30 p.m. and Friday, June, 29th from 8:00 a.m. to 12:00 p.m., Pacific Time. 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: May 17, 2012.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–12434 Filed 5–22–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0718]

Agency Information Collection (Yellow Ribbon Agreement Under Title 38 U.S.C. Chapter 33) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 22, 2012.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0718'' in any correspondence.

For Further Information or a Copy of the Submission Contact: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7479, FAX (202) 632–7583 or email: *denise.mclamb@va.gov*. Please refer to ''OMB Control No. 2900–0718).''

SUPPLEMENTARY INFORMATION: *Title:* Yellow Ribbon Agreement (Under Title 38 U.S.C. Chapter 33), VA Form 22–0839.

OMB Control Number: 2900–0718.

Type of Review: Extension of a currently approved collection.

Abstract: Title 38 U.S.C. 3317 requires VA to enter into an agreement with schools wishing to participate in Yellow Ribbon Program. The agreement must state the beginning and ending dates of the academic year for which the school will provide contributions under the Yellow Ribbon Program, the maximum number of individuals for whom the school will make contributions in the specified academic year, and the maximum amount of contributions that may be provided on behalf of participating individuals during the academic year. VA is required to match each dollar provided by the school not to exceed 50 percent of the outstanding established charges. The statute further requires that VA post the information on a Web site for public viewing. VA will accept requests for participation, modifications, and withdrawals of Yellow Ribbon Program agreements during the open season enrollment period (March 15th through May 15th each calendar year) for the upcoming academic year and all future academic years unless changes are requested by VA or the institution.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 14, 2012, at page 15188.

Affected Public: Business or other for profit and Not for profit institutions.

Estimated Annual Burden: 1,538 hours.

Estimated Average Burden per Respondent: 14 hours.

Frequency of Response: One time per year.

Estimated Number of Respondents: 21,532.

Dated: May 17, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–12384 Filed 5–22–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0205]

Agency Information Collection (Applications and Appraisals for Employment for Title 38 Positions and Trainees) Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 22, 2012.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0205'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7479, FAX (202) 632–7583 or email *denise.mclamb@va.gov*. Please refer to ''OMB Control No. 2900–0205.''

SUPPLEMENTARY INFORMATION: *Title:* Applications and Appraisals for Employment for Title 38 Positions and Trainees, VA Forms 10–2850, 2850a through d, and VA Form Letters 10–341a and b.

OMB Control Number: 2900–0205.

Type of Review: Extension of a currently approved collection.

Abstract: The data collected on VA Forms 10–2850, 2850a through d, and VA Form Letters 10–341a and b, will be used to evaluate an applicant's qualification for employment with the VA, as well as their training, educational, and professional experiences. The data is necessary to determine the applicant's suitability, grade level and clinical privileges.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 14, 2012, at page 15190.

Affected Public: Individuals or Households.

Estimated Annual Burden:

a. Application for Physicians, Dentists, Podiatrists and Optometrists, Chiropractors, VA Form 10–2850—7,450 hours.

b. Application for Nurses and Nurse Anesthetists, VA Form 10–2850a—29,799 hours.

c. Application for Residents, VA Form 10–2850b—17,001 hours.

d. Application for Associated Health Occupations, VA Form 10–2850c—9,933 hours.

e. Application for Health Professions Trainees, VA Form 10–2850d—33,670 hours.

f. Appraisal of Applicant, VA Form Letter 10–341a—25,410 hours.

g. Trainee Qualification and Credentials Verification Letter, VA Form Letter 10–341b—6,709 hours.

Estimated Average Burden per Respondent:

a. Application for Physicians, Dentists, Podiatrists and Optometrists, Chiropractors, VA Form 10–2850—30 minutes.

b. Application for Nurses and Nurse Anesthetists, VA Form 10–2850a—30 minutes.

c. Application for Residents, VA Form 10–2850b—30 minutes.

d. Application for Associated Health Occupations, VA Form 10–2850c—30 minutes.

e. Application for Health Professions Trainees, VA Form 10–2850d—30 minutes.

f. Appraisal of Applicant, VA Form FL 10–341a—30 minutes.

g. Trainee Qualification and Credentials Verification Letter, VA Form 10–341b—5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. Application for Physicians, Dentists, Podiatrists and Optometrists, Chiropractors, VA Form 10–2850—14,900.

b. Application for Nurses and Nurse Anesthetists, VA Form 10–2850a—59,598.

c. Application for Residents, VA Form 10–2850b—34,003.

d. Application for Associated Health Occupations, VA Form 10–2850c—19,866.

e. Application for Health Professions Trainees, VA Form 10–2850d—67,341.

f. Appraisal of Applicant, VA Form 10–341a—50,820.

g. Trainee Qualification and Credentials Verification Letter, VA Form 10–341b—80,518.

Dated: May 17, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–12385 Filed 5–22–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Rural Health Advisory Committee, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Veterans' Rural Health Advisory Committee will conduct a telephone conference call meeting from 2:30 p.m. to 4 p.m. on Friday, June 22, 2012, in Room GL20 of the Office of Rural Health (ORH), 1722 I Street NW., Washington, DC. The toll-free number for the meeting is 1–800–767–1750, and the access code is 44970#. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on health care issues affecting enrolled Veterans residing in rural areas. The Committee examines programs and policies that impact the provision of VA health care to enrolled Veterans residing in rural areas and discusses ways to improve and enhance VA services for these Veterans.

The Committee will discuss its Annual Report to the Secretary, the Director's update, the meeting agenda and planning for the Committee's upcoming October 2012 face-to-face meeting in Morgantown, West Virginia.

A 15-minute period will be reserved at 3:45 p.m. for public comments. Individuals who wish to address the Committee are invited to submit a 1–2 page summary of their comments for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Ms. Judy Bowie, Designated Federal Officer, ORH (10P1R), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, or email at *rural.health.inquiry@va.gov*. Any member of the public seeking additional

information should contact Ms. Bowie at (202) 461–7100.

Dated: May 18, 2012.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–12520 Filed 5–22–12; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 100 May 23, 2012

Part II

Commodity Futures Trading Commission

17 CFR Part 1

Securities and Exchange Commission

17 CFR Part 240

Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant;'' Final Rules

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AD06

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–66868; File No. S7–39–10]

RIN 3235–AK65

Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant''

AGENCY: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Joint final rule; joint interim final rule; interpretations.

SUMMARY: In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), the Commodity Futures Trading Commission (''CFTC'') and the Securities and Exchange Commission (''SEC'') (collectively, the ''Commissions''), in consultation with the Board of Governors of the Federal Reserve System (''Board''), are adopting new rules and interpretive guidance under the Commodity Exchange Act (''CEA''), and the Securities Exchange Act of 1934 (''Exchange Act''), to further define the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant.''

DATES: *Effective date.* The effective date for this joint final rule and joint interim final rule: July 23, 2012, except for CFTC regulations at 17 CFR 1.3(m)(5) and (6), which are effective December 31, 2012.

Comment date. The comment period for the interim final rule (CFTC regulation at 17 CFR 1.3(ggg)(6)(iii)) will close July 23, 2012.

Compliance date. Compliance with the element of the CFTC regulation at 17 CFR 1.3(m)(8)(iii) requiring that a commodity pool be formed by a registered CPO shall be required with respect to a commodity pool formed on or after December 31, 2012 for any person seeking to rely on such regulation; compliance with such element shall not be required with respect to a commodity pool formed prior to December 31, 2012.

FOR FURTHER INFORMATION CONTACT: *CFTC:* Jeffrey P. Burns, Assistant General Counsel, at 202- 418–5101, *jburns@cftc.gov*, Mark Fajfar, Assistant General Counsel, at 202–418–6636, *mfajfar@cftc.gov*, Julian E. Hammar, Assistant General Counsel, at 202–418–5118, *jhammar@cftc.gov*, or David E. Aron, Counsel, at 202–418–6621, *daron@cftc.gov*, Office of General Counsel; Gary Barnett, Director, at 202–418–5977, *gbarnett@cftc.gov*, or Frank Fisanich, Deputy Director, at 202–418–5949, *ffisanich@cftc.gov*, Division of Swap Dealer and Intermediary Oversight,Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581;

SEC: Joshua Kans, Senior Special Counsel, Richard Grant, Special Counsel, or Richard Gabbert, Attorney Advisor, at 202–551–5550, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.[1] Title VII of the Dodd-Frank Act established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (i) providing for the registration and regulation of swap dealers and major swap participants; (ii) imposing clearing and trade execution requirements on standardized derivative products; (iii) creating recordkeeping and real-time reporting regimes; and (iv) enhancing the Commissions' rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commissions' oversight.

The Dodd-Frank Act particularly provides that the CFTC will regulate ''swaps,'' and that the SEC will regulate ''security-based swaps.'' The Dodd-Frank Act also adds definitions of the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant'' and ''eligible contract participant'' to the CEA and Exchange Act.[2] Section 712(d)(1) of the Dodd-Frank Act further directs the CFTC and the SEC, in consultation with the Board, jointly to further define those terms, among others.[3]

In December 2010, the Commissions proposed rules and interpretations to further define the meaning of the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant.''[4] The Commissions received approximately 968 written comments in response to the Proposing Release.[5] In addition, the Staffs of the Commissions participated in approximately 114 meetings with market participants and other members of the public about the Proposing Release,[6] and the Commissions held a

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm*.

[2] *See* Dodd-Frank Act sections 721 and 761. Sections 721(b)(2) and 761(b)(2) also provide that the CFTC and SEC may by rule further define any other term included in an amendment made by Title VII to the CEA or the Exchange Act, respectively.

[3] In addition, section 712(d)(1) directs the CFTC and SEC, in consultation with the Board, jointly to further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement.'' These further definitions are the subject of a separate rulemaking by the Commissions. *See* CFTC and SEC, Notice of Proposed Joint Rulemaking, Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818 (May 23, 2011) (''Product Definitions Proposal''). Section 712(d)(2)(A), in turn, provides that the Commissions shall jointly adopt such other rules regarding the definitions set forth in section 712(d)(1) as they ''determine are necessary and appropriate, in the public interest, and for the protection of investors.''

In addition, section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant'' for the purpose of including transactions and entities that have been structured to evade Title VII. Also, section 761(b) of the Dodd-Frank Act permits the SEC to adopt a rule to further define the terms ''security-based swap dealer,'' ''major security-based swap participant,'' and ''eligible contract participant,'' with regard to security-based swaps, for the purpose of including transactions and entities that have been structured to evade Title VII.

[4] *See* CFTC and SEC, Notice of Proposed Joint Rulemaking: Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' Securities Exchange Act Release No. 63452, 75 FR 80174 (Dec. 21, 2010) (''Proposing Release'').

Prior to issuing the Proposing Release, the Commissions issued a joint Advance Notice of Proposed Rulemaking (''ANPRM'') requesting public comment regarding the definitions of the terms ''swap,'' ''security-based swap,'' ''security-based swap agreement,'' ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant.'' *See* CFTC and SEC, Advance Notice of Proposed Joint Rulemaking: Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Securities Exchange Act Release No. 62717, 75 FR 51429 (Aug. 20, 2010). The Proposing Release and these final rules both reflect comments received in response to the ANPRM.

[5] Comment letters received in response to the Proposing Release may be found on the Commissions' Web sites at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=933* and at *http://www.sec.gov/comments/s7-39-10/s73910.shtml*.

[6] Summaries of these staff meetings may be found on the Commissions' Web sites at *http://*

Joint Public Roundtable on the proposed dealer and major participant definitions.[7] After considering the comments received, the Commissions are adopting final rules and interpretations to further define these terms.

II. Definitions of ''Swap Dealer'' and ''Security-Based Swap Dealer''

The Dodd-Frank Act definitions of the terms ''swap dealer'' and ''security-based swap dealer'' focus on whether a person engages in particular types of activities involving swaps or security-based swaps.[8] Persons that meet either of those definitions are subject to statutory requirements related to, among other things, registration, margin, capital and business conduct.[9]

The CEA and Exchange Act definitions in general encompass persons that engage in any of the following types of activity:

(i) Holding oneself out as a dealer in swaps or security-based swaps,

(ii) making a market in swaps or security-based swaps,

(iii) regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one's own account, or

(iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.[10] These dealer activities are enumerated in the CEA and Exchange Act in the disjunctive, in that a person that engages in any one of these activities is a swap dealer under the CEA or security-based swap dealer under the Exchange Act, even if such person does not engage in one or more of the other identified activities.

At the same time, the statutory dealer definitions provide exceptions for a person that enters into swaps or security-based swaps for the person's own account, either individually or in a fiduciary capacity, but not as a part of a ''regular business.'' [11] The Dodd-Frank Act also instructs the Commissions to exempt from designation as a dealer a person that ''engages in a *de minimis* quantity of [swap or security-based swap] dealing in connection with transactions with or on behalf of its customers.'' [12] Moreover, the definition of ''swap dealer'' (but not the definition of ''security-based swap dealer'') provides that an insured depository institution is not to be considered a swap dealer ''to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.'' [13] The statutory definitions further provide that a person may be designated as a dealer for one or more types, classes or categories of swaps or security-based swaps, or activities without being designated a dealer for other types, classes or categories or activities.[14]

In the Proposing Release, the Commissions proposed rules to identify the activity that would cause a person to be a dealer,[15] to implement the exception for *de minimis* dealing activity,[16] to implement the exception from the swap dealer definition in connection with the origination of loans by insured depository institutions,[17] and to provide for the limited purpose designation of dealers.[18] The release also set forth proposed interpretive guidance related to the definitions.

After considering the comments received, the Commissions are adopting final rules and interpretations to further define the terms ''swap dealer'' and ''security-based swap dealer.'' In this Adopting Release, we particularly address: (i) The general analysis for identifying dealing activity involving swaps and security-based swaps; (ii) the exclusion from the ''swap dealer'' definition in connection with the origination of loans by insured depository institutions; (iii) the application of the dealer analysis to inter-affiliate swaps and security-based swaps; (iv) the application of the *de minimis* exception from the dealer definitions; and (v) the limited designation of swap dealers and security-based swap dealers.

A. General Considerations for the Dealer Analysis

1. Proposed Approach

The proposed rules to define the activities that would lead a person to be a ''swap dealer'' and ''security-based swap dealer'' were based closely on the corresponding language of the statutory definitions.[19] The Proposing Release further noted that the Dodd-Frank Act defined the terms ''swap dealer'' and ''security-based swap dealer'' in a functional manner, and stated that those statutory definitions should not be interpreted in a constrained, overly technical or rigid manner, particularly given the diversity of the swap and security-based swap markets. The Proposing Release also identified potential distinguishing characteristics of swap dealers and security-based swap dealers based on the functional role that dealers fulfill in the swap and security-based swap markets, such as: dealers tend to accommodate demand from other parties; dealers generally are available to enter into swaps or security-based swaps to facilitate other parties' interest; dealers tend not to request that other parties propose the terms of swaps or security-based swaps, but instead tend to enter into those instruments on their own standard terms or on terms they arrange in response to other parties' interest; and dealers tend to be able to arrange customized terms for

www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_2_Definitions/index.htm and *http://www.sec.gov/comments/s7-39-10/s73910.shtml#meetings*.

[7] A transcript of the roundtable discussion and public comments received with respect to the roundtable may be found on the CFTC's Web site at *http://www.cftc.gov/PressRoom/Events/opaevent_cftcsecstaff061611*.

[8] *See* section 721 of the Dodd-Frank Act (adding Section 1a(49) of the CEA, 7 U.S.C. 1a(49), to define ''swap dealer'') and section 761 of the Dodd-Frank Act (adding Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71), to define ''security-based swap dealer'').

[9] The Dodd-Frank Act excludes from the Exchange Act definition of ''dealer'' persons who engage in security-based swaps with eligible contract participants. *See* section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), as amended by section 761(a)(1) of the Dodd-Frank Act.

The Dodd-Frank Act does not include comparable amendments for persons who act as brokers in swaps and security-based swaps. Because security-based swaps, as defined in section 3(a)(68) of the Exchange Act, are included in the Exchange Act section 3(a)(10) definition of ''security,'' persons who act as brokers in connection with security-based swaps must, absent an exception or exemption, register with the SEC as a broker pursuant to Exchange Act section 15(a), and comply with the Exchange Act's requirements applicable to brokers.

In mid-2011, the SEC issued temporary exemptions under the Exchange Act in connection with the revision of the ''security'' definition to encompass security-based swaps. Among other aspects, these temporary exemptions extended to certain broker activities involving security-based swaps. *See* ''Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of ''Security'' to Encompass Security-Based Swaps, and Request for Comment,'' Securities Exchange Act Release No. 64795 (Jul. 1, 2011), 76 FR 39927, 39939 (Jul. 7, 2011) (addressing availability of exemption to registration requirement for securities brokers).

[10] *See* CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A); Exchange Act section 3(a)(71)(A), 15 U.S.C. 78c(a)(71)(A).

[11] *See* CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C); Exchange Act section 3(a)(71)(C), 15 U.S.C. 78c(a)(71)(C).

[12] *See* CEA section 1a(49)(D), 7 U.S.C. 1a(49)(D); Exchange Act section 3(a)(71)(D), 15 U.S.C. 78c(a)(71)(D).

[13] *See* CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A).

[14] *See* CEA section 1a(49)(B), 7 U.S.C. 1a(49)(B); Exchange Act section 3(a)(71)(B), 15 U.S.C. 78c(a)(71)(B).

[15] *See* proposed CFTC Regulation § 1.3(ggg)(1); proposed Exchange Act rule 3a71–1(a), (b).

[16] *See* proposed CFTC Regulation § 1.3(ggg)(4); proposed Exchange Act rule 3a71–2.

[17] *See* proposed CFTC Regulation § 1.3(ggg)(5).

[18] *See* proposed CFTC Regulation § 1.3(ggg)(3); proposed Exchange Act rule 3a71–1(c).

[19] *See* CFTC Regulation § 1.3(ggg); Exchange Act rule 3a71–1(a), (b).

swaps or security-based swaps upon request, or to create new types of swaps or security-based swaps at the dealer's own initiative.[20]

The proposal recognized that the principles for identifying dealing activity involving swaps can differ from principles for identifying dealing activity involving security-based swaps, in part due to differences in how those instruments are used.[21]

a. ''Swap Dealer'' Activity

Consistent with the statutory definition, the proposed rule stated that the term ''swap dealer'' includes a person that ''regularly enters into swaps with counterparties as an ordinary course of business for its own account,'' but also that ''the term swap dealer does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.'' The Proposing Release stated that these two provisions should be read in combination with each other, and explained that the difference between the two provisions is whether or not the person enters into swaps as a part of, or as an ordinary course of, a ''regular business.'' Thus, the Proposing Release equated the phrases ''ordinary course of business'' and ''regular business.'' The Proposing Release also stated that persons who enter into swaps as a part of a ''regular business'' are those persons whose function is to accommodate demand for swaps from other parties and enter into swaps in response to interest expressed by other parties. Such persons would be swap dealers.[22] Conversely, the Proposing Release said that persons who do not fulfill this function in connection with swaps should not be deemed to enter into swaps as part of a ''regular business,'' and thus would not likely be swap dealers.[23]

In addition, the Proposing Release noted that the nature of swaps precludes importing concepts used to identify dealers in other areas. The Proposing Release explained that because swaps are typically not bought and sold, concepts such as whether a person buys and sells swaps, makes a two-sided market in swaps, or trades within a bid/offer spread cannot necessarily be used to determine if the person is a swap dealer, even if such concepts are useful in determining whether a person is a dealer in other financial instruments.[24]

The Proposing Release further stated that swap dealers can be identified through their relationships with counterparties, explaining that swap dealers tend to enter into swaps with more counterparties than do non-dealers, and in some markets, non-dealers tend to constitute a large portion of swap dealers' counterparties. In contrast, the Proposing Release said, non-dealers tend to enter into swaps with swap dealers more often than with other non-dealers. The Proposing Release noted that it is likely that swap dealers are involved in most or all significant parts of the swap markets.[25]

The Proposing Release concluded that this functional approach would identify as swap dealers those persons whose function is to serve as the points of connection in the swap markets. Thus, requiring registration and compliance with the requirements of the Dodd-Frank Act by such persons would thereby reduce risk and enhance operational standards and fair dealing in those markets.[26]

The Proposing Release also noted that the swap markets are diverse and encompass a wide variety of situations in which parties enter into swaps with each other, and invited comment as to what aspects of the parties' activities in particular situations should, or should not, be considered swap dealing activities. Specifically, the Proposing Release invited comment regarding persons who enter into swaps: (i) As aggregators; (ii) as part of their participation in physical markets; or (iii) in connection with the generation and transmission of electricity.[27]

First, regarding aggregators, the Proposing Release noted that some persons, including certain cooperatives, enter into swaps with other parties in order to aggregate the swap positions of the other parties into a size that would be more amenable to entering into swaps in the larger swap market. The Proposing Release explained that, for example, certain cooperatives enter into swaps with smaller businesses because the smaller business cannot establish a commodity position large enough to be traded on a swap or futures market, or large enough to be of interest to larger financial institutions. The Proposing Release said that while such persons engage in activities that are similar in many respects to those of a swap dealer, it may be that the swap dealing activities of these aggregators would not exceed the *de minimis* threshold, and therefore they would not be swap dealers. The CFTC requested comment as to how the *de minimis* threshold would apply to such persons, and in general on the application of the swap dealer definition to this activity. The Proposing Release also noted that the CFTC was engaged in a separate rulemaking pursuant to section 723(c)(3)(B) of the Dodd-Frank Act regarding swaps in agricultural commodities, and requested comment on the application of the swap dealer definition to dealers, including potentially agricultural cooperatives, that limit their dealing activity primarily to swaps in agricultural commodities.[28]

Second, the Proposing Release noted that the markets in physical commodities such as oil, natural gas, chemicals and metals have developed highly customized transactions, some of which would be encompassed by the statutory definition of the term ''swap,'' and that some participants in these markets engage in swap dealing activities that are above the proposed *de minimis* threshold. The CFTC invited comment as to any different or additional factors that should be considered in applying the swap dealer definition to participants in these markets.

Third, the Proposing Release noted a number of complexities that arise when applying the swap dealer definition in connection with the generation and transmission of electricity. In particular, the Proposing Release noted that additional complexity results because electricity is generated, transmitted and used on a continuous, real-time basis, and because the number and variety of participants in the electricity market is very large, and some electricity services are provided as a public good rather than for profit. The CFTC invited comment as to any different or additional factors that should be considered in applying the swap dealer definition to participants in the generation and transmission of electricity. Specifically, the CFTC invited comment on whether there are special considerations, including without limitation special considerations arising from section

[20] Proposing Release, 75 FR at 80176.

[21] *Id.*

[22] In addition, the Proposing Release explained that (in general, and not specifically limited to the provisions relating to entering into swaps as part of a ''regular business'') the proposed swap dealer definition does not depend on whether a person's activity as a swap dealer is the person's sole or predominant business (other than through the *de minimis* exception discussed below).

[23] *See* Proposing Release, 75 FR at 80177.

[24] *See id.* at 80176–77.

[25] *See id.* at 80177.

[26] *See id.*

[27] *See id.* at 80183–84.

[28] After publication of the Proposing Release, the CFTC adopted a final rule on agricultural swaps under which swaps in agricultural commodities will be permitted to transact subject to the same rules as all other swaps. *See* Agricultural Swaps; Final Rule, 76 FR 49291 (Aug. 10, 2011).

201(f) of the Federal Power Act,[29] related to not-for-profit power systems such as rural electric cooperatives and entities operating as political subdivisions of a state and on the applicability of the exemptive authority in section 722(f) of the Dodd-Frank Act to address those considerations.

b. ''Security-Based Swap Dealer'' Activity

The Proposing Release noted the parallels between the definition of ''security-based swap dealer'' and the definition of ''dealer'' under the Exchange Act,[30] as well as the fact that security-based swaps may be used to hedge risks associated with owning certain types of securities or to gain economic exposure akin to ownership of certain types of securities. As a result, the Proposing Release took the view that the same factors that are relevant to determining whether a person is a ''dealer'' under the Exchange Act also are generally relevant to the analysis of whether a person is a security-based swap dealer. The Proposing Release also addressed the relevance of the ''dealer-trader'' distinction for identifying dealing activity involving security-based swaps,[31] while recognizing that certain concepts associated with the dealer-trader distinction—particularly concepts involving ''turnover of inventory'' and ''regular place of business''—appeared potentially less applicable to the security-based swap dealer definition. In addition, the Proposing Release noted that under the dealer-trader distinction, we would expect that entities that use security-based swaps to hedge business risks, absent other activities, likely would not be dealers.[32]

c. Additional Principles Common to Both Definitions

i. ''Hold Themselves Out'' and ''Commonly Known in the Trade'' Tests

The Proposing Release identified the following non-exclusive list of factors as potentially indicating that a person meets the ''hold themselves out'' and ''commonly known in the trade'' tests of the statutory dealer definitions:

- Contacting potential counterparties to solicit interest in swaps or security-based swaps;
- Developing new types of swaps or security-based swaps (which may include financial products that contain swaps or security-based swaps) and informing potential counterparties of the availability of such swaps or security-based swaps and a willingness to enter into such swaps or security-based swaps with the potential counterparties;
- Membership in a swap association in a category reserved for dealers;
- Providing marketing materials (such as a Web site) that describe the types of swaps or security-based swaps that one is willing to enter into with other parties; or
- Generally expressing a willingness to offer or provide a range of financial products that would include swaps or security-based swaps.[33]

The Proposing Release further stated that the test for being ''commonly known in the trade'' as a swap dealer or security-based swap dealer may appropriately reflect, among other factors, the perspective of persons with substantial experience with and knowledge of the swap and security-based swap markets (regardless of whether a particular entity is known as a dealer by persons without that experience or knowledge). The Proposing Release also stated that holding oneself out as a security-based swap dealer likely would encompass a person who is a dealer in another type of security entering into a security-based swap with a customer, as well as a person expressing its availability to enter into security-based swaps, regardless of the direction of the transaction or across a broad spectrum of risks.[34]

ii. Market Making

In addressing the statutory definitions' ''making a market'' test, the Proposing Release noted that while continuous two-sided quotations and a willingness to buy and sell a security are important indicators of market making in the equities market, these indicia may not be appropriate in the swap and security-based swap markets. The proposal also noted that nothing in the statutory text or legislative history suggested the intent to impute a ''continuous'' activity requirement to the dealer definitions.[35]

iii. No Predominance Test

The Proposing Release further addressed whether a person should be a dealer only if that activity is the person's sole or predominant business, and took the view that such an approach was not consistent with the statutory definition. The Proposing Release rejected this as an unworkable test of dealer status because many parties that commonly are acknowledged as dealers also engage in other businesses that outweigh their swap or security-based swap dealing business in terms of transaction volume or other measures.[36]

iv. Application to New Types of Wwaps and New Activities

The Proposing Release noted that the Commissions intended to apply the dealer definitions flexibly when the development of innovative business models is accompanied by new types of dealer activity, following a facts-and-circumstances approach.[37]

2. Commenters' Views

Numerous commenters addressed the proposed rules and interpretations in connection with the ''swap dealer'' and ''security-based swap dealer'' definitions. Several commenters addressed principles that are common to the two dealer definitions, while a number of commenters also addressed interpretations in the Proposing Release that were specific to the ''swap dealer'' definition.

a. ''Hold Themselves Out'' and ''Commonly Known in the Trade'' Tests

Some commenters expressed the view that the persons that hold themselves out as or are commonly known as dealers are easy to identify.[38] In addressing the ''hold themselves out'' and ''commonly known'' criteria of the dealer definitions, commenters placed particular focus on whether only dealers engage in the activities cited by the

[29] 16 U.S.C. 824(f).

[30] *See* Exchange Act sections 3(a)(5)(A), (B), 15 U.S.C. 78c(a)(5)(A), (B), as amended by Section 761(a)(1) of the Dodd-Frank Act.

[31] The Proposing Release referred to the fact that the SEC previously has noted that the dealer-trader distinction: ''recognizes that dealers normally have a regular clientele, hold themselves out as buying or selling securities at a regular place of business, have a regular turnover of inventory (or participate in the sale or distribution of new issues, such as by acting as an underwriter), and generally provide liquidity services in transactions with investors (or, in the case of dealers who are market makers, for other professionals).'' Proposing Release, 75 FR at 80177 (*citing* Securities Exchange Act Release No. 47364 (Feb. 13, 2003) (footnotes omitted)). The Proposing Release further noted that other non-exclusive factors that are relevant for distinguishing between dealers and non-dealers can include receipt of customer property and the furnishing of incidental advice in connection with transactions. *See id.*

[32] *See* Proposing Release, 75 FR at 80177–78.

[33] *See id.* at 80178.

[34] *See id.*

[35] *See id.*

[36] *See id.* at 80178–79.

[37] *See id.* at 80179.

[38] *See* transcript of Joint CFTC–SEC Staff Roundtable Discussion on Proposed Dealer and Major Participant Definitions Under Dodd-Frank Act, June 16, 2011 (''Roundtable Transcript'') at 22–23 (remarks of Ron Filler, New York Law School), 50–51 (remarks of Ron Oppenheimer, Working Group of Commercial Energy Firms), 215 (remarks of Bella Sanevich, NISA Investment Advisors LLC).

Proposing Release, or whether those activities are common both to dealers and to other users of swaps and security-based swaps. Commenters particularly stated that end users contact potential counterparties,[39] develop new types of swaps or security-based swaps,[40] and propose terms or language for swap or security-based swap agreements.[41] One commenter further stated that identifying dealing activity based on whether a person develops new types of swaps or proposes swap terms would discourage innovation and the free negotiation of swaps.[42] Some commenters stated that merely responding to a request for proposals or quotations should not, in itself, constitute dealing.[43] Commenters also criticized the Proposing Release's suggestion that criteria for identifying dealing activity include membership in a dealer category of a trade association,[44] as well as providing marketing materials and offering a range of financial products.[45] Commenters also argued for more objective criteria for identifying persons ''commonly known'' as dealers.[46]

Conversely, one commenter said that three particular activities cited in the Proposing Release—membership in a swap association category reserved for dealers, providing marketing materials and expressing a willingness to offer a range of financial products—are indicative of holding oneself out as a dealer or being commonly known in the trade as a dealer, and should be codified in the final rule.[47] Another commenter suggested other factors, such as having a derivatives sales team, that should be treated as indicators of dealer activity.[48] Commenters also expressed the view that this aspect of the dealer definition should focus on whether a person solicits expressions of interest in swaps from a range of market participants,[49] and that end users of swaps can actively seek out and negotiate swaps without necessarily being swap dealers.[50]

b. Market Making

Several commenters generally requested that the Commissions provide more guidance as to which activities constitute making a market in swaps or security-based swaps.[51] Commenters also described various activities as indicating, or not indicating, market making activity. For example, two commenters expressed the view that market making is characterized by entering into swaps on one side of the market and then establishing offsetting positions on the other side of the market.[52] Other commenters equated market making to providing liquidity by regularly quoting bid and offer prices for swaps, and standing ready to enter into swaps.[53] One commenter stated that market making activity is indicated by a person consistently presenting itself as willing to take either side of a trade.[54] Two commenters said that market makers receive tangible benefits (such as reduced trading fees) in return for the obligation to transact when liquidity is required.[55]

In contrast, one commenter said the proposal correctly did not limit market making to consistently quoting a two-sided market, because to do so would insert a loophole into the definition.[56] Some commenters expressed the view that mere active participation in a market or entering into swaps on both sides of a market does not necessarily constitute market making.[57] Others said that occasionally quoting prices on both sides of the market is not market making when done to obtain information about the market or to mask one's view of the market.[58] One commenter stated that futures commission merchants (''FCMs'') and broker-dealers that facilitate customers' entering into swaps are not necessarily market makers.[59] Other commenters urged the Commissions to reject the view that market making requires continuous activity.[60]

A number of commenters addressed the issue of how the dealer definitions should treat swaps or security-based swaps entered into on a trading platform such as a designated contract market (''DCM''), national securities exchange, swap execution facility (''SEF''), or security-based SEF (collectively referred to herein as ''exchanges'').[61] Several stated that entering into swaps or security-based swaps on exchanges should not be considered in determining if a person is a dealer.[62] Some of these commenters emphasized the fact that parties would not know the identity of the counterparty to the swap executed on an exchange (*i.e.,* such swaps are ''anonymous''),[63] while other commenters said that such swaps do not constitute ''accommodating demand'' for swaps or ''facilitating interest'' in swaps.[64] Another commenter said that future means of executing swaps on exchanges are likely to be diverse, and it is premature to draw conclusions

[39] *See* letters from the Financial Services Roundtable (''FSR'') dated February 22, 2011 (''FSR I''), the International Swap Dealers Association (''ISDA'') dated February 22, 2011 (''ISDA I'') and the Midsize Bank Coalition of America (''Midsize Banks'').

[40] *See* letters from the Committee on Capital Markets Regulation (''CCMR'') dated February 22, 2011 (''CCMR I''), FSR I, ISDA I and Midsize Banks.

[41] *See* letters from the BG Americas & Global LNG (''BG LNG'') dated February 22, 2011 (''BG LNG I''), CCMR I, EDF Trading North America, LLC (''EDF Trading'') and The Gavilon Group, LLC (''Gavilon'') dated February 21, 2011 (''Gavilon II'').

[42] *See* letter from EDF Trading.

[43] *See* meeting with American Electric Power, Calpine Corporation (''Calpine''), Constellation, DC Energy LLC (''DC Energy''), Edison International (''Edison Int'l''), Exelon Corp., GenOn, Southern Company, Edison Electric Institute (''EEI'') and Electric Power Supply Association (''ESPA'') (collectively ''Electric Companies'') on April 13, 2011.

[44] *See* letter from ISDA I and joint letter from National Corn Growers Association (''NCGA'') and Natural Gas Supply Association (''NGSA'') (''NCGA/NGSA'') dated February 22, 2011 (''NCGA/NGSA I'').

[45] *See* letter from ISDA I.

[46] *See* letters from ISDA I and Peabody Energy Corporation (''Peabody'').

[47] *See* letter from FSR I.

[48] *See* meeting with Vitol, Inc. (''Vitol'') on February 16, 2011.

[49] *See* letter from Midsize Banks.

[50] *See* letter from EDF Trading.

[51] *See* joint letter from American Benefits Council and the Committee on Investment of Employee Benefits Assets (''ABC/CIEBA'') and letters from FSR I.

[52] *See* letters from DC Energy and FSR I.

[53] *See* letters from Edison Int'l, NextEra Energy Resources, LLC (''NextEra'') dated February 22, 2011 (''NextEra I'') and Vitol, and joint letter from American Electric Power, Edison Int'l, Exelon Corp., and Southern Company (''Utility Group'').

[54] *See* letter from ISDA I.

[55] *See* joint letter from EEI and EPSA (''EEI/EPSA'') and letter from Vitol.

[56] *See* letter from Americans for Financial Reform (''AFR'').

[57] *See* letters from ABC/CIEBA, Managed Funds Association (''MFA'') dated February 22, 2011 (''MFA I''), and Vitol.

[58] *See* letters from NextEra Iand Vitol.

[59] *See* letter from Newedge USA LLC (''Newedge''); *see also* Roundtable Transcript at 39 (remarks of Eric Chern, Chicago Trading Company).

[60] *See* letters from American Federation of State, County and Municipal Employees (''AFSCME''), and FSR I.

[61] While some of these commenters specially addressed this issue in the context of whether a person is a market maker in swaps, others more generally addressed the issue in terms of whether a person is a dealer. For clarity, all of those comments are being addressed in the market maker context.

[62] *See* letters from EEI/EPSA, International Energy Credit Association (''IECA–Credit'') dated February 22, 2011 (''IECA–Credit I''), and NextEra I, joint letter from Shell Trading (US) Company and Shell Energy North America (US), L.P. (''Shell Trading'') dated February 22, 2011 (''Shell Trading I''), and joint letter from Allston Trading, LLC, Atlantic Trading USA LLC, Bluefin Trading LLC, Chopper Trading LLC, DRW Holdings, LLC, Eagle Seven, LLC, Endeavor Trading, LLC, Geneva Trading USA, LLC, GETCO, Hard Eight Futures, LLC, HTG Capital Partners, IMC Financial Markets, Infinium Capital Management LLC, Kottke Associates, LLC, Liger Investments Limited, Marquette Partners, LP, Nico Holdings LLC, Optiver US, Quantlab Financial, LLC, RGM Advisors, LLC, Tibra Trading America LLC, Traditum Group LLC, WH Trading and XR Trading LLC (''Traders Coalition'').

[63] *See* letters from Shell Trading I and Traders Coalition.

[64] *See* letters from EEI/EPSA, IECA–Credit I, and NextEra I. For further discussion of this issue, *see* parts II.A.4 and II.A.5 below.

about how they should be treated in the dealer definitions.[65]

Two commenters asserted that firms that provide liquidity in cleared and exchange-executed swaps by actively participating in the market provide heterogeneity among liquidity providers and thereby disperse risk, and further stated that to regulate such persons as swap dealers subject to increased capital requirements would discourage their participation in the market and increase risk.[66]

One commenter expressed the view that the statutory definition uses dealing and market making interchangeably, and suggested that the analysis of whether a person acts as a dealer should be subsumed within the analysis of whether it acts as a market maker.[67]

c. Exception for Activities Not Part of a ''Regular Business''

Several commenters addressed the exception from the dealer definitions for swap or security-based swap activities that are not part of a ''regular business.'' Some commenters supported the Commissions' proposed interpretation in the context of the ''swap dealer'' definition and stated that this interpretation should be codified in the text of the final rule.[68]

Many commenters said that the activity of entering into swaps or security-based swaps should not be deemed to be a ''regular business,'' and thus not indicative of dealing activity, when the person's use of swaps or security-based swaps are ancillary to, or in connection with, a separate non-swap business that is the person's primary business.[69] Some commenters making this point said that when the person's primary business relates to physical commodities, the person's use of swaps relating to those commodities does not constitute a ''regular business.''[70] Other commenters stated that where a person enters into swaps to serve its own business needs, as opposed to serving the business needs of the counterparty, the person's use of swaps does not constitute a ''regular business.''[71] Other commenters said that the use of swaps to hedge the commercial risks of a business does not constitute a ''regular business'' of entering into swaps.[72] Some commenters also suggested that the ''regular business'' exclusion should be interpreted to mean ''regular swap dealing business'' or ''regular security-based swap dealing business'' to prevent the dealer definitions from capturing hedgers.[73]

On the other hand, two commenters said that the proposed interpretation was correct in the view that the test of whether a person has a ''regular business'' of entering into swaps does not necessarily depend on whether a person's swap activities are a predominant activity, because such an approach would allow a person to engage in a significant level of swap dealing activity without registering as a swap dealer simply because the person also has substantial activities in a non-swap business or businesses.[74]

Other commenters suggested that the types of swap activities that a person engages in are relevant to determining whether the person has a ''regular business'' of entering into swaps. One commenter stated that a person has a ''regular business'' of entering into swaps when the person has a primary business of accommodating demand or facilitating interest in swaps,[75] while others similarly emphasized that a ''regular business'' of entering into swaps is characterized by financial intermediation activities.[76] One commenter took the view that a person that enters into swaps primarily with financial intermediaries does not have a ''regular business'' of entering into swaps.[77]

Some commenters said that the final rule should clarify the point at which a person's episodic or occasional swap activities become a ''regular business'' of entering into swaps.[78] Others stated that the fact that a person enters into swaps frequently or with a large number of counterparties does not necessarily mean that the person has a ''regular business'' of entering into swaps.[79]

Commenters proposed specific tests for determining if a person has a ''regular business'' of entering into swaps. One commenter said the determination should look to whether a person enters into swaps to accommodate demand from other parties and to profit from a bid/ask spread on swaps (as opposed to swaps that are substitutes for physical transactions or positions and used by at least one party to hedge commercial risk), and consider specifically the volume, revenues and profits of such activities, the person's value at risk (VaR) and exposure from such activities, and its resources devoted to such activities.[80] Another commenter said that the determination should be based on the nature of the person's business, the person's business purpose for using swaps, and the person's method of executing swap transactions (*e.g.,* a person whose business primarily relates to physical commodities, who uses swaps to hedge commercial risk, and who executes swaps on an exchange would be less likely to have a ''regular business'' of entering into swaps).[81]

One commenter argued that the ''regular business'' exception should apply to all four of the dealer tests—not only the test for persons that regularly enters into swaps or security-based swaps as an ''ordinary course of business''—and further argued that the ''regular business'' exception should be linked to a ''two-way market'' base

[65] *See* letter from Metropolitan Life Insurance Company (''MetLife'').

[66] *See* letters from Newedge and Traders Coalition; Roundtable Transcript at 39 (remarks of Eric Chern, Chicago Trading Company).

[67] *See* letter from ISDA I.

[68] *See* letters from FSR I, MFA I and Midsize Banks.

[69] *See* Roundtable Transcript at 88 (remarks of Steve Walton, Bank of Oklahoma).

[70] *See* letters from Atmos Energy Corporation (''Atmos Energy''), Dominion Resources, Inc. (''Dominion Resources''), EDF Trading, Edison Int'l, EEI/EPSA, Gavilon II, Hess Corporation and its affiliates (''Hess''), Mississippi Public Utility Staff, NextEra I, National Milk Producers Federation (''NMPF''), Shell Trading I, Utility Group and Working Group of Commercial Energy Firms (''WGCEF'') on the swap dealer definition dated February 22, 2011 (''WGCEF I''), and meeting with Bunge on February 23, 2011.

[71] *See* letters from BT Pension Scheme Management Limited (''BTPS''), EDF Trading, EEI/EPSA and Vitol.

[72] *See* letters from American Petroleum Institute (''API'') dated February 22, 2011 (''API I''), Calpine, Coalition of Physical Energy Companies (''COPE'') dated February 22, 2011 (''COPE I''), Dominion Resources, EDF Trading, Edison Int'l and Peabody; *see also* Roundtable Transcript at 45 (remarks of Ed Prosser, Gavilon) and letter from Church Alliance. In addition, three commenters said that the interpretation of the provisions relating to a ''regular business'' in the Proposing Release is correct, because it will exclude from the definition of swap dealer those persons using swaps to hedge commercial risk. *See* letters from Air Transport Association of America, Inc. (''ATAA''), IECA–Credit I and joint letter from Petroleum Marketers Association of America and New England Fuel Institute.

[73] *See* letters from Church Alliance and Peabody.

[74] *See* letters from AFR and Better Markets, Inc. (''Better Markets'') dated February 22, 2011 (''Better Markets I'').

[75] *See* letter from IECA–Credit I.

[76] *See* letter from NextEra I and Shell Trading I. Another commenter disagreed with this approach, however, saying that a person who enters into swaps as an intermediary between smaller customers and larger financial institutions is not entering into swaps for its ''own account'' and therefore is not a swap dealer, but rather would be an FCM or introducing broker. *See* letter from MFX Solutions, Inc. (''MFX'') dated February 22, 2011 (''MFX I'').

[77] *See* letter from Traders Coalition.

[78] *See* letters from BG LNG I and WGCEF I.

[79] *See* letters from NCGA/NGSA I and Vitol. One of these commenters asked that the final rule clarify that simply because a person engages in swap activity exceeding the thresholds for the *de minimis* exception from the swap dealer definition does not necessarily mean that the person is engaged in a ''regular business'' of swap dealing. *See* letter from Vitol.

[80] *See* letter from NextEra I; *see also* letter from Hess (proposing similar criteria).

[81] *See* letter from Shell Trading I.

requirement to avoid commercial hedgers being encompassed by the dealer definitions.[82]

d. Other Dealer Issues

Commenters also addressed other issues in the Proposing Release, including: (i) Whether Congress intended that there be implicit preconditions to dealer status; (ii) whether the concepts of ''accommodating demand'' for swaps or security-based swaps or ''facilitating interest'' in swaps are useful in identifying dealers; and (iii) whether the interpretation of the dealer definitions should depend on pre-defined, objective criteria.

i. Preconditions

Several commenters said that the proposal is overbroad and would encompass persons that Congress did not intend to regulate as dealers.[83] Comments in this vein said that the statutory definition should be interpreted to require that persons meet certain criteria or engage in certain activity, not explicitly stated in the statute, to be covered by the swap dealer definition. For instance, some commenters said that a dealer is a person who enters into swaps or security-based swaps on either side of the market and who profits from fees for doing so, or from the spread between the terms of swaps on either side of the market.[84] Other commenters made a similar point, saying that swap dealers are those persons that intermediate between swap users on either side of the market.[85]

The commenters were not all in agreement on this, however. Several commenters (including some of those that said swap dealers enter into swaps on both sides of the market) also stated that there are a variety of situations in which a person's activity of contemporaneously entering into swaps on both sides of the market is not indicative of dealing activity.[86] One commenter said that it would not be appropriate to require that a person enter into swaps or security-based swaps on both sides of the market as a litmus test for dealer status, because to do so would create loopholes in the definition.[87] Two commenters also supported rejection of any interpretation that would limit the dealer definitions to encompass only those entities that solely or predominately act as dealers.[88]

In addition, commenters were particularly divided as to whether acting as an intermediary always is indicative of swap dealing, as some commenters said that a person is not a swap dealer when it simply stands between two parties by entering into offsetting swaps with each party.[89]

ii. ''Accommodating Demand'' and ''Facilitating Interest''

A number of commenters addressed the Proposing Release's view that a tendency to accommodate demand for swaps and a general availability to enter into swaps to facilitate other parties' interest in swaps (referred to here as ''accommodating demand'' and ''facilitating interest'') are characteristic of swap dealers. Some commenters stated that accommodating demand and facilitating interest would not be effective factors to identify swap dealers, particularly in bilateral negotiations where it is difficult to say which party is accommodating demand for swaps.[90] Other commenters said the activities of accommodating demand or facilitating interest are indicative of swap dealing only in certain circumstances, such as when they are not related to a person's commodity business,[91] or when done with the purpose of serving the needs of the other party to the swap.[92] Some commenters argued that the statement in the Proposing Release that swap dealers are likely involved in most or all significant parts of the swap markets is incorrect in the market for energy swaps. There, the commenters said, persons can find counterparties for swaps without the intermediation of a swap dealer, and swaps entered into directly by two end users are more frequent.[93]

Other commenters, though, said that the proposal's focus on accommodating demand and facilitating interest strikes the right balance and that the proposed approach is generally correct.[94] Another commenter did not object to including accommodating demand and facilitating risk as factors in the definition, but said that those factors should be applied flexibly.[95]

iii. Application of Objective Criteria, and Additional Factors

Some commenters, specifically addressing the CFTC's proposed interpretive approach to the ''swap dealer'' definition, said that the final rule should set out objective criteria that market participants could use to determine whether or not they are covered by the definition and therefore required to register as swap dealers.[96]

[82] *See* letter from ISDA dated I.

[83] *See, e.g.,* letters from BG LNG I, EDF Trading, ISDA I, NCGA/NGSA dated February 17, 2012 (''NCGA/NGSA II'') and WGCEF I, and joint letter from American Farm Bureau Federation, American Soybean Association, National Association of Wheat Growers, National Cattlemen's Beef Association, National Corn Growers Association, National Council of Farmer Cooperatives, National Grain and Feed Association, National Milk Producers Federation and National Pork Producers Council (''Farmers' Associations'').

[84] *See* letters from COPE I, Edison Int'l, Hess, ISDA I, Shell Trading I, Utility Group, Vitol and WGCEF I; *see also* Roundtable Transcript at 43–45 (remarks of Ed Prosser, Gavilon). However, other commenters questioned whether profiting from a bid/ask spread is a relevant test of dealer status, and emphasized that dealers are those persons who take risk by entering into swaps or security-based swaps on both sides of the market. *See* Roundtable Transcript at 21, 56 (remarks of Richard Ostrander, Morgan Stanley) and 43 (remarks of Russ Wasson, National Rural Electric Cooperative Association (''NRECA'')). Another commenter pointed out that it could be difficult to determine how a person is profiting from entering into swaps. *See* Roundtable Transcript at 42 (remarks of Michael Masters, Better Markets).

[85] *See* letters from API I, BG LNG I and NCGA/NGSA II.

[86] The examples cited were: entering into swaps on either side of a market depending on a firm's commercial purpose for entering each particular swap (*see* letters from the Industrial Energy Consumers of America (''IECA–Consumers'') and WGCEF I, and letter from the Not-For-Profit Electric End User Coalition (''NFPEEU''), consisting of NRECA, American Public Power Association (''APPA'') and Large Public Power Council (''LPPC''); *see also* Roundtable Transcript at 44 (remarks of Ed Prosser, Gavilon)); entering into swaps on both sides of an illiquid market for purposes of price discovery or to elicit bids and offers from other market participants (*see* letters from Hess, Vitol and WGCEF I); and entering into swaps on both sides of the market as part of an investment strategy (*see* letter from ABC/CIEBA).

[87] *See* letter from AFR.

[88] *See* letters from AFR and Better Markets I.

[89] *See* letters from BOKF, National Association (''BOK'') dated January 13, 2012 (''BOK V''), MFX I, Newedge and Northland Energy Trading LLC (''Northland Energy''); *see also* Roundtable Transcript at 48 (remarks of John Nicholas, Newedge). One commenter queried whether the final rule should clarify whether a customer relationship between the parties to a swap is necessary in order for the swap to be relevant in determining whether either of the parties is a swap dealer. *See* letter from Representative Scott Desjarlais (''Rep. Desjarlais'').

[90] *See* letters from NextEra I and Peabody and meeting with Vitol on February 15, 2011.

[91] *See* letter from Shell Trading I.

[92] *See* letters from IECA–Credit I, National Association of Insurance Commissioners (''NAIC''), Vitol and WGCEF I. One of these commenters also said that entering into a bespoke swap with a registered swap dealer, in which the swap dealer lays off risk, should not be viewed as accommodating demand or facilitating interest. *See* letter from Vitol.

[93] *See* letter from BG LNG I, NCGA/NGSA I, NFPEEU, NRG Energy, Inc. (''NRG Energy'') and WGCEF I and meeting with Vitol on February 16, 2011.

[94] *See* letters from AFR and MFX I.

[95] *See* letter from National Grain and Feed Association (''NGFA'') dated February 22, 2011 (''NGFA I'').

[96] *See* letters from BG LNG I, EEI/EPSA, Peabody, Rep. Desjarlais and Utility Group. Some commenters said that the CFTC's interpretive approach to the swap dealer definition should be codified in the text of the final rule. *See* letters from Alternative Investment Management Association Limited (''AIMA'') dated February 22, 2011 (''AIMA I'') and COPE I.

Others focused especially on statements in the Proposing Release to the effect that swap dealers are those persons who ''tend to'' engage in certain activities, and that persons who engage in certain activities are ''likely'' to be swap dealers, as being overly subjective and difficult to interpret.[97]

Certain commenters suggested specific objective criteria to use to identify swap dealers. One commenter said that swap dealing activity is characterized by more frequent use of swaps; having substantial staff and technological resources devoted to swaps; a larger portion of revenue and profit being derived from swap activity; and owning fewer physical assets related to the type of swaps entered into.[98] Another commenter said that to identify swap dealers, the CFTC should compare a person's revenue or profits generated by swap activity to its overall revenue or profits; compare a person's total business volume to the volume, VaR and exposure associated with the swap activity; compare a person's total business resources to the resources devoted to swap activity; and consider ownership or control of physical assets in the specific market or region to which the person's swap activity is tied.[99]

More generally, some commenters supported codification of more concrete tests in connection with the dealer definitions.[100] However, other commenters said that the use of bright line rules to determine whether a person is a dealer would be inappropriate given the dynamic nature of the swap and security-based swap markets. These commenters supported a facts and circumstances approach to the dealer definition as a better approach.[101] One commenter also raised issues about the sources of information that may be considered as part of a dealer determination.[102]

e. Application of Exchange Act ''Dealer-Trader'' distinction

i. Security-Based Swap Dealer Definition

A number of commenters supported the proposed use of the dealer-trader distinction under the Exchange Act to interpret the ''security-based swap dealer'' definition.[103] Two commenters, however, specifically opposed use of the distinction in the context of security-based swaps, arguing that use of the distinction would create confusion or would be inconsistent with the goal of improved transparency.[104]

ii. Swap Dealer Definition

Some commenters said that the CFTC should apply the dealer-trader distinction as it has been interpreted with respect to the definition of ''dealer'' under the Exchange Act to identify swap dealers.[105] Some commenters said that the applicable interpretations under the Exchange Act mean that swaps a person uses for proprietary trading (including for speculative purposes) should not be considered in determining if the person is a swap dealer because dealers enter into transactions in order to profit from spreads or fees regardless of their view of the market for the underlying item, whereas traders enter into transactions in order to take a view on the direction of the market or to obtain exposure to movements in the price of the underlying item.[106] Two commenters said that if the CFTC applied the distinction, traders should be subject to potential registration as major swap participants, and dealers should be subject to regulation as swap dealers.[107] Commenters acknowledged differences between the market for swaps and the market for securities, but said that the Exchange Act interpretations are still relevant.[108]

On the other hand, some commenters agreed with the CFTC's view not to apply Exchange Act interpretations to the definition of the term ''swap dealer.'' These commenters said that it is appropriate not to apply the interpretations under the Exchange Act to identify persons that meet the swap dealer definition under the CEA.[109]

e. Application to Particular Swap Markets

i. Aggregators

Certain commenters addressed persons who enter into swaps as aggregators, with most of those commenters discussing agricultural cooperatives. Commenters said that agricultural cooperatives that hedge their own risks or the risks of their members regarding agricultural commodities should be excluded from the swap dealer definition because Congress did not intend to treat agricultural cooperatives as swap dealers and because agricultural cooperatives are in effect an extension of their members.[110] Some commenters said that the agricultural cooperatives' use of swaps allows their members to hedge risks when the members' transactions are too small for (or otherwise not qualified for) the futures markets.[111]

Some commenters said that an exclusion from the swap dealer definition also should be available to private companies that serve as aggregators for swaps in agricultural commodities or otherwise offer swaps

[97] *See* letters from BG LNG I, Chesapeake Energy Corporation (''Chesapeake Energy''), COPE I, ISDA I, Vitol and WGCEF I. Some commenters focused on particular aspects of the swap dealer definition as requiring further detail, such as, for example, what it means to be ''commonly known in the trade'' as a swap dealer (*see* letter from Peabody) and the definition of market making (*see* letters from Midsize Banks and Peabody).

[98] *See* letter from Hess.

[99] *See* letter from NextEra I.

[100] *See, e.g.,* letters from EEI/EPSA, FSR I, ISDA I, NextEra I and WGCEF I.

[101] *See* letters from Better Markets I, Chris Barnard (''Barnard'') and Prof. Michael Greenberger, University of Maryland School of Law (''Greenberger'').

[102] *See* letter from ISDA I (stating that sources of information considered by the Commissions in determining dealer status should be revealed to the entity being evaluated).

[103] *See, e.g.,* letters from Coalition for Derivatives End-Users (''CDEU''), CCMR I, ISDA I and MetLife.

[104] *See* letters from AFR and AFSCME.

[105] Some of these commenters said that, since some provisions in the statutory swap dealer definition are similar to the definition of a ''dealer'' under the Exchange Act, Congress intended that the two definitions would be applied in the same way. *See* letters from API I, BG LNG I, CDEU, IECA–Consumers and WGCEF I. Others said that the CFTC should apply these interpretations because they have been effectively applied for a long time in the context of securities. *See* letters from CCMR I and MFA I.

[106] *See* letters from Gavilon II, and Next Era I, and meetings with Electric Companies on April 13, 2011 and WGCEF on April 28, 2011. Another commenter said the interpretations mean that dealers and traders can be distinguished by their activities: dealers hold themselves out as buying and selling on a regular basis, derive income from providing services in the chain of distribution, and profit from price spreads, while traders do not provide services or extend credit but, rather, profit from changes in the market value of underlying items. *See* letter from API I.

[107] *See* letters from EDF Trading and IECA–Consumers.

[108] *See* letters from API I, Gavilon I and IECA–Consumers.

[109] *See* letters from AFR and AFSCME; *see also* joint meeting with AFR and Better Markets on March 17, 2011 (dealer-trader distinction not helpful in identifying swap dealers because the transparency and operational robustness of the swap market is much lower than in the securities market). One commenter said the precedents should be applied only by the SEC to identify security-based swap dealers. *See* letter from NAIC.

[110] *See* letters from Dairy Farmers of America (''DFA''), Growmark, Land O'Lakes, Inc. (''Land O'Lakes'') dated February 22, 2011 (''Land O'Lakes II''), National Council of Farmer Cooperatives (''NCFC'') dated February 22, 2011 (''NCFC I'') and NMPF. One commenter also said that a subsidiary of an agricultural cooperative that enters into swaps with its parent cooperative, and the members of the parent cooperative, should be excluded from the swap dealer definition for the same reason. *See* meeting with Agrivisor. Another commenter said that an agricultural cooperative's swaps with farmers and other persons for risk management should be disregarded in determining if the cooperative is a swap dealer so long as the swaps relate to the marketing function of the cooperative, even if the swaps are not with members of the cooperative. *See* letter from NMPF.

[111] *See* letters from DFA and Growmark.

for agricultural risk management.[112] These commenters said that such an exclusion would reduce the costs and regulatory burdens imposed on such companies and therefore provide a broader choice of swap providers to farmers and other agricultural market participants, which they said would reduce risks.[113]

One commenter discussed a small energy firm that aggregates demand for swaps from small energy retailers and consumers. This commenter said that such aggregators should be excluded from the swap dealer definition because imposing the swap dealer regulations (which would be promulgated with large financial firms in mind) on such firms would increase costs for the aggregators, discourage the aggregators' offering of swaps, and thereby reduce choice and efficiency in the market.[114] Another commenter said that a firm that enters into swaps with microfinance lenders and offsetting swaps with commercial banks is akin to an introducing broker or FCM, and should be excluded from the swap dealer definition on the grounds that it does not enter into swaps on its own initiative, but rather to provide access to the swap markets to smaller counterparties.[115]

Another commenter said that there is no need for any special treatment of aggregators in the swap dealer definition. According to this commenter, the CFTC's guidance regarding the definition and the *de minimis* exception from the definition address the relevant issues properly and completely.[116]

ii. Physical Commodity Swaps

Commenters that discussed physical commodity swaps primarily focused on swaps related to energy commodities such as oil, natural gas and electricity. The commenters said that the market for these swaps is different from the market for swaps on interest rates and other financial commodities because, among other things, the swaps are used to mitigate price and delivery risks directly linked to a commercial enterprise; less swap activity flows through intermediaries; the markets for the underlying physical commodities are separately regulated; and the failure of a commodity market participant is not likely to impact financial markets as a whole.[117] Therefore, these commenters believe, the application of the swap dealer definition to participants in these physical commodity swap markets should be different from the application to participants in the financial commodity swap markets.[118] Some commenters said that imposing the costs of swap dealer regulation on participants in the markets for physical commodity swaps would discourage participation in the market, thereby reducing liquidity and increasing market concentration.[119]

iii. Electricity Swaps

Commenters on the use of swaps in connection with the generation and transmission of electricity addressed a variety of issues. First, commenters said that markets related to electricity are different from markets for other physical commodities in that electricity must be generated and transmitted at the time it is needed (it cannot be stored for future use); the overall demand for electricity is inelastic but demand at any particular time is subject to external variables, such as weather; the generation, transmission and use of electricity is widely dispersed and geographically specific; the markets are overseen by regulators such as state Public Utility Commissions, regional transmission organizations (''RTOs'') and the Federal Energy Regulatory Commission (''FERC''); and government mandates require continuous supply of electricity and treat electricity as a ''public good.'' [120] Commenters said that because of these differences, the use of swaps related to electricity is different from the use of swaps on other physical commodities in that electricity swaps: Are more highly customized to a particular place and time; are more likely to relate to a short time period or be more frequently entered into; typically can be tied to a specific generation, transmission or use of electricity; are more likely to be entered into directly by end-users rather than through dealers; are likely to be entered into by electricity companies on both sides of the market; and in many cases were subject to regulatory oversight prior to the Dodd-Frank Act.[121]

Commenters made various points regarding how swaps related to electricity should be treated for purposes of the swap dealer definition. A coalition of not-for-profit power utilities and electric cooperatives said that electricity cooperatives should be excluded from the swap dealer definition because they are non-profit entities that enter into swaps for the benefit of their members, they do not hold themselves out as swap dealers, they do not make markets, and their swaps are not necessarily reflective of market rates.[122] Other commenters said that swaps related to transactions on tariff schedules approved by FERC or the Electric Reliability Council of Texas should be disregarded in determining if a person is a swap dealer.[123] And, some commenters said that any special treatment of swaps related to electricity should apply not only to companies that generate, transmit or distribute electricity, but also to energy marketing companies that use swaps to benefit from price changes in the underlying energy commodities or to hedge related risks.[124]

On the other hand, some commenters acknowledged that a person who makes a market in swaps related to electricity by standing ready to enter into such swaps in order to profit from a bid/ask spread would be a swap dealer, even if the person was in the business of generating, transmitting or distributing

[112] *See* letters from Farmers' Associations, NGFA I and NMPF.

[113] *See id.*

[114] *See* letter from Northland Energy. This commenter defined an ''aggregator'' as a person who: (i) Enters into swaps predominantly in one direction with counterparties that are using swaps to establish bona fide hedges; and (ii) offsets risks associated with such swaps using regulated futures contracts or cleared swaps.

[115] *See* letter from MFX dated June 3, 2011 (''MFX II''). This commenter said that the exclusion should be available to a person who operates primarily on a not-for-profit basis and limits its swap activities to offering swaps to persons in underserved markets and offsetting such swaps, and who meets other requirements to limit the scope of the exclusion.

[116] *See* letter from Better Markets I.

[117] *See* letters from BG LNG I, Dominion Resources, National Energy Marketers Association (''NEM''), NFPEEU, Vitol and WGCEF I joint letter from Senator Debbie Stabenow and Representative Frank Lucas (many commercial end-users of swaps with inherent physical commodity price risk use swaps to hedge such risk and otherwise for their own trading objectives and not for the benefit of others) and meetings with Bunge on May 18, 2011 and Electric Companies on April 13, 2011.

[118] *See id.*

[119] *See* letters from Dominion Resources, NEM and NFPEEU.

[120] *See* letters from Edison Int'l, the staff of the FERC (''FERC Staff''), National Association of Regulatory Utility Commissioners (''NARUC''), NEM, NextEra I, NFPEEU and National Rural Utilities Cooperative Finance Corporation (''NRU CFC'') dated February 14, 2011 (''NRU CFC I''), joint letter from NRECA, APPA, LPPC, EEI and EPSA (''Electric Trade Associations'') and meetings with Electric Companies on April 13, 2011 and NFPEEU on January 29, 2011.

[121] *See* letters from Edison Int'l, EEI/EPSA, Electric Trade Associations, FERC Staff, NextEra I and NFPEEU and meeting with Electric Companies on April 13, 2011.

[122] *See* letter from NFPEEU. This commenter said the exclusion from the swap dealer definition should extend to persons acting as an operating or purchasing agent for other utilities in connection with energy infrastructure products, or otherwise entering into energy commodity swaps on behalf of other end users.

[123] *See* letters from EDF Trading, FERC Staff and NARUC.

[124] *See* letters from DC Energy, EDF Trading and EEI/EPSA.

electricity and owned physical facilities for that purpose.[125]

f. Suggested Exlusions From the Dealer Definitions

Several commenters took the view that the swap dealer and security-based swap dealer definitions should categorically exclude, or should be interpreted in a way that would be expected to exclude, a variety of types of persons or transactions. Commenters particularly suggested that the following categories of persons should be excluded from the dealer definitions: Agricultural cooperatives and electric cooperatives (as addressed above), employee benefit plans as defined in the Employee Retirement Income Security Act of 1974 (''ERISA''),[126] farm credit system institutions,[127] Federal Home Loan Banks,[128] insured depository institutions that limit their swap dealing activity to riskless principal transactions,[129] FCMs and broker-dealers that limit their swap dealing activity to riskless principal transactions,[130] financial guaranty insurers and their affiliates that do not enter into new swaps,[131] asset managers,[132] non-financial companies offering swaps related to their physical commodity business,[133] any person who enters into swaps or security-based swaps only with registered dealers and major participants,[134] persons that do not pose systemic risk,[135] hedge funds [136] and entities that enter into swaps or security-based swaps solely in a fiduciary capacity.[137]

Commenters also suggested that the dealer definitions categorically exclude, or should be interpreted to exclude, the following types of swaps and security-based swaps: Exchange-cleared swaps and security-based swaps,[138] options to make or receive delivery of physical commodities,[139] cash forward transactions with embedded swaps and book-out transactions,[140] swaps or security-based swaps that are used for hedging or mitigating commercial risk,[141] swaps entered into to profit from future changes in the price of the underlying commodity,[142] swaps or security-based swaps entered into as a fiduciary or agent for another person,[143] swaps or security-based swaps entered into for purposes of price discovery,[144] and, as noted above, swaps related to items that are covered by a tariff approved by FERC or the Electric Reliability Council of Texas.[145]

In contrast, some commenters opposed providing any categorical exclusions from the dealer definitions. One commenter stated that the definitions' focus on a person's activities—as opposed to whether that person falls within a particular category—is a better means of determining whether the person is a swap dealer.[146] Another commenter described the requested exclusions as attempts to achieve carve-outs that are not provided for in the statute.[147]

Lastly, several commenters addressed the extraterritorial application of the definitions of the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant.'' In general, the commenters addressed when and how the definitions should be applied to persons based outside the U.S. and how the definitions should take account of non-U.S. requirements that may be applicable to such persons.[148] The Commissions intend to separately address issues related to the application of these definitions to non-U.S. persons in the context of the application of Title VII to non-U.S. persons.

g. Cost-Benefit Issues and Hedging Deterrence

Several commenters emphasized the cost of being regulated as a dealer, and emphasized that an overbroad scope of the dealer definitions would impose significant unwarranted costs on entities contrary to the goals of the Dodd-Frank Act, and would deter the use of swaps and security-based swaps for hedging.[149] Some commenters also noted that impact of the provisions of section 716 of the Dodd-Frank Act on entities that are deemed to be swap

[125] *See* letter from EEI/EPSA and meeting with Electric Companies on April 13, 2011.

[126] *See* letter from ABC/CIEBA.

[127] *See* letter from Farm Credit Council dated February 22, 2011 (''Farm Credit Council I'').

[128] *See* letters from Credit Union National Association (''CUNA'') and Federal Home Loan Banks (''FHLB'') dated February 22, 2011 (''FHLB I'').

[129] *See* letter from BOK dated January 31, 2011 (''BOK I''); *but see* letter from Vitol at 7 (riskless principal transactions are a ''good model for true swap dealing activity'').

[130] *See* letter from Newedge.

[131] *See* letter from Association of Financial Guaranty Insurers (''AFGI'').

[132] *See* letter from BlackRock, Inc. (''BlackRock'') dated February 22, 2011 (''BlackRock I'').

[133] Commenters making this point varied in their phrasing of potential exclusions, and particularly suggested exclusions for: Agricultural firms offering swaps as risk management tools related to physical commodities (*see* letter from NGFA I); all firms, other than financial entities whose primary business is swap dealing (*see* letter from NEM); any person that uses swaps only to reduce price volatility, enters into a volume of swaps relating to any physical commodity that is less than the volume of its trading in that commodity, and is not making a market (*see* letter from Chesapeake Energy); or any person that limit its use of swaps to hedging or speculating (*see* letters from API I).

[134] *See* letter from ISDA I.

[135] *See* letters from NARUC and NCGA/NGSA I.

[136] *See* letter from MFA I.

[137] *See* letters from FSR dated February 22, 2011 and Midsize Banks.

[138] *See* letters from Commodity Markets Council (''CMC''), EEI/EPSA, IECA-Credit I, NextEra I, Shell Trading I, Utility Group and Vitol.

[139] *See* letters from NextEra I and WGCEF I. The commenters acknowledged that such options may or may not be included in the definition of ''swap.''

[140] *See* letter from CMC.

[141] *See, e.g.,* letters from Edison Int'l and WGCEF I and joint letter from Senator Stabenow and Representative Lucas (also saying that definition of ''hedging'' should be consistent with respect to the dealer and major participant definitions and the end-user exception from clearing).

[142] *See* letters from EEI/EPSA, NextEra I, Utility Group and WGCEF I.

[143] *See* letters from Midsize Banks, NFPEEU and FSR I.

[144] *See* letters from EEI/EPSA, Vitol and WGCEF I.

[145] *See* letters from EDF Trading, FERC Staff and NARUC.

[146] *See* letter from Better Markets I.

[147] *See* letter from AFSCME. Additional commenters emphasized the need for transparency about swaps and swap activities. *See* letters from Jason Cropping and BJ D'Milli.

[148] *See, e.g.,* letters from FSR I, Institute of International Bankers, ISDA I, Investment Management Association, Japan Financial Services Agency, Securities Industry and Financial Markets Association (''SIFMA'') dated February 3, 2011 (''SIFMA I''), and the World Bank Group, joint letter from the Autorité de contrôle prudential and the Autorité des marches financiers, joint letter from Bank of America Merrill Lynch, Barclays Capital, BNP Paribas S.A. (''BNP Paribas''), Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG (''Deutsche Bank''), HSBC, Morgan Stanley, Nomura Securities International, Inc. (''Nomura Securities''), Société Générale and UBS Securities LLC (''Twelve Firms''), joint letter from the Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd. and Sumitomo Mitsui Banking Corporation, and joint letter from Barclays Bank PLC, BNP Paribas, Credit Suisse AG, Deutsche Bank, HSBC, Nomura Securities, Rabobank Nederland, Royal Bank of Canada, the Royal Bank of Scotland Group pLc, Société Générale, the Toronto-Dominion Bank and UBS AG.

[149] *See* joint letter from Representatives Spencer Bachus and Frank Lucas at 2 (''Casting an overly-broad net in defining [dealer and major participant] could force some smaller participants to leave the marketplace as a result of increased costs, or eliminate certain types of contracts used for hedging. If either occurs, businesses will be left exposed to market volatility and the consequences will ultimately be felt by Americans in the form of increased consumer costs.'') and letters from ISDA Iat 7 (''The substantial additional burdens and costs of Dealer regulation must be reserved for those whose business it is to 'make the market,' that is, those who consistently both buy and sell. This is in accord with Dodd-Frank Act's market regulatory goals, as well as the legislation's obvious intent to preserve healthy growth and innovation in the U.S. swap markets.'' (footnote omitted)), Peabody at 2–3 (''Legal uncertainty over the application to end users of the significant regulatory requirements for [swap dealers] could lead end users to minimize their use of swaps in order to avoid the risk of being deemed to be [a swap dealer].''), and Church Alliance (stating that the risk of incurring the costs of dealer regulation would harm employee benefit plans by reducing their use of swaps and security-based swaps for hedging and risk mitigation).

dealers or security-based swap dealers.[150] Also, one commenter suggested that using a qualitative test for the dealer definition might increase costs due to regulatory uncertainty.[151]

One commenter specifically suggested that in considering the final rules, the Commissions should consider empirical data regarding the costs and benefits flowing from the rules and issue a second analysis of the costs and benefits of the rules for public comment,[152] while other commenters said that the consideration of cost and benefits should include the cumulative cost of interrelated regulatory burdens arising from all the rules proposed under the Dodd-Frank Act.[153] Other commenters said the Commissions should consider alternatives that would impose fewer costs.[154]

Another commenter said that the cost-benefit analyses in the Proposing Release may have understated the benefits of the proposed rules, because focusing on individual aspects of all the rules proposed under the Dodd-Frank Act prevents consideration of the full range of benefits that arise from the rules as a whole, in terms of providing greater financial stability, reducing systemic risk and avoiding the expense of assistance to financial institutions in the future.[155] This commenter said the consideration of benefits of the proposed rules should include the mitigated risk of a financial crisis.[156]

3. Final Rules and Interpretation—General Principles

Consistent with the Proposing Release, the final rules that define the terms ''swap dealer'' and ''security-based swap dealer'' closely follow the statutory definitions' four tests and exclusion for activities that are not part of a ''regular business.'' [157] In addition, this Adopting Release sets forth interpretive guidance regarding various elements of the final rules.

Because the definitions of the terms ''swap dealer'' in the CEA and ''security-based swap dealer'' in the Exchange Act are substantially similar, the rules further defining those terms and the accompanying interpretations in this Adopting Release reflect common underlying principles. At the same time, the interpretations regarding the application of the definitions differ in certain respects given the differences in the uses of and markets for swaps and security-based swaps.[158] For example, because security-based swaps may be used to hedge or gain economic exposure to underlying individual securities (while recognizing distinctions between security-based swaps and other types of securities, as discussed below), there is a basis to build upon the same principles that presently are used to identify dealers for other types of securities. These same principles, though instructive, may be inapplicable to swaps in certain circumstances or may be applied differently in the context of dealing activities involving commodity, interest rate, or other types of swaps.

For these reasons, we separately are addressing the interpretation of the ''swap dealer'' and ''security-based swap dealer'' definitions.

Also, as discussed below, the Commissions are directing their respective staffs to report separately regarding the rules being adopted in connection with the definition and related interpretations. These staff reports will help the Commissions evaluate the ''swap dealer'' and ''security-based swap dealer'' definitions in all respects, including whether new or revised tests or approaches would be appropriate for identifying swap dealers and security-based swap dealers.[159]

4. Final Rules and Interpretation—Definition of ''Swap Dealer''

The Dodd-Frank Act contains a comprehensive definition of the term ''swap dealer,'' based upon types of activities. As noted above, we are adopting a final rule under the CEA that, like the proposed rule, defines the term ''swap dealer'' using terms from the four statutory tests and the exclusion for swap activities that are not part of ''a regular business.'' [160] The final rule includes modifications from the proposed rule that are described below, including provisions stating that swaps entered into for hedging physical positions as defined in the rule, swaps between majority-owned affiliates, swaps entered into by a cooperative with its members, and certain swaps entered into by registered floor traders, are excluded from the swap dealer determination.[161] The Commissions, in consideration of comments received, are also making certain modifications to the interpretive guidance set out in the Proposing Release with respect to various elements of the statutory definition of the term ''swap dealer,'' as described below.

The determination of whether a person is covered by the statutory definition of the term ''swap dealer'' requires application of various provisions of the rule further defining that term, as well as the interpretive guidance in this Adopting Release, depending on the person's particular circumstances. We intend that the determination with respect to a particular person would proceed as follows.

The person would begin by applying the statutory definition, and the provisions of the rule which implement the four statutory tests and the exclusion for swap activities that are not part of ''a regular business,'' [162] in order to determine if the person is engaged in swap dealing activity. In that analysis, the person would apply the interpretive guidance described in this part II.A.4, which provides for consideration of the relevant facts and circumstances. As part of this consideration, the person would apply elements of the dealer-trader distinction, as appropriate, including as described in part II.A.4.a, below.

The rule provides that certain swaps are not considered in the determination of whether a person is a swap dealer.[163] In particular, swaps entered into by an insured depository institution with a customer in connection with originating a loan with that customer, [164] swaps

[150] *See* letters from American Bankers Association (''ABA'') dated November 3, 2011 (''ABA I''), BOK I, and ISDA I. Section 716 of the Dodd-Frank Act prohibits any ''swaps entity''—a term that encompasses swap dealers and security-based swap dealers—from receiving Federal assistance with respect to any swap, security-based swap, or other activity of the swaps entity.

[151] *See* letter from API I (stating that costs of regulatory uncertainty stem from the use of qualitative factors for identifying dealing, and from regulatory efforts to reach beyond ''true'' swap dealers); *see also* letter from Dominion Resources (the opportunity costs associated with regulatory uncertainty should be considered).

[152] *See* letter from WGCEF I.

[153] *See* letters from ABA I, NFPEEU and WGCEF dated December 20, 2011, enclosing a report prepared by NERA Economic Consulting (''NERA'') (''WGCEF VIII''); *see also* letter from NERA dated March 13, 2012.

[154] *See* letters from NextEra I (referring to alternative *de minimis* tests) and NFPEEU.

[155] *See* letter from Better Markets dated June 3, 2011 (''Better Markets II'').

[156] Better Markets cited estimates that the worldwide cost of the 2008 financial crisis in terms of lost output was between $60 trillion and $200 trillion, depending primarily on the long term persistence of the effects. *See* letter from Better Markets II.

[157] *See* CFTC Regulation § 1.3(ggg)(1), (2); Exchange Act rule 3a71–1(a), (b).

[158] Section 712(a)(7)(A) of the Dodd-Frank Act provides that in adopting rules and orders implementing Title VII, the Commissions shall treat functionally or economically similar products or entities in a similar manner. Section 712(a)(7)(B), though, provides that the Commissions need not act in an identical manner.

[159] *See* part V, *infra*.

[160] *See* CFTC Regulation § 1.3(ggg)(1), (2).

[161] *See* CFTC Regulation § 1.3(ggg)(6)(ii), (iii).

[162] *See* CFTC Regulation § 1.3(ggg)(1), (2).

[163] *See* CFTC Regulation § 1.3(ggg)(5), (6).

[164] *See* CFTC Regulation § 1.3(ggg)(5); *see also* part II.B, *infra*.

between majority-owned affiliates, [165] swaps entered into by a cooperative with its members,[166] swaps entered into for hedging physical positions as defined in the rule,[167] and certain swaps entered into by registered floor traders [168] are excluded from the swap dealer determination.

If, after completing this review (taking into account the applicable interpretive guidance and excluding any swaps as noted above), the person determines that it is engaged in swap dealing activity, the next step is to determine if the person is engaged in more than a *de minimis* quantity of swap dealing.[169] If so, the person is a swap dealer. When the person registers, it may apply to limit its designation as a swap dealer to specified categories of swaps or specified activities of the person in connection with swaps.[170]

In this part II.A.4., we provide interpretive guidance on the application of the ''swap dealer'' definition, modified from the Proposing Release as appropriate based on comments received. This guidance separately addresses the following: application of the dealer-trader framework; the ''holding out'' and ''commonly known'' criteria; market making; the not part of ''a regular business'' exception; the exclusion of swaps entered into for hedging physical positions as defined in the rule; and the overall interpretive approach to the definition.[171]

a. Use of the Dealer-Trader Distinction

We believe that the dealer-trader distinction [172]—which already forms a basis for identifying which persons fall within the longstanding Exchange Act definition of ''dealer''—in general provides an appropriate framework for interpreting the statutory definition of the term ''swap dealer.'' [173] While there are differences in the structure of those two statutory definitions,[174] we believe that their parallels—particularly their exclusions for activities that are ''not part of a regular business''—warrant analogous interpretive approaches for distinguishing dealers from non-dealers.[175] Thus, the dealer-trader distinction forms the basis for a framework that appropriately distinguishes between persons who should be regulated as swap dealers and those who should not. We also believe that the distinction affords an appropriate degree of flexibility to the analysis, and that it would not be appropriate to seek to codify the distinction in rule text.

The Commissions recognize that the dealer-trader distinction needs to be adapted to apply to swap activities in light of the special characteristics of swaps and the differences between the ''dealer'' definition, on the one hand, and the ''swap dealer'' definition, on the other. Relevant differences between the swap market and the markets for securities (other than security-based swaps) include:

• *Level of activity*—Swap markets are marked by less activity than markets involving certain types of securities (while recognizing that some debt and equity securities are not actively traded). This suggests that in the swap context, concepts of ''regularity'' should account for a participant's level of activity in the market relative to the total size of the market.

• *No separate issuer*—Each counterparty to a swap in essence is the ''issuer'' of that instrument; in contrast, dealers in cash market securities generally transact in securities issued by another party. This distinction suggests that the concept of maintaining an ''inventory'' of securities is inapposite in the context of swaps. Moreover, this distinction—along with the fact that the ''swap dealer'' definition lacks the conjunctive ''buying *and* selling'' language of the ''dealer'' definition—suggests that concepts of two-sided markets at times would be less relevant for identifying swap dealers than they would be for identifying dealers.[176]

• *Predominance of over-the-counter and non-standardized instruments*—Swaps an thus far are not significantly traded on exchanges or other trading systems, in contrast to some cash market securities (while recognizing that many cash market securities also are not significantly traded on those systems).[177] These attributes—along with the lack of ''buying *and* selling'' language in the swap dealer definition, as noted above—suggest that concepts of what it means to make a market need to be construed flexibly in the contexts of the swap markets.

• *Mutuality of obligations and significance to ''customer'' relationship*—In contrast to a secondary market transaction involving equity or debt securities, in which the completion of a purchase or sale transaction can be expected to terminate the mutual obligations of the parties to the transaction, the parties to a swap often will have an ongoing obligation to exchange cash flows over the life of the agreement. In light of this attribute, some market participants have expressed the view that they have ''counterparties'' rather than ''customers'' in the context of their swap activities.

In applying the dealer-trader distinction, it also is necessary to apply

[165] *See* CFTC Regulation § 1.3(ggg)(6)(i); *see also* part II.C, *infra.*

[166] *See* CFTC Regulation § 1.3(ggg)(6)(ii); *see also* part II.C, *infra.*

[167] *See* CFTC Regulation § 1.3(ggg)(6)(iii); *see also* part II.B.4.e, *infra.*

[168] *See* CFTC Regulation § 1.3(ggg)(6)(iv); *see also* part II.B.4.f, *infra.*

[169] *See* CFTC Regulation § 1.3(ggg)(4); *see also* part II.D, *infra.*

[170] *See* CFTC Regulation § 1.3(ggg)(3); *see also* part II.E, *infra.*

[171] The Commissions note that interpretations of the applicability of the dealer-trader distinction to the ''swap dealer'' definition under the CEA do not affect existing, or future, interpretations of the dealer-trader distinction under the Exchange Act.

[172] *See* note 31, *supra.* The principles embedded within the ''dealer-trader distinction'' are also applicable to distinguishing dealers from non-dealers such as hedgers or investors. *See* note 250, *infra.*

[173] The Commissions note that interpretations of the applicability of the dealer-trader distinction to the ''swap dealer'' definition under the CEA do not affect existing, or future, interpretations of the dealer-trader distinction under the Exchange Act.

[174] For example, while the ''dealer'' definition encompasses certain persons in the business of ''buying and selling'' securities, the ''swap dealer'' definition does not address either ''buying'' or ''selling.'' We also note that the ''dealer'' definition requires the conjunctive ''buying *and* selling''—which connotes a degree of offsetting two-sided activity. In contrast, the swap dealer definition (particularly the ''regularly enters into'' swaps language of the definition's third prong) lacks that conjunctive terminology.

[175] In the Proposing Release, the CFTC did not propose to use principles from the dealer-trader distinction to interpret the definition of the term ''swap dealer,'' instead proposing an interpretive approach that focused on, among other things, a person's functional role in the swap markets and its relationships with swap counterparties. *See* Proposing Release, 75 FR at 80177. There was, however, some overlap in practice between the factors identified in the Proposing Release relating to a swap dealer's functional role and relationships and the principles of the dealer-trader distinction that were proposed to be applied to identify security-based swap dealers. Moreover, the changes to the interpretive approach to the swap dealer definition that we are adopting here and discussed in this part II.A.4 are in many respects similar to the principles of the dealer-trader distinction. We also acknowledge the commenters who asked for additional guidance regarding the application of the definitions. *See, e.g.,* letters from Gavilon II, Peabody and the Utility Group, and meeting with CDEU on April 7, 2011.

Thus, while the incorporation of the dealer-trader distinction in the interpretation of the term ''swap dealer'' constitutes a change from the Proposing Release, this is simply reflective of the other changes to the CFTC's interpretive approach that we are adopting for the final rule and the overlap between the factors relating to a swap dealer's functional role and counterparty relationships and the principles of the dealer-trader distinction.

[176] The analysis also should account for the fact that a party to a swap can use other derivatives or cash market instruments to hedge the risks associated with the swap position, meaning that two-way trading is not necessary to maintain a flat risk book.

[177] Even though we expect trading of swaps on exchanges following the implementation of Title VII, we expect there to remain a significant amount of over-the-counter activity involving swaps.

the statutory provisions that will govern swap dealers in an effective and logical way. Those statutory provisions added by the Dodd-Frank Act advance financial responsibility (*e.g.,* the ability to satisfy obligations, and the maintenance of counterparties' funds and assets) associated with swap dealers' activities,[178] other counterparty protections,[179] and the promotion of market efficiency and transparency.[180] As a whole, the relevant statutory provisions suggest that we should interpret the ''swap dealer'' definition to identify those persons for which regulation is warranted either: (i) Due to the nature of their interactions with counterparties; or (ii) to promote market stability and transparency, in light of the role those persons occupy within the swap and security-based swap markets.

There are several aspects of our interpretive approach to the swap dealer definition that are particularly similar to the dealer-trader distinction as it will be applied to determine if a person is a security-based swap dealer. In particular, the following activities, which are indicative of dealing activity in the application of the dealer-trader distinction,[181] similarly are indicative that a person is acting as a swap dealer:[182] (i) Providing liquidity by accommodating demand for or facilitating interest in the instrument (swaps, in this case), holding oneself out as willing to enter into swaps (independent of whether another party has already expressed interest), or being known in the industry as being available to accommodate demand for swaps; (ii) advising a counterparty as to how to use swaps to meet the counterparty's hedging goals, or structuring swaps on behalf of a counterparty; (iii) having a regular clientele and actively advertising or soliciting clients in connection with swaps;[183] (iv) acting in a market maker capacity on an organized exchange or trading system for swaps;[184] and (v) helping to set the prices offered in the market (such as by acting as a market maker) rather than taking those prices, although the fact that a person regularly takes the market price for its swaps does not foreclose the possibility that the person may be a swap dealer.

The Commissions further note that the following elements of the interpretive approach to the swap dealer definition are also generally consistent with the dealer-trader distinction as it will be applied to determine if a person is a security-based swap dealer: (i) A willingness to enter into swaps on either side of the market is not a prerequisite to swap dealer status; (ii) the swap dealer analysis does not turn on whether a person's swap dealing activity constitutes that person's sole or predominant business; (iii) a customer relationship is not a prerequisite to swap dealer status; and (iv) in general, entering into a swap for the purpose of hedging, absent other activity, is unlikely to be indicative of dealing. Last, under the interpretive approach to the definition of both the terms ''swap dealer'' and ''security-based swap dealer,'' whether a person is acting as a dealer will turn upon the relevant facts and circumstances, as informed by the interpretive guidance set forth in this Adopting Release.

At the same time, the Commissions recognize that the dealer-trader distinction is not static, but rather has evolved over time through interpretive materials. The Commissions expect the dealer-trader distinction to evolve over time with respect to swaps independently of its evolution over time with respect to securities or security-based swaps. Prior interpretations and future developments in the law regarding securities or security-based swaps may inform the interpretation of the swap dealer definition, but will not be dispositive in identifying dealers in the swap markets.[185]

b. Indicia of Holding Oneself Out as a Dealer in Swaps or Being Commonly Known in the Trade as a Dealer in Swaps

The final rule further defining the term ''swap dealer'' includes the provisions in the proposed rule which incorporate the statutory requirements that the term includes a person that is holding itself out as a dealer in swaps or is engaging in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.[186]

We continue to believe that the Proposing Release appropriately identifies a number of factors as indicia of ''hold[ing] itself out as a dealer in swaps'' and ''engag[ing] in any activity causing [itself] to be commonly known in the trade as a dealer or market maker in swaps.''[187] In our view, those factors thus are relevant to determining if a person is a swap dealer. For example, regarding the proposed factor of ''membership in a swap association in a category reserved for dealers,'' we note that the bylaws of the International Swaps and Derivatives Association (''ISDA'') provide that any business organization that:

> Directly or through an affiliate, as part of its business (whether for its own account or as agent), deals in derivatives shall be eligible for election to membership in the Association as a Primary Member, provided that no person or entity shall be eligible for membership as a Primary Member if such person or entity participates in derivatives transactions solely for the purpose of risk hedging or asset or liability management.[188]

We believe that in circumstances such as this, where a category of association

[178] *E.g.,* capital and margin requirements (CEA section 4s(e)), and requirements for segregation of collateral (CEA sections 4d(f), 4s(l)).

[179] *E.g.,* requirements with respect to business conduct when transacting with special entities (CEA sections 4s(h)(2), 4s(h)(4), 4s(h)(5)); disclosure requirements (CEA section 4s(h)(3)(B)); requirements for fair and balanced communications (CEA section 4s(h)(3)(D)); other requirements related to the public interest and investor protection (CEA section 4s(h)(3)(D)); and conflict of interest provisions (CEA section 4s(j)(5)).

[180] *E.g.,* reporting and recordkeeping requirements (CEA section 4s(f)); daily trading records requirements (CEA section 4s(g)); regulatory standards related to the confirmation, processing, netting, documentation and valuation of security-based swaps (CEA section 4s(i)); position limit monitoring requirements (CEA section 4s(j)(1)); risk management procedure requirements (CEA section 4s(j)(2)); and requirements related to the disclosure of information to regulators (CEA section 4s(j)(3)).

[181] *See generally* part II.A.5, *infra.*

[182] To clarify, the activities listed in the text are indicative of acting as a swap dealer. Engaging in one or more of these activities is not a prerequisite to a person being covered by the swap dealer definition.

[183] As with the interpretation of the dealer-trader distinction with respect to securities, a nomenclature distinction between ''counterparties'' and ''customers'' is not significant for purposes of applying the dealer-trader distinction to swap activities. Contractual provisions related to nomenclature, such as a provision stating that no ''customer'' relationship is present, would not be significant if the reality of the situation is different. *See* note 271, *infra,* and accompanying text.

[184] As with the dealer-trader distinction as it has been interpreted under the Exchange Act with respect to securities (and as noted below in the discussion of the ''makes a market in swaps'' prong of the swap dealer definition), the presence of an organized exchange or trading system is not a prerequisite to being a market maker for purposes of the swap dealer definition, nor is acting as a market maker a prerequisite to being a swap dealer.

[185] In interpreting the term ''swap dealer,'' we intend to consider, but do not formally adopt, the body of court decisions, SEC releases, and SEC staff no-action letters that have interpreted the dealer-trader distinction.

[186] *See* CFTC Regulation § 1.3(ggg)(1)(i) and (iv).

[187] These factors are as follows: Contacting potential counterparties to solicit interest; developing new types of swaps or security-based swaps and informing potential counterparties of their availability and of the person's willingness to enter into the swap or security-based swap; membership in a swap association in a category reserved for dealers; providing marketing materials describing the type of swaps or security-based swaps the party is willing to enter into; and generally expressing a willingness to offer or provide a range of products or services that include swaps or security-based swaps. *See* Proposing Release, 75 FR at 80178.

[188] *See* By-laws of ISDA at 3, available at: *https://www.isdadocs.org/membership.* The Commissions note that the Primary Members of ISDA are not limited to only financial firms.

membership requires that a person deal in derivatives and not limit its participation in derivative transactions to solely risk hedging, membership in the category is an indicator of swap dealer status.[189]

We take note, however, of the comments that these activities may be insufficient to establish that a person is a swap dealer. In particular, we generally agree with commenters that many commercial end users of swaps do, from time to time, actively seek out and negotiate swaps. Yet, based on the applicable facts and circumstances, these end users do not necessarily fall within the definition of a swap dealer solely because they actively seek out and negotiate swaps from time to time.

The activities described in the Proposing Release as indicia of holding oneself out as a swap dealer or engaging in any activity causing oneself to be commonly known as a swap dealer should not be considered in a vacuum, but should instead be considered in the context of all the activities of the swap participant. While the activities listed in the Proposing Release are indicators that a person is holding itself out or is commonly known as a swap dealer, these are factors to be considered in the analysis. They are not *per se* conclusive, and could be countered by other factors indicating that the person is not a swap dealer.[190] Because of the flexibility—including the consideration of applicable facts and circumstances—needed for such an analysis, we do not believe that it is appropriate to codify this guidance in rule text, as suggested by some commenters.

c. Market Making

The final rule defining ''swap dealer'' includes the provision from the proposed rule which incorporates the statutory requirement that this term include a person that ''makes a market in swaps.'' [191]

We have considered the comments suggesting various descriptions of activities that should and should not be deemed to be market making in swaps for purposes of this rule. In consideration of these comments, we clarify that making a market in swaps is appropriately described as routinely standing ready to enter into swaps at the request or demand of a counterparty. In this regard, ''routinely'' means that the person must do so more frequently than occasionally, but there is no requirement that the person do so continuously.[192]

It is appropriate, in response to comments asking for further guidance regarding what activities constitute making a market in swaps, to describe some of the activities indicative of whether a person is routinely standing ready to enter into swaps at the request or demand of a counterparty. Such activities include routinely: (i) Quoting bid or offer prices, rates or other financial terms for swaps on an exchange; (ii) responding to requests made directly, or indirectly through an interdealer broker, by potential counterparties for bid or offer prices, rates or other similar terms for bilaterally negotiated swaps; (iii) placing limit orders for swaps; or (iv) receiving compensation for acting in a market maker capacity on an organized exchange or trading system for swaps.[193] These examples are not exhaustive, and other activities also may be indicative of making a market in swaps if the person engaging in them routinely stands ready to enter into swaps as principal at the request or demand of a counterparty.

In determining whether a person's routine presence in the market constitutes market making under these four factors, the dealer-trader interpretative framework may be usefully applied.[194] Under the dealer-trader distinction, seeking to profit by providing liquidity to the market is an indication of dealer activity.[195] Thus, in applying these four factors, it is useful to consider whether the person is seeking, through presence in the market, compensation for providing liquidity, compensation through spreads or fees, or other compensation not attributable to changes in the value of the swaps it enters into.[196] If not, such activity would not be indicative of market making.

Some commenters suggested that, in order to be a market maker in swaps, a person must make a two-way market in swaps.[197] Nonetheless, it is possible for a person making a one-way market in swaps to be a maker of a market in swaps and, therefore, within the swap dealer definition. This may be true, for example, where a person routinely

[189] However, while such membership is an indicator of swap dealer status, a person holding such membership could nonetheless be excluded by other provisions of the definition of the term ''swap dealer.'' For example, an insured depository institution that limits its activity to offering swaps in connection with the origination of loans, as discussed below in part II.B, would not be covered by the definition simply because it holds such membership.

[190] The statutory definition of the term ''swap dealer'' contains four separate clauses, or ''prongs,'' joined by the disjunctive ''or,'' the ordinary meaning of which is that the prongs are stated as alternative types of swap dealer. Accordingly, where an assessment of all the activities of a swap participant demonstrates that the person is not holding itself out as a swap dealer or engaging in any activity that causes it to be commonly known as a swap dealer, that person may, nonetheless, be a swap dealer based on the market making or regular business prongs of the swap dealer definition, discussed below. The Commissions note, however, that as discussed below in part II.A.4.g, the CFTC's overall interpretive guidance, including guidance regarding the dealer-trader framework, applies to identify swap dealers under all four prongs of the statutory ''swap dealer'' definition.

[191] *See* CFTC Regulation § 1.3(ggg)(1)(ii). Because the statutory swap dealer definition contains four disjunctive prongs, the CFTC does not agree with a commenter (*see* letter from ISDA I) who asserted that status as a market maker in swaps is a prerequisite to a person being a swap dealer.

[192] A person that occasionally, or less than routinely, enters into a swap at the request of a counterparty is not a maker of a market in swaps, and therefore is not a swap dealer on that basis. However, we reiterate, as stated in the Proposing Release, that since many types of swaps are not entered into on a continuous basis, it is not necessary that a person enter into swaps at the request or demand of counterparties on a continuous basis in order for the person to be a market maker in swaps and, therefore, a swap dealer.

[193] In addition, section 619 of the Dodd-Frank Act (the ''Volcker Rule'') generally prohibits banking entities from engaging in proprietary trading, but contains an exception for certain market making-related activities. The Commissions have proposed an approach to the Volcker Rule under which a person could seek to avoid the Volcker Rule in connection with swap activities by asserting the availability of that market making exception. *See* SEC, Board, Office of the Comptroller of the Currency (''OCC''), and Federal Deposit Insurance Corporation (''FDIC''), Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Proposed Rule, 76 FR 68846 (Nov. 7, 2011); CFTC, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Proposed Rule, 77 FR 8332 (Feb. 14, 2012). Under this approach, such a person would likely also be required to register as a swap dealer (unless the person is excluded from the swap dealer definition, such as by the exclusion of certain swaps entered into in connection with the origination of a loan). The SEC has proposed to adopt the same approach with respect to the interplay of the Volcker Rule and the definition of the term ''security-based swap dealer.'' *See* note 272, *infra.*

[194] We recognize that routine presence in the swap market is not necessarily indicative of making a market in swaps. For example, persons may be routinely present in the market in order to engage in swaps for purposes of hedging, to advance their investment objectives, or to engage in proprietary trading.

[195] *See* note 265, *infra,* and accompanying text.

[196] In this case, the spread from which a person profits may be between two or more swaps, or it may be between a swap and another position or financial instrument. In contrast, entering into swaps in order to obtain compensation attributable to changes in the value of the swaps is indicative of using swaps for a hedging, investment or trading purpose.

[197] *See* letters cited in notes 52 to 58, *supra.* Although swaps are notional contracts requiring the performance of agreed upon terms by each party, it is possible to describe swap users in practical terms as being on either ''side'' of a market. For example, for many swaps the party paying a fixed amount is on one ''side'' of the market and the party paying a floating amount is on the other ''side.''

stands ready to enter into swaps on a particular side of the market—say, routinely bidding for floating exposures on a swap trading platform—while entering into transactions on the other side of the market in other instruments (such as futures contracts). The relevant indicator of market maker status is the willingness of the person to routinely stand ready to enter into swaps at the request or demand of a counterparty (as opposed to entering into swaps to accommodate one's own demand or desire to participate in a particular market), be it on one or both sides of the market, and then to enter into offsetting positions, either in the swap market or in other markets.

The Commissions disagree with the commenters who said that swaps executed on an exchange should not be considered in determining if a person is a market maker in swaps and thus a swap dealer.[198] First, the statutory definition of the term ''swap dealer'' makes no distinction between swaps executed on an exchange and swaps that are not, suggesting that the same protections should apply regardless of the method of executing the swap. Second, from the perspective of an end user seeking to execute a swap on an exchange, the important consideration under our analysis is whether a market maker is ready to enter into swaps, not whether the market maker is aware of the counterparty's identity. A market maker in swaps routinely stands ready to enter into swaps at the request or demand of a counterparty, regardless of whether the counterparty and the market maker meet on a disclosed basis through bilateral negotiations or anonymously through an exchange.[199] Similarly, the issue of whether a person is a registered FCM or broker-dealer is not necessarily relevant to whether the person is a maker of a market in swaps, if the person is routinely standing ready to enter into swaps at the request or demand of a counterparty. Third, we believe it would be inappropriate to disregard swaps executed on exchanges in order, as some commenters suggested,[200] to encourage market participants to use, or to provide liquidity to, exchanges. Finally, variety of exchanges, markets, and other facilities for the execution of swaps are likely to evolve in response to the requirements of the Dodd-Frank Act, and there is no basis for any bright-line rule excluding swaps executed on an exchange, given the impossibility of obtaining information about how market participants will interact and execute swaps in the future, after the requirements under the Dodd-Frank Act are fully in effect. For all these reasons, we have determined that it is inappropriate to restrict the ''making a market in swaps'' prong of the swap dealer definition (*i.e.,* routinely standing ready to enter into swaps at the request or demand of a counterparty) to swaps that are not executed on an exchange.[201]

d. Exception for Activities Not Part of ''a Regular Business''

The final rule includes the provisions in the proposed rule that incorporate the provisions of the statutory definition regarding activities that are not part of ''a regular business'' of entering into swaps. One provision states that the term ''swap dealer'' includes a person that ''regularly enters into swaps with counterparties as an ordinary course of business for its own account''; the other provision states that the term ''swap dealer'' does not include a person that ''enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.'' [202]

The Commissions continue to believe, as stated in the Proposing Release, that the phrases ''ordinary course of business'' and ''a regular business'' are, for purposes of the definition of ''swap dealer'' essentially synonymous. In this context, we interpret these phrases to focus on activities of a person that are usual and normal in the person's course of business and identifiable as a swap dealing business. It is not necessarily relevant whether the person conducts its swap-related activities in a dedicated subsidiary, division, department or trading desk, or whether such activities are a person's ''primary'' business or an ''ancillary'' business, so long as the person's swap dealing business is identifiable.[203]

We have taken into consideration comments seeking additional guidance regarding the types and levels of activities that constitute having ''a regular business'' of entering into swaps.[204] In this regard, any one of the following activities would generally constitute both entering into swaps ''as an ordinary course of business'' and ''as a part of a regular business'': [205] (i) Entering into swaps with the purpose of satisfying the business or risk management needs of the counterparty (as opposed to entering into swaps to accommodate one's own demand or desire to participate in a particular market); (ii) maintaining a separate profit and loss statement reflecting the results of swap activity or treating swap activity as a separate profit center; or (iii) having staff and resources allocated to dealer-type activities with counterparties, including activities relating to credit analysis, customer onboarding, document negotiation, confirmation generation, requests for novations and amendments, exposure monitoring and collateral calls, covenant monitoring, and reconciliation.[206]

[198] *See, e.g.,* letters cited in note 62, *supra.*

[199] As discussed above, in many cases routine presence in the swap market, without more, would not constitute market making activity. Nevertheless, the CFTC will, in connection with promulgation of final rules relating to capital requirements for swap dealers and major swap participants, consider institution of reduced capital requirements for entities or individuals that fall within the swap dealer definition and that execute swaps only on exchanges, using only proprietary funds. Similarly, the CFTC also will consider the applicability to such entities or individuals of the other requirements imposed on swap dealers (*e.g.,* internal business conduct standards, external business conduct standards with counterparties), and may adjust those swap dealer requirements as appropriate.

[200] *See, e.g.,* letters cited in note 66, *supra.* Since the structures of the markets on which swaps will be executed are still in development, and market obligations have not been established, there is little support for comments asserting that market makers should be defined as only those persons who receive benefits from the market (such as reduced trading fees) in return for the obligation to transact when the market requires liquidity.

[201] By contrast, it may be appropriate, over time, to tailor the specific requirements imposed on swap dealers depending on the facility on which the swap dealer executes swaps. For example, the application of certain business conduct requirements may vary depending on how the swap is executed, and it may be appropriate, as the swap markets evolve, to consider adjusting certain of those requirements for swaps that are executed on an exchange or through particular modes of execution.

[202] Final CFTC Regulation § 1.3(ggg)(2) is modified from the proposal to include the word ''a'' before the words ''regular business,'' to conform the text of the rule to the text of the statute. *See* CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C).

As stated in the Proposing Release, we interpret the reference in the definition of the term ''swap dealer'' to a person entering into swaps ''with counterparties * * * for its own account'' to refer to a person who enters into a swap as a principal, and not as an agent. A person who enters into swaps as an agent for customers (*i.e.,* for the customers' accounts) would be required to register as either an FCM, introducing broker, commodity pool operator or commodity trading advisor, depending on the nature of the person's activity.

[203] We recognize, as noted by one commenter (*see* letter from ISDA I), that the ''regular business'' exclusion is not limited solely to the ''ordinary course of business'' test of the swap dealer definition. Our interpretations of the other three tests are, and should be read to be, consistent with the exclusion of activities that are not part of a regular business.

[204] *See, e.g.,* letters from BG LNG I, COPE I, IECA–Credit I, Shell Trading I, WGCEF I and Vitol (stating that the proposed approach was overly subjective and requesting guidance as to the specific activities that are covered by the statutory definition).

[205] These activities are inconsistent with entering into a swap to hedge a physical position as defined in § 1.3(ggg)(6)(iii). As discussed below, such hedging is not dealing activity.

[206] The three indicators of being engaged in ''a regular business'' of entering into swaps described

The Commissions see merit in the comments saying that ''a regular business'' of entering into swaps can be characterized by entering into swaps to satisfy the business or risk management needs of the other party to the swap, and so incorporate this element into our interpretation of the rule.[207] Also, an objective indicator of a person being engaged in ''a regular business'' of entering into swaps is when the person accounts for the results of its swap activities separately, by maintaining a separate profit and loss statement for those activities or treating them as a separate profit center. Our interpretation incorporates this indicator of activity that is ''a regular business'' of entering into swaps.

Other comments suggesting specific criteria to identify ''a regular business'' also were helpful. We agree with commenters[208] that ''a regular business'' of entering into swaps can be characterized by having staff and resources allocated to the types of activities in which swap dealers must engage with their counterparties, such as those noted above (*e.g.,* credit analysis, confirmation generation, collateral calls, and covenant monitoring). However, we understand that some end users of swaps engage in some of these activities and, in certain circumstances, may have staff and resources available for these activities. Therefore, this element of the definition should be applied in a reasonable manner, taking all appropriate circumstances into account. This element does not depend on whether a specific amount or percentage of expenses or employee time are related to these swap activities. Instead, it is appropriate to objectively examine a person's use of staff and resources related to swap activities. Using staff and resources to a significant extent in conducting credit analysis, opening and monitoring accounts and the other activities noted above, is an indication that the person is engaged in ''a regular business'' of entering into swaps.

Regarding the commenters' assertion that the activity of entering into swaps in connection with a person's physical commodity business cannot constitute ''a regular business'' of the person, we believe that while in most cases this is not dealing activity,[209] a *per se* exclusion of this type is not appropriate because it is possible that in some circumstances a person might enter into swaps that are connected to a physical commodity business but also serve market functions characteristic of the functions served by swap dealers. Also, again, the statutory definition does not contain any such exclusion, but rather includes any person who ''regularly enters into swaps with counterparties as an ordinary course of business for its own account,'' without regard to the person's particular type of business.

Consistent with the statutory definition, we interpret ''a regular business'' of entering into swaps in a manner that applies equally to all market participants that engage in the activities set forth in the statutory definition. This will ensure that all participants in the swap markets are regulated in a fair and consistent manner, regardless of whether their underlying business is primarily physical or financial in nature.[210]

Finally, as noted above, the manner in which persons negotiate, execute and use swaps is likely to evolve in response to the requirements of the Dodd-Frank Act and the other forces that will shape the swap markets going forward. For this reason, it would be inappropriate to craft per se exclusions from the swap dealer definition at a time when the only available information about the use of swaps relates to the period prior to implementation of the Dodd-Frank Act.[211]

e. Interim Final Rule Excluding Swaps Entered Into for Hedging Physical Positions

We note that some commenters said that swaps used to hedge or mitigate commercial risks should not be considered in determining whether a person is a swap dealer.[212] We understand that swaps are used to hedge risks in numerous and varied ways, and we expect that the number of persons covered by the definition will be very small in comparison to the thousands of persons that use swaps for hedging.

In terms of the statutory definition of the term ''swap dealer,'' the CFTC notes as an initial matter that there is no specific provision addressing hedging activity. Thus, the statutory definition leaves the treatment of hedging swaps to the CFTC's discretion; it neither precludes consideration of a swap's hedging purpose, nor does it require an absolute exclusion of all swaps used for hedging.[213]

In general, entering into a swap for the purpose of hedging is inconsistent with swap dealing.[214] The practical

here are set forth in the alternative. Any one of these indicators may be sufficient, based on a facts and circumstances analysis, to reach a conclusion that an entity is engaged in ''a regular business'' of entering into swaps.

[207] This element of the interpretation reflects our agreement with those commenters who said that ''a regular business'' of entering into swaps is characterized by having a business of accommodating demand or facilitating interest in swaps (*see* letter from IECA–Credit I), and those commenters who said that ''a regular business'' does not encompass the use of swaps to serve a person's own business needs, as opposed to serving the business needs of the counterparty (*see* letters cited in note 71, *supra*).

[208] *See* letters cited in note 80, *supra.*

[209] *See* CFTC Regulation § 1.3(ggg)(6)(iii) (swaps entered into for hedging physical positions as defined in the rule are not considered in the determination of whether a person is a swap dealer).

[210] Regulation of firms engaged in an underlying physical business is also consistent with regulatory practices outside the U.S. For example, non-financial entities register with the Financial Services Authority in the U.K. as ''Oil Market Participants'' and ''Energy Market Participants.'' *See* Financial Services Authority Handbook EMPS and OMPS, available at *http://fsahandbook.info/FSA/html/handbook.*

[211] For the same reasons, we do not believe it would be appropriate, in determining whether a person has a ''regular business'' of entering into swaps, to consider whether a person engages in activities normally associated with financial institutions, as some commenters suggested. *See* letters cited in note 76, *supra.*

[212] *See, e.g.,* letters cited in note 72, *supra.*

[213] In this regard, the statutory definition of the term ''swap dealer'' stands in contrast to the statutory definition of the term ''major swap participant'' which, as discussed further below, explicitly provides that positions in swaps held for hedging or mitigating commercial risk are to be excluded in certain parts of that definition. *See* CEA section 1a(33)(A)(i)(1), 7 U.S.C. 1a(33)(A)(i)(1). The absence of any explicit requirement in the ''swap dealer'' definition to exclude swaps held for hedging or mitigating commercial risk does not support the view that Congress intended to categorically exclude all swaps that may serve as hedges in determining whether a person is covered by the definition.

Similarly, the absence of any limitation in the statutory definition of the term ''swap dealer'' to financial entities, when such limitation is included elsewhere in Title VII, indicates that no such limitation applies to the swap dealer definition. CEA section 2(h)(7), 7 U.S.C. 2(h)(7), specifically limits the application of the clearing mandate, in certain circumstances, to only ''financial entities.'' That section also provides a detailed definition of the term ''financial entity.'' *See* CEA section 2(h)(7)(C), 7 U.S.C. 2(h)(7)(C). That such a limitation is included in this section, but not in the swap dealer definition, does not support the view that the statutory definition of the term ''swap dealer'' should encompass only financial entities.

[214] For example, under the dealer-trader distinction, the Commissions would expect persons that use security-based swaps to hedge their business risks, absent other activity, likely would not be dealers. *See* part II.A.5.b, *infra.* Under the CFTC's interpretive guidance, making a market in swaps is appropriately described as routinely standing ready to enter into swaps at the request or demand of a counterparty, and the indicia of swap dealing as a ''regular business'' include entering into swaps to satisfy the business or risk management needs of the counterparty. Entering into swaps for the purpose of hedging one's own risks generally would not be indicative of this form of swap activity. *See also, e.g.,* joint letter from Senator Stabenow and Representative Lucas (the

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difficulty lies in determining when a person has entered into a swap for the purpose of hedging, as opposed to other purposes for entering into swaps, such as accommodating demand for swaps or as part of making a market in swaps, and in distinguishing a swap with a hedging purpose from a swap with a hedging consequence. In view of these uncertainties, the CFTC believes it is appropriate to adopt an interim final rule that draws upon the principles of bona fide hedging that the CFTC has long applied to identify when a financial instrument is used for hedging purposes, and excludes from the swap dealer analysis swaps entered into for the purpose of hedging physical positions that meet the requirements of the rule.

Specifically, the CFTC is adopting as an interim final rule CFTC Regulation § 1.3(ggg)(6)(iii), which provides that the determination of whether a person is a swap dealer will not consider a swap that the person enters into, if:

(i) The person enters into the swap for the purpose of offsetting or mitigating the person's price risks that arise from the potential change in the value of one or several (a) assets that the person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising; (b) liabilities that the person owns or anticipates incurring; or (c) services that the person provides, purchases, or anticipates providing or purchasing;

(ii) the swap represents a substitute for transactions made or to be made or positions taken or to be taken by the person at a later time in a physical marketing channel;

(iii) the swap is economically appropriate to the reduction of the person's risks in the conduct and management of a commercial enterprise;

(iv) the swap is entered into in accordance with sound commercial practices; and

(v) the person does not enter into the swap in connection with activity structured to evade designation as a swap dealer.[215]

Thus, although the CFTC is not incorporating the bona fide hedging provisions of the CFTC's position limits rule here, the exclusion from the swap dealer analysis draws upon language in the CFTC's definition of bona fide hedging.[216] For example, the exclusion expressly includes swaps hedging price risks arising from the potential change in value of existing or anticipated assets, liabilities, or services, if the hedger has an exposure to physical price risk. And, as in the bona fide hedging rule, the exclusion utilizes the word ''several'' to reflect that there is no requirement that swaps hedge risk on a one-to-one transactional basis in order to be excluded, but rather they may hedge on a portfolio basis.[217] For these reasons, swaps that qualify as enumerated hedging transactions and positions are examples of the types of physical commodity swaps that are excluded from the swap dealer analysis if the rule's requirements are met.[218]

This provision in the final rule is consistent with our overall interpretive approach to the definition of the term ''swap dealer.'' The interpretations of the statutory dealer definitions by both Commissions focus on a person's activities in relation to its counterparties and other market participants.[219] As noted above, for example, one indicator that a person enters into swaps as part of ''a regular business'' is that the person does so to satisfy the business or risk management needs of the counterparty. This aspect of the swap dealer analysis turns on the accommodation of a counterparty's needs or demands. If a person enters into swaps for the purpose of hedging a physical position as defined in CFTC Regulation § 1.3(ggg)(6)(iii), by contrast, then the swap can be identified as not having been entered into for the purpose of accommodating the counterparty's needs or demands.[220] Also, a person's activity of seeking out swap counterparties in order to hedge a physical position as defined in the rule generally would not warrant regulations to promote market stability and transparency or to serve the other purposes of dealer regulation.[221]

At the same time, however, there may be circumstances where a person's activity of entering into swaps is encompassed by the statutory definition of the term ''swap dealer,'' notwithstanding that the swaps have the effect of hedging or mitigating the person's commercial risk.[222] Although these swaps could, in theory, be excluded from the swap dealer analysis, we believe that a broader, *per se* exclusion for all swaps that hedge or mitigate commercial risk is

final rule should distinguish using swaps for hedging from swap dealing).

[215] *See* CFTC Regulation § 1.3(ggg)(6)(iii). All five requirements set forth in the regulation must be met with respect to the swap, in order for the swap to be excluded from the swap dealer determination by the regulation.

[216] *See* CFTC Regulation § 151.5(a)(1). The definition of bona fide hedging in CFTC Regulation § 1.3(z), which applies for excluded commodities, is not relevant here, because it does not contain the requirement that the swap represents a substitute for a transaction made or to be made or a position taken or to be taken in a physical marketing channel, as required by CFTC Regulation § 1.3(ggg)(6)(iii)(B). We believe that this requirement is an important aspect of how principles from the bona fide hedging definition are useful in identifying swaps that are entered into for the purpose of hedging as opposed to other purposes.

[217] *See* CFTC, Position Limits for Futures and Swaps; Final Rule, 76 FR 71626, 71649 (Nov. 18, 2011).

[218] The swaps that qualify as enumerated hedging transactions and positions are those listed in CFTC Regulation § 151.5(a)(2) and appendix B to part 151. These examples are illustrative of the types of ''assets,'' ''liabilities,'' and ''services'' contemplated in CFTC Regulation § 1.3(ggg)(6)(iii), because the price risk arising from changes in their value could be offset or mitigated with a swap that represents a substitute for transactions made or to be made or positions taken or to be taken by the person at a later time in a physical marketing channel. To be clear, notwithstanding that a swap does not fit precisely within such examples, it may still satisfy CFTC Regulation § 1.3(ggg)(6)(iii).

Regarding commenters' queries about dynamic hedging, which one commenter described as the ability to modify the hedging structure related to physical assets or positions when relevant pricing relationships applicable to that asset change (*see* joint letter from WGCEF and CMC), we note that qualification as bona fide hedging has never been understood to require that hedges, once entered into, must remain static. We expect that entites would move to update their hedges periodically when pricing relationships or other market factors applicable to the hedge change.

[219] *See* parts II.A.4.e and II.A.5.a, *infra.* For example, the conclusion that a person's relationship with its counterparties can lead to associated obligations is consistent with the ''shingle theory,'' which implies a duty of fair dealing when a person hangs out its shingle to do business. *See* note 260, *infra.*

[220] In this way, the exclusion from the swap dealer analysis of swaps hedging physical positions as defined in CFTC Regulation § 1.3(ggg)(6)(iii) is similar to the exclusions, discussed below, of swaps between affiliates and swaps between a cooperative and its members. *See* CFTC Regulation § 1.3(ggg)(6)(i)(ii); *see also* part II.C, *infra.* However, to the extent a person engages in dealing activities involving swaps, the presence of offsetting positions that hedge those dealing activities would not excuse the requirement that the person register as a swap dealer.

[221] Thus, the CFTC's interpretation of the swap dealer definition in this regard draws upon principles in the dealer-trader distinction. *See* part II.A.4.a. Additional authority for CFTC Regulation § 1.3(ggg)(6)(iii) is provided by subparagraph (B) of the swap dealer definition. This subparagraph provides that a person ''may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or activities.'' CEA Section 1a(49)(B), 7 U.S.C. 1a(49)(B). It thereby authorizes a review of a person's various activities with respect to swaps, and a determination that some of the person's activities are covered by a designation as a swap dealer, while other of the person's activities are not. Thus, a person who enters into some swaps for hedging physical positions as defined in CFTC Regulation § 1.3(ggg)(6)(iii), and also enters into other swaps in connection with activities covered by the swap dealer definition, could be designated as a swap dealer only for the latter activities.

[222] For example, ''pay floating/receive fixed'' swaps entered into by a swap dealer with long exposure to the floating side of a market would have the effect of hedging the dealer's exposure.

inappropriate for the swap dealer definition.

First, the hedging exclusion that we are adopting is in the nature of a safe harbor; *i.e.,* it describes activity that will not be considered swap dealing activity. As such, the CFTC believes that it is appropriate that the interim final rule not be cast broadly.[223] This does not mean that other types of hedging activity that do not meet the requirements of the interim final rule are necessarily swap dealing activity. Rather, such hedging activity is to be considered in light of all other relevant facts and circumstances to determine whether the person is engaging in activity (*e.g.,* accommodating demand for swaps, making a market for swaps, etc.) that makes the person a swap dealer.

Second, the usefulness of an exclusion of all swaps that hedge or mitigate commercial risk for certain aspects of the major swap participant definition [224] is not a reason to use the same exclusion in the swap dealer definition, since the swap dealer definition serves a different function. The definition of the term ''major swap participant,'' which applies only to persons who are not swap dealers,[225] is premised on the prior identification, by the swap dealer definition, of persons who accommodate demand for swaps, make a market in swaps, or otherwise engage in swap dealing activity. The major swap participant definition performs the subsequent function of identifying persons that are not swap dealers, but hold swap positions that create an especially high level of risk that could significantly impact the U.S. financial system.[226] Only for this subsequent function is it appropriate to apply the broader exclusion of swaps held for the purpose of hedging or mitigating commercial risk.[227]

The CFTC believes that since the over-the-counter swap markets have operated largely without regulatory oversight and encompass swaps used for a wide variety of commercial purposes, no method has yet been developed to reliably distinguish, through a *per se* rule, between: (i) Swaps that are entered into for the purpose of hedging or mitigating commercial risk; and (ii) swaps that are entered into for the purpose of accommodating the counterparty's needs or demands or otherwise constitute swap dealing activity, but which also have a hedging consequence.[228] In contrast, the CFTC notes that it has set forth and modified standards for bona fide hedging transactions and granted exemptions in compliance with such standards for decades.[229] These historically-developed standards form the basis of the interim final rule excluding from the swap dealer analysis certain swaps that hedge the risks associated with a physical position.

The exclusion in CFTC Regulation § 1.3(ggg)(6)(iii) depends not on the effect or consequences of the swap, but on whether the purpose for which a person enters into a swap is to hedge a physical position as defined in the rule. If so, then the swap is excluded from the dealer analysis because using swaps for that purpose is inconsistent with, and is not, dealing activity.[230] On the other hand, if, at the time the swap is entered into, the person's purpose for entering into the swap is not as defined in CFTC regulation § 1.3(ggg)(6)(iii), or if it is unclear whether the swap is for such purpose, then the fact that the swap hedges the person's exposure in some regard does not preclude consideration of that swap in the dealer analysis.[231] In this latter case, all relevant facts and circumstances regarding the swap and the person's activity with respect to the swap would be relevant in the determination of whether the person is a swap dealer.[232]

We believe that, based on the CFTC's experience in applying bona fide hedging principles with respect to swaps hedging risks related to physical positions, the exclusion in CFTC Regulation § 1.3(ggg)(6)(iii) at this time is the best means of providing certainty to market participants regarding which swaps may be disregarded in the dealer analysis. However, commenters presented a range of views as to the exclusions from the dealer analysis that may be appropriate in this regard.[233] Accordingly, the CFTC is implementing this exclusion on an interim rule basis and is seeking comments on all aspects of the interim rule, including any adjustments that may be appropriate in the rule or accompanying interpretive guidance.

The CFTC also seeks comments on whether a different approach to swaps entered into for the purpose of hedging risk is appropriate to implement the statutory definition of the term ''swap dealer.''

For example, the CFTC invites commenters to address whether any exclusion of hedging swaps from the swap dealer analysis is appropriate, and if so, how swaps that are entered into for purposes of hedging may be identified and distinguished from other swaps. Commenters are encouraged to address whether it is relevant to distinguish swaps entered into for purposes of hedging from swaps that have a consequential result of hedging, and if so, how such swaps may be distinguished. Also, commenters may address whether the exclusion should be limited to swaps hedging risks related to physical positions or extended to encompass swaps hedging financial risks or other types of risks.

Commenters should address whether the exclusion in CFTC Regulation § 1.3(ggg)(6)(iii) should be consistent with the exclusion in CFTC Regulation § 1.3(kkk). If so, why, and if not, why not? If the two exclusions should be consistent, does consistency require that that exclusions be identical, or would there be variations in application of the two exclusions? Are there market participants whose swap positions would be classified as held for the purpose of hedging or mitigating commercial risk under CFTC Regulation

[223] While we recognize that a rule delineating the swap activities that do not constitute swap dealing would simplify and make more certain, at least in some contexts, the application of the swap dealer definition, there are also reasons for caution in incorporating a categorical exclusion for hedging.

[224] *See* part IV.C, *infra.*

[225] *See* CEA § 1a(33)(A)(i), 7 U.S.C. 1a(33)(A)(i).

[226] *See* CEA § 1a(33)(B), 7 U.S.C. 1a(33)(B).

[227] We do not believe that the differences between the exclusion in the major participant definitions for swaps held for the purpose of hedging or mitigating commercial risk and the exclusion in the swap dealer definition for certain swaps entered into for the purpose of hedging risks related to physical positions mean that the Commissions, or the CFTC in particular, have implemented two different definitions of hedging. In fact, neither of these exclusions define the term ''hedging.'' Rather, the differences between the two exclusions reflect differences in the parameters that must be satisfied in order to ensure that hedging swaps are appropriately excluded from the two different definitions.

[228] As noted in the preceding paragraph, it is not necessary to make this distinction for purposes of the major swap participant definition.

[229] *See, e.g.,* 42 FR 42751 (Aug. 8, 1977). Although the latest formulation of the definition of bona fide hedging—CFTC Regulation § 151.5(a)—was recently adopted, *see* CFTC, Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626 (Nov. 18, 2011), the bona fide hedging test has been in use for decades.

[230] To be clear, the swaps a person enters into for hedging physical positions as defined in CFTC Regulation § 1.3(ggg)(6)(iii) are not indicative of dealing activity under any of the prongs of the swap dealer definition.

[231] In this regard, CFTC Regulation § 1.3(ggg)(6)(iii) is different from certain of the CFTC's rules regarding bona fide hedging, where a person's purpose in entering into a swap may not be relevant.

[232] We believe that, in practice, the difficulty of distinguishing, in applying the swap dealer definition, swaps entered into for the purpose of hedging from other types of swaps will be resolvable when the facts and circumstances of a person's swap activities are taken into consideration in light of our interpretive guidance.

[233] *See, e.g.,* letters cited in note 141, *supra.*

§ 1.3(kkk) but would not qualify for the exclusion under CFTC Regulation § 1.3(ggg)(6)(iii)? If so, specifically identify the types of market participants and swaps. If the CFTC were to apply in the swap dealer definition the exclusion in CFTC Regulation § 1.3(kkk) in lieu of the exclusion in CFTC Regulation § 1.3(ggg)(6)(iii), would there be negative market impacts? If so, what are they? Would there be positive market impacts? If so, what are they? In particular, what type(s) of swaps that ''hedge or mitigate commercial risk,'' but that are not excluded under the interim rule, may constitute dealing activity in light of the rules and interpretive guidance regarding the swap dealer definition set forth in this Adopting Release?

Comments regarding the costs and benefits related to the interim final rule and any alternative approaches, including in particular the quantification of such costs and benefits, are also invited.

Commenters are encouraged, to the extent feasible, to be comprehensive and detailed in providing their approach and rationale. The comment period for the interim final rule will close July 23, 2012.

f. Swaps Entered Into by Persons Registered as Floor Traders

Commenters discussed whether the swap dealer definition encompasses the activity of entering into swaps on or subject to the rules of a DCM or SEF, and submitted for clearing to a derivatives clearing organization (''DCO''), particularly when firms engage in that activity using only proprietary funds.[234] Because Title VII of the Dodd-Frank Act amended the definition of floor trader specifically to encompass activities involving swaps,[235] the CFTC believes that it would lead to potentially duplicative regulation if floor traders engaging in swaps in their capacity as floor traders were also required to register as swap dealers. Accordingly, the CFTC believes that it is appropriate not to consider such swaps when determining whether a person acting as a floor trader, as defined under CEA section 1a(23),[236] and registered with the CFTC under CFTC Regulation § 3.11, is a swap dealer if the floor trader meets certain conditions. Specifically, the final rule provides that, in determining whether a person is a swap dealer, each swap that the person enters into in its capacity as a floor trader as defined by CEA section 1a(23) or on a SEF shall not be considered for the purpose of determining whether the person is a swap dealer, provided that the person:

(i) Is registered with the CFTC as a floor trader pursuant to CFTC Regulation § 3.11;

(ii) enters into swaps solely with proprietary funds for that trader's own account on or subject to the rules of a DCM or SEF, and submits each such swap for clearing to a DCO;

(iii) is not an affiliated person of a registered swap dealer;

(iv) does not directly, or through an affiliated person, negotiate the terms of swap agreements, other than price and quantity or to participate in a request for quote process subject to the rules of a DCM or SEF;

(v) does not directly or through an affiliated person offer or provide swap clearing services to third parties;

(vi) does not directly or through an affiliated person enter into swaps that would qualify as hedging physical positions pursuant to CFTC Regulation § 1.3(ggg)(6)(iii) or hedging or mitigating commercial risk pursuant to CFTC Regulation § 1.3(kkk), with the exception of swaps that are executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction;

(vii) does not participate in any market making program offered by a DCM or SEF; and

(viii) complies with the record keeping and risk management requirements of CFTC Regulation §§ 23.201, 23.202, 23.203, and 23.600 with respect to each such swap as if it were a swap dealer.[237]

This rule permits floor traders who might otherwise be required to register as a swap dealer to be registered solely as floor traders with the CFTC. Given the limitations on the scope of the rule, the requirements for floor traders using the relief to comply with recordkeeping and risk management rules applicable to swap dealers as a condition of the relief, and the fact that swaps subject to the rule are traded on a DCM or SEF and cleared through a DCO, the CFTC believes it is not necessary to have floor traders subject to this rule register as both floor traders and swap dealers as a result of swaps activities covered by the rule.[238]

g. Additional Interpretive Issues Relating to the ''Swap Dealer'' Definition

As noted above, the Commissions, in consideration of comments received, are making certain modifications to the interpretive guidance concerning the definition of the term ''swap dealer'' set out in the Proposing Release. However, the Commissions are retaining certain elements of their proposed interpretation of the term ''swap dealer,'' as discussed below.

First, with respect to the comments asserting that the proposed interpretive approach is overly broad,[239] we note that the statute provides that the term ''swap dealer'' means ''any person'' who engages in the activities described in any of the four prongs of the definition, subject to the exceptions and qualifications set out in the statute. In view of this statutory text, these comments effectively assert that the statute should be interpreted to include preconditions to swap dealer status that are not set forth in the statute. For example, the assertion that the swap dealer definition must be limited to persons who enter into swaps on both sides of the market would impose a requirement that does not exist in the statute. Similarly, the comments to the effect that swap dealers are only those persons who seek to profit by intermediating between swap market participants adds a requirement not set forth in the statute.

We believe, though, that the activities that cause a person to be covered by the

[234] *See* letter from Trading Coalition. One commenter specifically discussed floor traders and floor brokers and the regulatory regime that should apply to them following implementation of the Dodd Frank Act. *See* letter from Christopher K. Hehmeyer.

We note that other commenters suggested that all swaps cleared on an exchange should be excluded from the dealer definitions. *See* letters cited in note 138, *supra.* However, the discussion here is limited to persons who are registered as floor traders and meet other conditions. Also, the final rule provision discussed here does not exclude floor traders from the definition of the term ''swap dealer;'' rather, it provides that if the stated conditions are met, certain swaps entered into by floor traders are excluded from the swap dealer analysis.

[235] *See* section 721(a)(11) of the Dodd-Frank Act (amending the definition of the term ''floor trader'' in CEA section 1a(23)). The Exchange Act does not have an equivalent regulatory category to floor trader under the CEA, and thus Congress did not make a similar amendment to the Exchange Act.

[236] The definition of the term ''floor trader'' includes a person entering into swaps on a ''contract market.'' *See* CEA section 1a(23). This exclusion also encompasses swaps that a registered floor trader enters into on or subject to the rules of a SEF, in addition to on or subject to the rules of a DCM, so long as the swap meets the conditions stated in the exclusion.

[237] *See* CFTC Regulation § 1.3(ggg)(6)(iv).

[238] The Commissions note the rule applies only to CFTC-registered floor traders engaging in swaps on DCMs or SEFs and cleared through DCOs. As noted above, the SEC does not have a regulatory category under the Exchange Act equivalent to floor trader under the CEA and none of these provisions apply in the context of security-based swap dealers or any entity regulated under the Exchange Act. Any person engaging in security-based swap transactions, whether or not these activities are similar to those engaged in by floor traders, will need to independently consider whether they need to register as security-based swap dealers as a result of their activities.

[239] *See* letters cited at notes 83 to 84, *supra.*

swap dealer definition should be addressed in the context of the four prongs of the statutory definition. That is, the relevant question is whether a person engages in any of the types of activities enumerated in the statute, and not whether the person meets any additional, supposedly implicit preconditions to swap dealer status.

Second, the Commissions continue to believe, as stated in the Proposing Release, that accommodating demand and facilitating interest are appropriately used as factors in identifying swap dealers. As noted by commenters, however, the mere fact that a person entering into a particular swap has the effect of ''accommodating demand'' or ''facilitating interest'' in swaps does not conclusively establish that the person is a swap dealer. Instead, the person's overall activities in the swap market (or particular sector of the swap market if the person is active in a variety of sectors) should be compared against these factors. If, in the context of its overall swap activities, a person fulfills a function of accommodating demand or facilitating interest in swaps for other parties, then these factors would be significant in the analysis and the person is likely to be a swap dealer.[240]

Third, as discussed above, we have adopted some of the objective criteria suggested by commenters with respect to the indicia of holding oneself out as a dealer or being commonly known as a dealer, market making, and the ''regular business'' prongs of the swap dealer definition.[241] For instance, allocating staff and technological resources to swap activity, deriving revenue and profit from swap activity, or responding to customer-initiated orders for swaps can all be indicative of having ''a regular business'' of entering into swaps and, therefore, indicative of being a swap dealer. In addition, activities such as providing advice about swaps or offering oneself as a point of connection to other parties needing access to the swap market are indicative of a person holding itself out as a swap dealer, if the person also enters into swaps in conjunction with such activities.

The guidance we have provided about these indicia is responsive to concerns expressed by commenters about the application of the swap dealer definition to energy markets. As described above, some commenters stated that in energy markets, unlike in some other markets, end-users often enter into swaps directly with each other, on both sides of the market, without the involvement of a separate category of businesses serving as intermediaries.[242] As a result, according to these commenters, energy swap market participants often engage in some of the activities that are indicative of swap dealer status. Some of these commenters contended that our activity-based interpretation of the swap dealer definition could therefore result in the inappropriate inclusion of energy market participants in the coverage of the definition of the term ''swap dealer.''[243]

We believe that the language of the statutory ''swap dealer'' definition supports our activity-based interpretation and does not support categorical exclusions of particular types of persons from the ''swap dealer'' definition based on the general nature of their businesses. Further evidence that such a categorical exclusion is unwarranted is provided by the fact that a number of energy market participants—BP Plc., Cargill, Incorporated, Centrica Energy Limited, ConocoPhillips, EDF Trading Limited, GASELYS, Hess Energy Trading Company, LLC, Hydro-Quebec, Koch Supply & Trading, LP, RWE Supply & Trading GmbH, Shell Energy North America (US), L.P., STASCO, Totsa Total Oil Trading S.A., and Vattenfall Energy Trading Netherlands N.V.—have voluntarily joined ISDA as primary dealers.[244] As previously noted, any business organization that ''deals in derivatives shall be eligible for election to membership in the Association as a primary member, provided that no person or entity shall be eligible for membership as a Primary Member if such person or entity participates in derivatives transactions solely for the purpose of risk hedging or asset or liability management.''[245] Hence, a categorical exclusion from the ''swap dealer'' definition based on any particular type of business or general market activity also would be inconsistent with current industry structure and practice.

At the same time, however, the fact that a person engages in some swap activities that are indicative of swap dealer status does not, by itself, mean that the person is covered by the definition of the term ''swap dealer.'' The ''not as part of a regular business'' exception and our guidance about its meaning address the issue of swap market participants that engage to some extent in the activities characteristic of swap dealers. The guidance we have provided here therefore provides the appropriate approach to addressing these issues in energy markets as elsewhere.

Although several commenters attempted to articulate bright-line tests that would differentiate swap dealers from other swap market participants, the suggested bright-line tests generally could not be applied across the board to all types of swap market activity. For example, some commenters suggested that swap dealers can be identified as those who profit from entering into swaps on both sides of the market (and under the interpretive approach set forth in this Adopting Release, such activity may be an indicator of swap dealing).[246] But other commenters said that, in certain circumstances, entering into swaps on both sides of the market is not necessarily indicative of swap dealing.[247]

The ways in which participants throughout the market use swaps are simply too diverse for swap dealer status to be resolved with a single, one-factor test. This is reflected in the statutory definition of the term ''swap dealer'' itself. Focused as it is on types of activities, with four prongs set forth in the alternative to cover different types of swap dealing activity, the statutory swap dealer definition is not susceptible to the bright-line test that

[240] The language of the four statutory tests for swap dealer status (which refer to a person who holds itself out as a dealer, is commonly known as a dealer, makes a market in swaps or regularly enters into swaps with counterparties) contemplate that a dealer is a person who, through its swap activities, functions to create legal relationships that transfer risk between independent persons. *See* CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A).

See also Proposing Release, 75 FR at 80177 (describing swap dealers as those persons whose function is to serve as the points of connection in the swap markets); letter from COPE I at 4 (''Simply stated, dealers are in the regular business of being a point of connection to the market for others that need access to the market to hedge risk.''): Roundtable Transcript at 21 (remarks of Richard Ostrander, Morgan Stanley; ''a dealer is someone who is out there willing to enter into trades'').

[241] *See* part II.B.2.d.iii, *supra.*

[242] *See* parts II.A.2.f.ii and iii, *supra.*

[243] *See* letters cited in note 117, *supra.* Comments expressing concern that the definition of the term ''swap dealer'' could include physical commodities businesses also were presented to Congress during consideration of legislation leading to passage of the Dodd-Frank Act. *See* Proposed Legislation by the U.S. Department of the Treasury Regarding the Regulation of Over-The-Counter Derivatives Markets: Hearing Before the H. Comm. On Agriculture, 111th Cong. 103 (2009) (submitted report on behalf of the Working Group of Commercial Energy Firms). However, as noted above, there is no exclusion in the statutory definition for such businesses.

[244] The list of ISDA Primary Members is available at *http://www.isda.org/membership/isdamemberslist.pdf.*

[245] *See* note 188, *supra.*

[246] *See* letters cited in note 84, *supra.*

[247] *See* letters cited in note 86, *supra.* As noted above in the discussion of market making, a swap dealer may in some circumstances enter into swaps on only one side of the market.

some commenters seek. For these reasons, we continue to believe that it is appropriate to apply the multi-factor interpretive approach set forth in this Adopting Release.

In closing, we emphasize that the purpose of in this part IV.A.4 is to provide guidance as to how the rules further defining the term ''swap dealer'' will be applied in particular, complex situations where a person's status as a swap dealer may be uncertain. Even though bright-line tests and categorical exclusions are inappropriate, we recognize that the large majority of market participants use swaps for normal course hedging, financial, investment or trading purposes and are not swap dealers.

5. Final Rules and Interpretation—Definition of ''Security-Based Swap Dealer''

a. General Reliance on the Dealer-Trader Distinction

As discussed above, we are adopting a rule under the Exchange Act that defines ''security-based swap dealer'' in terms of the four statutory tests and the exclusion for security-based swap activities that are not as part of a ''regular business.'' [248] Also, we believe that the dealer-trader distinction [249]—which already forms a basis for identifying which persons fall within the longstanding Exchange Act definition of ''dealer''—in general provides an appropriate framework for interpreting the meaning of ''security-based swap dealer.'' [250] While there are differences in the structure of those two statutory definitions,[251] we believe that their parallels—particularly both definitions' exclusions for activities that are ''not part of a regular business''—warrant analogous interpretive approaches for distinguishing dealers from non-dealers.

As discussed above,[252] the Commissions note that interpretations of the applicability of the dealer-trader distinction to the ''swap dealer'' definition under the CEA do not affect existing, or future, interpretations of the dealer-trader distinction under the Exchange Act—both with regard to the ''security-based swap dealer'' definition, and with regard to the ''dealer'' definition.

In interpreting the security-based swap dealer definition in terms of the dealer-trader distinction, the Commissions have been mindful that some commenters expressed the view that we instead should rely on other interpretive factors that were identified in the Proposing Release (*e.g.,* accommodating demand). We believe, nonetheless, that the dealer-trader distinction forms the basis for a framework that appropriately distinguishes between persons who should be regulated as security-based swap dealers and those who should not. We also believe that the distinction affords an appropriate degree of flexibility to the analysis, and that it would not be appropriate to seek to codify the distinction.

At the same time, the Commissions recognize that the dealer-trader distinction needs to be adapted to apply to security-based swap activities in light of the special characteristics of security-based swaps and the differences between the ''dealer'' and ''security-based swap dealer'' definitions. Relevant differences include:

- *Level of activity*—Security-based swap markets are marked by less activity than markets involving certain other types of securities (while recognizing that some debt and equity securities are not actively traded). This suggests that in the security-based swap context concepts of ''regularity'' should account for the level of activity in the market.
- *No separate issuer*—Each counterparty to a security-based swap in essence is the ''issuer'' of that instrument; in contrast, dealers in cash market securities generally transact in securities issued by another party. This distinction suggests that the concept of turnover of ''inventory'' of securities, which has been identified as a factor in connection with the dealer-trader distinction, is inapposite in the context of security-based swaps. Moreover, this distinction—along with the fact that the ''security-based swap dealer'' definition lacks the conjunctive ''buying *and* selling'' language of the ''dealer'' definition [253]—suggests that concepts of two-sided markets at times would be less relevant for identifying ''security-based swap dealers'' than they would be for identifying ''dealers.'' [254]
- *Predominance of over-the-counter and non-standardized instruments*—Security-based swaps thus far are not significantly traded on exchanges or other trading systems, in contrast to some cash market securities (while recognizing that many cash market securities also are not significantly traded on those systems).[255] These attributes—along with the lack of ''buying *and* selling'' language in the security-based swap dealer definition, as noted above—suggest that concepts of what it means to make a market need to be construed flexibly in the context of the security-based swap market.[256]
- *Mutuality of obligations and significance to ''customer'' relationship*—In contrast to a secondary market transaction involving equity or debt securities, in which the completion of a purchase or sale transaction can be expected to terminate the mutual obligations of the parties to the

[248] *See* Exchange Act rule 3a71–1(a), (b).

[249] *See* note 31, *supra.*

[250] The principles embedded within the ''dealer-trader distinction'' are not solely useful for distinguishing persons who constitute dealers from active ''traders,'' but also are applicable to distinguishing dealers from non-dealers such as hedgers or investors. The ''dealer-trader'' nomenclature has been used for decades. *See* Loss, *Securities Regulation* 722 (1st ed. 1951) (''One aspect of the 'business' concept is the matter of drawing the line between a 'dealer' and a trader—an ordinary investor who buys and sells for his own account with some frequency.'').

[251] For example, while the ''dealer'' definition encompasses certain persons in the business of ''buying and selling'' securities, the ''security-based swap dealer'' definition does not address either ''buying'' or ''selling.'' As we noted in the Proposing Release, we do not believe that the lack of those terms in the ''security-based swap dealer'' definition leads to material interpretive distinctions, as the Dodd-Frank Act amended the Exchange Act definitions of ''buy'' and ''purchase,'' and the Exchange Act definitions of ''sale'' and ''sell,'' to encompass 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 security-based swap. *See* Proposing Release, 75 FR at 80178 n.26 (*citing* Dodd-Frank Act sections 761(a)(3), (4), which amend Exchange Act sections 3(a)(13), (14)).

At the same time, we note that the ''dealer'' definition requires the conjunctive ''buying *and* selling''—which connotes a degree of offsetting two-sided activity. In contrast, the ''security-based swap dealer'' definition (particularly the ''regularly enters into security-based swaps'' language of the definition's third test) lacks that conjunctive terminology.

[252] *See* note 171, *supra.*

[253] *See* note 251, *supra.*

[254] The analysis also should account for the fact that a party to a security-based swap can use other derivatives or cash market instruments to hedge the risks associated with the security-based swap position, meaning that two-way trading is not necessary to maintain a flat risk book.

[255] Even though we expect trading of security-based swaps on security-based swap execution facilities or exchanges following the implementation of Title VII, we expect there to remain a significant amount of over-the-counter activity involving security-based swaps.

[256] For example, the definition of ''market maker'' in Exchange Act section 3(a)(38)—which is applicable for purposes of the Exchange Act ''unless the context otherwise requires'' (*see* Exchange Act section 3(a))—defines the term ''market maker'' to mean ''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 communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.'' That definition is useful in the context of systems in which standardized securities are regularly or continuously bought and sold, but would not be apposite in the context of non-standardized securities or securities that are not regularly or continuously transacted.

transaction, the parties to a security-based swap often will have an ongoing obligation to exchange cash flows over the life of the agreement. In light of this attribute, some market participants have expressed the view that they have ''counterparties'' rather than ''customers'' in the context of their swap activities.

It also is necessary to use the dealer-trader distinction to interpret the security-based swap dealer definition so that the statutory provisions that will govern security-based swap dealers are applied in an effective and logical way. Those statutory provisions added by the Dodd-Frank Act advance financial responsibility (*e.g.,* the ability to satisfy obligations, and the maintenance of counterparties' funds and assets) associated with security-based swap dealers' activities,[257] other counterparty protections,[258] and the promotion of market efficiency and transparency.[259] As a whole, the relevant statutory provisions suggest that we should apply the dealer-trader distinction to interpret the security-based swap dealer definition in a way that identifies those persons for which regulation is warranted either: (i) Due to the nature of their interactions with counterparties;[260] or (ii) to promote market stability and transparency, in light of the role those persons occupy within the security-based swap markets.[261]

b. Principles for Applying the Dealer-Trader Distinction to Security-Based Swap Activity

In light of the statutory security-based swap dealer definition, statutory provisions applicable to security-based swap dealers and market characteristics addressed above, the Commissions believe that the factors set forth below are relevant for identifying security-based swap dealers and for distinguishing those dealers from other market participants. This guidance seeks to address commenter requests that we further clarify the scope of the security-based swap dealer definition, and the Commissions believe that these factors provide appropriate guidance without being inflexible or allowing the opportunity for evasion that may accompany a bright-line test. At the same time, the determination of whether a person is acting as a security-based swap dealer ultimately depends on the relevant facts and circumstances. In light of the overall context in which a person's activity occurs, the absence of one or more of these factors does not necessitate the conclusion that a person is not a security-based swap dealer.[262]

• *Providing liquidity to market professionals or other persons in connection with security-based swaps.* A market participant might manifest this indication of dealer activity by accommodating demand or facilitating interest expressed by other market participants,[263] holding itself out as willing to enter into security-based swaps, being known in the industry as being available to accommodate demand for security-based swaps, or maintaining a sales force in connection with security-based swap activities.[264]

• *Seeking to profit by providing liquidity in connection with security-based swaps.* A market participant may manifest this indication of security-based swap dealer activity—which is consistent with the definition's ''regular business'' requirement—by seeking compensation in connection with providing liquidity involving security-based swaps (*e.g.,* by seeking a spread, fees or other compensation not attributable to changes in the value of the security-based swap).[265] The Commissions do not believe that this necessarily requires that a person be available to take either side of the market at any time, or that a person continuously engage in this type of activity, to be a security-based swap dealer. Although one commenter expressed the view that the security-based swap dealer definition requires that a person be consistently available to take either side of the market,[266] in our view such an approach would be underinclusive.[267]

[257] *E.g.,* capital and margin requirements (Exchange Act section 15F(e)), and requirements for segregation of collateral (Exchange Act section 3E).

[258] *E.g.,* requirements with respect to business conduct when transacting with special entities (Exchange Act sections 15F(h)(2), (h)(4), (h)(5)); disclosure requirements (Exchange Act section 15F(h)(3)(B)); requirements for fair and balanced communications (Exchange Act section 15F(h)(3)(C)); other requirements related to the public interest and investor protection (Exchange Act section 15F(h)(3)(D)); and conflict of interest provisions (Exchange Act section 15F(j)(5)).

[259] *E.g.,* reporting and recordkeeping requirements (Exchange Act section 15F(f)); daily trading records requirements (Exchange Act section 15F(g)); regulatory standards related to the confirmation, processing, netting, documentation and valuation of security-based swaps (Exchange Act section 15F(i)); position limit monitoring requirements (Exchange Act section 15F(j)(1)); risk management procedure requirements (Exchange Act section 15F(j)(2)); and requirements related to the disclosure of information to regulators (Exchange Act section 15F(j)(3)).

[260] The conclusion that a person's relationship with its counterparties can lead to associated obligations is consistent with the ''shingle theory,'' which implies a duty of fair dealing when a person hangs out its shingle to do business. *See* Securities and Exchange Commission, *Report of the Special Study of Securities Market* Part I at 238 (1963) (''An obligation of fair dealing, based upon the general antifraud provisions of the Federal securities laws, rests upon the theory that even a dealer at arm's length impliedly represents when he hangs out his shingle that he will deal fairly with the public.''; footnote omitted); Weiss, *Registration and Regulation of Brokers and Dealers* 171 (1965) (''the solicitation and acceptance by a broker-dealer of orders from customers and the confirmation of transactions do constitute a representation by the broker-dealer that he will deal fairly with his customers and that such transactions will be handled promptly in the usual manner, in accordance with trade custom'').

[261] The importance of regulating dealers due to the centrality of their market role was illustrated by the Government Securities Act of 1986. When Congress provided for the regulation of government securities dealers, Congress specifically cited the lack of regulation as contributing to the failures of several unregulated government securities dealers. *See* S. Rep. No. 99–426 (1986), as reprinted in 1986 U.S.C.C.A.N. 5395, 5400–04. The resulting statute provided for a definition of ''government securities dealer'' that in relevant part is parallel to the definitions of ''dealer'' and ''security-based swap dealer,'' particularly with regard to sharing an exclusion for activities that are not part of a ''regular business.'' *See* Exchange Act section 3(a)(44).

[262] Similarly, depending on the relevant facts and circumstances, the presence of certain of the illustrative activities described here does not necessitate the conclusion that the entity is a dealer.

[263] This is to be distinguished from an entity entering into security-based swaps for other business purposes, such as to gain economic exposure to a particular market.

[264] A sales force, however, is not a prerequisite to a person being a security-based swap dealer. For example, a person that enters into security-based swaps in a dealing capacity can fall within the dealer definition even if it uses an affiliated entity to market and/or negotiate those security-based swaps (*e.g.,* the person is a booking entity). Depending on the applicable facts and circumstances, the affiliate that performs the marketing and/or negotiation functions may fall within the Exchange Act's definition of ''broker'' (which was not revised by Title VII). *See* Exchange Act section 3(a)(4)(A).

[265] Indicia of this objective may include, but would not be limited to, maintaining separate profit/loss statements in connection with this type of activity, and/or devoting staff and resources to this type of activity.

In this regard, we believe that the issue of whether a person tends to take the prices offered in the market, rather than helping to set those prices (such as by providing quotes, placing limit orders, or otherwise accommodating demand), can be relevant as a factor for distinguishing security-based swap dealers from non-dealers. At the same time, we are mindful that a dealer may also accept the market price as part of its dealer activity (such as when a person enters into a security-based swap to offset the risk it assumes in connection with its security-based swap dealing activity); as a result, the fact that a person regularly takes the market price as part of its security-based swap transactions does not foreclose the possibility that the person may be a security-based swap dealer.

[266] *See* letter from ISDA I.

[267] It is possible for a dealer to be compensated for providing liquidity by entering into sequential offsetting positions, or by hedging the security-based swap position by using a different type of security-based swap, a swap or some other financial instrument. Accordingly, a rule of decision that permitted a person to avoid dealer regulation by providing liquidity in connection with security-based swaps, and laying off the associated risk using a different type of security-based swap, a swap or a different instrument entirely, would be susceptible to abuse. Moreover, as noted above, the

Continued

• *Providing advice in connection with security-based swaps or structuring security-based swaps.* Advising a counterparty as to how to use security-based swaps to meet the counterparty's hedging goals, or structuring security-based swaps on behalf of a counterparty, also would indicate security-based swap dealing activity. It particularly is important that persons engaged in those activities are appropriately regulated so that their counterparties will receive the protections afforded by certain of the statutory business conduct rules (*e.g.,* special entity requirements and communication requirements) [268] applicable to security-based swap dealers.[269] The Commissions recognize commenter concerns that end-users may also develop new types of security-based swaps,[270] but also recognize that the activities of end-users related to the structuring of security-based swaps for purposes of hedging commercial risk are appreciably different than being in the business of structuring security-based swaps on behalf of a counterparty.

• *Presence of regular clientele and actively soliciting clients.* These dealer-trader factors would reasonably appear to be applicable in the security-based swap context, just as they are applicable in the context of other types of securities, as indicia of a business model that seeks to profit by providing liquidity. The Commissions are mindful that some industry participants have highlighted a distinction between ''counterparties'' and ''customers'' in connection with swaps, and have suggested that they have no ''customers'' in the swap context. We do not believe such points of nomenclature are significant for purposes of identifying security-based swap dealers, however.[271]

• *Use of inter-dealer brokers.* As with activities involving other types of securities, the Commissions would expect that a person's use of an inter-dealer broker in connection with security-based swap activities to be an indication of the person's status as a dealer.

• *Acting as a market maker on an organized security-based swap exchange or trading system.* Acting in a market maker capacity on an organized exchange or trading system for security-based swaps would indicate that the person is acting as a dealer.[272] While the Commissions recognize that some commenters have expressed the view that persons who solely enter into security-based swaps on an organized security-based swap exchange or trading system should not be regulated as security-based swap dealers,[273] in our view such an approach would be contrary to the express language of the definition. This is not to say, of course, that the presence of an organized exchange or trading system is a prerequisite to being a market maker for purposes of the security-based swap dealer definition.[274] Moreover, acting as a market maker is not a prerequisite to being a security-based swap dealer.[275] On the other hand, being a member of an organized exchange or trading system for purposes of trading security-based swaps does not necessarily by itself make a person a security-based swap dealer.[276]

As with the current application of the dealer-trader distinction to the Exchange Act ''dealer'' definition, the question of whether a person is acting as a security-based swap dealer ultimately will turn upon the relevant facts and circumstances, as informed by these criteria.

c. Additional Interpretive Issues

Activity by hedgers. As noted above, a number of commenters raised concerns that an overbroad ''security-based swap dealer'' definition would inappropriately encompass persons

definition of ''security-based swap dealer'' does not contain the ''buying *and* selling'' language found in the general Exchange Act definition of ''dealer.'' Thus, while being regularly willing to enter into either side of the security-based swap market would suggest that a person is engaged in dealing activity, the absence of such activity should not necessarily lead to an inference that a person is not acting as a dealer.

We also note that some commenters have stated that two-way quoting by itself should not necessarily be enough to make a person a dealer, and some of those commenters specifically stated that a person may use two-sided quotes as part of the price discovery process or to elicit trading interest. *See, e.g.,* letter from MFA I. Here too, it is important to consider whether the activity also has a dealing business purpose, such as seeking to profit by providing liquidity. Moreover, all participants in the security-based swap market, whether or not security-based swap dealers, should be mindful of the potential application of the antifraud and anti-manipulation provisions of the federal securities laws to such activities. Section 10(b) of the Exchange Act and Exchange Act rule 10b-5 particularly prescribe the use of any manipulative or fraudulent device in connection with the purchase or sale of any security, which includes manipulative trading. *See* Terrance Yoshikawa, Securities Exchange Act Release No. 53731 (Apr. 26, 2006), 87 SEC Docket 2924, 2930–31 & n.19 (citing *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 199 (1976)). The SEC has characterized manipulation as ''the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand.'' *See Swartwood, Hesse, Inc.,* 50 S.E.C. 1301, 1307 (1992) (citing *Hochfelder,* 425 U.S. at 199; *Schreiber* v. *Burlington Northern, Inc.,* 472 U.S. 1 (1985); *Feldbaum* v. *Avon Products, Inc.,* 741 F.2d 234 (8th Cir. 1984)).

[268] The SEC has proposed rules to implement Title VII provisions relating to external business conduct standards for security-based swap dealers (as well as major security-based swap participants). *See* Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396 (July 18, 2011).

[269] This factor would also reasonably take into account whether a preexisting relationship involving other types of securities or other financial instruments is present. For example, to the extent a person has an existing broker or dealer relationship with a counterparty in connection with other types of securities, and also enters into a security-based swap with that counterparty, a reasonable inference would be that the person entered into the security-based swap in a dealer capacity. Any other approach would invite abuse, as persons could seek to leverage existing relationships of trust while avoiding regulation as a security-based swap dealer.

[270] *See* letter from FSR I.

[271] For purposes of the dealer-trader analysis, as it applies in the context of security-based swaps or any other security, we would not expect contractual provisions stating that the counterparty is not relying on the person's advice to have any significance.

[272] Under the proposal of the SEC, the Board, the OCC and the FDIC to implement the provisions of section 619 of the Dodd-Frank Act (also known as the ''Volcker Rule''), a person who claims the benefit of the market maker exception to that section's prohibitions and restrictions on proprietary trading in connection with security-based swap activities would be required to register with the SEC as a security-based swap dealer, unless the person is exempt from registration or is engaged in a dealing business outside the U.S., and is subject to substantive regulation in the jurisdiction where the business is located. *See* Securities Exchange Act Release No. 65545, 76 FR 68846, 68947 (Nov. 7, 2011) (proposed implementing rule § ___.4(b)(2)(iv)(C)).

[273] *See, e.g.,* letter from Traders Coalition.

[274] Given the current nature of the security-based swap market, including the present level of activity and the present lack of significant trading of security-based swaps on exchanges or organized trading systems, we believe that it would negate the legislative intent to interpret the definition's use of market making concepts to require the same use of quotation media that are incorporated into the interpretation of market making concepts in the context of securities that are actively traded on an organized exchange or trading system. At the same time, we recognize that routine activity in the security-based swap market is not necessarily indicative of making a market in security-based swaps. For example, persons may routinely be active in the market for purposes of hedging, to advance their investment objectives, or to engage in proprietary trading.

[275] The definition of ''security-based swap dealer'' contains four alternative tests, only two of which use market making terminology. Moreover, the third test of the security-based swap dealer definition—which addresses persons who regularly enter into security-based swaps as an ordinary course of business for their own account—appears particularly inapt as a proxy for market making activity. Transacting with customers is not an element of this alternative test. A person thus may be a security-based swap dealer even if it transacts exclusively with other market professionals. *Cf.* OCC, ''Risk Management of Financial Derivatives'' 3–4 (1997) (stating that OCC has classified banks as ''Tier I'' dealers if they act as market makers by ''providing quotes to other dealers and brokers, and other market professionals''). *Compare* letter from ISDA I (taking the view that the dealer definition should be interpreted in the context of market-making concepts).

[276] The analysis of the status of members of such exchanges and trading systems in part may be influenced by the final Exchange Act rules that govern such systems, as well as the internal rules of such systems.

using security-based swaps for hedging purposes.[277] As we stated in the Proposing Release, however, under the dealer-trader distinction the Commissions would expect persons that use security-based swaps to hedge their business risks, absent other activity, likely would not be dealers.[278] We maintain that view. In other words, to the extent that a person engages in security-based swap activity to hedge commercial risk, or otherwise to hedge risks unrelated to activities that constitute dealing under the dealer-trader distinction (particularly activities that have the business purpose of seeking to profit by providing liquidity in connection with security-based swaps), the Commissions would not expect those hedging transactions to lead a person to be a security-based swap dealer.[279] Of course, to the extent a person engages in dealing activities involving security-based swaps, the presence of offsetting positions that hedge those dealing activities would not excuse the requirement that the person register as a security-based swap dealer.[280]

No predominance test. As discussed in the Proposing Release, the Commissions do not believe that the security-based swap dealer analysis should appropriately turn upon whether a person's dealing activity constitutes that person's sole or predominant business. The separate *de minimis* exemption, however, may have the effect of excusing from dealer regulation those persons whose security-based swap dealing activities are relatively modest.

Presence or absence of a customer relationship. Although commenters have expressed the view that a person that engages in security-based swap activities on an organized market should not be deemed to be a dealer unless it engages in those activities with customers,[281] we do not agree. It is true that having a customer relationship can illustrate a business model of seeking to profit by providing liquidity, and thus provide one basis for concluding that a person is acting as a security-based swap dealer. Nonetheless, the presence of market making terminology within the definition is inconsistent with the view that a security-based swap dealer must have ''customers.'' Also, Title VII requirements applicable to security-based swap dealers address interests apart from customer protection.[282] Accordingly, to the extent that a person regularly enters into security-based swaps with a view toward profiting by providing liquidity—rather than by taking directional positions—that person may be a security-based swap dealer regardless of whether it views itself as maintaining a ''customer'' relationship with its counterparties.[283]

Criteria associated with ''holding self out'' as a dealer or being ''commonly known in the trade'' as a security-based swap dealer. The Proposing Release articulated a number of activities that could satisfy the definition's tests for a person ''holding itself out'' as a dealer or being ''commonly known in the trade'' as a dealer.[284] Several commenters criticized those proposed criteria, largely on the grounds that those criteria would inappropriately encompass end-users who seek to use security-based swaps for hedging purposes, or otherwise would be overbroad or irrelevant.[285] The Commissions recognize the significance of the concerns those commenters raised, and agree that these activities need to be considered within the context of whether a person engages in those activities with the purpose of facilitating dealing activity. While we do not believe that any of those activities by themselves would necessarily indicate that a person is acting as a security-based swap dealer, under certain circumstances they may serve as an indicia of a business purpose of seeking to profit by providing liquidity in connection with security-based swaps.[286]

6. Requests for Exclusions From the Dealer Definitions

Certain commenters have sought to exclude entire categories of persons from the dealer definitions, notwithstanding that some persons in those categories may engage in the activities set forth in the statutory definition (as further defined by the Commissions).[287] The final rules nonetheless do not incorporate categorical exclusions of persons from the dealer definitions because the statutory definitions provide that ''any person'' who engages in the activities enumerated in the definitions is covered by the dealer definitions, unless the person's activities fall within one of the statutory exceptions.[288] In this regard, it is significant that the exceptions in the dealer definitions depend on whether a person engages in certain types of swap or security-based swap activity, not on other characteristics of the person. That is, the exceptions apply for swaps between an insured depository institution and its customers in connection with originating loans,[289] swaps or security-based swaps entered into not as a part of a regular business,[290] and swap or security-based swap dealing that is below a *de minimis*

[277] *See, e.g.,* letter from Church Alliance.

[278] *See* Proposing Release, 75 FR at 80178 n.27. The Proposing Release also noted that if a person's other activities satisfy the definition of security-based swap dealer, the person must comply with the applicable requirements with regard to all of its security-based swap activities, absent an order to the contrary. We further noted in the Proposing Release that we would expect end-users to use security-based swaps for hedging purposes less commonly than they use swaps for hedging purposes.

[279] In addition, consistent with the exclusion from the dealer analysis of activities involving majority-owned affiliates, *see* part II.C, *infra,* to the extent that a person engages in activities to hedge positions subject to the inter-affiliate exclusion, absent other activity, the Commission would not expect those hedging transactions to lead a person to be a security-based swap dealer. Conversely, security-based swap activities connected with the indicia of dealing discussed above (*e.g.,* seeking to profit by providing liquidity in connection with security-based swaps) themselves would suggest security-based swap dealing activity.

[280] For example, if a person were to use other instruments to hedge the risks associated with its security-based swap dealing activity, that hedging would not undermine the obligation of the person to register as a security-based swap dealer, notwithstanding the fact that it could be asserted that the dealing positions happen to hedge those other positions.

[281] *See* letters from ISDA I and Traders Coalition.

[282] Particularly in light of the view expressed by some market participants that they only have ''counterparties'' in the swap markets, and not ''customers,'' any interpretation of the ''security-based swap dealer'' definition that is predicated on the existence of a customer relationship may lead to an overly narrow construction of the definition.

[283] For example, a person's activity involving entering into security-based swaps on a SEF may cause it to be a security-based swap dealer even in the absence of a customer relationship with any of its counterparties.

[284] As noted above, these were: contacting potential counterparties to solicit interest; developing new types of swaps or security-based swaps and informing potential counterparties of their availability and of the person's willingness to enter into the swap or security-based swap; membership in a swap association in a category reserved for dealers; providing marketing materials describing the type of swaps or security-based swaps the party is willing to enter into; and generally expressing a willingness to offer or provide a range of products or services that include swaps or security-based swaps. *See* Proposing Release, 75 FR at 80178.

[285] *See* part II.A.2.a, *supra.*

[286] While the Proposing Release identified ''membership in a swap association in a category reserved for dealers'' as a factor in connection with the ''holding out'' and ''commonly known'' tests, we recognize that, depending on the applicable facts and circumstances, such membership may not be sufficient to cause a person to be a security-based swap dealer if the person does nothing else to cause it to be considered a dealer.

[287] *See* part II.A.2.f, *supra.*

[288] *See* CEA section 1a(49), 7 U.S.C. 1a(49); Exchange Act section 3(a)(71), 15 U.S.C. 78c(a)(71).

[289] *See* CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A).

[290] *See* CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C); Exchange Act section 3(a)(71)(C), 15 U.S.C. 78c(a)(71)(C).

level.[291] The Dodd-Frank Act does not exclude any category of persons from the coverage of the dealer definitions; rather, it excludes certain activities from the dealer analysis.

Given that the statutory dealer definitions focus on a person's activity, the Commissions believe that it is appropriate to determine whether a person meets any of the tests set forth in those statutory definitions, and thus is acting as a swap dealer or security-based swap dealer, on a case-by-case basis reflecting the applicable facts and circumstances.[292] If a person's swap or security-based swap activities are of a nature to be covered by the statutory definitions, and those activities are not otherwise excluded, then the person is covered by the definitions. The contrary is equally true—a person who is not engaged in activities covered by the statutory definitions, or whose activities are excluded from the definition, is not covered by the definitions.[293] The *per se* exclusions requested by the commenters have no foundation in the statutory text, and have the potential to lead to arbitrary line drawing that may result in disparate regulatory treatment and inappropriate competitive advantages.[294]

The final rules particularly do not include any exclusions for aggregators of swaps or other persons that use swaps in connection with the physical commodity markets, including swaps in connection with the generation, transmission and distribution of electricity. It is likely, though, that a significant portion of the financial instruments used for risk management by such persons are forward contracts in nonfinancial commodities that are excluded from the definition of the term ''swap.'' [295] Such forward contracts are not relevant in determining whether a person is a swap dealer.

B. ''Swap Dealer'' Exclusion for Swaps in Connection With Originating a Loan

1. Proposed Approach

The statutory definition of the term ''swap dealer'' excludes an insured depository institution (''IDI'') ''to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.'' [296] This exclusion does not appear in the definition of the term ''security-based swap dealer.''

Proposed CFTC Regulation § 1.3(ggg)(5) would implement this statutory exclusion by providing that an IDI's swaps with a customer in connection with originating a loan to that customer are disregarded in determining if the IDI is a swap dealer. In order to prevent evasion, the proposed rule further provided that the statutory exclusion does not apply where the purpose of the swap is not linked to the financial terms of the loan; the IDI enters into a ''sham'' loan; or the purported ''loan'' is actually a synthetic loan such as a loan credit default swap or loan total return swap.

1. Commenters' Views

Nearly all the commenters on this issue were IDIs seeking a broad interpretation of the exclusion. The commenters addressed four primary issues: (i) The type of swaps that should be covered by the exclusion; (ii) the time period during which parties would be required to enter into the swap in order for the swap to be considered to be ''in connection with originating a loan;'' (iii) which transactions should be deemed to be ''loans'' for purposes of the exclusion; and (iv) which entities should be included within the definition of IDI.

First, regarding the type of swap that should be covered by the exclusion, as proposed, § 1.3(ggg)(5) would require that the rate, asset, liability or other notional item underlying the swap be, or be directly related to, a financial term of the loan (such as the loan's principal amount, duration, rate of interest or currency). Some commenters agreed with the principle of limiting the exclusion to swaps that are connected to the financial terms of the loan, stating that the exclusion should cover any swap between a borrower and the lending IDI, so long as the swap's notional amount is no greater than the loan amount, the swap's duration is no longer than the loan's duration, and the swap's index and payment dates match the index and payment dates of the loan.[297] Another commenter, agreeing with the proposed approach, said that there is no basis to extend the loan origination exclusion to swaps related to the borrower's business risks, as opposed to the financial terms of the loan.[298]

Other commenters, though, said that this limitation to swaps connected to the financial terms of the loan was inappropriate or inconsistent with the Dodd-Frank Act, and that any swap required by the loan agreement or required by the IDI as a matter of prudent lending should be covered by the exclusion.[299] Some of the commenters arguing for the broader exclusion emphasized that the exclusion should be available for any swap with the lending IDI which reduces the borrower's risks, such as a commodity swap the borrower uses for hedging, because reduction of commodity price risks faced by the borrower also reduces the risk that the loan will not be repaid to the IDI.[300] Commenters said that if the exclusion does not apply to swaps hedging the borrower's commodity price risks, then only IDIs that are able to create a separately capitalized affiliate will be able to offer commodity swaps (because section 716 of the Dodd-Frank Act limits the ability of IDIs to offer commodity swaps), thereby reducing the availability of commodity swaps to

[291] *See* CEA section 1a(49)(D), 7 U.S.C. 1a(49)(D); Exchange Act section 3(a)(71)(D), 15 U.S.C. 78c(a)(71)(D).

[292] The Commissions believe that a facts and circumstances approach is particularly appropriate here, where the broad terms of the statutory dealer definitions indicate that the Commissions should apply their expertise and discretion to interpret the statutory text.

[293] For example, a manufacturer, producer, processor, or merchant that enters into swaps to hedge its currency or interest rate risk, absent any facts and circumstances establishing dealing activity, is not a swap dealer.

[294] In response to the commenters concerns, the Commissions have adopted certain tailored exclusions of certain types of swaps and security-based swaps in the final rule.

[295] A coalition of not-for-profit power utilities and electric cooperatives has advised that it plans to submit a request for an exemption for transactions between entities described in section 201(f) of the Federal Power Act, as contemplated by section 722(f) of the Dodd-Frank Act. *See* letter from NFPEEU. Separately, some regional transmission organizations and independent systems operators have expressed interest in submitting an exemption application to the CFTC as well. *See generally* section 722(e) of the Dodd-Frank Act. Such exemptions, if granted after notice and comment pursuant to CEA section 4(c), 7 U.S.C. 6(c), could further address commenters' concerns in this regard.

[296] *See* CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A).

[297] *See* letters from Branch Banking & Trust Company (''BB&T'') dated February 3, 2011 (''BB&T I''), B&F Capital Markets, Inc. (''B&F Capital'') dated February 18, 2011 (''B&F Capital I''), Capital One Financial Corporation (''Capital One'') and Capstar Bank (''Capstar''); *see also* joint letter from Atlantic Capital Bank, Cobiz Bank, Cole Taylor Bank, Commerce Bank, N.A., East West Bank, First Business Bank, First National Bank of Pennsylvania, Heartland Financial USA, Inc., Old National Bancorp, Peoples Bancorp of North Carolina, Inc., Susquehanna Bank, The PrivateBank and Trust Co, The Savannah Bank, N.A., The Washington Trust Company, Trustmark National Bank, UMB Financial Corporation, Valley National Bank, Webster Bank NA, WesBanco Bank (''Regional Banks'') (general support for limitation to swaps connected to financial terms of the loan).

[298] *See* letter from Better Markets I.

[299] *See* letters from BOK dated February 18, 2011 (''BOK II''), FSR I, ISDA I, Midsize Banks, OCC Staff at 6 (noting that ''[l]oan underwriting criteria for community and mid-size banks * * * may require, as a condition of the loan, that the borrower be hedged against the commodity price risks incidental to its business'') and White & Case LLP (''White & Case'') and joint letter from Senator Stabenow and Representative Lucas.

[300] *See* letters from BOK II, FSR I, OCC Staff and White & Case.

borrowers that are smaller companies.[301]

Second, regarding timing, the proposed rule requested comment on whether this exclusion should apply only to swaps that are entered into contemporaneously with the IDI's origination of the loan (and if so, how ''contemporaneously'' should be defined for this purpose), or whether this exclusion also should apply to swaps entered into during part or all of the duration of the loan. In response, commenters said that the exclusion should apply to swaps entered into in anticipation of a loan or at any time during the loan term.[302] Commenters said that application of the exclusion throughout the duration of the loan would give IDIs and borrowers flexibility as to when to fix interest rates in fixed/floating swaps relating to loans and would allow borrowers to make other hedging decisions over a longer time period.[303] Commenters also said that loans such as construction loans, equipment loans and committed loan facilities may allow for draws of loan principal over an extended period of time, and that swaps entered into by the borrower and lending IDI through the course of such a loan should be covered by the exclusion.[304]

Third, as to which transactions should be deemed ''loans'' for purposes of the exclusion, the proposal said that the exclusion should be available in connection with all transactions by which an IDI is a source of funds to a borrower, including, for example, loan syndications, participations and refinancings. Commenters agreed that the exclusion should be available for IDIs that are in a loan syndicate, purchasers of a loan, assignees of a loan or participants in a loan.[305] On loan syndications and participations in particular, one commenter said that the exclusion should be available even if the notional amount of the swap is more than the amount of the loan tranche assigned to the IDI, so long as the swap notional amount is not more than the entire amount of the loan.[306] Another commenter said that the exclusion should not be available if the IDI's participation in the loan drops below a minimum level (such as 20 percent) because such use of the exclusion by minimally-participating IDIs would invite abuse.[307]

Some commenters said that other types of transactions also should be treated as ''loans'' for purposes of the exclusion. The transactions cited by commenters in this regard include leases, letters of credit, financings documented as sales of financial assets, bank qualified tax exempt loans and bonds that are credit enhanced by an IDI.[308] Other commenters said the exclusion should apply where entities related to an IDI provide financing, such as loans or financial asset purchases by bank-sponsored commercial paper conduits where the IDI provides committed liquidity,[309] and transactions where a special purpose entity formed by an IDI is the source of financing and enters into the swap.[310] Some commenters said the exclusion should encompass all transactions where an IDI facilitates a financing,[311] or all extensions of credit by an IDI,[312] or all transactions where an IDI provides risk mitigation to a borrower.[313]

Fourth, with respect to the types of financial institutions that are eligible for the loan origination exclusion, three commenters said that IDIs, for purposes of this exclusion, encompass more than banks or savings associations with federally-insured deposits. The Farm Credit Council said the exclusion should be extended to Farm Credit System institutions because one of these institutions enters into interest rate swaps with borrowing customers identical in function to those offered by commercial banks and savings associations in connection with loans, and the institutions are subject to similar regulatory requirements and covered by a similar insurance regime.[314] Another commenter said that the exclusion should be extended to other regulated financial institutions, such as insurers, so as not to create an unlevel playing field.[315] And the Federal Home Loan Banks said that the exclusion should be available to them because they are subject to similar regulatory oversight and capital standards and engage in a similar function of extending credit as do commercial banks and savings associations.[316] In addition, some commenters said the exclusion should be broadly construed as a general matter, to encourage competition in the swap market between smaller and larger banks and to increase borrowers' choice among potential swap providers.[317]

Two commenters asked for clarification of the following technical points in the proposed rule: (i) Whether a swap would be covered by the exclusion even if it does not hedge all the risks under the loan, (ii) whether a swap that is within the exclusion could continue to be treated as covered by the exclusion by an IDI if the IDI transfers the loan, and (iii) whether an IDI should count swaps covered by the exclusion in determining if its dealing activity is above the *de minimis* thresholds.[318] Another commenter asked whether an IDI with swaps that are covered by the exclusion could be a swap dealer based on other dealing activity.[319] And others asked whether the exclusion would cover swaps used by an IDI to hedge its risks arising from a loan (*i.e.,* a swap which the IDI enters into with a party other than the loan borrower).[320]

3. Final Rule

The CFTC believes that the extent of this exclusion should be determined by

[301] *See* letters from ABA I and BOK I. Other commenters addressed the relationship between the swap dealer definition and section 619 of the Dodd-Frank Act (the ''Volcker Rule''). *See* joint letter from Capital One, Fifth Third Bancorp and Regions Financial Corporation.

[302] *See* letters from BB&T I, B&F Capital I, BOK II, Capital One, Capstar, FSR I, Midsize Banks, Manufacturers and Traders Trust Company (''M&T'') dated June 3, 2011 (''M&T I'') and September 28, 2011 (''M&T II''), Peoples Bank Co. (''Peoples Bank''), Regional Banks and White & Case.

[303] *See* letters from B&F Capital I, BOK II, Capital One, Capstar and M&T I and M&T II.

[304] *See* letters from FSR dated October 17, 2011 (''FSR VI''), M&T II and Wells Fargo Bank, N.A. (''Wells Fargo'') dated August 16, 2011 (''Wells Fargo II'').

[305] *See* letters from BB&T I, Midsize Banks, Regional Banks and White & Case; *see also* letter from Loan Market Association (providing background information on loan participations).

[306] *See* letter from Regional Banks.

[307] *See* letter from Better Markets I.

[308] *See* letters from BB&T I, Capital One, FSR I, M&T I, Midsize Banks and Regional Banks.

[309] *See* letter from FSR I.

[310] *See* letter from Midsize Banks.

[311] *See* letters from Pacific Coast Bankers' Bancshares (''PCBB'') and Regional Banks.

[312] *See* letters from FSR I and Midsize Banks.

[313] *See* letter from PCBB.

[314] Consequently, the Farm Credit Council argued, disallowing these institutions from using the exclusion would give commercial banks and savings associations a competitive advantage in agricultural lending. *See* letters from Farm Credit Council I and dated February 17, 2012 (''Farm Credit Council II''). Another commenter argued that, to the contrary, making Farm Credit System institutions eligible for the exclusion would confer an inappropriate competitive advantage on those institutions. *See* letter from ABA dated February 14, 2012 (''ABA II''). This commenter said that Farm Credit System institutions have certain advantages over other IDIs, and the commenter asserted that Farm Credit System institutions were left out of the statutory language of the exclusion in order that they would not receive additional competitive advantages. *See id.*

[315] *See* letter from NAIC.

[316] *See* letter from FHLB I. The Credit Union National Association said that the Federal Home Loan Banks should not be covered by the swap dealer definition because they do not enter into swaps for their own account as part of a regular business. *See* letter from CUNA.

[317] *See* letters from BB&T I, B&F Capital dated June 1, 2011 (''B&F Capital II''), Capital One, Capstar, M&T I and Peoples Bank.

[318] *See* letters from FSR VI and Midsize Banks.

[319] *See* letter from Better Markets I.

[320] *See* letters from B&F Capital I, FSR I, ISDA I, M&T I and Midsize Banks.

the language of the statutory definition, which relates to an IDI that ''offers to enter into a swap with a customer in connection with originating a loan with that customer.'' The expansive interpretation of the exclusion advanced by some commenters, however, would read the statute to exclude almost any swap that an IDI enters into with a loan customer. That is not the exclusion that was enacted. Instead, we interpret the statutory phrase ''enter into a swap with a customer in connection with originating a loan with that customer'' to mean that the swap is directly connected to the IDI's process of originating the loan to the customer.

Because of the statute's direct reference to ''originating'' the loan, it would be inappropriate to construe the exclusion as applying to all swaps entered into between an IDI and a borrower at any time during the duration of the loan. If this were the intended scope of the statutory exclusion, there would be no reason for the text to focus on swaps in connection with ''originating'' a loan. The CFTC recognizes the concern expressed by commenters that: (i) there be flexibility regarding when the IDI and borrower enter into a swap relating to a loan, and (ii) the expectation when an IDI originates a loan with a customer is often that the customer will enter into a swap with the IDI when there is a subsequent advance, or a draw, of principal on the loan. We do not believe, however, that the statutory term ''origination'' can reasonably be stretched to cover the entire term of every loan that an IDI makes to its customers. At some point, the temporal distance renders the link to loan origination too attenuated, and the risk of evasion too great, to support the exclusion. In order to balance these competing and conflicting considerations, the final rule applies the exclusion to any swap that otherwise meets the terms of the exclusion and is entered into no more than 90 days before or 180 days after the date of execution of the loan agreement, or no more than 90 days before or 180 days after the date of any transfer of principal to the borrower from the IDI (*e.g.,* a draw of principal) pursuant to the loan, so long as the aggregate notional amount of the swaps in connection with the financial terms of the loan at any time is no more than the aggregate amount of the borrowings under the loan at that time.[321]

Since a loan involves the repayment of funds to the IDI on particular terms, a swap that relates to those terms of repayment should be covered by the exclusion. In addition, we recognize that, as stated by commenters, requirements in an IDI's loan underwriting criteria relating to the borrower's financial stability are an important part of ensuring that loans are repaid.[322] Therefore, the final rule modifies the proposed rule to provide that the exclusion applies to swaps between an IDI and a loan borrower that are connected to the financial terms of the loan, such as, for example, the loan's duration, interest rate, currency or principal amount, or that are required under the IDI's loan underwriting criteria to be in place as a condition of the loan in order to hedge commodity price risks incidental to the borrower's business.[323] The first category of swaps generally serve to transform the financial terms of a loan for purposes of adjusting the borrower's exposure to certain risks directly related to the loan itself, such as risks arising from changes in interest rates or currency exchange rates. The second category of swaps mitigate risks faced by both the borrower and the lender, by reducing risks that the loan will not be repaid. Thus, both types of swaps are directly related to repayment of the loan. Although some commenters said that this exclusion should also apply to other types of swaps, we believe it would be inappropriate to construe this exclusion as encompassing all swaps that are connected to a borrower's other business activities, even if the loan agreement requires that the borrower enter into such swaps or otherwise refers to them.[324] In contrast to a swap that transforms the financial terms of a loan or is required by the IDI's loan underwriting criteria to reduce the borrower's commodity price risks, other types of swaps serve a more general risk management purposes by reducing other risks related to the borrower or the loan. If the purpose of the exclusion were to cover the broad range of swaps cited by some commenters (such as all swaps reducing a borrower's business risks), then the terms of the statute limiting the exclusion to swaps that are ''in connection with originating a loan with that customer'' would be superfluous.[325] To give effect to the statutory text, the exclusion is limited to a swap that is connected to the financial terms of the loan or is required by the IDI's loan underwriting criteria to to be in place as a condition of the loan in order to hedge commodity price risks incidental to the borrower's business.

Regarding the types of transactions that will be treated as a ''loan'' for purposes of the exclusion, courts have defined the term ''loan'' in other statutory contexts based on the settled meaning of the term under common law. This definition encompasses any contract by which one party transfers a defined quantity of money and the other party agrees to repay the sum transferred at a later date.[326] Rather than examine at this time the many particularized examples of financing transactions cited by some commenters, the term ''loan'' for purposes of this exclusion should be interpreted in accordance with this settled legal meaning.[327]

As stated in the proposed rule, this exclusion is available to all IDIs that are a source of a transfer of money to a borrower pursuant to a loan. The final rule adopts provisions from the proposed rule that the exclusion is available to an IDI that is a source of money by being part of a loan syndicate, being an assignee of a loan, obtaining a participation in a loan, or purchasing a loan.[328] However, the proposed rule did

[321] We note that because the exclusion is available within the specified time period around the execution of the loan agreement and any draw of principal under the loan, any amendment, restructuring, extension or other modification of the loan will, in itself, neither preclude application of the exclusion nor expand application of the exclusion.

[322] *See* letter from OCC Staff.

[323] The final rule provides that the second category of swaps must hedge a price risk related to a commodity other than an excluded commodity because if the price risk relates to an excluded commodity (such as an interest rate) the swap must be connected to the financial terms of the loan in order to be covered by the exclusion.

[324] On the other hand, there is no requirement that the loan agreement reference a swap in order for the swap to be excluded, if the swap otherwise qualifies for the exclusion.

[325] Also, we believe that the broader range of swaps serving general risk management purposes are more likely to involve concerns regarding market transparency and appropriate business conduct practices addressed by swap dealer regulation than are the narrower range of swaps that are encompassed by the exclusion.

[326] *See, e.g., In Re Renshaw,* 222 F.3d 82, 88 (2d Cir. 2000) (''Because Congress did not define the term ''loan'' for [11 U.S.C.] § 523(a)(8), we must interpret it according to its settled meaning under common law. The classic definition of a loan [is] * * * as follows: To constitute a loan there must be (i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services, to another, and (iii) the other party agrees to pay for the sum or items transferred at a later date.'') (*citing In re Grand Union Co.,* 219 F. 353, 356 (2d Cir. 1914)).

[327] The final rule adopts provisions from the proposed rule that, in order to prevent evasion, the statutory exclusion does not apply where the IDI originates a ''sham'' loan; or the purported ''loan'' is actually a synthetic loan such as a loan credit default swap or loan total return swap. *See* CFTC Regulation § 1.3(ggg)(5)(iii).

[328] *See* CFTC Regulation § 1.3(ggg)(5)(ii). As is also stated in the Proposing Release, if an IDI were to transfer its participation in a loan to a non-IDI, then the non-IDI would not be able to claim this

not state explicitly how the notional amount of a swap subject to the exclusion must relate to the amount of money provided by an IDI that is in a loan syndicate or is an assignee of, participant in or purchaser of a loan. In this regard, some commenters said that a borrower and the IDIs in a lending syndicate need flexibility to allocate responsibility for the swap(s) related to the loan as they may agree.[329] We believe that, to allow for this flexibility, the exclusion may apply to a swap (which is otherwise covered by the exclusion) even if the notional amount of the swap is different from the amount of the loan tranche assigned to the IDI. However, we also agree with a commenter that the IDI should have a substantial participation in the loan.[330] The requirement of substantial participation would prevent an IDI from applying the exclusion where the IDI makes minimal lending commitments in multiple loan syndicates where it offers swaps, causing its swap activity to be far out of proportion to its loan activity.[331]

Therefore, the final rule includes a provision that the exclusion may apply regardless of whether the notional amount of the swap is the same as the amount of the loan, but only if the IDI is the sole source of funds under the loan or is committed to be, under the applicable loan agreements, the source of at least 10 percent of the maximum principal amount under the loan.[332] If the IDI does not meet this 10 percent threshold, the final rule provides that the exclusion may apply only if the aggregate notional amount of all the IDI's swaps with the customer related to the financial terms of the loan is no more than the amount lent by the IDI to the customer.[333] We also note that, in all cases, application of the exclusion requires that the aggregate notional amount of all swaps entered into by the borrower with any person in connection with the financial terms of the loan at any time is not more than the aggregate principal amount outstanding under the loan at that time.[334]

We also reiterate the interpretation in the Proposing Release that the word ''offer'' in this exclusion includes scenarios where the IDI requires the customer to enter into a swap, or where the customer asks the IDI to enter into a swap, specifically in connection with a loan made by that IDI.

We also continue to emphasize, as stated in the Proposing Release, that the statutory language of the exclusion limits its availability to only IDIs as defined in the statute. Regarding some commenters' statements about the competitive effect of this interpretation of the term ''insured depository institution,'' we believe that the scope of application of the swap dealer definition to various entities should be treated in the *de minimis* exception, which is available to all persons.

In order to provide clarification in response to certain technical questions raised by commenters, we note that whether a swap hedges all of the risk, or only some of the risk, of a loan is not relevant to application of the exclusion. Nor is it relevant to the exclusion if the IDI later transfers or terminates the loan in connection with which the swap was entered into, so long as the swap otherwise qualifies for the exclusion and the loan was originated in good faith and was not a sham.[335] Further, swaps that are covered by the exclusion should not be considered in determining if an IDI exceeds the *de minimis* level of swap dealing activity, because the statute provides that swaps covered by the exclusion should not be considered in determining if an IDI is a swap dealer, and the *de minimis* exception provides that it considers the ''quantity of [a person's] swap dealing.''[336] The application of the exclusion to swaps entered into by an IDI in connection with the origination of loans, however, does not mean that the IDI could not be a swap dealer because of other of the IDI's activities that constitute swap dealing. Regarding swaps used by an IDI to hedge or lay off its risks arising from a loan, we do not believe it is appropriate to treat such swaps as covered by the exclusion, because the statute explicitly limits the exclusion to swaps ''with a customer,'' which such hedging swaps are not. However, a swap that an IDI enters into for the purpose of hedging or laying off the risk of a swap that is covered by the IDI exclusion will not be considered in the *de minimis* determination, or otherwise in evaluating whether the IDI is covered by the swap dealer definition.[337]

Last, we believe it is appropriate to require that an IDI claiming the exclusion report its swaps that are covered by the exclusion to a swap data repository (''SDR''). This requirement is consistent with the prevailing practice that IDIs handle the documentation of loans made to borrowers, and will provide for consistent reporting of swaps that are covered by the exclusion, thereby allowing the CFTC and other regulators to monitor the use of the exclusion.

In sum, the final rule balances the need for flexibility in response to existing lending practices, consistent with the constraints imposed by the statutory text as enacted, against the risk of establishing a gap in the regulatory framework enacted in Title VII.[338] It provides that the exclusion may be claimed by a person that meets the following conditions: (i) The person is an IDI; (ii) the IDI enters into a swap with the borrower that does not extend beyond the termination of the loan; (iii) the swap is connected to the financial terms of the loan or is required by the IDI's loan underwriting criteria to to be in place as a condition of the loan in order to hedge commodity price risks incidental to the borrower's business; (iv) the loan is within the common law meaning of ''loan'' and it is not a sham or a synthetic loan; (v) the IDI is the source of money to the borrower in connection with the loan either directly, or (so long as the IDI is the source of at least 10 percent of the entire amount of the loan) through syndication, participation, assignment, purchase, refinancing or otherwise; (vi) the IDI

exclusion, regardless of the terms of the loan or the manner of the transfer. Similarly, a non-IDI that is part of a loan syndicate with IDIs would not be able to claim the exclusion.

[329] *See, e.g.,* letter from Regional Banks.

[330] *See* letter from Better Markets I. This commenter suggested a minimal threshold of at least 20 percent of the loan. However, we believe that a 10 percent commitment constitutes a substantial participation in the loan which supports offering of a swap up to the loan's full amount.

[331] For example, an IDI could act as a 0.1 percent participant in one hundred different loans in order to serve as the sole swap counterparty to the borrowers for hedging the borrowers' interest rate risk on the loans. Thus, by lending or committing to lend $100 million, the IDI could apply the exclusion to swaps with an aggregate notional amount of $100 billion.

[332] *See* CFTC Regulation § 1.3(ggg)(5)(i)(D)(*1*) and (*2*).

[333] *See* CFTC Regulation § 1.3(ggg)(5)(i)(D)(3).

[334] *See* CFTC Regulation § 1.3(ggg)(5)(i)(E). Paragraphs (D)(3) and (E) of this regulation refer to all swaps ''in connection with the financial terms of the loan'' in order to clarify that only such swaps are relevant in this regard. For example, if the IDI were to enter into a swap with the customer that is not in connection with the loan's financial terms, the swap would not be relevant because the exclusion would not apply to the swap.

[335] On the other hand, if the IDI were to transfer the swap (but not the loan) to another IDI, and the IDI that is the transferee of the swap is not a source of money to the borrower under the loan, then the transferee IDI would not be able to apply the exclusion to the swap.

[336] *See* CEA sections 1a(49)(A) and 1a(49)(D), 7 U.S.C. 1a(49)(A) and 1a(49)(D).

[337] An IDI that is seeking out swap counterparties to enter into swaps in order to hedge or lay off the risk of a swap that is subject to the IDI exclusion would generally not be accommodating demand for swaps or facilitating interest in swaps.

[338] The final rule text in CFTC Regulation § 1.3(ggg)(5)(i) has been revised to conform the text of the rule to the statutory provision which refers to ''an insured depository institution [that] * * * enter[s] into a swap with a customer in connection with originating a loan with that customer.'' *See* CEA § 1a(49)(A), 7 U.S.C. 1a(49)(A)

enters into the swap with the borrower within 90 days before or 180 days after the date the execution of the loan agreement, or within 90 days before or 180 days after any transfer of principal to the borrower from the IDI pursuant to the loan; (vii) the aggregate notional amount of all swaps entered into by the borrower with all persons in connection with the financial terms of the loan at any time is not more than the aggregate amount of the borrowings under the loan at that time; and (viii) the IDI agrees to report the swap to an SDR.

An IDI that enters into swaps that do not meet these conditions, and thus do not qualify for the statutory exclusion, is not necessarily required to register as a swap dealer. Rather, the IDI would apply the statutory definition and the provisions of the rule (taking into account the applicable interpretive guidance set forth in this Adopting Release), solely with respect to its swaps that are not subject to the IDI exclusion, in order to determine whether it is engaged in swap dealing activity that exceeds the *de minimis* threshold.

C. Application of Dealer Definitions to Legal Persons and to Inter-Affiliate Swaps and Security-Based Swaps

1. Proposed Approach and Commenters' Views

In the Proposing Release, the Commissions preliminarily concluded that designation as a dealer would apply on an entity-level basis (rather than to a trading desk or other business unit that is not organized as a separate legal person), and that an affiliated group of legal persons could include more than one dealer.[339] The Proposing Release also stated that the dealer analysis should consider the economic reality of swaps and security-based swaps between affiliates, and preliminarily noted that swaps or security-based swaps ''between persons under common control may not involve the interaction with unaffiliated persons that we believe is a hallmark of the elements of the definitions that refer to holding oneself out as a dealer or being commonly known as a dealer.'' [340]

Commenters supported the view that swaps and security-based swaps among affiliates should be excluded from the dealer analysis.[341] A number of commenters took the view that the dealer definitions should not apply when there is common control between counterparties, or when common control is combined with the consolidation of financial statements.[342] Some commenters suggested that this interpretation regarding the scope of the dealer definitions should incorporate concepts of affiliation that are found in other statutory and regulatory provisions.[343] Several commenters also opposed the suggestion (raised as part of the Proposing Release's request for comments) that this interpretation be limited to transactions among wholly owned subsidiaries.[344]

2. Final Interpretation and Rule

a. Application to Legal Persons

Consistent with the Proposing Release, the Commissions interpret ''person'' as used in the swap dealer and security-based swap dealer definitions to refer to a particular legal person. Accordingly, the dealer definitions will apply to the particular legal person performing the dealing activity, even if that person's dealing activity is limited to a trading desk or discrete business unit,[345] unless the person is able to take advantage of a limited designation as a dealer.[346]

b. Application to Inter-Affiliate Swaps and Security-Based Swaps

The final rules codify exclusions from the dealer definitions for a person's swap or security-based swap activities with certain affiliates.[347] These rules are consistent with the Proposing Release's recognition of the need to consider the economic reality of any swaps or security-based swaps that a person enters into with affiliates. Market participants may enter into such inter-affiliate swaps or security-based swaps for a variety of purposes, such as to allocate risk within a corporate group or to transfer risks within a corporate group to a central hedging or treasury entity.

Under the final rules, the dealer analysis will not apply to swaps and security-based swaps between majority-owned affiliates.[348] When the economic interests of those affiliates are aligned adequately—as would be found in the case of majority-ownership—such swaps and security-based swaps serve to allocate or transfer risks within an affiliated group, rather than to move those risks out of the group to an unaffiliated third party. For this reason, and as contemplated by the Proposing Release,[349] we do not believe that such

[339] *See* Proposing Release, 75 FR at 80183.

[340] *Id.* The Proposing Release further noted that sections 721(c) and 761(b)(3) give the Commissions anti-evasion authority, to the extent that an entity were to seek to use transactions between persons under common control to avoid one of the dealer definitions. *See id.* (erroneously referring to section 721(c) as section 721(b)(3).

[341] *See, e.g.,* letters from API I, COPE I, ISDA I, Midsize Banks, ONEOK, Inc. (''ONEOK'') and Peabody.

Several commenters explained the widespread use of central hedging desks to allocate risk within affiliate groups or to gather risk from within a group and lay that risk off on the market. *See, e.g.,* letters from EEI/EPSA, Kraft Foods Inc. (''Kraft''), MetLife and Prudential Financial, Inc. (''Prudential'') dated February 17, 2011 (''Prudential I'').

Some commenters particularly stated that the use of a single entity to face the market on behalf of an affiliate group had several risk-reducing and efficiency-enhancing benefits, and that those benefits would be lost if the dealer definitions were to lead corporate groups to avoid using central trading desks and instead require each affiliate to face the market as an independent end-user. *See* letters from FSR I, Philip Morris International Inc. (''Philip Morris''), Shell Trading dated June 3, 2011 (''Shell Trading II'') and Utility Group, and joint letter from ABA Securities Association, American Council of Life Insurers (''ACLI''), FSR, Futures Industry Association (''FIA''), Institute of International Bankers, ISDA and SIFMA (''Financial Associations'').

Some commenters also stated that legislative history suggested that Congress did not intend that the dealer definition capture transactions involving the use of an affiliate to hedge commercial risk. *See* letters from CDEU and Prudential I.

[342] *See* letters from CDEU (common control), Financial Associations (common control and consolidation), MetLife (consolidation), ONEOK (common control, evaluated based on whether the trading interests of the entities are aligned) and Prudential I (citing CFTC letter interpretation regarding common control).

[343] *See, e.g.,* letters from EDF Trading (proposing definition from regulations promulgated by the Federal Energy Regulatory Commission) and Peabody (proposing definition of ''affiliate'' used in federal securities laws) and joint letter from the Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd. and Sumitomo Mitsui Banking Corp. (suggesting use of control definition in Bank Holding Company Act).

[344] *See, e.g.,* letters from Kraft and ONEOK.

[345] Within an affiliated group of companies, however, only those legal persons that engage in dealing activities will be designated as dealers; that designation will not be imputed to other non-dealer affiliates or to the group as a whole. A single affiliate group may, however, have multiple swap or security-based swap dealers.

[346] Limited designation as a dealer is addressed in more detail below in part II.E.

[347] *See* CFTC Regulation § 1.3(ggg)(6)(i); Exchange Act rule 3a71–1(d). A person's market-facing swap or security-based swap activity may still cause that person to be a dealer, even if that market-facing activity is linked to the inter-affiliate activity, to the extent that the market-facing activity satisfies the dealer definition. However, a person's market-facing swap activity for hedging purposes as defined in CFTC Regulation § 1.3(ggg)(6)(iii) would not cause that person to be a dealer.

[348] *See* CFTC Regulation § 1.3(ggg)(6)(i); Exchange Act rule 3a71–1(d)(1). For the purposes of these rules, the counterparties are majority-owned affiliates if one party directly or indirectly holds a majority ownership interest in the other, or if a third party directly or indirectly holds a majority interest in both, based on holding a majority of the equity securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership. *See* CFTC Regulation § 1.3(ggg)(6)(i); Exchange Act rule 3a71–1(d)(2).

[349] *See* Proposing Release, 75 FR at 80183 (noting that swaps or security-based swaps between affiliates ''may not involve the interaction with unaffiliated persons that we believe is a hallmark of the elements of the definitions that refer to

swaps and security-based swaps involve the interaction with unaffiliated persons to which dealer regulation is intended to apply.

The standard in the final rules differs from the standard suggested by the Proposing Release, which alluded to affiliates as legal persons under ''common control.'' This change is based on our further consideration of the issue, including consideration of comments that an inter-affiliate exclusion should be available when common control is combined with the consolidation of financial statements. Although we are not including a requirement that financial statements be consolidated—as we do not believe that the scope of this exclusion should be exposed to the risk of future changes in accounting standards—in our view a majority ownership standard is generally consistent with consolidation under GAAP.[350] Absent majority ownership, we cannot be confident that there would be an alignment of economic interests that is sufficient to eliminate the concerns that underpin dealer regulation.

In taking this approach, we have also considered alternatives suggested by commenters. For example, while one commenter suggested that we adopt a definition of ''affiliate'' as used in the securities laws,[351] we believe that such an approach would be too broad for the purpose of this exclusion from dealing activity, given that common control by itself does not ensure that two entities' economic interests are sufficiently aligned.[352]

c. Application to Cooperatives

Similar considerations apply, in certain situations, to cooperative entities that enter into swaps with their members in order to allocate risk between the members and the cooperative. Commenters identified two general types of such cooperatives—''cooperative associations of producers'' as defined in section 1a(14) of the CEA [353] and cooperative financial entities such as Farm Credit System institutions and Federal Home Loan Banks.[354] As is the case for affiliated groups of corporate entities, we believe that when one of these cooperatives enters into a swap with one of its members,[355] the swap serves to allocate or transfer risks within an affiliated group, rather than to move those risks from the group to an unaffiliated third party, so long as the cooperative adheres to certain risk management practices.

Accordingly, the final rules specifically provide that the dealer analysis excludes swaps between a cooperative and its members, so long as the swaps in question are reported to the relevant SDR by the cooperative and are subject to policies and procedures of the cooperative which ensure that it monitors and manages the risk of such swaps.[356] The final rules define the term ''cooperative'' to include cooperative associations of producers and any entity chartered under Federal law as a cooperative and predominantly engaged in activities that are financial in nature.[357] The cooperatives covered by this relief are subject to provisions of Federal law providing for their cooperative purpose. Cooperative associations of producers have been recognized since the passage of the Capper-Volstead Act as being permitted to engage in certain cooperative activities without violating antitrust laws.[358] Cooperative financial institutions such as the Farm Credit System institutions and Federal Home Loan Banks are chartered under Federal laws that limit their membership and require that they serve certain public purposes.[359]

We are aware that other persons commented that their swap activities should be excluded from the dealer analysis because they use swaps in connection with a cooperative or non-profit purpose, or because they aggregate demand for swaps arising from numerous small entities.[360] However, the key distinction drawn in granting this relief is that cooperatives covered by the exclusion enter into swaps with their members in order to allocate risk between the members and

holding oneself out as a dealer or being commonly known as a dealer'').

[350] *See* FASB ASC Section 810–10–25, Consolidation—Overall—Recognition (stating that consolidation is appropriate if a reporting entity has a controlling financial interest in another entity and a specific scope exception does not apply).

[351] *See* letter from Peabody. The commenter did not specify which definition of ''affiliate'' in the securities laws it was proposing. For example, Rule 405 of the Securities Act of 1933 defines affiliate in terms of common control, *see* 17 CFR 230.405, and Section 20(a) of the Exchange Act takes a similar approach. The Investment Company Act of 1940 (''ICA'') defines affiliate to include entities with a common ownership interest as low as 5 percent, ICA section 2(a)(3). Two other commenters proposed using a common control standard, perhaps also in reference to the Rule 405 definition of ''affiliate.''

[352] The definitions of ''affiliate'' and ''control'' found in Rule 405 and other securities law provisions are appropriate in the context of the prophylactic and remedial provisions in which they are found. Rule 405, for example, uses the terms ''affiliate'' and ''control'' to identify those persons that have the power to effect registration of an issuer's securities, and the broad definitions ensure that the persons with that power actually fulfill their obligation to do so. By comparison, the exclusion of inter-affiliate swaps and security-based swaps from the dealer analysis should be more tightly focused to address situations in which counterparties have similar economic interests.

Another commenter noted the definition of ''affiliate'' found in certain Federal Energy Regulation Commission regulations—which define ''affiliate'' in terms of a ten percent or five percent common ownership interest. *See* letter from EDF Trading. Those relatively low ownership thresholds, however, are intended to address different concerns regarding collusion and cross-subsidization, and do not appear appropriate for an interpretation that has the potential to reduce the counterparty and market protections provided by Title VII. *See* 18 CFR sections 35.36(a)(9), 35.39, 366.2(b), 366.3.

[353] 7 U.S.C. 1a(14). A cooperative association of producers is at least 75 percent owned or controlled, directly or indirectly, by producers of agricultural products and must comply with the Capper-Volstead Act (referred to in the CEA as the Act of February 18, 1922, 7 U.S.C. 291 and 292). *See* letters from Land O'Lakes II, NCFC I and NMPF.

[354] *See* letters from Farm Credit Council I and FHLB I. The NRU CFC qualifies as a cooperative financial entity, but we understand that it does not enter into a significant amount of swaps with its members; rather, it enters into swaps with unaffiliated third parties. *See* letter from NRU CFC I and meeting with NRU CFC on January 13, 2011.

[355] The term ''cooperative association of producers'' also includes any organization acting for a group of such associations and owned or controlled by such associations. *See* CEA section 1a(14), 7 U.S.C. 1a(14). For a cooperative association of producers that is acting for and owned or controlled by such associations, we believe that this conclusion applies to any swap between such cooperative association of producers and any cooperative association of producers that is a member of it, and any producer that is a member of any such cooperative association of producers that is itself a member of the first cooperative association of producers. *See* CFTC Regulation § 1.3(ggg)(6)(ii)(C).

However, we do not believe that this conclusion applies to any security-based swap that a cooperative association of producers may enter into, nor does it apply to any swap related to a non-physical commodity (such as a rate swap). For this reason, the exclusion for cooperative associations of producers is limited to swaps that are primarily based on a commodity that is not an excluded commodity. *See* CFTC Regulation § 1.3(ggg)(6)(ii)(A)(*3*). The term ''excluded commodity'' is defined in CEA section 1a(19), 7 U.S.C. 1a(19).

[356] *See* CFTC Regulation § 1.3(ggg)(6)(ii). To be clear, these cooperatives are not excluded from the dealer definitions. *See* part II.A.6, *supra*. Rather, swaps between a cooperative and its members (and swaps that a cooperative enters into to hedge or lay off the risk of such swaps) are excluded from the dealer analysis. If a cooperative were to engage in other swap activities that are covered by, and not otherwise excluded from, the statutory definition of the term ''swap dealer,'' then it would be required to register as a swap dealer.

[357] *See* CFTC Regulation § 1.3(ggg)(6)(ii)(B).

[358] *See* Capper-Volstead Act section 1, 7 U.S.C. 291.

[359] *See* Farm Credit Act of 1971, 12 U.S.C. 2001 et seq. and Federal Home Loan Bank Act, 12 U.S.C. 1421 et seq.

[360] *See* letter from NFPEEU (not-for-profit power utilities, electric cooperatives and related persons); letters from Farmers' Associations, NGFA I and NMPF (referring to private companies that serve as aggregators for swaps in agricultural commodities or otherwise offer swaps for agricultural risk management); and letter from Northland Energy (small energy firm that aggregates demand for swaps from small energy retailers and consumers).

the cooperative. By contrast, the other entities noted above enter into swaps with unaffiliated parties in order to transfer risks between unaffiliated parties.[361] As noted above, the Commissions believe that the contemplated scope of the statutory definitions does not include instances where a person's swap activities transfer risk within an affiliated group, but does extend to activities that create legal relationships that transfer risk between unaffiliated parties. Thus, it is appropriate that the dealer analysis exclude swaps between a cooperative and its members, but such analysis should include swaps between a cooperative or other aggregator and unaffiliated persons.

D. De Minimis Exception

1. Proposed Approach

The Dodd-Frank Act's definitions of ''swap dealer'' and ''security-based swap dealer'' require that the Commissions exempt from dealer designation any entity ''that engages in a *de minimis* quantity'' of dealing ''in connection with transactions with or on behalf of customers.'' The statutory definitions further require the Commissions to ''promulgate regulations to establish factors with respect to the making of any determination to exempt.'' [362]

In the Proposing Release, we preliminarily concluded that the *de minimis* exception ''should be interpreted to address amounts of dealing activity that are sufficiently small that they do not warrant registration to address concerns implicated by the regulations governing swap dealers and security-based swap dealers. In other words, the exception should apply only when an entity's dealing activity is so minimal that applying dealer regulations to the entity would not be warranted.'' [363] In taking this view, we rejected the suggestion that the *de minimis* exception should compare a person's swap or security-based swap dealing activities to the person's non-dealing activities.[364]

At the same time, we recognized that this proposed approach did not appear to ''readily translate into objective criteria.'' We further recognized that a range of alternative approaches may be reasonable, and we solicited comment as to what factors should be used to implement the exception.[365]

The proposed *de minimis* exception was comprised of three factors, all of which a person would have had to satisfy to avail itself of the exception.[366] The first proposed factor would have limited the aggregate effective amount, measured on a gross basis, of the swaps or security-based swaps that a person entered into over the prior 12 months in connection with its dealing activities to $100 million [367] (or $25 million with regard to counterparties that are ''special entities'').[368]

The second proposed factor would have limited a person's swap or security-based swap dealing activity to no more than 15 counterparties over the prior 12 months (while counting counterparties that are members of an affiliated group as one counterparty for these purposes). The final proposed factor would have limited a person's dealing activity to no more than 20 swaps or security-based swaps over the prior 12 months (without counting certain amendments as new swaps or security-based swaps).

2. Commenters' Views

a. Basis for the Exception

Some commenters sought to link the *de minimis* exception to systemic risk criteria by taking the position that a person should have to register as a dealer only if its dealing activities pose systemic significance.[369] One commenter specifically objected to the position in the Proposing Release that the *de minimis* exception should take into account customer protection principles.[370] On the other hand, one commenter supported the rejection of a risk-based *de minimis* test.[371]

Some commenters argued that the *de minimis* test should account for proportionality criteria that would excuse entities whose dealing activity is relatively minor compared to their other activities.[372]

b. Significance of ''Customer'' Language

One commenter took the position that the language within the *de minimis* exception that specifically referred to ''transactions with or on behalf of customers'' meant that the exception should be available only for persons who limit their swaps or security-based swaps to those that are entered into with or on behalf of customers.[373] Other commenters posited the opposite view that the ''customer'' language should be read to mean that a person's dealing activities with counterparties other than customers may be disregarded for purposes of the exception (*i.e.,* non-customer transactions would not count against the *de minimis* thresholds).[374] Some commenters argued that

[361] *See, e.g.,* letter from NFPEEU (not-for-profit power utilities and electric cooperatives generally enter into swaps between themselves, with large industrial consumers, and a wide range of other counterparties). Indeed, the Dodd-Frank Act permits the CFTC to exempt agreements, contracts or transactions between entities described in section 201(f) of the Federal Power Act, such as certain not-for-profit power utilities and electric cooperatives. *See* section 722(f) of the Dodd-Frank Act. As noted above, a coalition of not-for-profit power utilities and electric cooperatives has advised that it plans to submit a request for the exemption contemplated by section 722(f) of the Dodd-Frank Act. *See* note 295 *supra.*

[362] CEA section 1a(49)(D), 7 U.S.C. 1a(49)(D); Exchange Act section 3(a)(71)(D), 15 U.S.C. 78c(a)(71)(D).

[363] Proposing Release, 75 FR at 80179 (footnote omitted).

[364] *See id.* at 80179–80.

[365] *See id.* at 80180.

[366] Under the proposal, the factors would consider a person's swap or security-based swap dealing activity as a whole, rather than separately considering different types of swaps or security-based swaps. *See* Proposing Release, 75 FR at 80181.

[367] *See* proposed Exchange Act rule 3a71–2(a). The proposed standard reflected our understanding that in general the notional size of a small swap or security-based swap is $5 million or less, and that the proposed threshold would reflect 20 instruments of that size. The standard also sought to reflect the customer protection issues implicated by swaps and security-based swaps. *See* Proposing Release, 75 FR at 80180.

The proposed notional threshold would not consider the market risk offsets associated with combining long and short positions. In addition, the proposed notional threshold would not account for the amount of collateral held or posted by the entity, or other risk mitigating factors. *See id.*

[368] *See* proposed Exchange Act rule 3a71–2(a). As set forth by the statutory business conduct rules applicable to security-based swap dealers (as set forth in Exchange Act section 15F(h)(2)(C)), ''special entity'' refers to: Federal agencies; States, State agencies and political subdivisions (including cities, counties and municipalities); ''employee benefit plans'' as defined under the Employee Retirement Income Security Act of 1974 (''ERISA''); ''governmental plans'' as defined under ERISA; and endowments. Title VII imposes additional business conduct requirements on security-based swap dealers in connection with special entities. *See* CEA sections 4s(h)(2), 4s(h)(4), 4s(h)(5); Exchange Act section 15F(h)(2), (4), (5).

[369] *See, e.g.,* letters from CDEU, MFX II, NCGA/NGSA II and SIFMA—Regional Dealers Derivatives Committee (''SIFMA—Regional Dealers'').

[370] *See* letter from WGCEF I (arguing that basing the exception on customer protection principles would be contrary to the statutory framework, given that only ECPs are eligible to participate in off-exchange swap transactions).

[371] *See* letter from Better Markets I.

[372] *See, e.g.,* letters from FHLB I, IECA–Credit I, NCGA/NGSA I, NRG Energy, Peabody and WGCEF I. One commenter said the proportionality criteria should also consider an entity's activities with respect to the physical commodity underlying its swaps. *See* letter from NCGA/NGSA I. *But see* letter from Better Markets I (supporting rejection of a proportionality test). Some commenters suggested more than one alternative approach.

[373] *See* letter from Better Markets I. Another commenter said that the ''customer'' language serves to emphasize that the *de minimis* exception is available to entities that provide swaps to customers. *See* letter from NGFA I.

[374] *See* letters from ISDA I, Vitol and WGCEF I. Another commenter said that the use of the term ''customer'' indicates that all transactions with physical commodity customers should be disregarded in determining if a person is a dealer. *See* letter from EDF Trading.

transactions entered into in a fiduciary capacity should be disregarded for purposes of the exception.[375] One commenter questioned the proposal's use of the term ''counterparty'' in lieu of the statutory term ''customer.''[376]

c. Proposed Tests and Thresholds

Commenters criticized the proposed *de minimis* thresholds in a variety of ways. These included arguments that the proposed thresholds were inappropriately low,[377] would harm end-users by reducing the number of entities willing to enter into low-value swaps and security-based swaps,[378] would be unjustified on a cost-benefit basis,[379] and were disproportionately low compared to the activities of recognized dealers.[380] Other commenters said the *de minimis* thresholds should be set at a level to allow entities to engage in a meaningful amount of customer-facing swaps or security-based swaps without being required to register as dealers.[381]

A number of commenters particularly criticized the proposed notional threshold, with some commenters suggesting that the threshold should be based on a percentage of the total swap market[382] or some other fixed value,[383] or arguing in favor of an exposure-based threshold in lieu of a notional threshold.[384] Other commenters said that the aggregate notional amount of swaps is not a meaningful measure of an entity's dealing activity.[385] A few commenters supported the proposed notional threshold.[386]

Some commenters argued against basing the *de minimis* exception on the number of a person's swaps or security-based swaps or the number of a person's counterparties,[387] or supported increasing those thresholds above the proposed standard.[388] Commenters also suggested a variety of other alternatives to the proposed tests.[389]

d. Additional Issues

Some commenters emphasized the need to provide protections in connection with ''special entities.''[390] Certain commenters sought to identify problems related to the application of the proposed thresholds in connection with particular types of businesses or markets,[391] or to aggregators or

[375] *See, e.g.,* letter from FSR I.

[376] *See* letter from Vitol (suggesting that the proposed language meant that dealing activity involved ''customers'' but not ''counterparties'').

[377] *See, e.g.,* letters from API I, CDEU, DFA, EDF Trading, Farm Credit Council I, Growmark, Land O'Lakes dated January 13, 2011 (''Land O'Lakes I''), Midsize Banks, NCFC I, NCGA/NGSA II, New York City Bar Association—Committee on Futures and Derivatives Regulation (''NYCBA Committee''), Northland Energy, NRG Energy, Regional Banks and SIFMA—Regional Dealers. Some commenters also said that the thresholds, particularly those for swaps, should vary according to the riskiness of the swap or type of commodity underlying the swap. *See* letters from BG LNG I, Farm Credit Council I, Gavilon II, ISDA I, NFPEEU, Vitol and WGCEF I.

[378] *See, e.g.,* letters from API I, BG LNG IFarm Credit Council I, Midsize Banks, NCFC I, NGFA I, Regional Banks and SIFMA—Regional Dealers and meetings with Electric Companies on April 13, 2011, the Asset Management Group of SIFMA (''SIFMA—AMG'') on February 4, 2011 and WGCEF on April 28, 2011.

[379] *See, e.g.,* letters from CDEU and Vitol. Another commenter noted that application of a cost-benefit analysis of the *de minimis* threshold could be challenging. *See* Roundtable Transcript at 193–94 (remarks of Camille Rudge, The PrivateBank and Trust Company).

[380] *See* letter from CDEU (citing statistics indicating that the average respondent to an ISDA survey had an annual ''event volume'' of over 297,000 OTC derivatives trade processing actions); *see also* letter from Regional Banks.

[381] *See* meetings with Electric Companies on April 13, 2011, Gavilon on May 11, 2011 and WGCEF on April 28, 2011.

[382] *See* letter from COPE I (suggesting 0.001% of the total U.S. swap market, amounting to approximately $3 billion); *see also* letters from API dated June 3, 2011 (''API II''), EDF Trading, Edison Int'l, EEI/EPSA, IECA–Credit I, NCGA/NGSA II, NextEra, NFPEEU, Utility Group and WGCEF I (suggesting 0.001% of the total U.S. swap market).

[383] *See, e.g.,* meeting with Land O'Lakes on January 6, 2011 (suggesting the threshold be increased by 2 to 5 times—*i.e.,* to $200 million to $500 million); letters from Growmark, FHLB I and MFX II (each supporting $1 billion notional standard); Regional Banks (supporting $2 billion notional standard); letter from NCFC dated October 31, 2011 (''NCFC III'') (supporting alternative notional standards of $1 billion or $3 billion depending on certain assumptions); letter from FSR VI and joint letter from Capital One, Fifth Third Bancorp and Regions Financial Corporation (suggesting notional standard of at least $2 billion); letter from WGCEF dated June 3, 2011 regarding the swap dealer definition (''WGCEF V'') (suggesting notional standard of $3.5 billion); and letter from IPR–GDF Suez Energy North America (suggesting notional standard of $10 billion). Some commenters suggested more than one possible threshold.

[384] *See, e.g.,* letters from Farm Credit Council I, FSR VI and Midsize Banks. Other commenters said the threshold should account for the effect of netting. *See* letters from API II, Chesapeake Energy, Land O'Lakes I and MFX II. On the other hand, one commenter specifically supported the use of the gross notional amount. *See* letter from Greenberger.

[385] *See* letters from Farm Credit Council I, ISDA I, Land O'Lakes I, Midsize Banks, NCFC I, SIFMA—Regional Dealers and Vitol.

[386] *See* letters from AFR, Better Markets I, Greenberger and NMPF. One of these commenters said that data on credit default swaps analyzed by the SEC's Division of Risk, Strategy, and Financial Innovation indicates that the $100 million proposed notional thresholds are too high. *See* letters from Better Markets to CFTC and SEC dated April 6, 2012 (''Better Markets III'').

[387] *See, e.g.,* letters from API II, Atmos Energy, Chesapeake Energy, COPE I, EEI/EPSA, Gavilon II, IECA–Credit I, Land O'Lakes I, NCGA/NGSA II, NEM, NextEra I, NMPF, NRG Energy, Peabody and Utility Group.

[388] *See, e.g.,* letters from ISDA I (suggesting 25 transactions over 12 months); FHLB I (suggesting 25 counterparties and 50 transactions over 12 months) FSR I and Midsize Banks (each suggesting 75 counterparties and 200 transactions over 12 months); Regional Banks (suggesting 100 counterparties and 300 transactions over 12 months); Growmark and MFX II (suggesting thresholds should be increased by a factor of 10) and meeting with Land O'Lakes on January 6, 2011 (suggesting thresholds should be increased by a factor of between 2 and 5).

One commenter said the number of transaction and number of counterparty standards should be disjunctive—*i.e.,* a dealer's activity would be *de minimis* if it were below either standard. *See* letter from Northland Energy. Other commenters raised questions about how counterparties or transactions should be counted for purposes of the standard. *See* letters from CDEU (novations should not be counted as new transactions) and J.P. Morgan (members of an affiliated group should be counted as one counterparty), joint letter from BB&T, East West Bank, Fifth Third Bank, The PrivateBank and Trust Company, Regions Bank, Sun Trust Bank, U.S. Bank National Association and Wells Fargo Bank, N.A. (''Midmarket Banks'') (questioning how to count multiple borrower counterparties to a loan and swap) and meeting with Land O'Lakes on January 6, 2011 (members of a cooperative should be counted as one counterparty).

Last, some commenters said that the number of transaction or number of counterparty standards should be deleted because they are not useful as tests of *de minimis* status. *See* letters from Gavilon II (eliminate both standards) and SIFMA—Regional Dealers (eliminate number of counterparties standard).

[389] *See* letters from IECA–Credit I (suggesting that exception exclude persons whose positions either are below a notional threshold or are below a combined proportionality and revenue threshold), SIFMA—Regional Dealers (supporting annual threshold of 500 customer-facing or riskless principal swaps, consistent with the *de minimis* exception from the Exchange Act ''broker'' definition in connection with bank brokerage activity, as well as SEC rules in connection with the Exchange Act definition of ''dealer''), FHLB I (supporting non-quantitative test accounting for relatively small swap-related exposure compared to primary customer activity, collateral that also provides credit support for other business done with the customer, an existing relationship with customer and inability of customer to obtain swaps from entities that primarily are dealers), Gavilon II (alluding to use of non-quantitative tests), MFX II (suggesting establishment of a separate qualitative process by which a dealer may establish why registration is not warranted) and DC Energy (thresholds should be set at a level appropriate to support the capital levels to be required for swap dealers).

[390] *See* letters from Better Markets I (arguing that the *de minimis* exception should not be available in connection with transactions with special entities), AFR (similar), Greenberger (supporting reduction of the notional threshold for transactions with special entities to $5 million) and AFSCME. Some commenters said the standard for swaps and security-based swaps with special entities should be a notional value equal to 0.0001% of the total U.S. swap market. *See* letters from COPE I, EDF Trading, EEI/EPSA, IECA–Credit I, NFPEEU and Utility Group. One commenter said the threshold for special entities should be eliminated because it is not useful in determining *de minimis* status. *See* letter from Gavilon II.

[391] *See* letters from BG LNG I (small energy companies), COPE I and Northland Energy (each discussing commodity markets, suggesting that notional thresholds be based on the unit of a

Continued

cooperatives.[392] Other commenters suggested that the exception should focus dealer regulation toward ''financial'' entities.[393] One commenter emphasized the need for the exception to be available when the end-user is a credit union, bank or thrift.[394]

Commenters sought clarification that the *de minimis* criteria would not apply to transactions for hedging or proprietary trading purposes,[395] or to inter-affiliate transactions.[396]

Commenters also raised issues related to the exception's treatment of the proposed use of a rolling annual period for calculations,[397] the proposed use of ''effective notional amounts,'' [398] the possibility of adjusting the thresholds over time,[399] how the *de minimis* tests would apply in the context of affiliated positions,[400] and how the exception would account for swaps or security-based swaps entered into before the definition's effective date.[401]

Some commenters suggested that the *de minimis* thresholds be set higher initially to provide for efficient use of regulatory resources.[402] One commenter requested clarification that the exception would apply prospectively without regard to dealing activities taken prior to the effectiveness of Title VII.[403] One commenter requested that a person that falls above the *de minimis* tests be able to take advantage of application and re-evaluation periods akin to those associated with the major participant definitions.[404]

Two commenters expressed support for the proposed self-executing approach of the exception.[405] Some commenters requested clarification that the *de minimis* exception is independent of the loan origination exclusion in the CEA ''swap dealer'' definition.[406]

A number of commenters also addressed the application of dealer regulation to non-U.S. entities. While those comments did not specifically address the *de minimis* exception, the exception may be relevant to addressing these cross-border issues.[407]

One commenter separately addressed the credit default swap data analysis made available by CFTC and SEC staffs.[408] The commenter expressed the view that this data supported the adoption of a *de minimis* threshold of $100 million or less, particularly focusing on the number of entities that may be excluded under particular thresholds.[409]

3. Final Rules—General Principles for Implementing the *De Minimis* Exception

a. Balancing Regulatory Goals and Burdens

The Commissions recognize that implementing the *de minimis* exception requires a careful balancing that considers the regulatory interests that could be undermined by an unduly broad exception as well as those regulatory interests that may be promoted by an appropriately limited exception.

On the one hand, a *de minimis* exception, by its nature, will eliminate key counterparty protections provided by Title VII for particular users of swaps and security-based swaps.[410] The broader the exception, the greater the loss of protection.[411] Moreover, in determining the scope of the exception, it is important to consider not only the current state of the swap and security-based swap markets, but also to account for how those markets may evolve in the future. This is particularly important because the full implementation of Title VII—including enhancements to pricing transparency and the increased access to central clearing—reasonably may be expected to facilitate new entrants into the swap and security-based swap markets. To the extent that such entrants engage in dealing activity below the *de minimis* threshold—either for the long term or until their activity surpasses the threshold—the relative amount of unregistered activity within the market may be expected to increase. Accordingly, a higher *de minimis* threshold may not only result in a certain percentage of unregistered activity being transacted initially, consistent with the current market, but also may result in an even greater proportion of unregistered activity being transacted in the future.

On the other hand, the Commissions also recognize that Congress included a statutorily mandated *de minimis* exception for certain swap and security-based swap dealing activity, and that an appropriately calibrated *de minimis* exception has the potential to advance other interests. For example, the *de minimis* exception may further the interest of regulatory efficiency when

commodity), NCFC I (commodity prices), NGFA I (grain elevators) and WGCEF I (energy prices).

[392] *See, e.g.,* letters from Growmark and Land O'Lakes I.

[393] *See* letters from NEM, NextEra I, and NGFA I.

[394] *See* letter from CUNA.

[395] *See, e.g.,* letters from API I, EDF Trading, Gavilon II and SIFMA—Regional Dealers.

[396] *See, e.g.,* letter from Atmos Energy Holdings, Inc (''Atmos Holdings'').

[397] *See* letters from NCGA/NGSA I (supporting measurement of rolling period average over 12 months), NextEra I (supporting evaluation as of the last day of each calendar quarter rather than over the immediate preceding 12 months) and Northland Energy (requesting clarification that if a monetary notional amount is used, the evaluation periods should be fixed rather than rolling).

[398] *See* letters from ISDA I (stating that the use of ''effective notional amount'' in the test introduces ambiguity and uncertainty) and WGCEF I (notional amounts should be measured on a ''delta-equivalent'' basis).

[399] *See* letters from Farm Credit Council I (supporting automatic periodic increases to reflect changes in market size, the size of typical contracts and inflation), Greenberger (supporting reevaluation of the *de minimis* criteria on an ongoing basis), and BG LNG I, EEI/EPSA, NCFC I and WGCEF I (each supporting inflation or market size adjustments).

[400] *See* meeting with Edison Int'l (requesting clarification that an entity that is prohibited from coordinating its financial derivatives activities should determine whether it qualifies for the *de minimis* exception without considering financial derivatives entered into by its affiliated entities).

[401] *See* letter from Covington & Burling (urging clarification that lookback period will not commence until all the relevant regulations become effective).

[402] *See* letters from BGLNG I and WGCEF V. *See also* Roundtable Transcript at 50–51 (remarks of Ron Oppenheimer, WGCEF), 57 (remarks of Richard Ostrander, Morgan Stanley) and 208–09 (remarks of Bella Sanevich, NISA Investment Advisors).

[403] *See* letter from FSR I.

[404] *See* letter from WGCEF I; *see also* Northland Energy (supporting grace period for registration if the *de minimis* threshold is exceeded).

[405] *See* letters from ISDA I and Northland Energy.

[406] *See* letters from FSR VI and Midsize Banks.

[407] Some commenters particularly took the view that the application of the dealer definitions to non-U.S. persons should solely address those persons' U.S. dealing activities. *See* letters from FSR I, ISDA I and Société Générale. Some commenters also specifically identified concerns of international comity in this context. *See* letters cited in note 148, *supra.*

The Commissions intend to address the application of dealer regulation to non-U.S. persons as part of separate releases that generally will address the application of Title VII to non-U.S. persons.

[408] *See* letter from Better Markets III.

[409] *See id.*

[410] A number of commenters expressed particular concerns as to the threats that an overbroad exception would pose to special entities. *See* letters from AFR (noting that Congress incorporated special protections for special entities in reaction to news reports about special entities losing millions of dollars ''after signing up for derivatives deals they did not understand,'' and urging the elimination of any *de minimis* exception for transactions with special entities); Better Markets I (stating that history has shown that special entities are vulnerable to abuse, and that they need capital, collateral and business conduct protections as much as or more than any other category of market participants); and AFSCME (expressing skepticism as to the view that dealer status would preclude firms from entering into transactions with special entities). Some of those commenters also generally supported the proposed $100 million *de minimis* threshold. *See* letters from AFR and Better Markets I; *see also* letter from Greenberger (stating that the dynamic nature of the derivatives sector of the financial markets should counsel caution, and that the *de minimis* threshold should be reevaluated on an ongoing basis).

[411] Notwithstanding the reduction in protection, however, in the case of swaps and security-based swaps the general antifraud provisions of the CEA and the securities laws, respectively, including rules to be adopted by the SEC pertaining specifically to security-based swaps, will continue to apply to all transactions in security-based swaps. *See, e.g.,* CEA section 4b(2), 7 U.S.C. 6b(2).

the amount of a person's dealing activity is, in the context of the relevant market, limited to an amount that does not warrant registration to address the concerns implicated by government regulation of swap dealers and security-based swap dealers. To advance this interest, it is necessary to consider the benefits to the marketplace associated with the regulation of dealers against the total burdens and potential impacts on competition, capital formation and efficiency associated with that regulation.[412]

In addition, the exception can provide an objective test for persons who engage in some swap or security-based swap activities that, in their view, potentially raise the risk that they would be deemed to be dealers.[413] The exception also may permit persons that are not registered as dealers to accommodate existing clients that have a need for swaps or security-based swaps in conjunction with other financial services or commercial activities, thus avoiding the need for such clients to establish separate relationships with registered dealers, which may have attendant costs. The exception further may promote competition in dealing activity within the swap or security-based swap markets, by helping to allow non-registered persons to commence providing dealing services while avoiding the costs associated with full-fledged dealers. More competition within the market for swaps and security-based swaps may not only decrease the costs for participants in the market, but also may help to decrease systemic risk by lessening the current apparent concentration of dealing activity among a few major market participants.[414]

The statutory requirements that apply to swap dealers and security-based swap dealers include requirements aimed at the protection of customers and counterparties,[415] as discussed above, as well as requirements aimed at helping to promote effective operation and transparency of the swap and security-based swap markets.[416] The overall economic benefits provided by these requirements in large part will depend on the proportion of swaps and security-based swaps that are transacted subject to these requirements. In other words, the greater the dealing activity of a registered dealer, the more significant the resulting increase in market efficiency,[417] and the greater the reduction in risks faced by the entity's customers and counterparties.[418] These benefits can be expected to accrue over the long term and be distributed over the market and its participants as a whole. This is not to say, however, that it would be insignificant for any particular counterparty if its swaps or security-based swaps were to fall outside of the ambit of dealer regulation. For example, a customer or counterparty that is not protected by the business conduct rules applicable to dealers might be more likely to suffer losses associated with entering into an inappropriate or misunderstood swap or security-based swap than if the instrument was transacted pursuant to the business conduct rules applicable to registered dealers.

In contrast to the benefits associated with dealer regulation, many of the burdens of dealer regulation will accrue in the short term and will fall directly on registered dealers.[419] Some of those burdens may be expected to be independent of the amount of an entity's dealing activity (*i.e.,* entities that engage in minimal dealing activity would still be expected to face certain burdens associated with the registration process and the development of compliance and other systems if they are required to register as dealers), while other burdens (*e.g.,* the impact of margin and capital rules applicable to dealers) may be more directly linked to the amount of that entity's dealing activity.

As discussed below, the Commissions have sought to balance the various interests associated with a *de minimis* exception, as well as the benefits and burdens associated with such an exception, in developing the factors to implement the *de minimis* exceptions to the ''swap dealer'' and ''security-based swap dealer'' definitions.

However, in moving forward with implementing this balancing approach, we recognize that the information that currently is available regarding certain portions of the swap market is limited. Following the full implementation of Title VII, more information will be available to permit us to assess the effectiveness of this balancing for particular markets and to revise the exception as appropriate.

In that context—and in light of the tools currently available to us—we have been influenced, in particular, by comments taking the view that the *de minimis* factors should take into account the size and unique attributes of the market for swaps and security-based swaps.[420] We believe that factors that exclude entities whose dealing activity is sufficiently modest in light of the total size, concentration and other attributes of the applicable markets can be useful in avoiding the imposition of

[412] While we are mindful that the Commissions have yet to adopt all the final substantive rules applicable to swap dealers and security-based swap dealers, we nonetheless believe that we have sufficient understanding of those potential requirements to reasonably balance the relevant factors to identify the initial level of dealing activity that should be considered to be *de minimis.* Moreover, finalizing the dealer definitions will help provide for the orderly and informed finalization of those other substantive rules governing swap dealers and security-based swap dealers.

[413] ''Congress incorporated a *de minimis* exception to the Swap Dealer definition to ensure that smaller institutions that are responsibly managing their commercial risk are not inadvertently pulled into additional regulation.'' *See* 156 Cong. Rec. S6192 (daily ed. July 22, 2010) (letter from Senators Dodd and Lincoln to Representatives Frank and Peterson).

[414] *See* 478 through 487 and accompanying text, *infra.*

[415] As discussed above, in part, these customer and counterparty protections derive from the financial responsibility requirements applicable to dealers, particularly: capital and margin requirements (CEA section 4s(e); Exchange Act section 15F(e)), and requirements for segregation of collateral (CEA sections 4d(f), 4s(l); Exchange Act section 3E).

These customer and counterparty protections also derive from certain other requirements applicable to dealers, particularly: requirements with respect to business conduct when transacting with special entities (CEA sections 4s(h)(2), 4s(h)(4), 4s(h)(5); Exchange Act sections 15F(h)(2), (h)(4), (h)(5)); disclosure requirements (CEA section 4s(h)(3)(B); Exchange Act section 15F(h)(3)(B)); requirements for fair and balanced communications (CEA section 4s(h)(3)(D); Exchange Act section 15F(h)(3)(C)); other requirements related to the public interest and investor protection (CEA section 4s(h)(3)(D); Exchange Act section 15F(h)(3)(D)); and conflict of interest provisions (CEA section 4s(j)(5); Exchange Act section 15F(j)(5)).

[416] Relevant provisions are: reporting and recordkeeping requirements (CEA section 4s(f); Exchange Act section 15F(f)); daily trading records requirements (CEA section 4s(g); Exchange Act section 15F(g)); regulatory standards related to the confirmation, processing, netting, documentation and valuation of security-based swaps (CEA section 4s(i); Exchange Act section 15F(i)); position limit monitoring requirements (CEA section 4s(j)(1); Exchange Act section 15F(j)(1)); risk management procedure requirements (CEA section 4s(j)(2); Exchange Act section 15F(j)(2)); and requirements related to the disclosure of information to regulators (CEA section 4s(j)(3); Exchange Act section 15F(j)(3)).

[417] For example, the more swaps or security-based swaps a dealer enters into, the more significant will be the efficiency benefits associated with confirmation, processing, netting documentation and valuation requirements applicable to dealers.

[418] For example, the more swaps or security-based swaps a dealer enters into, the more significant the number of counterparties that will be protected by the disclosure and other business conduct obligations imposed on dealers.

[419] Certain commenters also have expressed concerns that the prospect of regulation may deter certain entities from engaging in limited swap or security-based swap dealing activities, *see, e.g.,* letters from SIFMA—Regional Dealers and Midsize Banks, which could reduce the availability of those instruments.

[420] *See, e.g.,* letters from CDEU (comparing proposed thresholds with statistics regarding the activities of recognized dealers) and EEI/EPSA (recommending that thresholds be set at an amount equal to 0.001 percent of the aggregate size of the U.S. swaps market, and 0.0001 percent for swaps in which the counterparty is a special entity).

regulatory burdens on those entities for which dealer regulation would not be expected to contribute significantly to advancing the customer protection, market efficiency and transparency objectives of dealer regulation. The Commissions note, however, that they are not of the general view that the costs of extending regulation to any particular entity must be outweighed by the quantifiable or other benefits to be achieved with respect to that particular entity. The Commissions, rather, analyze the overall benefits and costs of regulation, keeping in mind, as noted above, that the benefits may be distributed, accrue over the long-term, and be difficult to quantify or to measure as easily as certain costs.[421]

b. Specific Factors Implementing the *De Minimis* Exception

i. Notional Test

Consistent with the proposal, the final rules implementing the *de minimis* exception take into account the notional amount of an entity's swap or security-based swap positions over the prior 12 months arising from its dealing activity.[422] While the Commissions recognize that notional amounts do not directly measure the exposure or risk associated with a swap or security-based swap position, such measures do reflect the relative amount of an entity's dealing activity.[423] Moreover, although some commenters have posited measures of risk or exposure as alternatives to notional measures, such risk or exposure measures could, to the extent they allow for netting or collateral offsets, potentially allow an unregistered entity to engage in large amounts of swap or security-based swap dealing activity while remaining within the *de minimis* exception so long as that entity nets or collateralizes its swap or security-based swap positions. Such an outcome could undermine the customer protection and market operation benefits associated with dealer regulation. As with the proposed rules, the notional factor in the final rules is based on the notional positions of an entity over a 12 month period, rather than capping the current notional amount of a position at any time, to better reflect the amount of an entity's current activity.

The final rules, like the proposed rules, include lower notional thresholds for dealing activities in which the counterparty is a ''special entity.''[424] This is consistent with the fact that Title VII's requirements applicable to swap dealers and security-based swap dealers provide heightened protection to those types of entities.[425] It is important that the *de minimis* exception not undermine those statutory protections.[426] Also, consistent with the Proposing Release, these notional standards will be based on ''effective notional'' amounts when the stated notional amount is leveraged or enhanced by the structure of the swap or security-based swap.[427]

ii. Other Tests From the Proposing Release

The proposed rules limited the number of swaps or security-based swaps that an entity could enter into in a dealing capacity, and the number of an entity's counterparties in a dealing capacity. The final rules do not include those measures. In part, this reflects commenter concerns that a standard based on the number of swaps or security-based swaps or counterparties can produce arbitrary results by giving disproportionate weight to a series of smaller transactions or counterparties.[428]

c. Significance of Statutory ''Customer'' Language

Consistent with the Proposing Release, the final rules implementing the *de minimis* exception do not require the presence of any type of defined ''customer'' relationship.

In adopting these rules the Commissions have considered alternative approaches suggested by commenters, including one commenter's suggestion that the *de minimis* exception should be available only in connection with swaps or security-based swaps entered into as part of a ''customer'' relationship.[429] In considering that alternative view, however, we believe that it is significant that the statutory exception lacks terminology such as ''existing'' or ''preexisting'' that limits the availability of the exception or otherwise to distinguishes a ''customer'' relationship from other types of counterparty relationship. Also, while that alternative view could still permit an unregistered person to provide limited dealer services as an accommodation to an existing customer or counterparty, an interpretation that predicates the exception on the presence of a particular type of ''customer'' relationship would not advance other potential benefits associated with a *de minimis* exception, including the

[421] For example, it does not appear possible to demonstrate empirically—let alone quantify—the increase or decrease in the possibility that a financial crisis would occur at a particular future time and with a particular intensity in the absence of financial regulation or as a result of varying levels or types of financial regulation. It also is difficult to demonstrate empirically that the customer protections associated with dealer regulation would increase or decrease the likelihood that any particular market participant would suffer injury (or the degree to which the participant would suffer injury) associated with entering into an inappropriate swap or security-based swap. At the same time, certain costs may also not be readily susceptible to quantification or measurement, for example, the costs that might be associated with diminished presence, if any, of new entrants. The inability to quantify these benefits and costs does not mean that the benefits and costs of dealer regulation are any less substantial.

[422] *See* CFTC Regulation § 1.3(ggg)(4); Exchange Act rule 3a71–2(a)(1). Over the first year following the effective date of the final rules implementing the statutory definition of ''swap'' and ''security-based swap'' as set forth in CEA section 1a(47) and Exchange Act section 3(a)(68), respectively, this notional test will be based on the person's dealing activity following that effective date. *See id.* Accordingly, the analysis of whether a person may take advantage of the *de minimis* exception will not encompass the person's dealing activity prior to that effective date, given the need for the person to know whether an instrument is a swap or security-based swap for purposes of the analysis.

[423] ''Changes in notional volumes are generally reasonable reflections of business activity, and therefore can provide insight into potential revenue and operational issues. However, the notional amount of derivatives contracts does not provide a useful measure of either market or credit risks.'' OCC Quarterly Report at 8.

[424] For these purposes, ''special entity'' means: (i) A Federal agency; (ii) a state, state agency, city, county, municipality, or other political subdivision of a state; (iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (''ERISA''); (iv) any governmental plan, as defined in section 3 of ERISA; or (v) any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986. *See* CEA section 4s(h)(2)(C) and CFTC Regulation § 23.401(c); Exchange Act section 15F(h)(2)(C).

[425] *See* CEA sections 4s(h)(2), (4), (5); *see also* CFTC, Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties; Final Rule, 77 FR 9733 (Feb. 17, 2012); Exchange Act sections 15F(h)(2), (4), (5) (providing additional requirements for dealers that advise special entities or that enter into swaps or security-based swaps with special entities).

[426] The importance of the statutory protections for special entities has been highlighted by the SEC's recent action in connection with the inappropriate sale of notes linked to the performance of synthetic collateralized debt obligations to a number of school districts. According to a complaint filed in federal district court, these securities were unsuitable for the investment needs of the school districts, were sold to school districts that lacked the requisite sophistication and experience to independently evaluate the risks of the investment, and exposed the school districts to a heightened risk of catastrophic loss ultimately led to a complete loss of their investments. ''SEC Charges Stifel, Nicolaus and Former Executive with Fraud in Sale of Investments to Wisconsin School Districts,'' SEC Litigation Release No. 22064 (Aug. 10, 2011) (*http://www.sec.gov/litigation/litreleases/2011/lr22064.htm*).

[427] For example, if an exchange of payments associated with a $1 million notional equity swap was based on three times the return associated with the underlying equity, the effective notional amount of the equity swap would be $3 million.

[428] *See, e.g.,* letter from COPE I.

[429] *See* letter from Better Markets I.

benefit of providing certainty in connection with the swap or security-based swap activities of end-users.[430] Accordingly, we do not believe that the ''customer'' reference standing alone provides a sufficient basis to conclude that the exception should only be available if there is an existing relationship of some type, and the final rules neither require that a dealer accommodate the demand of an existing customer nor require the presence of a preexisting relationship for the exception to apply.

We also are not persuaded by the different commenter suggestion that the statutory *de minimis* exception's ''customer'' language means that an unregistered dealer should be permitted to engage in unlimited dealing activity so long as its counterparties are not customers.[431] Such an unlimited exception would appear to be contrary to the express language of the statutory exception. In addition, such an approach would lead to the perverse result of discouraging entities from entering into swaps or security-based swaps to facilitate risk management activities of customers (while encouraging other dealing activities), which appears contrary to Title VII's general approach of seeking to limit undue impacts on the swap and security-based swap activities of commercial end-users.

d. Focus on ''Dealing'' Activity

Some commenters suggested that we clarify that the limitations associated with the *de minimis* exception apply only in connection with a person's dealing activities, and not to the person's hedging or proprietary trading activities.[432] The Commissions agree that the *de minimis* exception is intended to permit an unregistered person to engage in a limited amount of dealing activity without regard to the person's non-dealing activity. Thus, to the extent that a particular swap or security-based swap position is not connected to dealing activity under the applicable interpretation of the statutory dealer definition, it will not count against the *de minimis* thresholds. Conversely, if a swap or security-based swap position is connected to the person's dealing activity, the position will count against those thresholds.[433]

Commenters also requested clarification that the *de minimis* thresholds do not apply to a person's inter-affiliate swaps and security-based swaps, nor apply to swaps covered by the exclusion for swaps entered into by insured depository institutions in connection with the origination of loans to customers.[434] Consistent with the discussion above,[435] such swaps or security-based swaps do not constitute dealing activity and should not be counted against the *de minimis* thresholds. Similarly, swaps between a cooperative and its members, as provided in CFTC Regulation § 1.3(ggg)(6)(ii), and swaps entered into for the hedging purpose defined in CFTC Regulation § 1.3(ggg)(6)(iii) should not be counted against the *de minimis* threshold.[436]

In light of the increased notional thresholds of the final rules, and the resulting opportunity for a person to evasively engage in large amounts of dealing activity if it can multiply those thresholds, the final rules provide that the notional thresholds to the *de minimis* exception encompass swap and security-based swap dealing positions entered into by an affiliate controlling, controlled by or under common control with the person at issue.[437] This is necessary to prevent persons from avoiding dealer regulation by dividing up dealing activity in excess of the notional thresholds among multiple affiliates.[438]

e. Alternative Approaches We Are Not Following

Certain commenters have suggested alternative approaches to implementing the *de minimis* exception. While the Commissions have considered those suggested alternatives, we do not believe that they provide the optimal framework for implementing the exception.

For example, some commenters took the position that the *de minimis* exception should focus dealer regulation on those entities whose dealing activities pose systemic risk, and excuse other dealers from having to register.[439] Such an approach, however, would fail to account for regulatory interests apart from the control of systemic risk that are addressed by dealer regulation, including statutory provisions that protect customers and counterparties in other ways, and that promote effective market operations and transparency.[440]

Some commenters also have suggested that the *de minimis* exception should subsume a proportionality

[430] As discussed above, *see* note 413, *supra,* there is legislative history that suggests that an intended purpose of the exception would be to ensure that the dealer definition does not encompass ''smaller institutions that are responsibly managing their commercial risk.''

[431] *See, e.g.,* letter from ISDA I.

[432] *See, e.g.,* letters from SIFMA—Regional Dealers and EDF Trading.

[433] For purposes of the *de minimis* exception to the security-based swap dealer definition, we note that one indicator of dealing activity under the dealer-trader distinction is that a person profit by providing liquidity in connection with security-based swaps. Accordingly, for purposes of the *de minimis* exception to the security-based swap dealer definition, a security-based swap position that hedges or otherwise offsets a position that was entered into as part of dealing activity would itself comprise part of the person's dealing activity, and hence count against the *de minimis* thresholds.

For purposes of the *de minimis* exception to the swap dealer definition, we take the view that the relevant question in determining whether swaps count as dealing activity against the *de minimis* thresholds is whether the swaps fall within the swap dealer definition under the statute and the final rules, as further interpreted by this Adopting Release. If hedging or proprietary trading activities did not fall within the definition, including because of the application of CFTC Regulation § 1.3(ggg)(6), they would not count against the *de minimis* thresholds.

[434] *See, e.g.,* letters from Atmos Holdings and FSR I.

[435] *See* parts II.B and II.C, *supra.*

[436] Swaps and security-based swaps that hedge, mitigate, or offset the types of swaps and security-based swaps discussed in the foregoing paragraph, which do not constitute dealing activity, similarly should not be counted against the *de minimis* thresholds.

[437] *See* CFTC Regulation § 1.3(ggg)(4)(i); Exchange Act rule 3a71–2(a)(1). For these purposes, we interpret control to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. This is consistent with the definition of ''control'' and ''affiliate'' in connection with Exchange Act rules regarding registration statements. *See* Exchange Act rule 12b–2.

The final rules use a control standard in connection with the *de minimis* notional thresholds as a means reasonably designed to prevent evasion of the limitations of that exception. This contrasts with the majority-ownership standard used by the inter-affiliate exclusions from the dealer and major participant definitions. *See* parts II.C.2 and IV.G.2, *infra.* That majority-ownership standard, which in application will not be expected to be satisfied in all circumstances in which a control standard is satisfied, is reasonably designed to reflect the economic alignment that appropriately underpins those exclusions.

[438] In other words, for example, if a parent entity controls two subsidiaries which both engage in activities that would cause the subsidiaries to be covered by the dealer definitions, then each subsidiary must aggregate the swaps or security-based swaps that result from both subsidiaries' dealing activities in determining if either subsidiary qualifies for the *de minimis* exception.

The SEC expects to address the application of this principle to the security-based swap activities of non-U.S. persons in a separate release.

[439] *See, e.g.,* letters from CDEU and SIFMA—Regional Dealers.

[440] We also disagree with the suggestion that it would be inconsistent with the Title VII framework to consider customer protection issues in setting the *de minimis* factors. *See* letter from WGCEF I. While the restrictions on the availability of swaps and security-based swaps to non-ECPs help to mitigate certain customer protection concerns, Title VII includes specific safeguards designed to protect dealers' customers and counterparties regardless of whether those are ECPs. It would not be consistent with Title VII to ignore those interests.

standard, whereby an entity may be excluded from dealer regulation if its dealing activity comprises only a relatively small portion of its overall activities (or its overall swap or security-based swap activities), or if its dealing activity is ''tangential'' to its principal business.[441] We are not incorporating that type of approach into the *de minimis* factors, however, because that approach would not appear to provide a logical way to balance the benefits and burdens of dealer regulation. A proportionality approach could permit a large entity to engage in a significant amount of dealing activity without being subject to dealer regulation, thus undermining the benefits of dealer regulation. Moreover, a proportionality approach could lead to arbitrary results by excusing a large entity from dealer regulation while requiring the registration of a smaller entity that engages in less total dealing activity (if that smaller amount of dealing activity comprises a greater portion of the smaller entity's total activity).[442]

Some commenters also supported the use of non-quantitative standards in connection with the *de minimis* exception.[443] Although we recognize that such an approach may help us weigh the facts and circumstances associated with a particular person's dealing activity, we believe that it is more appropriate to base the exception on an objective quantitative standard, to allow the exception to be self-executing, and to promote predictability among market participants and the efficient use of regulatory resources. Unlike the overall definitions of ''swap dealer'' and ''security-based swap dealers,'' which consider the entirety of a person's activities with respect to swaps, the *de minimis* exception is only relevant to persons who have determined that they are engaged in swap or security-based swap dealing, and are looking to determine whether the quantity of their dealing activity is *de minimis.* For this more particular and focused determination, an objective quantitative standard is more appropriate.

Commenters also made various suggestions as to the types of factors and accompanying thresholds that should be used in connection with the *de minimis* exception. Those suggestions are addressed more specifically below in the specific context of the swap dealer and security-based swap dealer *de minimis* exceptions.

4. Final Rules—*De Minimis* Exception to Swap Dealer Definition

a. Overview of the Final Rule

After considering commenters' views, the final rule implementing the *de minimis* exception caps an entity's dealing activity involving swaps at $3 billion over the prior 12 months.[444] This amount is based on input from commenters and is supported by several rationales, including the estimated size of the domestic swap market, among others.

As noted above, commenters who suggested a fixed notional standard proposed that the standard be set at a level between $200 million and $3.5 billion in notional amount of swaps entered into over a period of twelve months.[445] In considering these comments, we are mindful of the variety of uses of swaps in various markets and therefore it is understandable that various commenters would reach different conclusions regarding the appropriate standard. At the same time, we see value in setting a single standard for all swaps so that there is a ''level playing field'' for all market participants and so that the standard can be implemented easily without the need to categorize swaps. Considering the written input of the commenters as well as the discussions of the *de minimis* standard at the Commissions' joint roundtable and numerous meetings with market participants, and the benefits of the regulation of swap dealers (*i.e.*, protection of customers and counterparties, and promotion of the effective operation and transparency of the swap markets), we believe a notional standard at a level of $3 billion appropriately balances the relevant regulatory goals.

As noted above, several commenters suggested that the standard be set at an amount equal to 0.001 percent of the overall domestic market for swaps. The Commissions note, however, that comprehensive information regarding the total size of the domestic swap market is incomplete, with more information available with respect to certain asset classes than others. The CFTC evaluated data regarding one particular type of swap—credit default swaps (''CDS'') based on indices of debt securities known as ''index CDS''—that was provided by the SEC.[446] As noted in the CFTC analysis of this data, however, the information is not filtered to reflect activity that would constitute swap dealing under the Dodd-Frank Act, so it is not possible to use the data to draw conclusions regarding any specific entity's status as a swap dealer.[447] The data reflects only activity relating to index CDS, which constitute a very narrow part of the overall swap market, and, as noted in the CFTC analysis, similar data regarding other types of swaps is not available.[448] Subject to these limitations, the data may help evaluate the impact of alternative approaches to implementing the *de minimis* exception.

One often-cited measure of the market, the Quarterly Report on Bank Trading and Derivatives Activities issued by the OCC (''OCC Quarterly Report'') is both limited, in that it includes only data related to the activities of U.S. bank holding companies, commercial banks and trust companies, and over-inclusive, in that it includes activities related to instruments that are not or may not be included in the final definition of ''swap'' (including futures, forwards, certain foreign exchange instruments, and certain options) and it includes both swaps and security-based swaps. Nonetheless, the Commissions believe that the available (imperfect) data suggests that a $3 billion notional standard is generally consistent with the commenters' suggestion of basing the standard on a percentage of the overall domestic market for swaps.

The total notional value of $333.1 trillion in ''derivatives'' stated in the most recent OCC Quarterly Report includes approximately $221.1 trillion

[441] *See* letter from FHLB I.

[442] As discussed below, if an entity is a dealer, the regulations applicable to dealers in general will govern all of the entity's swap or security-based swap activities and positions. Depending on the applicable facts and circumstances, however, the entity may be able to avail itself of a limited purpose designation as a dealer. *See* part II.E, *infra.*

[443] *See* letters from FHLB I, Gavilon II, and MFX II.

[444] CFTC Regulation § 1.3(ggg)(4). As noted above, for the first year following the effective date of the rules implementing the definition of ''swap'' the analysis would only address activity following that effective date. For clarity, the final rule also has been revised from the proposal to provide that persons taking advantage of the exception ''shall be deemed not to be'' swap dealers (the proposed rule used the phrasing ''shall not be deemed to be'' swap dealers) The final rule also reflects certain structural changes consistent with the substantive changes from the proposed rule. In addition, as discussed above, *see* part II.D.3.d, *supra,* the final rule has been revised to provide that the notional thresholds to the *de minimis* exception encompass swap dealing positions entered into by an affiliate controlling, controlled by or under common control with the person at issue.

[445] One commenter suggested a threshold of $3 billion. *See* letter from COPE I (suggesting 0.001% of the total U.S. swap market, amounting to approximately $3 billion). Other commenters also supported a threshold of 0.001% of the total U.S. swap market. *See* letters cited in note 382, *supra.*

[446] The CFTC analysis was made available to the public. *See* memorandum to the public comment file from the CFTC Office of the Chief Economist.

[447] *See id.*

[448] *See id.*

in ''swaps'' and ''credit derivatives.''[449] Since some instruments that are security-based swaps are included in this total,[450] the total notional value of swap positions at U.S. bank holding companies, commercial banks and trust companies at the end of the second quarter of 2011 of may be estimated to be somewhat less than $221.1 trillion.

This total notional value is by nature under-inclusive, because it reflects only swap positions at U.S. bank holding companies, commercial banks and trust companies and not the swap positions of other market participants. However, there are also reasons that the information from the OCC Quarterly Report may overstate the notional value of swaps that would be relevant to estimating the size of the domestic swap market for purposes of the *de minimis* standard. While we believe the data is not sufficiently precise at this time to serve as the sole basis for the notional standard, a standard of $3 billion seems that it is likely generally consistent with 0.001 percent of the domestic swap market that would be relevant to a potential dealer's *de minimis* swap activity figure. First, the large majority of derivatives in the OCC Quarterly Report (approximately $229 trillion in notional value for commercial banks and trust companies) are derivatives between ''dealers'' (as defined for the purposes of the report.)[451] Thus, it is likely that a large part of the derivatives in the OCC Quarterly Report reflect transactions between financial institutions that will be swap dealers. It is also notable that approximately $204.6 trillion in notional value of the derivatives (*i.e.,* not only swaps) reported by U.S. commercial banks were interest rate contracts, many of which are swaps entered into by IDIs with customers in connection with the origination of loans which will be excluded from the determination of whether the IDIs are swap dealers.[452] Finally, the OCC Quarterly Report measures swap positions held at a certain point in time, rather than the level of swap activity over a certain time period, again indicating that the figures are broader than those that would be subject to the *de minimis* figure. Accordingly, it appears that notional amount of the overall domestic market for swaps that actually would be relevant to determining the notional standard, and thus the appropriate basis for the 0.001 percent calculation, may be significantly lower than $331 trillion.

Because there is merit in the 0.001 percent ratio suggested by several commenters, we believe an appropriate balance of the goal of promoting the benefits of regulation (while recognizing the unquantifiable nature of those benefits) against the competing goal of avoiding the imposition of burdens on those entities for which regulation as a dealer would not be associated with achieving those benefits in a significant way, would be reached by setting the notional standard for swaps at a level that is near (taking into account the uncertainties noted above) 0.001 percent of a reasonable estimate of the overall domestic market for all swaps between all counterparties. We believe a $3 billion notional value standard is appropriate taking all these considerations into account.

b. Dealing Activity Involving Special Entities

For swaps in which the counterparty is a special entity, the final rules set a notional standard consistent with the proposal of $25 million over the prior 12 months.[453] The Commissions believe that this notional standard is appropriate in light of the special protections that Title VII affords to special entities. In adopting this threshold, we recognize the serious concerns raised by commenters stating that the *de minimis* exception should not permit any dealing activities (by persons who are not registered as swap dealers) involving special entities, in light of losses that special entities have incurred in the financial markets.[454] However, the final rule does not fully exclude such dealing activity from the exception, in light of the potential benefits that may arise from a *de minimis* exception. In this way, the threshold would not completely foreclose the availability of swaps to special entities from unregistered dealers, but the threshold would limit the financial and other risks associated with those positions for a special entity, which would in turn limit the possibility of inappropriately undermining the special protections that Title VII provides to special entities.

c. Phase-in Procedure

The Commissions believe that a phase-in period for the *de minimis* threshold would facilitate the orderly implementation of Title VII by permitting market participants and the Commissions to familiarize themselves with the application of the swap dealer definition and swap dealer requirements and to consider the information that will be available about the swap market, including real-time public reporting of swap data and information reported to swap data repositories. In addition, a phase-in period would afford the Commissions additional time to study the swap markets as they evolve in the new regulatory framework and allow potential swap dealers that engage in smaller amounts of activity (relative to the current size of the market) additional time to adjust their business practices, while at the same time preserving a focus on the regulation of the largest and most significant swap dealers. The Commissions also recognize that the data informing their current view of the *de minimis* threshold is based on the markets as they exist today, and that the markets will evolve over the coming years in light of the new regulatory framework and other developments.

We have also considered that there may be some uncertainty regarding the exact level of swap dealing activity, measured in terms of a gross notional amount of swaps, that should be regarded as *de minimis.* While some quantitative data regarding the usage of swaps is available, there are many aspects of the swap markets for which definitive data is not available. We have also considered comments suggesting that the *de minimis* thresholds should be set higher initially to provide for efficient use of regulatory resources,[455] or that implementation of the dealer requirements should be phased.[456] For

[449] *See* Office of the Comptroller of the Currency, ''Quarterly Report on Bank Trading and Derivatives Activities, Second Quarter 2011'' at tables 1 and 2 (*http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/dq211.pdf*). These totals reflect the sum of the amounts reported for the top 25 bank holding companies reported in table 1 and for all but the top 25 commercial banks and trust companies reported in table 2.

However, this adjustment is only approximate, because the definitions of ''swap'' and ''credit derivative'' used in the OCC Quarterly Report are likely to be significantly different from the final definition of ''swap'' and ''security-based swap'' for purposes of the Dodd-Frank Act. For the same reason, it is uncertain how many of the notional value of $54.5 trillion in options reported in the OCC Quarterly Report are swaps or security-based swaps.

Also, data from the CDS trade information warehouse maintained by the Depository Trust & Clearing Corporation (''DTCC'') indicates that total global notional CDS positions on indices amount to approximately $10.47 trillion. *See http://dtcc.com/products/derivserv/data_table_i.php?tbid=3* (data for the week ending October 7, 2011, obtained on October 17, 2011).

[450] *See* part II.D.5, *infra,* for a discussion of the size of the security-based swap market.

[451] *See* OCC Quarterly Report at Graph 1.

[452] *See* OCC Quarterly Report at Graph 3.

[453] CFTC Regulation § 1.3(ggg)(4)(i).

[454] *See* letters from AFR and Better Markets I.

[455] *See* letters cited in footnote 402, *supra.*

[456] *See, e.g.,* Roundtable Transcript at 35 (remarks of Ron Filler, New York Law School) and letters from FSR dated May 12, 2011 (''FSR III'') and WGCEF V.

all these reasons, the Commissions believe it is appropriate that the final rules provide for a phase-in period following the effective date during which higher *de minimis* thresholds would apply.

In particular, during this phase-in period, a person's swap dealing activity over the prior 12 months is capped at a gross notional value of $8 billion.[457] With respect to swaps with special entities, the Commissions believe it is appropriate that the $25 million gross notional value threshold apply during the phase-in period.[458] In light of the available data—and the limitations of that data in predicting how the full implementation of Title VII will affect dealing activity in the swap markets—the Commissions believe that the appropriate threshold for the phase-in period is an annual gross notional level of swap dealing activity of $8 billion or less. In particular, the $8 billion level should still lead to the regulation of persons responsible for the vast majority of dealing activity within the swap markets.

Accordingly, the Commissions believe that while a $3 billion notional threshold reflects an appropriate long-term standard based on the available data,[459] it also is appropriate to allow a degree of latitude in applying the threshold over time in the event that subsequent developments in the markets or the evaluation of new data from swap data reporting facilities suggest that the thresholds should be adjusted. In particular, the implementation of swap data reporting under the Dodd-Frank Act may result in new data that would be useful in confirming the Commissions' determination to establish the $3 billion threshold which applies after the phase-in period.

For these reasons, review of the *de minimis* exception will comprise an important part of the reports that the CFTC is directing its staff to conduct with regard to the swap dealer definition during the phase-in period. Among other topics, the report should consider market data addressing swap dealing activity over a period of approximately two years, and any resulting changes in swap dealing activity, by dealers above and below the $8 billion phase-in threshold, and above and below the $3 billion level applicable after the phase-in period. The report is required to be completed by the CFTC staff no later than 30 months following the date that a swap data repository first receives swap data under the CFTC's regulations, and the report will be published for public comment.[460] The CFTC will take this report, in conjunction with any public comment on it, into account in weighing further action on the *de minimis* exception at the end of the phase-in period.

The final rules provide that nine months after publication of its staff report, the CFTC may, in its discretion, either promulgate an order that the phase-in period will end as of the date set forth by the CFTC in that order, or issue for public comment a notice of proposed rulemaking to modify the *de minimis* threshold, in which case the CFTC would also issue an order establishing the date that the phase-in period will end.[461] The period of nine months provided in the rule is intended to provide the CFTC an opportunity to consider its staff report, public comments on the staff report and any other relevant information.

The CFTC recognizes that the determination of the appropriate *de minimis* threshold is a significant issue requiring thorough consideration of a variety of regulatory and market factors. At the same time, the CFTC recognizes the need for predictability in how the *de minimis* exception will apply. Therefore, the final rules include a finality provision, stating that the phase-in period will end no later than five years after the date that a swap data repository first receives swap data under the CFTC's regulations.[462]

Persons who are able to avail themselves of the higher *de minimis* threshold that applies during the phase-in period will not be required to do so. In particular, a person that is engaged in dealing activity involving swaps in excess of the $3 billion threshold may choose to commence the process for registering as a swap dealer during the phase-in period.[463]

d. CFTC Staff Report

As noted above, the CFTC is directing its staff to report to the CFTC as to whether changes are warranted to the rules implementing the swap dealer definition, including the rule implementing the *de minimis* exception. We are mindful that following the full implementation of Title VII—which itself is contingent on the implementation of the dealer definition—more data will be available to the CFTC via swap data repositories. We expect that this additional data will assist the CFTC in testing the assumptions and addressing the effects of the final rule we are adopting to implement the *de minimis* exception. For example, this data should help the CFTC assess, among other things, the nature and amount of unregulated dealing activity that occurs under the $3 billion threshold. The CFTC will make this report available for public comment so that it may benefit from additional input and analysis regarding the swap dealer definition.

By making use of post-implementation data, the staff report (together with public comment on the report) will help the CFTC better evaluate the exception in light of potential market changes resulting from the full implementation of Title VII—including market changes resulting from the *de minimis* exception itself—as part of determining whether revised *de minimis* thresholds would be appropriate. The report and public comment thereon will also be taken into consideration by the CFTC in determining what action, if any, to take with respect to the phase-in period associated with the *de minimis* exception.

The final rules provide, moreover, that the CFTC may change the requirements of the *de minimis* exception by rule or regulation.[464] Through this mechanism, the CFTC may revisit the rule implementing the exception and potentially change that rule, for example, if data regarding the post-implementation swap market suggests that different *de minimis* thresholds would be appropriate.[465] In determining whether to revisit the thresholds, the CFTC intends to pay particular attention to whether the *de minimis* exception results in a swap dealer definition that encompasses too many entities whose activities are not

[457] *See* CFTC Regulation § 1.3(ggg)(4)(i).

[458] This limitation regarding swaps with special entities during the phase-in period is consistent with the Dodd-Frank Act's goal of helping special entities be in a position to benefit from the counterparty protections associated with the regulation of registered swap dealers under Title VII.

[459] *See, e.g.,* part II.D.4.a, *supra.*

[460] *See* CFTC Regulation § 1.3(ggg)(4)(ii)(C).

[461] *See* CFTC Regulation § 1.3(ggg)(4)(ii)(C).

[462] *See* CFTC Regulation § 1.3(ggg)(4)(ii)(D).

[463] *See* CFTC Regulation § 1.3(ggg)(4)(vi).

[464] CFTC Regulation § 1.3(ggg)(4)(v). CEA section 1a(49)(D) (like Exchange Act section 3(a)(71)(D)) particularly states that the ''Commission''—meaning the CFTC—may exempt *de minimis* dealers and promulgate related regulations. We do not interpret the joint rulemaking provisions of section 712(d) of the Dodd-Frank Act to require joint rulemaking here, because such an interpretation would read the term ''Commission'' out of CEA section 1a(49)(D) (and Exchange Act section 3(a)(71)(D)), which themselves were added by the Dodd-Frank Act.

[465] *See* letter from Greenberger (stating that the dynamic nature of the derivatives sector of the financial markets should counsel caution, and that the *de minimis* threshold should be reevaluated on an ongoing basis).

significant enough to warrant full regulation under Title VII, or, alternatively, whether the *de minimis* exception leads an undue amount of dealing activity to fall outside of the ambit of the Title VII regulatory framework, or leads to inappropriate reductions in counterparty protections (including protections for special entities). The CFTC also intends to pay particular attention to whether alternative approaches would more effectively promote the regulatory goals that may be associated with a *de minimis* exception.

5. Final Rules—*De Minimis* Exception to ''Security-Based Swap Dealer'' Definition

a. Overview of the Final Rule

The final rule implementing the *de minimis* exception to the ''security-based swap dealer'' definition has been revised from the proposal in a number of ways. As discussed above, the final rule does not incorporate proposed limits on the number of security-based swaps that a person may enter into in a dealing capacity, or on the number of security-based swap counterparties a person may have when acting in a dealing capacity.[466] Moreover, the provisions of the exception that cap an unregistered person's annual notional dealing activity with counterparties other than ''special entities'' have been increased from the proposed $100 million threshold.[467] Instead, the final rule caps such dealing activity involving security-based swaps that are credit default swaps—which largely would consist of single-name credit default swaps—at $3 billion in notional amount over the prior 12 months.[468] For other types of security-based swaps (*e.g.,* single-name or narrow-based equity swaps or total return swaps), the exception caps an unregistered person's dealing activity at $150 million in notional amount over the prior 12 months.[469] Also, as addressed below, the final rule provides for phase-in levels in excess of those $3 billion and $150 million thresholds for a certain period of time.

In addition, consistent with the proposal, the final rule caps an unregistered person's security-based swap dealing activity involving counterparties that are ''special entities'' at $25 million in notional amount over the prior 12 months.[470] The final rule further provides that the SEC may establish alternative methods of determining the scope of the *de minimis* exception by rule or regulation.[471]

b. Interests Associated With a *De Minimis* Exception

In developing this final rule, we have sought to balance the interests advanced by the *de minimis* exception against the protections that would be weakened were the exception applied in an overbroad manner. In making this evaluation, we have taken into account data regarding the security-based swap market and especially data regarding the activity—including activity that may be suggestive of dealing behavior—of participants in the single-name credit default swap market.[472]

As discussed above, a *de minimis* exception eliminates key Title VII protections for some market participants by regulating less dealer activity. Conversely, an appropriately applied *de minimis* exception may provide an objective test when there is doubt as to whether particular activities may cause a person to be deemed to be a dealer;[473] allow non-dealers to accommodate the incidental security-based swap needs of existing clients; and help to facilitate competition by allowing the entry of new dealers into the market. In addition, as discussed above, a *de minimis* exception may promote regulatory efficiency by providing a framework to help focus dealer regulation upon those entities for which such regulation is warranted, rather than upon entities that engage in relatively limited amounts of dealing activity.[474]

i. Providing for Regulatory Coverage of the Vast Majority of Dealing Activity

In seeking to develop a *de minimis* exception that preserves key counterparty and market protections while promoting regulatory efficiency, we have considered the comparative amount of security-based swap dealing activity that could fall outside the ambit of dealer regulation as a result of the exception. In doing so we have considered not only the security-based swap market as it currently exists, but also how the market reasonably may be expected to change after the full implementation of Title VII.

In performing this comparative exercise we are, in part, drawing inferences from the CDS Data Analysis, a dataset released by the SEC staff that characterizes nearly all transactions in single-name credit default swaps during the 2011 calendar year.[475] Though the final rules apply to all security-based swaps, not just single-name credit

[466] *See* part II.D.3.b, *supra.*

[467] For clarity, the final rule also has been revised from the proposal to provide that persons taking advantage of the exception ''shall be deemed not to be'' dealers (the proposed rule used the phrasing ''shall not be deemed to be'' dealers), and to provide that such persons ''shall not be subject to Section 15F of the Exchange Act and the rules, regulations and interpretations issued thereunder.'' *See* Exchange Act rule 3a71–2(a). The final rule also reflects certain structural changes consistent with the substantive changes from the proposed rule.

In addition, as discussed above, *see* part II.D.3.d, *supra,* the final rule has been revised to provide that the notional thresholds to the *de minimis* exception encompass swap and security-based swap dealing positions entered into by an affiliate controlling, controlled by or under common control with the person at issue.

[468] Exchange Act rule 3a71–2(a)(1)(i). The final rule, like the proposal, requires the analysis of *de minimis* levels to be based on effective notional amounts to the extent that the stated notional amount is leveraged or enhanced by the structure of the security-based swap (such as, for example, if the exchange of payments associated with an equity swap was based on a multiple of the return associated with the underlying equity). *See* Exchange Act rule 3a71–2(a)(3).

It is important to recognize that while these types of *de minimis* principles are relevant to the ''security-based swap dealer'' definition, they are not applicable to the general definitions of ''broker'' and ''dealer'' under the Exchange Act, or the broker-dealer registration requirements of Exchange Act section 15(a). Unlike the ''security-based swap dealer'' definition, those other definitions, with the exception of the bank-broker definition in section 3(a)(4)(B)(xi) of the Exchange Act, lack *de minimis* exceptions.

[469] Exchange Act rule 3a71–2(a)(1)(ii).

[470] Exchange Act rule 3a71–2(a)(1)(iii).

[471] Exchange Act rule 3a71–2(d); *see* part II.D.5.f, *infra.*

[472] Certain data has been addressed by an analysis regarding the market for single-name credit default swaps performed by the SEC's Division of Risk, Strategy, and Financial Innovation. *See* ''Information regarding activities and positions of participants in the single-name credit default swap market'' (Mar. 15, 2012) (available at *http://www.sec.gov/comments/s7-39-10/s73910-154.pdf*) (''CDS Data Analysis''). We believe that the data underlying this analysis provides reasonably comprehensive information regarding the credit default swap activities and positions of U.S. market participants, but note that the data does not encompass those credit default swaps that both: (i) do not involve U.S. counterparties; and (ii) are based on non-U.S. reference entities. Our reliance on this data, which we believe to be the best available, should not be interpreted to indicate our views as to the nature or extent of the application of Title VII to non-U.S. persons; instead, the SEC anticipates that issues regarding the extraterritorial application of Title VII will be addressed in a separate release.

As discussed below, *see* notes 476 and 485, *infra,* we also have considered more limited publicly available data regarding equity swaps.

The CDS Data Analysis also included an appendix of data regarding index credit default swaps. We do not consider that data for purposes of the analysis described in this section because the statutory definition of ''security-based swap'' in relevant part encompasses swaps based on single securities or on narrow-based security indices. *See* Exchange Act sec. 3(a)(68)(A); *see also* Exchange Act Release No. 64372, 76 FR 29818 (May 23, 2011) (proposed rules further defining ''security-based swap'' and certain other terms).

[473] We believe that the application of the dealer-trader distinction and the guidance we have provided that distinguishes hedging activities from dealing activities in the security-based swap market will also help dealers meet their obligations.

[474] *See* part II.D.3.a, *supra.*

[475] *See* note 472, *supra.*

default swaps, the SEC believes that these data are sufficiently representative of the market to help inform the analysis because an estimated 95 percent of all security-based swap transactions appear likely to be single-name credit default swaps.[476] The SEC also recognizes that although the *de minimis* exception is applicable to persons only with respect to their dealing activity, the CDS Data Analysis contains transactions reflecting both dealing activity and non-dealing activity, including transactions by persons who may engage in no dealing activity whatsoever.[477]

As described more fully in the CDS Data Analysis, to ascertain which entities might be transacting as dealers, and which may not be, various criteria were employed as indicia of possible dealing activity. In each case, the results suggest the great extent to which there is currently a high degree of concentration of potential dealing activity in the single-name credit default swap market. For example, using the criterion that dealers are likely to transact with many counterparties who themselves are not dealers, analysis of 2011 transaction data show that only 28 out of 1,084 market participants have three or more counterparties that themselves are not recognized as dealers by ISDA.[478] As the data show, 15 of these 28 potential dealers exceeded a threshold of $100 billion notional transacted in single-name credit swaps during 2011, which accounts for over 98 percent of the 28 entities' total activity.[479] At a lower threshold of $10 billion notional, 21 of the 28 potential dealers are included (representing 99.7 percent of the activity of potential dealers), and at an even lower threshold of $3 billion notional, 25 potential dealers are included (representing 99.9 percent).[480]

Other criteria for identifying possible dealing activity based on the number of an entity's non-dealer counterparties similarly suggest a high degree of concentration of dealing activity within the current security-based swap market.[481] Criteria that consider the number of an entity's total single-name security-based swap counterparties,[482] criteria that consider alternative factors for identifying dealing activity,[483] and certain combined criteria[484] further

[476] While recognizing that the Commissions have yet to adopt final rules defining a ''security-based swap,'' we believe that single-name credit default swaps will constitute roughly 95 percent of the market, as measured on a notional basis, for instruments that will fall within that definition, with certain equity swaps (in other words, total return swaps based on single equities or narrow-based indices of equities) constituting the primary example of security-based swaps that are not credit default swaps.

In particular, according to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of June 2011 was $2.03 trillion, and the notional amount outstanding in credit default swaps was approximately $32.4 trillion. *See* Statistical Annex, BIS Quarterly Review (December 2011), at A10 (available at *http://www.bis.org/publ/qtrpdf/r_qs1112.pdf*). Although the BIS data reflects the global OTC derivatives market, and not just U.S. market, we have no reason to believe that these ratios differ significantly in the U.S. market. In fact, OCC data regarding U.S. entities generally confirms these ratios, in that as of June 30, 2011, U.S. commercial banks and trust companies held $15.23 trillion in notional outstanding credit derivative positions and $677 billion in equity derivative positions, meaning that credit derivatives accounted for approximately 95 percent of the total credit and equity derivative positions held by these entities. *See* OCC Quarterly Report at tables 1 and 10. *Cf.* letter from Greenberger (referencing OCC data as relevant to determining size of swap market).

[477] A person that is engaged in security-based swap dealing activity, for example, may also engage in proprietary trading involving security-based swaps that would be reflected in the transaction data. Even accounting for such possibilities, however, the SEC believes that the data nonetheless support the broad conclusion described below that dealing activity within the security-based swap market is highly concentrated.

[478] *See* CDS Data Analysis at table 3c. The SEC recognizes that the analysis of this transaction data is imperfect as a tool for identifying dealing activity, given that the presence or absence of dealing activity ultimately turns upon the relevant facts and circumstances of an entity's security-based swap transactions, as informed by the dealer-trader distinction. Criteria based on the number of an entity's counterparties that are not recognized as dealers nonetheless appear to be useful for identifying apparent dealing activity in the absence of full analysis of the relevant facts and circumstances, given that engaging in security-based swap transactions with non-dealers would be consistent with the conduct of seeking to profit by providing liquidity to others, as anticipated by the dealer-trader distinction. In emphasizing this criterion for identifying dealing activity, we are not seeking to predict with precision how many entities ultimately may register as security-based swap dealers. The ultimate number of dealers that may register can also be expected to reflect growth in the market, new dealing entrants, and in some cases the registration of multiple dealing entities within an affiliated group.

[479] *See* CDS Data Analysis at table 3c. In particular, those 15 entities engaged in a total of $11.01 trillion in notional single-name credit default swap transactions over 2011, which reflects 98.5 percent of the total $11.18 trillion in notional transactions over 2011 for the 28 total identified possible dealers.

[480] *See id.* The 21 possible dealers with a 2011 notional in excess of $10 billion account for a total of $11.15 trillion in notional single-name credit default swap transactions in 2011, or over 99.7 percent of the total. The 25 possible dealers in excess of $3 billion account for almost $11.18 in notional transactions in 2011, or over 99.9 percent of the total.

[481] For example, two other criteria consider the number of an entity's non-dealer counterparties (in those cases identifying as dealers those persons that have seven or more, or five or more, counterparties not recognized as dealers by ISDA) also indicate that potential dealers with notional amounts in excess of $100 billion in 2011 account for over 98 percent of the notional transactions of all entities meeting the applicable criteria in 2011. Potential dealers with notional transactions above $10 billion in 2011 (let alone those with notional transactions above $3 billion) reflect all or virtually the entire notional amount of all dealers identified by those criteria. *See id.* at tables 3a and 3b.

[482] The CDS Data Analysis also sought to identify dealing activity based on the total number of an entity's counterparties. *See id.* at tables 2a through 2c. Those criteria similarly suggest a high degree of concentration of dealing activity within the single-name credit default swap market:

i. A criterion that identifies potential dealing activity based on an entity having twenty or more counterparties in single-name security-based swaps identified 16 possible dealers. Fourteen of those entities had notional transactions in excess of $100 billion in 2011, reflecting over 99 percent of the total associated with all 16. The remaining two identified entities had notional transactions in excess of $10 billion in 2011. *See id.* at table 2a.

ii. A criterion that identifies potential dealing activity based on an entity having 15 or more counterparties in single-name security-based swaps identified 33 possible dealers. Fifteen of those entities had notional transactions in excess of $100 billion in 2011, reflecting over 97 percent of the total associated with all 33. A total of 27 of those entities had notional transactions in excess of $10 billion in 2011, and a total of 32 of those entities had notional transactions in excess of $3 billion in 2011, both reflecting over 99 percent of the total. *See id.* at table 2b.

iii. A criterion that identifies potential dealing activity based on an entity having 10 or more counterparties in single-name security-based swaps identified 154 possible dealers. Fifteen of those exceeded $100 billion in notional transactions in 2011, reflecting over 90 percent of the total; 49 of those exceeded $10 billion in notional transactions in 2011, reflecting over 97 percent of the total; and 93 exceeded $3 billion in notional transactions in 2011, reflecting over 99 percent of the total. *See id.* at table 2c.

In considering the data we are weighing these criteria less heavily than we are weighing the criteria based on the number of counterparties who are not identified by ISDA as dealers. This is because it is reasonable to foresee a non-dealer making use of multiple dealers to get the best possible price or to make use of special expertise possessed by certain dealers, meaning that the criteria discussed in this footnote are more likely to identify entities not engaged in dealing activity.

[483] Other criteria in the CDS Data Analysis sought to identify dealing activity based on whether an entity maintains a relatively flat book. Those criteria also indicated that entities with notional transactions in excess of $100 billion in 2011 represented over 97 percent of the total for all entities identified by those criteria, while entities with notional transactions in excess of $10 billion in 2011 represented over 99 of the total for all entities identified by those criteria. *See id.* at tables 4 and 5. We are weighing those criteria less heavily than we are weighing the counterparty-based criteria discussed above because an entity that engages in directional trades could also appear to have a flat book if its portfolio contained transactions representing various directional bets, but of similar aggregate notional sizes on both sides of the market. *See id.* at 3.

The analysis also included one criterion that considers potential dealing activity based on a low propensity to post margin. *See id.* at table 6. While we do not believe that this analysis deserves the same degree of weight as the others, given concerns about the completeness of the data (*see id.* at 4), we note that this criterion nonetheless also indicates a high concentration of dealing activity in the market. *See id.* at table 6 (indicating that of the 473 entities identified by this criterion, the 14 entities with notional transactions in excess of $100 billion in 2011 account for roughly 94 percent of the total notional transaction activity associated with all 473 entities over 2011).

[484] Finally, the CDS Data Analysis also included criteria that identified potential dealing activity

suggest a high concentration of dealing activity within the security-based swap market.

While less data are available in connection with other types of instruments constituting security-based swaps, such as equity swaps, the available data similarly suggest a high concentration of positions in those instruments among potential dealers.[485]

Though inspection of the data does not seem to suggest a single precise *de minimis* threshold, the above analysis of potential dealing activity is useful in that it reveals a range of possible thresholds from $100 billion to $3 billion that would cover anywhere from 98 percent through 99.9 percent of the total activity of all potential dealers in 2011. However, these thresholds—and their implied market coverage ratios—only reflect levels of activity that exist in today's highly concentrated market. In order to further narrow the range of possible thresholds, and to select an appropriate level for the *de minimis* exception, the analysis must consider the potential state of the market as it might reasonably exist after the implementation of Title VII.

ii. Avoiding Gaps Resulting From the Regulatory Changes in Conjunction With the Exception

Although the overall portion of security-based swap activity that would appear to be subject to dealer regulation based on current measures of dealing concentration in the market constitutes an important factor to consider in balancing the regulatory burdens and benefits associated with a *de minimis* exception, analysis of the current market should not serve as the sole mechanism for setting the exception.

In particular, sole reliance on an approach that focuses on current measures of market concentration would not adequately account for likely changes to the market associated with the implementation of regulation. In part, these changes may be a direct result of the full implementation of Title VII—including enhancements to transparency and increases in central clearing—as those changes reasonably may be expected to reduce the concentration of dealing activity within the market over time.[486] Also, to the extent implementation of Title VII permits new dealers to enter the market, the availability of a *de minimis* exception would mean those new dealing entrants would fall outside the ambit of dealer regulation, either for the long term or until their dealing activity surpasses the applicable notional threshold.[487] Accordingly, *de minimis* thresholds that are based solely on the current state of the market, including the current concentration of dealing activity within the market, may reasonably be expected to fail to account for the amount of dealing activity that in the future could fall outside of the ambit of dealer regulation due to the exception.[488]

For example, as discussed above, when possible dealers in single-name credit default swaps are identified by an entity having three or more counterparties that are not recognized by ISDA as being dealers, entities with notional transactions in excess of $100 billion over a 12 month period represent over 98 percent of the total activity of all such possible dealers over that period, leaving two percent of possible dealing activity below that level.[489] However, a *de minimis* threshold of $100 billion would allow new entrants to commence engaging in unregulated dealing in competition with persons who are regulated as dealers pursuant to Title VII, which, depending on the number and size of such entrants, could significantly decrease the portion of dealing activity in the market done by registered dealers (at least until the point that new entrants cross the *de minimis* threshold, if they do at all). For example, if 15 new entrants[490] were to engage in security-based swap dealing activity up to a $100 billion threshold, the result could be that nearly 15 percent of dealing activity within the single-name credit default swap market would be left outside of the ambit of dealer regulation.[491]

based on an entity meeting two or three of the other criteria considered. *See id.* at tables 7 and 8. These criteria again indicate a high degree of concentration of dealing activity in the market. The analysis that addressed whether an entity met two of the other criteria identified 92 possible dealers, with the 15 entities having notional transactions in excess of $100 billion in 2011 representing over 96 percent of the total activity of those 92 entities in 2011. *See id.* at table 7. The analysis that addressed whether an entity met three of the other criteria identified 41 possible dealers, with the 15 entities having notional transactions in excess of $100 billion in 2011, representing over 98 percent of the total activity of those 41 entities in 2011. *See id.* at table 8.

[485] For example, OCC data shows that, of the five largest bank or trust companies, four have notional equity derivative positions of above $1 billion, and that those four entities account for $630 billion in notional positions out of $677 billion for all U.S. commercial banks or trust companies, which constitutes approximately 93 percent of the total. *See* OCC Quarterly Report at table 10. Similarly, a review of the equity swaps positions of the 50 largest U.S. bank holding companies shows that nine bank holding companies have notional equity swap positions exceeding $1 billion, and account for 99.5 percent of the total positions held by such companies, and 29 have no positions in equity swaps. (Data was compiled from each bank holding company's FR 9–YC, available at *http://www.ffiec.gov/nicpubweb/nicweb/Top50Form.aspx*). *Cf.* letter from WGCEF V (referencing swap position data from bank holding companies' Forms FR Y–9C as relevant to determining size of the swap market).

[486] *Cf.* Bessembinder and Maxwell, ''Transparency and the Corporate Bond Market,'' Journal of Economic Perspectives, Spring 2008, at 217, 226 (noting that after reporting of U.S. OTC bond transactions through the Trade Reporting and Compliance Engine (''TRACE'') became mandatory, the portion of trades completed by the 12 largest dealers fell from 56 percent to 44 percent).

[487] We understand that large dealers have competitive advantages under the current market, in light of the desire of counterparties to engage in security-based swap transactions with large, well capitalized and highly rated dealers. *See, e.g.,* Craig Pirrong, *Rocket Science, Default Risk and The Organization of Derivatives Markets,* Working Paper, University of Houston (2006) (available at *http://www.cba.uh.edu/spirrong/Derivorg1.pdf*). The lower business costs associated with being unregulated may prove to partially offset that advantage. At the same time, we reasonably may expect that informed counterparties will take into account the lower protections—and higher risks—associated with transactions with unregulated dealers in determining whether to use regulated or unregulated dealers as counterparties.

[488] We note that there also are benefits to increased competition and a decrease in concentration of dealer activity, as contemplated by Title VII, including potentially lower costs for market participants and a decrease in systemic risk.

[489] *See* CDS Data Analysis at table 3c; *see also* note 479, *supra.* As noted above, these amounts may not only reflect dealing activity by an entity. Thus, even putting aside the possibility of new unregulated entrants into the market, the portion of dealing activity in the market that is represented by entities whose trailing notional dealing activity exceeds $100 billion may in fact be less than 98 percent.

[490] The illustrative use of new entrants for purposes of this discussion is intended to reflect the potential that new entrants to the market could take advantage of a *de minimis* threshold in a way that leads to a higher level of unregulated dealing activity within the market. In using this illustration we are not seeking to explicitly predict how many new entrants may come into the market in response to any particular *de minimis* threshold, nor are we seeking to predict how many new entrants may seek to stay under the *de minimis* thresholds and how many instead would seek to use the exception as a step on the way to eventually registering as a security-based swap dealer. Rather, we simply are illustrating why it is important to account for market changes in connection with setting the *de minimis* threshold.

The OTC Derivatives Supervisors Group—a group chaired by the Federal Reserve Bank of New York and consisting of the CFTC and SEC as well as other international supervisors and major over-the-counter derivatives market participants—currently recognizes 15 major OTC derivatives dealers. Accordingly, as an illustrative example, we have assumed that this number of significant security-based swap dealers would approximately double—*i.e.,* include 15 new dealers—in the wake of the various regulatory changes contemplated by the Dodd-Frank Act, many of which may result in increased access and competition in the security-based swap market (*e.g.,* enhanced priced transparency and increased access to central clearing). However, we emphasize that this number has been selected as an illustrative example, and have accordingly provided similar examples assuming ten and five new entrants.

[491] Fifteen new entities that each engage in $100 billion in dealing activity would reflect $1.5 trillion in additional dealing activity outside the ambit of

Continued

Similarly, a *de minimis* threshold of $25 billion may also lead to a material reduction in the portion of the market covered by registered dealers. For example, using the same assumptions as above, 15 new entrants up to a $25 billion threshold could leave over four percent of dealing activity in the market outside of the ambit of dealing regulation.[492] When other metrics are used to identify possible dealing activity, the possibility of a significant regulatory gap remains.[493]

Overall, it is reasonable to conclude that the higher the *de minimis* threshold, the greater the likelihood that the exception, combined with other changes resulting from the implementation of Title VII that may encourage new entrants, will lead to a proportionately larger amount of unregulated (except with respect to antifraud and anti-manipulation prohibitions) dealing activity.[494] We believe that it is reasonable to interpret the statutory language of the *de minimis* exception in a way that prevents a proportionately large amount of dealing activity within the security-based swap market from falling outside the ambit of dealer regulation. Accordingly, choosing to set a lower *de minimis* threshold from among the range of potential thresholds would limit the amount of potential future dealing activity that could be transacted without being subject to dealer rules and regulations.[495]

iii. Promoting Statutory Counterparty Protections

Sole reliance on an approach based on overall market coverage in balancing regulatory burdens and benefits would also threaten to unduly discount important counterparty protection interests, as discussed above and highlighted in the proposal.[496] For example, in light of data indicating that $5 million constitutes a common notional size for a single-name credit default swap position,[497] a *de minimis* notional threshold of $25 billion annually would permit an unregistered dealer to engage in as many as 5000 trades of that size. The counterparties to these unregistered dealers would not receive the benefit of the protections that Title VII affords to the counterparties of registered dealers. These include, among others, the segregation protections afforded to persons who post margin to dealers in connection with over-the-counter security-based swap transactions.[498] Accordingly, this consideration also suggests that choosing a *de minimis* threshold closer to the lower end of the range of potential thresholds would better preserve the counterparty protections contemplated by Title VII.

c. Balancing Reflected in the Final Rules—Credit Default Swaps That Constitute Security-Based Swaps

The final thresholds that implement the *de minimis* exception (and corresponding phase-in levels) address security-based swaps that are credit default swaps separately from other types of security-based swaps, in light of differences in the respective markets.

i. General Threshold for Credit Default Swaps That Constitute Security-Based Swaps

We conclude that $3 billion over the prior 12 months constitutes an appropriate notional threshold for applying the *de minimis* exception in connection with dealing activity involving credit default swaps that constitute security-based swaps.

dealer regulation, which could lead to roughly 14.9 percent of total dealing activity being outside the ambit of dealing regulation (with that $1.5 trillion being added to the existing $168 billion reflected by entities that fall below the $100 billion threshold, and that sum divided by $11.18 trillion, under the assumption that the new entrants displace business from the fifteen entities above the *de minimis* threshold). To further illustrate, under the same assumptions and analysis, the implied unregulated market share would be roughly 10.4 percent for ten new entities and 6.0 percent for five new entities.

In certain regards these illustrations, on the one hand, may overestimate the effect of new entrants because of the assumption that such entrants engage in dealing activities up to, but not surpassing, the *de minimis* threshold. While it is not impossible that some entities may seek to use the *de minimis* exception to conduct business as an unregulated niche dealer, it also is plausible that entities generally may seek to use the exception to commence engaging in dealing activity, with the goal of ultimately becoming registered dealers that are not constrained by the *de minimis* threshold.

On the other hand, these illustrations in certain respects may underestimate the amount of dealing activity that can fall outside of the regulatory ambit. For example, the amounts of security-based swap activity of persons identified in the analysis as dealers may not exclusively constitute dealing activity, meaning that persons whose notional transactions over a 12-month period exceed a particular threshold in fact may not be engaged in that amount of dealing activity, and hence may still be able to take advantage of the *de minimis* exception. Also, these illustrations do not seek to reflect increased activity by existing dealers that already fall below the assumed threshold.

[492] Fifteen new entities each engaged in $25 billion in dealing activity would reflect $375 billion in additional dealing activity outside the ambit of dealer regulation, which could lead to 4.1 percent of total dealing activity being outside the ambit of dealing regulation (with that $375 billion being added to the existing $80.2 billion reflected by entities that fall below the $25 billion threshold, and that sum divided by $11.18 trillion, under the assumption that the new entrants displace business from the seventeen entities above the *de minimis* threshold). To further illustrate, under the same assumptions and analysis, the implied unregulated market share would be 3.0 percent for 10 new entities and 1.8 percent for 5 new entities. Obviously, these illustrations are subject to the same limitations as are discussed above in the context of the $100 million threshold illustration.

[493] For example, similar results are obtained when possible dealing activity is identified based on whether an entity passes at least three of the other metrics discussed above. *See* CDS Data Analysis at table 8. Using the same types of assumptions as are discussed above, with fifteen new entities, a *de minimis* threshold of $100 billion could lead to 15.0 percent of dealing activity falling outside the ambit of dealer regulation, while a *de minimis* threshold of $25 billion could lead to 4.2 percent of dealing activity falling outside of regulation.

[494] As noted above, encouraging new entrants also has benefits flowing from increased competition and a decrease in concentration of dealer activity. *See* note 488, *supra.*

[495] For example, 15 new dealer entrants engaged in up to $3 billion in dealing activity would account for up to $45 billion in dealing activity. This result would mean approximately 0.4 percent of total potential future dealing activity could be transacted by unregistered dealers, as opposed to the potential for approximately 15 percent of potential future dealing activity to be transacted by unregistered dealers if the *de minimis* were set to $100 billion. *See* CDS Data Analysis at table 3c. As with the illustrative examples above, these calculations assume that the new entrants displace business from the entities above the *de minimis* threshold.

[496] *See* part II.D.3.a, *supra; see also* Proposing Release at 80180 (highlighting ''customer protection issues raised by swaps and security-based swaps—including risks that counterparties may not fully appreciate when entering into swaps and security-based swaps'').

[497] *See* Federal Reserve Bank of New York staff report, ''An Analysis of CDS Transactions: Implications for Public Reporting'' (2011) at 8 (stating that for dollar-denominated single name CDS on corporate or sovereign reference entities, $5 million represented the most common notional size) (available at *http://www.newyorkfed.org/research/staff_reports/sr517.pdf*); *see also* Proposing Release at 80180 (noting ''that in general the notional seize of a small swap or security-based swap is $5 million or less'').

We note, by comparison, that Congress has determined that a *de minimis* amount of securities broker activity by banks entails 500 trades annually. *See* Exchange Act section 3(a)(4)(B)(xi) (excluding from the ''broker'' definition a bank that annually effects no more than 500 securities transactions, other than transactions subject to certain other exceptions, so long as the transaction is not effected by a bank employee that also is a broker-dealer employee).

We further note that, while the number of counterparties or transactions potentially implicated by unregistered dealing activity is an important consideration in establishing an initial *de minimis* level, it does not alter our view, described above, that a single *de minimis* standard based on notional value—rather than the proposal's framework of three distinct standards based on notional value, number of counterparties, and number of transactions—is an appropriate choice in light of concerns expressed by commenters that a standard based on the number of transactions or counterparties can produce arbitrary results. *See* part II.D.3.b.ii, *supra.*

[498] Exchange Act section 3E, which was added by section 763(d) of the Dodd-Frank Act, provides a series of requirements in connection with the segregation of assets held as collateral in security-based swap transactions. These include requirements that security-based swap dealers and major security-based swap participants provide their counterparties with notice that they have the right to require segregation, and that such segregation must be at an independent third-party custodian.

In reaching this conclusion, we recognize the significance of comments that supported the proposed $100 million threshold,[499] and that urged caution in raising that proposed threshold,[500] as well as commenters who supported increases to the threshold.[501] We further recognize the importance of applying the *de minimis* exception in a way that promotes regulatory efficiency. We also recognize the range of potential thresholds suggested by the data currently available. Based on the competing factors described above, we believe that $3 billion reflects a reasonable notional threshold—though not necessarily the only such threshold.

In our view, the currently available data regarding the single-name credit default swap market indicates that a notional threshold of $3 billion would be expected to result in the regulation, as dealers, of persons responsible for the vast majority of dealing activity within that market, both as of today and, as described above, in the future as the benefits of the other Title VII rules are implemented and new dealer entrants come to market.[502]

In providing for a $3 billion notional threshold, we also recognize the threshold would permit an unregistered dealer annually to engage in up to 600 security-based swaps (as opposed to 20 transactions under the proposed threshold, assuming a $5 million average notional size). In this regard, we note that Congress, in another statutory *de minimis* exception within the Exchange Act, determined that 500 securities transactions annually constituted a *de minimis* amount of transactions for banks under the ''broker'' definition.[503] We further believe that a $3 billion threshold appropriately addresses commenter concerns regarding the *de minimis* exception being unduly narrow.[504]

In adopting this $3 billion threshold, we have carefully considered one commenter's view that the CDS Data Analysis suggests that the proposed $100 million threshold in fact is too high, and that any increase in that proposed $100 million threshold would be arbitrary and capricious.[505] In reaching these conclusions, the commenter focused on the number of entities that potentially are engaged in dealing activity but that could be excluded based on particular *de minimis* thresholds. For example, the commenter indicated that pursuant to one of the CDS Data Analysis's combined metrics for identifying dealing activity, a *de minimis* threshold of $3 billion could lead to the exclusion of up to 58 percent of all persons engaged in possible dealing activity. The commenter further suggested that some entities engaged in dealing activity may reduce their activities to take advantage of the *de minimis* exception and hence reduce liquidity, and argued that there would be no basis for the exception to be based on a market participant's percentage of total security-based swap activity.[506]

It is important to recognize that while the commenter focused on the number of entities that might be excluded pursuant to the exception, and suggested that higher notional dollar amount thresholds could lead to the exclusion of a larger number of entities, the statutory provision for the *de minimis* exception does not require the exemption of a ''*de minimis* number'' of dealers. The statute instead requires the exemption of persons engaged in a ''*de minimis* quantity'' of dealing activity.[507] The statutory language therefore indicates that the focus of the rule implementing the exception should be the amount of an entity's dealing activity, not how many entities ultimately may be able to take advantage of the exception.

Also, although the commenter implied that there would be no basis for the rule implementing the exception to take into account a market participant's security-based swap dealing activity compared to total dealing activity in the market, for the reasons discussed in this section we believe that such an approach can appropriately provide for the regulatory coverage of the vast majority of dealing activity in a way that promotes regulatory efficiency, without leading to unwarranted regulatory gaps. In contrast, in our view the commenter did not persuasively articulate a strong rationale for adopting the alternative approach proposed in the letter, which would appear to lead to the registration of a number of dealers that proportionately engage in a very small amount of dealing activity.[508]

In support of its approach, the commenter emphasized data regarding persons who meet certain combined criteria outlined in the CDS Data

[499] *See* letters from Better Markets I and AFR.

[500] *See* letter from Greenberger.

[501] *See, e.g.*, letter from COPE I.

[502] Of the 28 market participants that have three or more security-based swap counterparties that themselves are not recognized by dealers by ISDA, 25 had notional single-name credit default swap positions in excess of $3 billion in 2011. The remaining three entities in total accounted for only $3.59 billion in notional transactions in 2011, reflecting less than 0.1 percent of the $11.18 trillion total for those 28 market participants. *See* CDS Data Analysis at table 3c.

The other criteria set forth in the analysis for identifying possible dealing activity in general similarly indicate that entities with notional transactions in excess of $3 billion in 2011 account for more than 99 percent of the total notional transactions of all identified entities in 2011. *See id.* at tables 2a–c, 3a–b, 4, 5, 7 and 8. While the criterion based on the posting of initial margin only indicates 98 percent coverage for all of the 473 identified entities, *see id.* at table 6, as discussed above we believe it is appropriate to provide less weight to that criterion, which is based on voluntary reporting.

As noted above, *see* note 478, *supra,* we recognize that the underlying market data encompasses all of the security-based swap activity of persons identified as dealers, not only their dealing activity. Because the thresholds that implement the *de minimis* exception address only a person's dealing activity, this raises the possibility that the analysis overstates the extent to which a $3 billion threshold would encompass persons responsible for dealing activity within the single-name security-based swap market. Even with that possibility, however, we believe that the data indicates such a high concentration of dealing activity within the market that it is reasonable to conclude that a $3 billion threshold likely would encompass persons responsible for the vast majority of dealing activity within the market.

[503] *See* Exchange Act section 3(a)(4)(B)(xi); *see also* letter from SIFMA—Regional Dealers (supporting a threshold of 500 trades consistent with the statutory *de minimis* exception in connection with bank brokerage activity).

[504] For example, $3 billion is equal to the threshold suggested by many commenters in the context of the swap market, which is much larger than the security-based swap market. *See* letter from COPE (supporting a 0.001 percent notional threshold based on the overall swaps market, which would amount to $3 billion). Indeed, this $3 billion threshold appears to reflect roughly 0.024 percent of the overall market for single-name credit default swaps, a percentage that is much greater than the 0.001 percent multiplier that a number of commenters (*see, e.g.*, letters cited in note 382, *supra*) suggested in the swap market context. *See* CDS Data Analysis at table 1 (indicating that participants in the single-name credit default swap market engage in a total of $12.6 trillion in single-name credit default swap transactions in 2011).

[505] *See* letter from Better Markets III.

[506] The letter also raised issues regarding the ''customer'' language of the exception and argued that the *de minimis* exception should not represent a risk-based test. We address those issues elsewhere. *See* parts II.D.3.c (regarding ''customer'' language) and II.D.3.e (regarding rejection of risk-based and proportionality tests), *infra.*

In addition, the letter expressed the view that a percentage-based formula would be difficult to implement, by requiring market participants to repeatedly calculate the ratio of their activity to total market activity. We concur. The $3 billion threshold we are adopting reflects a fixed dollar amount, and does not share the complications that would arise from an approach based on a particular percentage of the market.

[507] *See* Exchange Act section 3(a)(71)(D).

[508] The commenter correctly pointed out that the regulatory requirements applicable to registered dealers encompass counterparty protection requirements, and that the *de minimis* exception should not defeat those requirements. We recognize that the implementation of the exception should take those counterparty protections into account, and we have sought to do so. We do not believe, however, that those important counterparty protection goals require a *de minimis* approach that focuses on the number of entities that would be excluded, in lieu of the statutory focus on whether a particular entity engages in a *de minimis* quantity of dealing activity.

Analysis. As discussed above, we believe that criteria based on the number of an entity's counterparties that are not recognized as dealers deserve special weight due to the potential consistency of those criteria with the dealer-trader distinction.[509] Identifying dealer activity using those criteria does not support the view that a $3 billion threshold would lead to the exclusion of a large *number* of entities engaged in dealing activity.[510]

Finally, we also are not persuaded by the commenter's suggestion that a number of entities engaged in dealing activity would reduce those activities to take advantage of a $3 billion *de minimis* threshold, and hence reduce liquidity in the market by five percent. To reach that figure, the commenter needed to exclude the vast majority of dealing activity in the market.[511] While we recognize that it is possible that current market participants may adjust their dealing activity in light of the *de minimis* threshold, and that this potentially could reduce the liquidity provided by certain entities, we also recognize that the *de minimis* exception has the potential to promote liquidity by facilitating new entrants into the market.

ii. Phase-in Period in Connection With Dealing Activity Involving Credit Default Swaps That Constitute Security-Based Swaps

The final rules further provide that persons with notional dealing activity of $8 billion or less over the prior 12 months involving credit default swaps that constitute security-based swaps would be able to avail themselves of a phase-in period.[512] Those persons would not be subject to the generally applicable compliance date that occurs no later than 60 days following publication of these final rules in the **Federal Register**.[513]

The use of a phase-in period—in connection with a person's status as a security-based swap dealer and in connection with the other regulatory requirements that are appurtenant to dealer status—is intended to facilitate the orderly implementation of Title VII. In addition, the phase-in period will afford the SEC additional time to study the security-based swap market as it evolves in the new regulatory framework and will allow potential dealers that engage in smaller amounts of activity (relative to the current size of the market) additional time to adjust their business practices, while at the same time preserving the focus of the regulation on the largest and most significant dealers. The SEC also recognizes that the data informing its current view of the *de minimis* threshold is based on the market as it exists today, and that the market will evolve over the coming years in light of the new regulatory framework and other developments.

Accordingly, while the SEC believes that a $3 billion notional threshold reflects an appropriate long-term standard based on the currently available data,[514] it also is appropriate to provide for a phase-in period for those entities with $8 billion or less in dealing activity, because subsequent developments in the market or the evaluation of new data from the security-based swap reporting facilities contemplated by the Dodd-Frank Act may suggest that the threshold should be increased or decreased. In particular, the implementation of security-based swap data reporting under the Dodd-Frank Act will result in significant new data and afford an opportunity to review the Commission's determination to establish a $3 billion threshold.

For these reasons, an important part of the report that the SEC is directing its staff conduct with regard to the definitions of ''security-based swap dealer'' and ''major security-based swap participant'' (described in detail below) will be a consideration of the operation of the *de minimis* exception following the full implementation of Section 15F under Title VII.[515] The SEC will take into account this report, along with public comment on the report, in determining whether to propose any changes to the rule implementing the *de minimis* exception, including any increases or decreases to the $3 billion threshold. The report will be linked to the availability of data regarding the activity of regulated security-based swap market participants in that it must be completed no later than three years[516] following a ''data collection initiation date'' that is the later of: the last compliance date for the registration and regulatory requirements for security-based swap dealers and major security-based swap participants under Section 15F of the Exchange Act; or the first date on which compliance with the trade-by-trade reporting rules for credit-related and equity-related security-based swaps to a registered security-based swap data repository is required.[517]

In light of the available data—and the limitations of that data in predicting how the full implementation of Title VII will affect dealing activity in the security-based swap market—the SEC believes that $8 billion constitutes an appropriate level for the availability of the phase-in period. The available data indicate that such a level generally comports with the balance of interests that informed the determination of the appropriate long-term threshold of $3 billion described above. In particular, the $8 billion level should still lead to the regulation of persons responsible for the vast majority of dealing activity

[509] *See* notes 478, 482, and 483, *supra.*

[510] For example, the CDS Data Analysis identifies:

- Three possible dealers with notional transactions below $3 billion in 2011—out of a total of 28 possible dealers—when possible dealing activity is based on having three or more counterparties that themselves are not identified as dealers;
- One possible dealer with notional transactions below $3 billion in 2011– out of a total of 20 possible dealers—when possible dealing activity is based on having five or more counterparties that themselves are not identified as dealers; and
- Zero possible dealers with notional transactions below $3 billion in 2011—out of a total of 16 possible dealers—when possible dealing activity is based on having seven or more counterparties that themselves are not identified as dealers.

See CDS Data analysis at tables 3c, 3b and 3a.

In addition, as described above, an approach focused on the quantity of activity is supported by relatively consistent results depending on which criterion from the CDS Data Analysis is applied—*i.e.*, each criterion shows a high amount of concentration and a commensurately low quantity of activity below the $3 billion threshold. By contrast, applying different criteria results in very different numbers of entities excluded under any specified threshold, suggesting that an approach focused on the number of entities may be highly dependent on how the possible dealing activity of those entities is defined.

[511] In particular, in arguing that this incentive would reduce liquidity by five percent, the commenter excluded all business done by entities within the top two brackets (*i.e.*, above $100 billion notional), on the grounds that those entities ''are assumed to transact mostly with larger entities.'' Based on the criteria on which the commenter relied, those 15 entities are responsible for over 96 percent of the activity of all possible dealers. *See* CDS Data Analysis at tables 7 and 8. Absent that exclusion, the estimated reduction of liquidity would amount to a small fraction of a percent.

[512] Exchange Act rule 3a71–2(a)(2).

[513] Even with the general 60 day compliance period, however, market participants will not necessarily be security-based swap dealers at the end of 60 days. In particular, for the first year following the effective date of the final rules implementing the definition of ''security-based swap'' pursuant to the Exchange Act section 3(a)(68), the *de minimis* analysis would only address security-based swap dealing activity following that effective date. *See* Exchange Act rule 3a71–2(a)(1). Among other things, this means that until the rules defining ''security-based swap'' are effective, no market participants would be deemed to be security-based swap dealers.

[514] *See* note 502, *supra.*

[515] *See* Exchange Act rule 3a71–2A(a)(1); *see also* part V, *infra.*

[516] *See* Exchange Act rule 3a71–2A(b).

[517] The SEC will announce the data collection initiation date on its Web site and publish it in the **Federal Register**. *See* Exchange Act rule 3a71–1(a)(2)(iii).

within the market.[518] In addition, we do not believe that providing a phase-in period for persons with notional dealing activity over the prior 12 months of less than $8 billion would lead to a risk of an undue portion of the market falling outside of the ambit of dealer regulation, even after considering the potential entry of unregulated new dealers into the market.[519]

The final rule provides that the phase-in period will continue until the ''phase-in termination date'' that the SEC will publish on its Web site and in the **Federal Register**.[520] In particular, the rule provides that nine months following publication of that report, and after giving due consideration of the report and associated public comment, the SEC may either: (1) Terminate the phase-in period and by order establish and publish the phase-in termination date; or (2) determine that it is necessary or appropriate in the public interest to propose an alternative *de minimis* threshold, in which case the SEC, by order published in the **Federal Register**, will provide notice of that determination and establish the phase-in termination date.[521] If the SEC does not establish the phase-in termination date in either of those ways, the phase-in termination date shall automatically occur in any event on what would be a date certain, which will be five years following the data collection initiation date.[522]

These provisions should allow sufficient time for the staff to complete its report, for the SEC to receive and review public comment on the report, and for the SEC to draw conclusions regarding establishing the phase-in termination date or proposing potential changes to the rule implementing the *de minimis* exception, in a way that also promotes the orderly and predictable termination of the phase-in period.[523]

This phase-in period will not be available in connection with the $25 million threshold for dealing activity involving special entities, discussed below. In addition, the final rule provides that this phase-in period will not be available in connection with security-based swap dealing activities involving natural persons, other than natural persons who qualify as ECPs by virtue of CEA section 1a(18)(A)(xi)(II), which addresses natural persons who have $5 million or more invested on a discretionary basis and who enter into a security-based swap to manage the risk associated with their assets and liabilities.[524] These limitations to the availability of the phase-in period are consistent with the Dodd-Frank Act's goal of helping special entities be in a position to benefit from the counterparty protections associated with the regulation of registered security-based swap dealers under Title VII, as well as the SEC's mandate to protect participants in the securities markets.

Persons who are able to avail themselves of the phase-in period, of course, will not be required to do so. Any person that chooses to register with the SEC as a security-based swap dealer shall be deemed to be a security-based swap dealer subject to all applicable regulatory requirements for such registrants, regardless of whether the person engages in security-based swap dealing activity in an amount that is below the applicable *de minimis* threshold or phase-in level.[525]

d. Balancing Reflected in the Final Rules—Other Types of Security-Based Swaps

The final rule provides that the *de minimis* exception for dealing activity involving security-based swaps other than credit default swaps will be based on a threshold of $150 million notional over the prior 12 months.[526] In addition, a phase-in period will be available in connection with persons whose dealing activity involving those instruments is $400 million or less in notional amount over the prior 12 months.

These amounts reflect roughly one-twentieth of the corresponding amounts associated with the exception for credit default swaps that constitute security-based swaps. As discussed above, while less data is available regarding other types of security-based swaps than is available regarding single-name credit default swaps, the available data is consistent in indicating that those other types of security-based swaps on a notional basis currently comprise roughly one-twentieth of the total amount of instruments that will be expected to constitute security-based swaps.[527] In light of this significantly smaller market, we believe that a $3 billion notional threshold would threaten to cause an overly large portion of dealing activity within the market to fall outside the ambit of dealer regulation.

In this regard, we note that it is likely that there are fewer barriers to entry in connection with acting as a dealer in security-based swaps such as equity swaps and total return swaps on debt than there are in connection with acting as a dealer in single-name credit default

[518] Of the 28 market participants that have three or more security-based swap counterparties that themselves are not recognized by dealers by ISDA, 23 had notional single-name credit default swap transactions in excess of $8 billion in 2011. The remaining five entities in total accounted for only $12.3 billion in notional transactions in 2011, reflecting roughly 0.1 percent of the $11.18 total for the 28 market participants. *See* CDS Data Analysis at table 3c. Only two of the 28 entities identified as possible dealers by that criterion had annual notional transactions between $3 billion and $8 billion in 2011.

Most of the other criteria set forth in the analysis for identifying possible dealing activity in general similarly indicate that entities with notional transactions in excess of $8 billion in 2011 account for more than 99 percent of the total notional transactions of all identified entities that year. *See id.* at tables 2a–b, 3a–b, 4 and 5. While the criterion based on an entity having 10 or more counterparties only indicates 98 percent coverage for all of the 154 identified entities at an $8 billion transaction level, *see id.* at table 2c, as noted above this criterion may identify persons who in reality are not engaged in dealing activity. *See* note 482, *supra.* Also, while the criterion based on the posting of initial margin only indicates 97 percent coverage for all of the 473 identified entities at an $8 billion transaction level, *see id.* at table 6, as discussed above that criterion is based on voluntary reporting.

[519] For example, 15 new dealer entrants up to $8 billion in annual notional dealing activity would account for $120 billion in dealing activity. This would amount to roughly 1.2 percent of the total notional single-name security-based swap activity over 12 months of entities identified as possible dealers by virtue of having three or more counterparties that are not recognized by dealers by ISDA. *See* CDS Data Analysis at table 2c.

[520] Exchange Act rule 3a71–2(a)(2)(i).

[521] Exchange Act rule 3a71–2(a)(2)(iii)(A).

[522] Exchange Act rule 3a71–2(a)(2)(iii)(B).

[523] This approach balances the fact that the SEC believes that its $3 billion and $150 million *de minimis* thresholds are appropriate in light of the currently available data and the market's need for a degree of certainty as to the length of this phase-in period, on the one hand, against the possibility that the staff report and the accompanying public comment may demonstrate that revision to these thresholds is necessary, on the other hand.

[524] *See* Exchange Act rule 3a71–2(a)(2)(i). In other words, the phase-in period will still be available in connection with dealing activities with natural persons who are ECPs because they have entered into a security-based swap for hedging purposes. While we recognize the importance of Title VII protections to natural persons who engage in security-based swap activity, we also recognize the benefit of facilitating such persons' use of security-based swaps as hedges. Accordingly, persons who engage in dealing activity with natural persons who are ECPs under other provisions of the ECP definition will be subject to the applicable *de minimis* threshold for all of their dealing activity, without the availability of the phase-in period.

Persons who engage in dealing activity with natural persons who are not ECPs will fall within the Exchange Act definition of ''dealer,'' which has no *de minimis* exception. *See* Exchange Act section 3(a)(5)(A) (generally excluding dealers in security-based swaps from the Exchange Act definition of ''dealer,'' unless the counterparty is not an ECP).

[525] *See* Exchange Act rule 3a71–2(e).

[526] Exchange Act rule 3a71–2(a)(1)(ii). The proposal requested comment on whether different segments of the security-based swap market should be treated differently. *See* Proposing Release at 80101 (''Commenters further are requested to address * * * whether the [*de minimis*] exemption's factors should vary depending on the type of swap or security-based swap at issue.'').

[527] *See* note 476, *supra.*

swaps.[528] We also note that because equity swaps and total return swaps on debt can serve as close economic proxies for equity and debt securities, an overly broad *de minimis* threshold in connection with such instruments could threaten to undermine the Exchange Act framework for regulating persons who act as dealers in equity and debt.

At the same time—notwithstanding the smaller scope of this market and the lesser availability of data regarding dealing activity within the market—we do not believe that it is necessary to make the *de minimis* exception unavailable in connection with dealing activity involving security-based swaps that are not credit default swaps. In this regard we particularly note that the limited available data regarding equity swaps suggests a high degree of concentration in dealing activity involving those instruments,[529] which indicates that an appropriately sized *de minimis* threshold can be expected to promote regulatory efficiency.

Balancing those factors, we conclude that a $150 million annual notional threshold is appropriate to implement the *de minimis* exception in connection with security-based swaps that are not credit default swaps, consistent with our understanding of the comparative size of that market as applied to the threshold applicable to credit default swap dealing activity. For reasons similar to those described above, we conclude that there should be a phase-in period available to persons whose annual notional dealing activity in connection with security-based swaps that are not credit default swaps is no more than $400 million in annual 12-month notional amount. This phase-in period is subject to the same limitations regarding transactions involving special entities and natural persons as apply to the phase-in period for credit default swaps. It also will be subject to the same provisions regarding the termination of the phase-in period as apply in connection with credit default swaps.[530] The comparative lack of data involving these markets—in contrast to the market for single-name credit default swaps—particularly highlights how the use of a phase-in period that is linked to the availability of post-implementation data is appropriate.[531]

As above, a person who is eligible to take advantage of the phase-in period in connection with these types of security-based swaps may nonetheless register as a security-based swap dealer.

e. Dealing Activity Involving Special Entities

Consistent with the proposal, the final rules in general will cap an entity's dealing activity involving security-based swaps at no more than $25 million notional amount over the prior 12 months when the counterparty to the security-based swap is a special entity.[532] There will be no phase-in period in connection with transactions involving special entities. In adopting this threshold, we recognize the serious concerns raised by commenters that stated that the *de minimis* exception should not permit any dealing activities involving special entities in light of losses that special entities have incurred in the financial markets,[533] as well as the special protection that Title VII affords special entities.[534]

At this time, the final rule does not fully exclude such dealing activity from the exception, in light of the potential benefits that may arise from a *de minimis* exception. In this way, the threshold would not completely foreclose the availability of security-based swaps to special entities from unregistered dealers—as $25 million would annually accommodate up to five single-name credit default swaps of a $5 million notional size—but the threshold would limit the financial and other risks associated with those positions for a special entity, which would in turn limit the possibility of inappropriately undermining the special protections that Title VII provides to special entities.

In reaching this conclusion we recognize that special entities do participate in the single-name credit default swap market, given that an analysis of market data indicates that in 2011 special entities were parties to over $40 billion in single-name credit default swap transactions.[535] At the same time, the impact of this $25 million threshold—particularly concerns that the threshold may foreclose the ability of special entities to access dealers in the market—appears to be mitigated by the fact that the counterparties to those special entities tend to engage in notional transactions in single-name credit default swap well in excess of the general *de minimis* standards.[536] In light of the underlying counterparty protection issues, we see no basis to distinguish between types of security-based swaps in setting this special entity threshold.

For similar reasons, in the future as we consider whether to amend the *de minimis* exception we expect to pay particular attention to whether the threshold for transactions involving special entities should further be lowered.

f. Future Revisions to the Rule

As noted above and described in detail below in part V, the SEC is directing its staff to report on whether changes are warranted to the rules and interpretations implementing the security-based swap dealer definition, including the rule implementing the *de minimis* exception.[537] The SEC will take the report and associated public comment into account in determining whether to propose any changes to the rule implementing the exception.[538] Consistent with that possibility, the final rule provides that the SEC may change the requirements of the *de minimis* exception by rule or regulation.[539] Through this mechanism,

[528] For example, persons registered with the SEC as broker-dealers in connection with other types of securities would appear to be well positioned to act as dealers in connection with equity swaps, as such broker-dealers already would be expected to have systems in place to enter into equity positions to hedge their equity swap dealing positions.

[529] As noted above, four commercial banks and trust companies accounted for 93 percent of all equity positions held by such companies as of June 30, 2011, and nine bank holding companies accounted for over 99 percent of all equity positions held by the fifty largest such companies as of December 2011. *See* note 485, *supra.*

[530] *See* Exchange Act rule 3a71–2(a)(2); *see also* notes 520 through 522, *supra,* and accompanying text.

[531] The SEC expects that the staff report should be especially helpful for providing data regarding dealing activity in connection with those other types of security-based swaps to consider the impact of the termination of the phase-in period, as well as potential changes to the *de minimis* exception in connection with these instruments.

[532] Exchange Act rule 3a71–2(a)(1)(iii).

[533] *See* letters from AFR and Better Markets I.

[534] In this regard we note that Title VII authorizes the SEC to impose special business conduct requirements when a security-based swap dealer is counterparty to a special entity. *See* Exchange Act section 15F(h)(5). In proposing rules to implement these requirements, the SEC requested comment regarding the scope of the ''special entity'' definition, including, for example, regarding whether the SEC should interpret ''special entity'' to exclude a collective investment vehicle in which one or more special entities have invested. *See* Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396, 42422 (July 18, 2011). For purposes of interpreting this special entity threshold to the *de minimis* exception—particularly with regard to when a special entity would be a counterparty to a person that is engaged in dealing activity—the SEC believes that it will be appropriate to be guided by final interpretations regarding when a dealer will be a counterparty to a special entity for purposes of those business conduct requirements.

[535] *See* CDS Data Analysis at table 9.

[536] *See id.* at n.8 (noting that the average notional activity of those 16 counterparties was $680 billion, with the lowest being approximately $9 billion).

[537] *See* Exchange Act rule 3a71–2A(a)(1).

[538] *See* notes 520 through 522, *supra,* and accompanying text.

[539] Exchange Act rule 3a71–2(d). Exchange Act section 3(a)(71)(D) particularly states that the ''Commission''—meaning the SEC—may exempt *de minimis* dealers and promulgate related regulations. We do not interpret the joint rulemaking provisions of section 712(d) of the Dodd-Frank Act to require

the SEC may revisit the rule implementing the exception and potentially change that rule, for example, if data regarding the security-based swap market following the implementation of Section 15F under Title VII suggests that different *de minimis* thresholds would be appropriate.[540] In determining whether to revisit the thresholds, the SEC intends to pay particular attention to whether the *de minimis* exception results in a dealer definition that encompasses too many entities whose activities are not significant enough to warrant full regulation under Title VII, or, alternatively, whether the *de minimis* exception leads an undue amount of dealing activity to fall outside of the ambit of the Title VII regulatory framework, or leads to inappropriate reductions in counterparty protections (including protections for special entities). The SEC also intends to pay particular attention to whether alternative approaches would more effectively promote the regulatory goals that may be associated with a *de minimis* exception.

6. Registration Period for Entities That Exceed the *De Minimis* Factors

The *de minimis* exception raises implementation issues akin to those associated with the major participant definition, in that both provisions use tests that have retrospective elements to determine whether an entity must register and be subject to future regulation. As a result, some commenters have suggested that entities that surpass the *de minimis* thresholds should be able to take advantage of a grace period to undertake the process of registering as swap dealers or security-based swap dealers.[541] Otherwise, absent such a ''roll-in'' period, entities whose dealing activities surpass the relevant *de minimis* factors would immediately be in violation of dealer registration requirements. In light of these concerns, and the interest of avoiding undue market disruptions, the Commissions believe that it is appropriate to provide entities that exceed applicable the *de minimis* factors a period of time to register as dealers.

Accordingly, the final rules have been revised from the proposal to provide for a timing standard that is similar to what we are using in connection with the major participant definition.[542] That is, if an entity that has relied on the *de minimis* exception no longer is able to rely on the exception because its dealing activity exceeds a relevant threshold, the entity would have two months, following the end of the month in which it no longer is able to take advantage of the exception, to submit a completed application to register as a swap dealer or security-based swap dealer.[543]

Also, akin to the major participant definitions,[544] a person registered as a swap dealer or security-based swap dealer may apply to withdraw that registration, while continuing to engage in a limited amount of dealing activity in reliance on the *de minimis* exception, if that person has been registered as a dealer for at least 12 months.[545] This should help ensure that persons do not rapidly move in and out of dealer status based on short-term fluctuations in their swap or security-based swap activities.

The final rules implementing the *de minimis* exception do not provide any reevaluation period for entities that engage in a level of dealing activity above the *de minimis* thresholds, in contrast to the major participant definitions.[546] We do not believe that there is an appropriate basis for such a provision, particularly given that dealer regulation addresses customer protection and market operation and transparency concerns apart from risk concerns.

E. Limited Purpose Designation as a Dealer

1. Proposed Approach

The definitions of the terms ''swap dealer'' and ''security-based swap dealer'' provide that the Commissions may designate a person as a dealer for one type, class or category of swap or security-based swap, or specified swap or security-based swap activities, without the person being considered a dealer for other types, classes, categories or activities.[547]

In the Proposing Release, we noted that these provisions represent permissive grants of authority that do not require the Commissions to provide limited designations.[548] We further stated that a person that is covered by the definitions of the terms ''swap dealer'' or ''security-based swap dealer'' would be considered a dealer for all types, classes or categories of the person's swaps or security-based swaps, or activities involving swaps or security-based swaps, in light of the difficulty of seeking to separate a person's dealing activities from their non-dealing activities involving swaps or security-based swaps, unless such person sought and received designation as a dealer for only specified categories of swaps or security-based swaps, or specified activities.[549] We explained that this would provide persons the opportunity to seek a limited designation based on applicable facts and circumstances, and that we anticipated that a dealer could seek a limited designation at the time of its initial registration or later.[550]

In the Proposing Release, the CFTC further noted that non-financial entities such as physical commodity firms potentially may conduct dealing activity through a division rather than through a separately incorporated subsidiary, and that such an entity's swap dealing activity would not be a core component of its overall business. The CFTC added that if this type of entity registered as a dealer, certain swap dealer requirements would apply to the dealing activities of the division, but not necessarily to the swap activities of other parts of the entity.[551]

joint rulemaking here, because such an interpretation would read the term ''Commission'' out of Exchange Act section 3(a)(71)(D), which itself was added by the Dodd-Frank Act.

[540] *See* letter from Greenberger (stating that the dynamic nature of the derivatives sector of the financial markets should counsel caution, and that the *de minimis* threshold should be reevaluated on an ongoing basis).

[541] *See* letters from Northland Energy and WGCEF I.

[542] *Compare* CFTC Regulation § 1.3(hhh)(3); Exchange Act rule 3a67–8(a) (providing that persons who meet the criteria to be major participants will have two months to submit a completed registration application).

[543] *See* CFTC Regulation § 1.3(ggg)(4)(ii); Exchange Act rule 3a71–2(b). As discussed below with regard to the implementation period for the major participant definitions, persons will have additional time to comply with the applicable requirements following the submission of a completed application. *See* part IV.L.3, *infra.*

[544] *Compare* CFTC Regulation § 1.3(hhh)(5); Exchange Act rule 3a67–8(c) (providing that a major participant may be deemed to no longer be a major participant if its swap or security-based swap positions are below the relevant thresholds for four quarters).

[545] *See* CFTC Regulation § 1.3(ggg)(4)(ii); Exchange Act rule 3a71–2(c). Consistent with this approach, moreover, the final rule has been revised from the proposal to clarify that the *de minimis* exception in general is not available to a registered swap dealer or security-based swap dealer. *See* CFTC Regulation § 1.3(hhh)(1)(i); Exchange Act rule 3a71–2(a)(1) (revised language clarifying availability of exception to a person that is not a swap dealer or security-based swap dealer).

[546] *Compare* CFTC Regulation § 1.3(hhh)(4); Exchange Act rule 3a67–8(b) (providing for a reevaluation period in connection with the major participant definitions when a person does not exceed any applicable threshold by more than 20 percent in a calendar quarter).

[547] CEA section 1a(49)(B); Exchange Act section 3(a)(71)(B).

[548] *See* Proposing Release, 75 FR at 80182.

[549] *See id.; see also* proposed CFTC Regulation § 1.3(ggg)(3); proposed Exchange Act rule 3a71–1(c).

[550] *See* Proposing Release, 75 FR at 80182.

[551] *See id.*

2. Commenters' Views

A number of commenters addressed the limited designation of dealers in conjunction with the limited designation of major participants. Many of the issues those commenters raised thus are relevant to both sets of definitions.

a. Presumption of Full Designation

A number of commenters objected to the proposed presumption that an entity would be designated as a dealer (or major participant) for all categories of swaps or security-based swaps and all of the person's activities connected to swaps or security-based swaps. Several commenters argued that this approach would be contrary to Congressional intent,[552] conflict with the statutory language,[553] or conflict with underlying policy concerns.[554] One commenter suggested that the Commissions lack the statutory authority to apply swap dealer requirements to an entity's non-swap dealing activities.[555]

b. Potential Types of Limited Designations

A number of commenters addressed potential types of limited designations. One expressed support for limited swap dealer designations for particularized business units and for particular swap categories,[556] while another requested that limited swap dealer designations be available based on any reasonable commercial groupings.[557] Some commenters urged that limited dealer designations should be available for the branches or business units of foreign swap dealers and security-based swap dealers with U.S.-based customers or U.S. business lines.[558]

c. Applications for Limited Designations

A number of commenters addressed issues relating to the application process for limited designations. Some commenters supported the ability of a person to apply for limited designations at the time of initial registration,[559] while one commenter sought clarification on how and when a person could apply for limited swap dealer status.[560] Some commenters suggested that entities should be considered to have a provisional limited designation upon the filing of a completed application for limited dealer designation.[561]

Some commenters requested further clarification as to what factors or criteria would be considered relevant to limited designation determinations.[562] One commenter stated that non-financial companies should have a presumption of limited swap dealer designation under certain circumstances.[563] Another commenter took the view that commercial firms should be able to determine whether to register a legal entity or a division as a dealer.[564] One commenter suggested the analysis consider the complexity of an entity's dealing and non-dealing activities, and further suggested that limited designations should automatically be available if an entity's dealing activities do not exceed 50 percent of its total swap activities.[565] Commenters also raised issues related to how a person's status as a financial or a non-financial entity affects a person's eligibility for limited designations.[566]

d. Application of Regulatory Requirements to Limited Dealers

Commenters also addressed issues related to the application of regulatory requirements to limited dealers. One commenter recommended that dealer regulatory requirements generally should apply only to a division undertaking limited dealing activities; that commenter further stated that capital requirements should be calculated based only on the activities of that division, while recognizing that capital must be held by the entity as a whole.[567] Other commenters argued that capital and margin requirements should only be applied to an entity on a limited basis.[568]

e. Miscellaneous Issues

One commenter recommended that non-financial entities that are deemed to be limited dealers (or major participants) be permitted to be treated as end-users for the aspects of their businesses that are not subject to the limited designation.[569] The commenter further suggested that the swaps ''push-out'' rule requirements of section 716 of the Dodd-Frank Act be interpreted so that an insured depository institution that is a limited purpose dealer would only have to push out the dealing portion of its swap business, and be allowed to retain the other aspects of its swaps business.[570] One commenter requested clarification as to whether a person that is a limited purpose dealer in connection with one category of swap could be a major participant in connection with another category (in light of the statutory language excluding dealers from the major participant definitions).[571]

3. Final Rules and General Principles

Consistent with the proposal, the final rules retain the presumption that a

[552] *See* letters from Cargill Incorporated (''Cargill''), CDEU and Investment Company Institute (''ICI'') dated February 22, 2011 (''ICI I'').

[553] *See* letters from MetLife and WGCEF I.

[554] *See* letter from Cargill (stating that limited designation promotes the policy of encouraging non-financial firms that primarily are engaged in non-dealing businesses to continue to conduct limited dealing activities, adding that such firms ''do not present the potential systemic risks of financial firms,'' and that their full designation as dealers would discourage them from providing risk management products).

[555] *See* letter from EDF Trading.

[556] *See* letter from Capital One.

[557] *See* letters from NCGA/NGSA II (particularly referring to groupings based on individual physical commodities) and WGCEF dated June 9, 2011 (''WGCEF VII'') (limited designation should permit firms to structure organization of limited purpose registrans as appropriate in particular circumstances).

[558] *See* letters cited in note 148, *supra.*

[559] *See* letters from MFA I (specifically requesting that the rules provide that an entity can receive a limited purpose designation at the time of their initial registration) and FSR I.

[560] *See* letter from National Futures Association (''NFA'').

[561] *See* letters from Capital One, Farm Credit Council I and FHLB I.

[562] *See* letters from BG LNG I and ISDA I.

[563] *See* letter from Cargill (arguing that a firm should be presumptively entitled to limited swap dealer status if: it is a non-financial company; its non-dealing activities include (but need not be limited to) production, merchandising or processing of physical commodities; the firm's dealing activities take place in a separately identifiable division or business unit with separate management; and dealing revenues are less than 30 percent of the firm's total revenues in the firm's most recent fiscal year).

[564] *See* letter from WGCEF VII (stating that so long as a registered swap dealer bears the onus of demonstrating compliance with regulatory requirements, regulators ''should not dictate'' whether the firm registers a legal entity or a division as a dealer; also requesting guidance as to how applicable regulatory requirements may apply to a subdivision of a legal entity that registers as a dealer, and requesting a safe harbor from enforcement action when a decision to register only a particular desk or division as a dealer is made in good faith).

[565] *See* letter from Capital One.

[566] *Compare* letter from Capital One (stating that all market participants, including financial institutions, should be allowed to apply for limited swap dealer designations) *with* letter from Cargill (suggesting that an entity's status as a financial company should be relevant to limited dealer determinations).

[567] *See* letter from Cargill.

[568] *See* letter from FSR I (recommending that to the extent that capital requirements are tied to swap activity or exposures, that only activities or exposures in the designated category be reflected in the calculation).

[569] *See id.* (recommending that the corporate treasurer of an entity with a limited designation as a swap dealer for ''other commodity swaps'' as a result of its energy derivatives activity be able to hedge the entity's interest rate and currency risk without being subject to the business conduct, reporting, recordkeeping or other rules applicable to dealers and major participants).

[570] *See id.*

[571] *See* letter from NFA. As discussed below, *see* 752, *infra,* a person who is designated as a dealer in connection with particular types of swaps or security-based swaps may be major participants with regard to other types.

person who meets one of the dealer definitions will be deemed to be a dealer with regard to all of its swaps or security-based swaps activities, unless the CFTC or SEC exercises its authority to limit the person's designation as a dealer to specified categories of swaps or security-based swaps, or specified activities.[572] As discussed in the Proposing Release, moreover, a person may apply for a limited designation when it submits a registration application, or at a later time.[573] The final rules also contain a technical change from the proposed rules to clarify that limited designations may be based on a particular type, class or category of swap or security-based-swap.[574]

a. Default Presumption of Full Designation

Consistent with the proposal, the final rules retain the standard that a person that satisfies the ''swap dealer'' or ''security-based swap dealer'' definition in general would be considered a dealer for all types, classes or categories of the person's swaps or security-based swaps, or all activities involving swaps or security-based swaps.

The Commissions are not persuaded by the suggestion that this presumption is inconsistent with the statute, legislative intent or underlying policy. Not only is the relevant statutory language written as a grant of authority rather than a specific mandate to designate certain entities as limited purpose dealers, but the presumption also reasonably reflects the difficulty of separating a dealer's dealing activities from its non-dealing activities, and the challenges of applying dealer regulatory requirements to only a portion of a dealer's swap or security-based swap activities.[575]

We similarly are not persuaded by the view that the Commissions lack the authority to apply dealer regulation to non-dealing activities of a registered swap dealer or security-based swap dealer.[576] Certain of the statutory requirements applicable to swap dealers and security-based swap dealers—such as capital requirements—simply do not distinguish between a person's dealing activities and their non-dealing activities.[577] In other words, absent a limited designation, the statutory requirements applicable to dealers address the regulation of all of a dealer's swap or security-based swap activities.[578]

b. Demonstration of Compliance With Dealer Requirements

The Commissions will consider limited purpose applications on an individual basis through analysis of the unique circumstances of each applicant, given that the types of entities that engage in swap or security-based swap dealing are diverse and their organization and activities are varied.[579]

Regardless of the type of limited designation being requested, the Commissions will not designate a person as a limited purpose dealer unless it can demonstrate that it can fully comply with the requirements applicable to dealers.

Certain of the statutory requirements applicable to dealers particularly focus on the entity's swap or security-based swap activities and positions. These include, among other aspects, requirements related to trading records, documentation and confirmations.[580] An applicant for a limited purpose designation would have to demonstrate how it would satisfy those transaction-specific requirements in the context of a limited designation.

Other statutory requirements applicable to dealers particularly focus on the entity itself. These include requirements related to registration, capital, risk management, supervision, and chief compliance officers.[581] Here too, an applicant for a limited purpose designation would have to demonstrate how it would satisfy those requirements in the context of limited designations.

A limited purpose designation might be appropriate, for example, where a commercial agricultural company is a dealer in swaps related to a thinly-traded commodity, such as a particular fertilizer, but is not a dealer in, and does not wish to be subject to the swap dealer requirements with respect to its swaps that relate to broadly-traded commodities like corn or wheat (or where, say, a commercial energy company is a dealer in swaps involving a commodity to be delivered at a particular location and does not wish to be subject to the swap dealer requirements for its swaps involving that commodity to be delivered at other locations, for which it is not a swap dealer). A limited designation might also be appropriate so that the swap dealer requirements do not apply to interest rate or currency swaps that the agricultural or energy company enters into in managing its financial risk.

[572] CFTC Regulation§ 1.3(ggg)(3); Exchange Act rule 3a71–1(c).

[573] The SEC expects to address the process for submitting an application for limited designation as a security-based swap dealer, along with principles to be used by the SEC in analyzing such applications, as part of separate rulemakings.

[574] The rules particularly have been revised from the proposal to add ''type'' and ''class'' language to supplement the use of the term ''category.'' This change is consistent with the statutory language. In addition, the final rules related to limited designations for ''security-based swap dealers'' corrects an erroneous reference to major participant designation.

[575] This approach also is consistent with the treatment of dealers of other types of securities under the Exchange Act. When a person's securities activities cause them to be a ''dealer'' for purposes of the Exchange Act, the statutory requirements and regulations applicable to dealers will apply to all of that person's securities activities, regardless of whether particular activities would not have caused the entity to fall within the ''dealer'' definition. For example, Exchange Act section 15(c)(3)(A) prohibits brokers and dealers from engaging in certain securities-related activity in contravention of SEC-prescribed rules with respect to financial responsibility or related practices. This provision does not distinguish between those activities that cause a person to fall within the ''broker'' or ''dealer'' definitions, and other activities that themselves do not cause that person to be a broker or dealer. The SEC's authority extends to all securities activities by those brokers or dealers.

[576] *See* letter from EDF Trading.

[577] *See, e.g.,* CEA section 4s(e); Exchange Act section 15F(e).

[578] The substantive regulations applicable to dealers, of course, can account for the nature of a dealer's particular swap or security-based swap activities.

The SEC also intends to address limited designation issues in the context of a separate release addressing the application of Title VII to non-U.S. entities.

[579] Consistent with this approach, applications to limit a person's dealer designation to ''specified categories'' of swaps or security-based swaps (*see* CFTC Regulation § 1.3(ggg)(3); Exchange Act rule 3a71–1(c)), would not be required to interpret the term ''category'' consistently with the use of that term in connection with the major participant definitions. CFTC Regulation § 1.3(iii) and Exchange Act rule 3a67–2, defining the terms ''major swap category'' and ''major security-based swap category,'' respectively, do not apply for this purpose.

[580] *See, e.g.,* CEA section 4s(h)(3), Exchange Act section 15F(h)(3) (business conduct standards, including disclosure requirements, for dealers); CEA section 4s(g), Exchange Act section 15F(g) (daily trading record requirements for dealers); CEA section 4s(i); Exchange Act section 15F(i) (documentation requirements for dealers).

[581] *See, e.g.,* CEA section 4s(a)(1), Exchange Act section 15F(a)(1) (registration requirements for dealers); CEA section 4s(e), Exchange Act section 15F(e) (capital and margin requirements for dealers). The Dodd-Frank Act provides that in setting the capital requirements for swap dealers and security-based swap dealers (as well as major participants) that are subject to a limited designation, the Commissions and the prudential regulators must take into account the risks associated with other types, classes, or categories of swaps or security-based swaps engaged in, and the other swap or security-based swap activities conducted by, that person ''that are not otherwise subject to regulation applicable to that person by virtue of the status of the person'' as a dealer or major participant. *See* CEA section 4s(e)(2)(C); Exchange Act section 15F(e)(2)(C). In the case of a commercial agricultural or energy company that obtains a limited purpose designation for a particular business unit, the CFTC does not expect that this provision will generally require the limited purpose designee to calculate its required capital on the basis of swaps engaged in, or activities conducted by, other business units within the company, to the extent those swaps or activities do not generate risk beyond the agricultural or energy company's ordinary commercial line of business.

A limited purpose designee could be a particular business unit within a company. Additionally, a limited designation might be considered to ''split the desk'' by applying the swap dealer requirements solely to the designee's limited activities involving swaps not entered into for the purpose of hedging a physical position as defined in CFTC Regulation § 1.3(ggg)(6)(iii). Any particular limited purpose application will be analyzed in light of the unique circumstances presented by the applicant.

A key challenge that any applicant to a limited dealer designation will face is the need to demonstrate full compliance with the requirements that apply to the type, class or category of swap or security-based swap, or the activities involving swaps or security-based swaps, that fall within the swap dealer designation.

III. Amendments to the Definition of Eligible Contract Participant

A. Background

The Dodd-Frank Act makes it unlawful for a person that is not an eligible contract participant (''ECP'') to enter into a swap other than on, or subject to the rules of, a DCM.[582] In addition, section 763(e) of the Dodd-Frank Act makes it unlawful for a person to effect a transaction in a security-based swap with or for a person that is not an ECP unless the transaction is effected on a national securities exchange registered with the SEC.[583] Moreover, section 768(b) of the Dodd-Frank Act makes it unlawful for a person to offer to sell, offer to buy or purchase, or sell a security-based swap to a person that is not an ECP unless a registration statement under the Securities Act of 1933 (''Securities Act'')[584] is in effect with respect to that security-based swap.[585] These provisions mean that persons can engage in neither swaps nor security-based swaps transactions with persons that are not ECPs on SEFs, on security-based SEFs, or on a bilateral, off-exchange basis.

The Dodd-Frank Act also amended the ECP definition by:[586] (i) Providing that, for purposes of CEA sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii), the term ECP does not include a commodity pool in which any participant is not itself an ECP; (ii) raising the monetary threshold that governmental entities may use to qualify as ECPs, in certain situations, from $25 million in investments owned and invested on a discretionary basis to $50 million in investments owned and invested on a discretionary basis;[587] and (iii) replacing the ''total asset'' standard for individuals to qualify as ECPs with an ''amounts invested on a discretionary basis'' standard.[588]

Commodity pools may, among other things, enter into transactions involving foreign currency. ECP status is important for commodity pools that enter into the following types of foreign currency transactions (such commodity pools, ''Forex Pools''): (i) Off-exchange foreign currency futures; (ii) off-exchange options on foreign currency futures; (iii) off-exchange options on foreign currency; (iv) leveraged or margined foreign currency transactions; and (v) foreign currency transactions that are financed by the offeror, the counterparty or a person acting in concert with the offeror or counterparty on a similar basis.[589] In some cases, discussed below in detail, if a Forex Pool does not satisfy the ECP definition applicable to commodity pools engaging in the types of foreign currency transactions noted above[590] and it engages in these types of foreign currency transactions (such transactions, ''retail forex transactions'' and such commodity pools, ''Retail Forex Pools''), the transactions will be subject to a regulatory regime that imposes certain requirements and restrictions on the counterparties to the Retail Forex Pool, and, if the Retail Forex Pool engages in retail forex transactions other than with certain counterparties, on the commodity pool operator (''CPO'') who operates the Retail Forex Pool. These requirements and restrictions do not apply if the Forex Pool satisfies the ECP definition applicable to commodity pools engaging in the types of foreign currency transactions noted above.

The Commissions are adopting further definitions of the term ''eligible contract participant'' in the following six respects: (i) Generally prohibiting a Forex Pool from qualifying as an ECP if such Forex Pool directly enters into retail forex transactions[591] and has one or more direct participants that are not ECPs;[592] (ii) clarifying that, in determining whether a direct participant in a Forex Pool is an ECP, the indirect participants in the Forex Pool will not be considered unless such Forex Pool, a commodity pool holding a direct or indirect (through one or more intermediate tiers of pools) interest in

[582] In particular, section 723(a)(2) of the Dodd-Frank Act adds new subsection (e) to CEA section 2 (7 U.S.C. 2(e)), providing that ''[i]t shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5.''

[583] In particular, section 763(e) of the Dodd-Frank Act adds paragraph (l) to Exchange Act section 6 (15 U.S.C. 78f(l)), providing that ''[i]t shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange registered pursuant to subsection (b).''

[584] 15 U.S.C. 77a *et seq.*

[585] In particular, section 768(b) of the Dodd-Frank Act adds paragraph (d) to Securities Act section 5 (15 U.S.C. 77e(d)), providing that ''[n]otwithstanding the provisions of section 3 or 4, unless a registration statement meeting the requirements of section 10(a) is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)).'' The Commissions note that market participants must make the determination of ECP status with respect to the parties to transactions in security-based swaps and mixed swaps prior to the offer to sell or the offer to buy or purchase the security-based swap or mixed swap.

[586] *See* Sections 741(b)(10) and 721(a)(9) of the Dodd-Frank Act; *see also* Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation, available at *http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf*, at 48–49 (June 17, 2009).

[587] *See* CEA section 1a(18)(A)(vii), 7 U.S.C. 1a(18)(A)(vii).

[588] *See* CEA section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi). The Dodd-Frank Act did not amend the monetary thresholds for individuals to qualify as ECPs. As such, an individual can qualify as an ECP if such individual has amounts invested on a discretionary basis, the aggregate of which is in excess of (i) $10,000,000, or (ii) $5,000,000 if such individual also enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by such individual.

[589] *See* CEA sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii), 7 U.S.C. 2(c)(2)(B)(vi) and 7 U.S.C. 2(c)(2)(C)(vii). In this context, the term ''off-exchange'' means other than on or subject to the rules of an organized exchange, as defined in CEA section 1a(37), 7 U.S.C. 1a(37).

[590] *See* CEA section 1a(18)(A)(iv), 7 U.S.C. 1a(18)(A)(iv); *see also* CFTC Regulation § 1.3(m)(5) (exporting the look-through language of CEA section 1a(18)(A)(iv) to CEA section 1a(18)(A)(v)). The Dodd-Frank Act amended the ECP definition to include a provision that specifically applies to Forex Pools engaging in these types of foreign currency transactions. *See* Section 741(b)(10) of the Dodd-Frank Act (adding a provision to CEA section 1a(18)(A)(iv), 7 U.S.C. 1a(18)(A)(iv), stating ''provided, however, that for purposes of section 2(c)(2)(B)(vi) and section 2(c)(2)(C)(vii), the term 'eligible contract participant' shall not include a commodity pool in which any participant is not otherwise an eligible contract participant.''). *See* part III.B below for a discussion of this provision. This provision applies only with respect to retail forex transactions. This means that a Retail Forex Pool, as defined above, that is not an ECP for retail forex transaction purposes could be an ECP for other transactions it enters into that are not retail forex transactions.

[591] In many commodity pool structures, this is the master fund alone.

[592] *But see* note 652, *infra,* with respect to single level Forex Pools using retail forex transactions solely to hedge.

such Forex Pool, or any commodity pool in which such Forex Pool holds a direct or indirect interest has been structured to evade Subtitle A of Title VII of the Dodd-Frank Act;[593] (iii) prohibiting a commodity pool from qualifying as an ECP unless it has total assets exceeding $5 million and is operated by a person described in CEA section 1a(18)(A)(iv)(II);[594] (iv) explicitly including swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants in the definition of ECP; (v) permitting a non-ECP to qualify as an ECP, with respect to certain swaps, based on the collective net worth of its owners, subject to several conditions, including that the owners are ECPs; and (vi) permitting a Forex Pool to qualify as an ECP notwithstanding that it has one or more direct participants that are not ECPs if the Forex Pool (a) is not formed for the purpose of evading regulation under CEA sections 2(c)(2)(B) or (C) or related rules, regulations or orders, (b) has total assets exceeding $10 million and (c) is formed and operated by a registered CPO or by a CPO who is exempt from registration as such pursuant to § 4.13(a)(3). In addition, the Commissions are issuing interpretive guidance regarding the definition of ECP to correct an inaccurate statutory cross-reference with respect to the ability of government entities to qualify as ECPs under CEA section 1a(18)(A)(vii).[595] The Commissions also are issuing interpretive guidance with respect to the ECP status of Forex Pools whose participants are limited solely to non-U.S. persons and which are operated by CPOs located outside the United States, its territories or possessions.

The Commissions note that commenters raised interpretive and other issues related to the ECP definition that the Commissions may consider in the future.[596]

B. Commodity Pool Look-Through for Retail Forex Transactions

1. Statutory Provisions

Prior to the Dodd-Frank Act, clause (A)(iv) of the ECP definition provided that a commodity pool was an ECP if it had $5 million in total assets and was operated by a person regulated under the CEA, regardless of whether each participant in the commodity pool was itself an ECP.[597] Section 741(b)(10) of the Dodd-Frank Act added a proviso to clause (A)(iv)[598] stating that a Forex Pool will not qualify as an ECP, solely for purposes of CEA sections 2(c)(2)(B)(vi) or 2(c)(2)(C)(vii) (*i.e.,* retail forex transactions) if any participant in the Forex Pool is itself not an ECP.[599]

Thus, for purposes of retail forex transactions, the Dodd-Frank Act imposed a requirement to ''look through'' a Forex Pool—meaning that ECP status would be limited to Forex Pools in which each participant is itself an ECP. This is important for two reasons. First, a Forex Pool that does not qualify as an ECP can enter into a retail forex transaction described in CEA section 2(c)(2)(B)(i)(I) only with one of the federally-regulated counterparties enumerated in CEA sections 2(c)(2)(B)(i)(II)(aa) (U.S. financial institutions),[600] (bb) (certain brokers, dealers and their associated persons),[601] (cc) (certain futures commission merchants (''FCMs'') and their affiliated persons),[602] (dd) (certain financial holding companies)[603] or (ff) (certain retail foreign exchange dealers (''RFEDs''))[604] (each an ''Enumerated Counterparty'' and collectively ''Enumerated Counterparties''); the counterparty restriction does not apply to retail forex transactions described in CEA section 2(c)(2)(C)(i)(I)(bb)[605] entered into by a Forex Pool that does not qualify as an ECP, though such transactions are subject to antifraud protections and related enforcement provisions if entered into with a

[593] Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant,'' in order ''[t]o include transactions and entities that have been structured to evade'' subtitle A of Title VII (or an amendment to the CEA made by subtitle A).

[594] 7 U.S.C. 1a(18)(A)(iv)(II).

[595] 7 U.S.C. 1a(18)(A)(vii).

[596] These issues include: (i) The ECP status of jointly and severally liable borrowers and counterparties, non-ECPs guaranteed by ECPs, and non-ECP swap collateral providers; (ii) whether bond proceeds count toward the ''owns and invests on a discretionary basis $50,000,000 or more in investments'' element of the governmental ECP prong (CEA section 1a(18)(A)(vii), 7 U.S.C. 1a(18)(A)(vii)); (iii) the relationship between the ECP and eligible commercial entity definitions for purposes of CEA section 1a(18)(A)(vii), 7 U.S.C. 1a(18)(A)(vii); (iv) the scope of the ''proprietorship'' element of the entity prong of the ECP definition in CEA section 1a(18)(A)(v), 7 U.S.C. 1a(18)(A)(v) (which the Commissions are addressing to a limited extent in the discussion of the new line of business ECP category in part III.F, *infra,* and in Regulation § 1.3(m)(7)(ii)(C) under the CEA); (v) the meaning of the new ''amounts invested on a discretionary basis'' element of the individual prong of the ECP definition (CEA section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi)); (vi) whether persons can be ECPs in anticipation of receiving, but before they have, the necessary assets; and (vii) that swap dealers are not among the entities listed in CEA section 2(c)(2)(B)(i)(II), 7 U.S.C. 2(c)(2)(B)(i)(II), as acceptable counterparties to non-ECPs engaging in retail forex transactions.

[597] Clause (A)(iv) of the pre-Dodd-Frank Act ECP definition also included a commodity pool operated by a foreign person performing a similar role or function as a person regulated under the CEA and subject as such to foreign regulation (regardless of whether the foreign person was itself an ECP).

[598] The proviso states ''provided, however, that for purposes of section 2(c)(2)(B)(vi) and section 2(c)(2)(C)(vii), the term 'eligible contract participant' shall not include a commodity pool in which any participant is not otherwise an eligible contract participant.'' CEA section 1a(18)(A)(iv); 7 U.S.C. 1a(18)(A)(iv).

[599] *See* CEA section 1a(18)(A)(iv), 7 U.S.C. 1a(18)(A)(iv). In other words, the proviso in section 1a(18)(A)(iv) does not reference or implicate ECP status for purposes of (i) CEA section 2(e), 7 U.S.C. 2(e) (which, as discussed above, permits non-ECPs to trade swaps only on or subject to the rules of a DCM); (ii) Securities Act section 5(d) (which, as discussed above, makes it unlawful for a person to offer to sell, offer to buy or purchase, or sell a security-based swap to a person that is not an ECP unless a registration statement under the Securities Act is in effect with respect to that security-based swap); or (iii) Exchange Act section 6(l) (which as discussed above, makes it unlawful for a person to effect a transaction in a security-based swap with or for a person that is not an ECP unless the transaction is effected on a national securities exchange registered with the SEC). The look-through proviso does not expressly state that indirect participants, as well as direct participants, in the Forex Pool must be ECPs for the Forex Pool to be an ECP. *But see* notes 636 and 638, *infra* (discussing the authority for such an approach).

[600] 7 U.S.C. 2(c)(2)(B)(i)(II)(aa). The term ''financial institution'' is defined in CEA Section 1a(21), 7 U.S.C. 1a(21).

[601] 7 U.S.C. 2(c)(2)(B)(i)(II)(bb). This category is comprised of each:

(AA) [] broker or dealer registered under section 15(b) (except paragraph (11) thereof) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o–5); [and] (BB) [ ] associated person of a broker or dealer registered under section 15(b) (except paragraph (11) thereof) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o–5) concerning the financial or securities activities of which the broker or dealer makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5(b), 78q(h)).

[602] 7 U.S.C. 2(c)(2)(B)(i)(II)(cc). This category is comprised of each:

(cc)(AA) []futures commission merchant that is primarily or substantially engaged in the business activities described in section 1a of this Act, is registered under this Act, is not a person described in item (bb) of this subclause, and maintains adjusted net capital equal to or in excess of the dollar amount that applies for purposes of clause (ii) of this subparagraph; [and] (BB) [ ] affiliated person of a futures commission merchant that is primarily or substantially engaged in the business activities described in section 1a of this Act, is registered under this Act, and is not a person described in item (bb) of this subclause, if the affiliated person maintains adjusted net capital equal to or in excess of the dollar amount that applies for purposes of clause (ii) of this subparagraph and is not a person described in such item (bb), and the futures commission merchant makes and keeps records under section 4f(c)(2)(B) of this Act concerning the futures and other financial activities of the affiliated person.

[603] 7 U.S.C. 2(c)(2)(B)(i)(II)(dd). The enumerated counterparty in this category is ''a financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956).''

[604] 7 U.S.C. 2(c)(2)(B)(i)(II)(ff). This category is comprised of each:

retail foreign exchange dealer that maintains adjusted net capital equal to or in excess of the dollar amount that applies for purposes of clause (ii) of this subparagraph and is registered in such capacity with the [CFTC], subject to such terms and conditions as the [CFTC] shall prescribe, and is a member of a futures association registered under section 17 [of the CEA].

[605] 7 U.S.C. 2(c)(2)(C)(i)(I)(bb).

counterparty other than an Enumerated Counterparty described in CEA section 2(c)(2)(B)(i)(II)(aa), (bb) or (dd).[606] Second, the operator of a Retail Forex Pool engaging in retail forex transactions with an Enumerated Counterparty that is an FCM, specified affiliated person of an FCM or RFED must register with the CFTC as a CPO,[607] unless the CPO also is an Enumerated Counterparty under 2(c)(2)(B)(i)(II)(aa), (bb) or (dd)[608] or an exemption from CPO registration applies.[609] Moreover, CEA section 2(c)(2)(E)(ii)(I),[610] which was added by section 742(c)(2) of the Dodd-Frank Act, prohibits an Enumerated Counterparty from entering into retail forex transactions described in CEA section 2(c)(2)(B)(i)(I) with a person that is not an ECP ''except pursuant to a rule or regulation of [the appropriate Federal regulator of such Enumerated Counterparty allowing such transactions] under such terms and conditions as [such regulator] shall prescribe.'' CEA section 2(c)(2)(E)(iii)(II)[611] requires that such rules or regulations treat similarly all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to CEA section 2(c)(2)(B)(i)(I) agreements, contracts, and transactions.

Separately, subclause (A)(v)(III) of the ECP definition, both before and after enactment of the Dodd-Frank Act, provides that a corporation, partnership, proprietorship,[612] organization, trust or other business entity may qualify as an ECP if it has a net worth exceeding $1 million and ''enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business.''[613]

2. Proposed Approach

The Commissions stated in the Proposing Release that ''in some cases commodity pools unable to satisfy the conditions of clause (A)(iv) of the ECP definition may rely on clause (A)(v) to qualify as ECPs instead for purposes of retail forex'' and that permitting such reliance would frustrate the intent of Congress in imposing the look-through requirement on Forex Pools in clause (A)(iv) of the ECP definition.[614]

The Commissions proposed to further define the term ''eligible contract participant'' to preclude a Forex Pool from qualifying as an ECP for purposes of retail forex transactions in reliance on clause (A)(v) of the ECP definition if

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[606] The counterparty limitation with respect to CEA section 2(c)(2)(B)(i)(I) retail forex transactions is a function of the fact that the CEA's exchange-trading requirement generally applies with respect to foreign currency futures, foreign currency options on futures, and foreign currency options. *See* CEA section 4(a), 7 U.S.C. 6(a) (generally requiring futures contracts to be traded on or subject to the rules of a DCM); CEA section 4c(b), 7 U.S.C. 6c(b) (prohibiting trading options subject to the CEA contrary to CFTC rules, regulations or orders permitting such trading); Part 32 of the CFTC's rules, 17 CFR part 32 (generally prohibiting entering into options subject to the CEA) and CFTC Regulation § 33.3(a), 17 CFR 33.3(a) (prohibiting entering into options on futures other than on or subject to the rules of a DCM). Because CEA section 4(a) would render an off-exchange futures contract illegal but for CEA section 2(c)(2)(B) permitting such transactions with an Enumerated Counterparty, it would be illegal for a non-Enumerated Counterparty to enter into a futures contract described in 2(c)(2)(B)(i)(I) with a non-ECP. Similarly, because options can be conducted only pursuant to CFTC authority and the CFTC has proposed to treat commodity options within its jurisdiction as swaps, CEA section 2(e) would prohibit such options, if on foreign exchange and entered into with a non-ECP, but for the fact that 2(c)(2)(B) permits them if traded with an Enumerated Counterparty.

The lack of a counterparty limitation with respect to CEA section 2(c)(2)(C)(i)(I)(bb) retail forex transactions is a function of the different structures of CEA sections 2(c)(2)(B) and (C). Whereas CEA section 2(c)(2)(B)(i) covers transactions that would be illegal but for compliance with CEA section 2(c)(2)(B) (due to such section's incorporation of the entire CEA, including, for example, the exchange-trading requirement discussed above), falling within CEA section 2(c)(2)(C)(i)(I), by that section's own terms, merely brings a covered transaction within the scope of CEA section 2(c)(2)(C), which does not include the exchange-trading requirement of CEA section 4(a). Because CEA section 2(c)(2)(C)(i)(I) covers transactions that may or may not also be transactions described in section 2(c)(2)(B)(i)(I) and the far fewer requirements imposed by CEA section 2(c)(2)(C) invite characterization of such difficult-to-categorize transactions as falling solely within CEA section 2(c)(2)(C), the CFTC will interpret such dually characterizable transactions as governed by CEA section 2(c)(2)(B). If such transactions fall only within CEA section 2(c)(2)(C), however, because they would be subject to neither the exchange-trading requirement of CEA section 4(a) nor the CFTC's plenary options authority under CEA section 4c(b) (while CEA section 2(c)(2)(C)(ii)(I), 7 U.S.C. 2(c)(2)(C)(ii)(I), reserves the CFTC's section 4c(b) authority, in this scenario, the contract in question is not an option), a person other than an Enumerated Counterparty may act as counterparty to a non-ECP. Such contracts would, however, be subject to two of the CEA's antifraud provisions, sections 4(b) and 4b, 7 U.S.C 6(b) and 7 U.S.C 6b, respectively, as if they were futures contracts. *See* CEA section 2(c)(2)(C)(iv), 7 U.S.C. 2(c)(2)(C)(iv). Such contracts also would be subject to related enforcement provisions. *See* CEA section 2(c)(2)(C)(ii)(I), 7 U.S.C. 2(c)(2)(C)(ii)(I).

[607] *See* CEA sections 2(c)(2)(B)(iv)(I) and (C)(iii)(I) (requiring registration for CPOs of Retail Forex Pools entering into retail forex transactions with FCMs, specified affiliated persons thereof or RFEDs). By contrast, those sections exclude from the CPO registration requirement CPOs of Retail Forex Pools engaging in retail forex transactions with Enumerated Counterparties described in CEA section 2(c)(2)(B)(i)(II)(aa), (bb), (ee) and (ff). While the cited CEA sections refer to counterparties not described in ''any of item (aa), (bb), (ee), or (ff)'' of subparagraph (B)(i)(II), the CFTC Reauthorization Act of 2008 (''CRA''), included as Title XIII of the Food, Conservation and Energy Act of 2008, Pub.L. 110–246, 122 Stat. 1651 changed item (ee) to item (dd) (a financial holding company as defined in section 2 of the Bank Holding Company Act of 1956) and removed item (ff) (formerly an investment bank holding company (as defined in section 17(i) of the Exchange Act (15 U.S.C. 78q(i))). Therefore, the Commissions interpret the reference in CEA sections 2(c)(2)(B)(iv)(I)(cc) and 2(c)(2)(C)(iii)(I)(cc) to items (aa), (bb), (ee), or (ff) to be references to items (aa), (bb) and (dd). *Cf.* Retail Foreign Exchange Transactions; Conforming Changes to Existing Regulations in Response to the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 56103 (Sept. 12, 2011) (providing background on related incorrect internal references in CEA sections 2(c)(2)(B) and (C)). *See also* CFTC Regulation § 5.3(a)(2)(i), 17 CFR 5.3(a)(2)(i), which requires a CPO, as defined in CFTC Regulation § 5.1(d)(1), 17 CFR 5.1(d)(1), to register as such. CFTC Regulation § 5.1(d)(1), in turn, defines a CPO, for purposes of Part 5 of the CFTC's Regulations, 17 CFR part 5, as ''any person who operates or solicits funds, securities or property for a pooled investment vehicle that is not an [ECP] as defined in section 1a(18) of the Act, and that engages in retail forex transactions.'' The CFTC interprets the references in Regulation § 5.1(d)(1) to ECPs as defined in CEA section 1a(18) to include the ECP definition as further defined or interpreted by the Commissions under authority conferred by the Dodd-Frank Act or otherwise amended or interpreted by the Commissions or a court. While the statutory CPO definition in CEA section 1a(11)(A), 7 U.S.C. 1a(11)(A), does not include transactions described in CEA section 2(c)(2)(B)(i), the Commissions believe this was an oversight. In any case, CEA section 1a(11)(B), 7 U.S.C. 1a(11)(B), grants the CFTC the authority to further define the term CPO, which the CFTC has done in CFTC Regulation § 5.1(d)(1). Therefore, a person operating a commodity pool engaging in transactions described in CEA section 2(c)(2)(B)(i) is a CPO.

[608] *See* CEA sections 2(c)(2)(B)(iv)(II) and 2(c)(2)(C)(iii)(II). While CEA sections 2(c)(2)(B)(iv)(II) and 2(c)(2)(C)(iii)(II) refer to counterparties described in item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II), the CFTC Reauthorization Act of 2008 changed item (ee) to item (dd) and removed item (ff). Therefore, the Commissions interpret the reference in CEA sections 2(c)(2)(B)(iv)(II) and 2(c)(2)(C)(iii)(II) to items (aa), (bb), (ee), or (ff) to be references to items (aa), (bb) and (dd). *Cf.* Retail Foreign Exchange Transactions; Conforming Changes to Existing Regulations in Response to the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 56103 (Sept. 12, 2011) (providing background on related incorrect internal references in 2(c)(2)(B) and (C)).

[609] *See, e.g.,* CFTC Regulation § 4.13(a)(3) (exempting from CPO registration operators of commodity pools engaged in a *de minimis* amount of trading in CFTC-jurisdictional contracts).

[610] 7 U.S.C. 2(c)(2)(E)(ii)(I).

[611] 7 U.S.C. 2(c)(2)(E)(iii)(II).

[612] Individuals also are covered by a different prong of the ECP definition. An individual can qualify as an ECP under clause (A)(xi) of the ECP definition. *See* CEA section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi).

[613] There are two other ways a person can qualify as an ECP under clause (A)(v): (i) being an entity with total assets exceeding $10 million; or (ii) being an entity the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity with total assets exceeding $10 million or an entity described in clause (A)(i), (ii), (iii), (iv) or (vii), or paragraph (C), of the ECP definition. *See* CEA section 1a(18)(A)(v)(I) and (II), 7 U.S.C. 1a(18)(A)(v)(I) and (II), respectively.

[614] Proposing Release, 75 FR at 80185.

such Forex Pool has any participant that is not an ECP and, therefore, is not an ECP due to the look-through provision added to clause (A)(iv). Further, because commodity pools can be structured in various ways and can have one or more feeder funds and/or pools, the Commissions proposed to preclude a Forex Pool from being an ECP for purposes of retail forex transactions if there was any non-ECP participant at any level of the pool structure (*e.g.,* the pool itself, a direct participant that invests in the pool, or any indirect participant that invests in that pool through other pools or vehicles).

3. Commenters' Views

One commenter supported the Commissions' efforts to close the potential loophole of Forex Pools that are unable to qualify as ECPs due to the new look-through provision in clause (A)(iv) of the ECP definition instead qualifying as ECPs under clause (A)(v) of the ECP definition.[615] This commenter indicated that it shares the Commissions' concern that Forex Pools that do not satisfy the amended ECP definition due to the look-through provision for commodity pools in clause (A)(iv) may alternatively rely upon clause (A)(v) of the ECP definition to qualify as an ECP for purposes of retail forex transactions.[616] This commenter further stated that Congressional intent in requiring a look-through for Forex Pools would be frustrated if fraudulent pool operators could avail themselves of this alternative.[617]

However, several commenters recognized the importance of the concern about a potential loophole[618] but stated that the Commissions should revise the proposal to mitigate the potential adverse consequences to market participants. One commenter, for example, commented on the expected effects of the proposed rule on funds of funds (''FOFs'').[619] According to this commenter, FOFs (i) normally face as counterparties foreign subsidiaries of U.S. banks and foreign banks, and (ii) would incur substantial counterparty, documentation and operational costs in moving their retail forex transactions onto DCMs or toward the Enumerated Counterparties.

In a similar vein, two commenters advised that a substantial number of hedge funds, as well as publicly offered commodity pools, would, under the Commissions' proposal, fail to qualify as ECPs for purposes of retail forex transactions, as most such funds have at least one direct or indirect non-ECP participant.[620] These commenters indicated that this would disrupt the trading strategies employed by many commodity trading advisors (''CTAs'') on behalf of commodity pools.[621] One of these commenters suggested an anti-evasion approach combining a lower level of pool assets with a requirement that the commodity pool not be formed for the purpose of evading the regulatory requirements applicable to retail forex transactions.[622]

Another commenter argued that Congress did not include the look-through provision in clause (A)(v) of the ECP definition because of its effect on bona fide hedgers.[623] This commenter also advised that the primary entities affected are hedge fund and private equity fund managers investing in securities who use retail forex transactions solely to hedge investment portfolio currency risks, and/or because they accept subscriptions in currencies other than U.S. dollars.[624]

Several commenters disagreed with the Commissions' statement in the proposal that extending the look-through provision in clause (A)(iv) of the ECP definition to clause (A)(v) would effectuate Congressional intent. Two commenters noted that there is no specific Dodd-Frank Act provision requiring such a change.[625] Two other commenters argued that clause (v) of the ECP definition provides an independent basis for qualification as an ECP, which should not be affected by the changes in clause (A)(iv) of the ECP definition.[626]

One commenter indicated that the extraterritorial application of the proposed rules regarding the ECP definition is unclear.[627] Among other things, this commenter indicated it is unnecessary to extend the scope of the look-through to protect possible retail investors outside of the U.S., especially where a CPO has not marketed a pool in the U.S. and does not otherwise have any U.S. investors.[628]

Commenters proposed several alternative approaches that they believed would address the Commissions' concerns. One commenter suggested that the Commissions create a new category of ECPs for Forex Pools comprised entirely of qualified eligible persons (''QEPs'')[629] and operated by persons subject to regulation under the CEA.[630] This commenter also suggested that the Commissions create a new category of ECPs for Forex Pools that satisfy a monetary threshold for total assets or for the minimum initial investment of a Forex Pool to be sufficiently large that, in general, only legitimate pools would exceed such thresholds.[631] Finally, this commenter suggested that the Commissions create a category of ECPs

[615] *See* letter from the NFA. The NFA indicated that it recently took separate emergency actions against two firms that did not qualify under the NFA's requirements for retail forex transactions. In one case, the commodity pool fell short of the $5 million total asset requirement in clause (A)(iv) of the ECP definition; in the other case, the firm never properly formed a commodity pool. The NFA cautioned in its letter, ''these cases illustrate that firms will attempt to obtain ECP status to shield themselves from the jurisdiction of regulators to the detriment of pool participants.''

[616] *Id.*

[617] *Id.*

[618] *See, e.g.,* letters from SIFMA—AMG dated September 15, 2011 (''SIFMA AMG IV'') (acknowledging some form of ECP look-through is appropriate to prevent evasion where circumvention otherwise could occur and stating that it is sympathetic to the Commissions' implicit objective of ensuring that a person that would not qualify as an ECP not be permitted to accomplish indirectly what it is not permitted to do directly), Sidley Austin LLP (''Sidley'') (stating that the commenter fully appreciates that Congress added the look-through language to the ECP definition to prevent unscrupulous forex market participants from avoiding the retail forex provisions of the CEA and the CFTC's rules by ''engineering'' an ECP by pooling the capital of a large group of retail customers, thus depriving those investors of the protections otherwise afforded to them), AIMA I (stating that ''we understand Congress has made a decision to try to protect retail investors by amending the definition of ECP under Section 1a(1[8]) of the [CEA] to include that, for a commodity pool to qualify as an ECP under sub-section (A)(iv), the pool's underlying participants must also qualify as ECPs under section 1a(1[8])).''

[619] *See* letter from Sidley. Sidley noted that FOF managers' retail forex transactions are largely undertaken for hedging purposes and that most FOF managers offer investments to non-U.S. persons, a significant number of which pay for their investments in FOF interests using their own currency. Sidley further noted that, because most FOFs accept investments only in U.S. dollars, FOF managers must convert to U.S. dollars the foreign currency received from such investors and invest those dollars in underlying funds, and that they enter into a hedging transaction to reduce the risk of exchange rate changes between an investor's currency and the U.S. dollar.

[620] *See* letters from Willkie Farr & Gallagher LLP (''Willkie Farr'') and the NYCBA Committee.

[621] *Id.*

[622] *See* letter from Willkie Farr.

[623] *See* letter from Akin Gump Strauss Hauer & Feld LLP (''Akin Gump'').

[624] *Id.*

[625] *See* letters from AIMA I and Ropes & Gray LLP (''Ropes & Gray'').

[626] *See* letters from Akin Gump, Sidley and Skadden, Arps, Slate, Meagher & Flom LLP (''Skadden''). Sidley also indicated that there seems to be no compelling reason to treat commodity pools worse than other sophisticated market participants with respect to retail forex transactions with non-Enumerated Counterparties, and no reason to treat them worse than a corporation or other entity with only $10 million in total assets that therefore qualifies as an ECP under clause (A)(v) of the ECP definition to trade retail forex transactions although it may have no particular expertise in such markets.

[627] *See* letter from AIMA I.

[628] *Id.*

[629] The term ''qualified eligible person'' is defined in CFTC Regulation §§ 4.7(a)(2) and (3).

[630] *See* letter from Sidley.

[631] *Id.*

for non-U.S. persons.[632] A second commenter suggested that the Commissions create a category of ECPs for commodity pools that are operated by a CPO or advised by a CTA subject to regulation by a foreign regulator comparable to the CFTC.[633]

One commenter suggested (i) allowing commodity pools and their counterparties to rely, for the duration of an investment and each time commodity pool participants make an investment decision, on participant ECP representations provided in connection with an initial investment, provided that each participant covenants to update such representations if they become inaccurate, and (ii) providing specific relief for FOFs because they generally invest all or substantially all of their assets in underlying portfolio funds and use retail forex transactions to reduce foreign exchange exposure.[634]

4. Final Rule

After considering commenters' concerns, the Commissions are adopting final rules that have been revised from the proposal. In particular, consistent with the statutory text of the Dodd-Frank Act, CFTC Regulation § 1.3(m)(5)(i) further defines the term ''eligible contract participant'' to prohibit a Forex Pool that directly enters into a retail forex transaction (*i.e.,* a transaction-level commodity pool)[635] from qualifying as an ECP under clause (A)(iv) or clause (A)(v) of the ECP definition, solely for purposes of entering into retail forex transactions, if the pool has one or more direct participants that are not ECPs. In response to commenters' concerns described above, CFTC Regulation § 1.3(m)(5)(ii) is revised to provide that, in determining whether a commodity pool that is a direct participant in a transaction-level Forex Pool is an ECP, the indirect participants in the transaction-level Forex Pool[636] will not be considered unless such Forex Pool, a commodity pool holding a direct or indirect (through one or more intermediate tiers of pools) interest in such Forex Pool, or any commodity pool in which such Forex Pool holds a direct or indirect interest has been structured to evade Subtitle A of Title VII of the Dodd-Frank Act by permitting persons that are not ECPs to participate in agreements, contracts, or transactions described in section 2(c)(2)(B)(i) or section 2(c)(2)(C)(i) of the Commodity Exchange Act. That is, absent evasion, the Commissions are changing the proposed ''indefinite look-through'' to an ''evasion-based look-through'' in the final rule.[637]

In adding the look-through provision to the commodity pool prong of the ECP definition, Congress made a decision to protect retail foreign exchange investors by requiring that the participants in a Forex Pool qualify as ECPs for the Forex Pool itself to qualify as an ECP. The Commissions believe that the intent of the look-through provision—protecting Forex Pool participants from fraudulent and abusive conduct—must be given effect to comply with this Congressional mandate. Nevertheless, the Commissions acknowledge commenters' concerns about potential unintended consequences of applying an indefinite look-through to every direct and indirect participant of a Forex Pool, as proposed. Accordingly, to avoid unintended consequences and related costs for Forex Pools whose operators and managers have not historically presented the risks that the look-through provision was intended to address,[638] the Commissions are replacing the proposed indefinite look-through of every participant in a Forex Pool with a limited, evasion-based look-through pursuant to which a transaction-level Forex Pool will qualify as an ECP, for purposes of retail forex transactions, if all of such Forex Pool's direct participants are ECPs, and will look through a commodity pool participant in such Forex Pool only if it, at any level, has been structured to evade the look-through provision in clause (A)(iv) of the ECP definition.

The Commissions believe the final rule strikes the right balance between implementing strong protections for non-ECP commodity pool participants and not imposing undue burdens or costs on CPOs, CTAs and commodity pool participants related to retail forex transactions. In addition, the Commissions believe that replacing the indefinite look-through with the limited, evasion-based look-through alleviates many of the commenters' concerns. Accordingly, the Commissions believe it is appropriate to limit the look-through provision to the level of a commodity pool structure that enters into retail forex transactions and to look through commodity pools to their ultimate participants only in those

[632] *Id.* Sidley cited to the approach in Regulation S under the Securities Act (17 CFR 230.901 *et seq.*), Sections 3(c)(1) and (7) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)(1) and (7)), and CFTC Regulation § 4.7(a)(2)(xi).

[633] *See* letter from Willkie Farr.

[634] *See* letter from Sidley.

[635] Commodity pool structures can take various forms. One common commodity pool structure is a ''master-feeder'' fund structure. In such a structure, investors purchase interests in ''feeder funds,'' which in turn purchase interests in a ''master fund.'' Typically, the only fund in a commodity pool structure that enters into retail forex transactions (and other transactions) directly is the master fund; the feeder funds (and their investors) typically would participate indirectly by receiving the profit or loss from such retail forex transactions (and other transactions) as distributions based on the feeder funds' interests in the master fund. Notwithstanding that the master-feeder structure is common, other structures exist. Thus, each fund in a commodity pool structure that directly enters into retail forex transactions is a transaction-level commodity pool.

[636] A fund that does not itself engage in retail forex transactions but that holds an interest in a transaction-level Forex Pool that engages in retail forex transactions is itself a commodity pool. *Cf.* U.S. Regulation of the International Securities and Derivatives Markets—Greene, Beller, Rosen, Silverman, Braverman and Sperber, § 12.13[1], n.351 and related text.

[637] The Commissions caution, however, that they will closely monitor developments in this part of the market and will not hesitate to revisit their decision to limit the look-through provision pursuant to 1.3(m)(5)(ii) should they observe a pattern of evasion or misconduct.

[638] The proposed rule was based on the CFTC's longstanding, broad view of what constitutes a ''pool,'' a view recently codified in the ''commodity pool'' definition by section 721(a)(5) of the Dodd-Frank Act in CEA section 1a(10), 7 U.S.C. 1a(10), and recognized by courts, and thus applied the look-through provision at each level of a Forex Pool's investment structure. *See* CFTC, Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 77 FR 11252 (Feb. 24, 2012) (''CPO/CTA Compliance Release'') (advising that ''it is the position of the [CFTC] that a fund investing in an unaffiliated commodity pool it itself a commodity pool'' and ''[t]his interpretation is consistent with the statutory definition of commodity pool, which draws no distinction between direct and indirect investments in commodity interests''); *CFTC* v. *Equity Financial Group,* 572 F.3d 150, 157–158 (July 13, 2009) (concluding, in the context of a commodity pool that invested all of its assets with a commodity pool operated by a different CPO, that the CFTC's commodity pool regulations ''cover pools that invest in other pools'' and that ''the remedial purposes of the statute would be thwarted if the operator of a fund could avoid the regulatory scheme simply by investing in another pool rather than trading''). The same logic applies to a master-feeder structure operated by the same CPO: the remedial purpose of the look-through proviso in clause (A)(iv) of the statutory ECP definition would be thwarted if the look-through could be defeated simply by funneling pool participants into a master fund through a feeder fund.

The proposed rule also was borne of the CFTC's long history of combating fraudulent practices by typically unregistered individuals or entities that prey upon often unsophisticated retail customers through complex and highly leveraged off-exchange transactions in foreign currency. However, the operators and managers of commodity pool FOFs, master-feeder structures and hedge funds for sophisticated investors have not generally been the subject of CFTC enforcement actions with respect to retail forex transactions. For an in depth discussion of the history of the CFTC's authority over retail forex transactions, the abuses giving rise to that authority, and related enforcement actions, *see* CFTC, Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 3282 (Jan. 20, 2010). Congress acted three times in a decade to clarify the CFTC's authority to prosecute the rampant fraud seen in this area—first in the Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000) in 2000, then again in the CRA, and finally in the Dodd-Frank Act in 2010.

cases in which it is required to prevent evasion of the protections for those persons whom Congress intended to be subject to retail forex transactions restrictions.

At the same time, the Commissions do not believe that Forex Pools failing to qualify as ECPs due to the look-through provision in clause (A)(iv) of the ECP definition should, nonetheless, be permitted unfettered access to ECP status under clause (A)(v).[639] The look-through provision for Forex Pools provides heightened investor protection from forex fraud for Forex Pool participants that are not themselves ECPs. Thus, the Commissions believe that permitting Forex Pools with one or more non-ECP participants to achieve ECP status by relying on clause (A)(v) of the ECP definition, which applies to business entities generally, would serve to undermine the look-through provision that Congress specifically imposed on Forex Pools under clause (A)(iv).[640]

Moreover, developments subsequent to the issuance of the Proposing Release should ameliorate commenters' concerns that CEA section 2(c)(2)(E)(ii)(I) significantly limits the universe of possible retail forex transaction counterparties.[641] At the time the Commissions issued the Proposing Release and throughout the comment period, the CFTC was the only Federal regulatory agency that had issued final rules governing retail forex transactions by its regulated persons and entities.[642] Since then, though, both the OCC and the FDIC finalized (effective July 15, 2011) rules governing retail forex transactions by Enumerated Counterparties regulated by those agencies.[643] In addition, the SEC has issued interim temporary final rules (also effective July 15, 2011) governing retail forex transactions by registered broker-dealers.[644] Also, the Federal Reserve Board proposed rules to govern retail forex transactions by its regulated banks on August 3, 2011.[645] As a result of these regulatory actions, Forex Pools that are not ECPs due to the look-through provision and who are subject to a counterparty limitation[646] may enter into retail forex transactions with any Enumerated Counterparty but for those regulated by the Federal Reserve Board.[647]

The Commissions believe that the final rules reasonably address commenters' concerns. In this regard, the Commissions note that in applying the look-through provision, the Commissions will consider the indirect participants in a transaction-level Forex Pool if such Forex Pool, a commodity pool holding a direct or indirect (through one or more intermediate tiers of pools) interest in such Forex Pool, or any commodity pool in which such Forex Pool holds a direct or indirect interest has been structured to evade Subtitle A of Title VII of the Dodd-Frank Act by permitting persons that are not ECPs to participate in agreements, contracts, or transactions described in section 2(c)(2)(B)(i) or section 2(c)(2)(C)(i) of the Commodity Exchange Act. One example of a scheme to evade would be if a commodity pool tier has been included in the structure of the Forex Pool primarily to provide non-ECP participants exposure to retail forex transactions rather than to achieve any other legitimate business purpose.[648] One example of a ''legitimate business purpose'' that would not trigger the look-through provision is a FOF operated primarily for the purpose of investing in underlying funds and using retail forex transactions solely to hedge the currency risk posed by an unfavorable change in the exchange rate between the currency in which underlying funds accept investments and the currency in which FOF investors pay for their investments in the FOF.[649] Similarly, the Commissions would not consider a commodity pool using retail forex transactions solely for bona fide hedging purposes[650] with

[639] In section 712(d)(2)(A) of the Dodd-Frank Act, Congress granted the Commissions the authority to adopt such rules regarding the ECP definition as the Commissions determine are necessary and appropriate, in the public interest, and for the protection of investors.

[640] The Commissions note that several commenters requested clarification regarding the relationship between the look-through provision set forth in CFTC Regulation § 1.3(m)(5) and the prohibition on a commodity pool qualifying as an ECP under clause (A)(v) of the ECP definition if it does not qualify as an ECP under clause (A)(iv) of the ECP definition set forth in CFTC Regulation § 1.3(m)(6). *See, e.g.,* meeting with SIFMA—AMG on August 2, 2011. The look-through provision is limited to determining ECP status under clause (A)(iv) or clause (A)(v) of the ECP definition for purposes of retail forex transactions entered into by Forex Pools. The look-through provision does not reference or implicate ECP status for purposes of CEA section 2(e) (which prohibits non-ECPs from entering into swaps other than on or subject to the rules of a DCM), Securities Act section 5(d) (which prohibits a person from offering to sell, offering to buy or purchase, or selling a security-based swap to a person that is a non-ECP unless a registration statement under the Securities Act is in effect with respect to that security-based swap), or Exchange Act section 6(l) (which prohibits a person from effecting a transaction in a security-based swap with or for a person that is a non-ECP unless the transaction is effected on a national securities exchange registered with the SEC). The prohibition in CFTC Regulation § 1.3(m)(6) on a commodity pool qualifying as an ECP under clause (A)(v) of the ECP definition if it does not qualify as an ECP under clause (A)(iv) of the ECP definition does not involve any look-through. Rather, in contrast with CFTC Regulation § 1.3(m)(5), CFTC Regulation § 1.3(m)(6) applies for purposes of all agreements, contracts and transactions for which ECP status is relevant. *See* part III.C, *infra,* for a discussion of the prohibition on a commodity pool qualifying as an ECP under clause (A)(v) of the ECP definition if it does not qualify as an ECP under clause (A)(iv) of the ECP definition.

[641] *See also* part III.G, *infra,* discussing CFTC Regulation § 1.3(m)(8), one effect of which is to eliminate the retail forex transaction counterparty restriction for Forex Pools qualifying as ECPs.

[642] *See generally* Part 5 of the CFTC's regulations, 17 CFR 5, and CFTC, Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55410 (Sept. 10, 2010). *See also* CFTC, Retail Foreign Exchange Transactions; Conforming Changes to Existing Regulations in Response to the Dodd-Frank Wall Street Reform and Consumer Protection Act 76 FR 56103 (Sept. 12, 2011).

[643] *See* FDIC, Retail Foreign Exchange Transactions, 76 FR 40779 (July 12, 2011) (final FDIC retail forex rules); OCC, Retail Foreign Exchange Transactions, 76 FR 41375 (July 14, 2011) (final OCC retail forex rules); *see also* OCC, Retail Foreign Exchange Transactions, 76 FR 56094 (Sept. 12, 2011) (interim final OCC retail forex rules for federal savings associations and their operating subsidiaries).

[644] *See* SEC, Retail Foreign Exchange Transactions, 76 FR 41676 (July 15, 2011). In the release accompanying the rules, the SEC requested comment on broker-dealers' involvement in retail forex transactions to inform the SEC in developing permanent rules to regulate these activities. *See id.* at 46181–83.

[645] *See* Board, Retail Foreign Exchange Transactions (Regulation NN), 76 FR 46652 (Aug. 3, 2011) (proposed Board rules for retail forex transactions).

[646] *See* part III.B.1, *supra,* discussing the applicability of the counterparty limitation.

[647] Of course, upon the Board's finalization of its retail forex rules, U.S. financial institutions regulated by the Board also will be acceptable counterparties.

[648] Feeder funds are usually added to commodity pool structures for purposes such as tax efficiency. A master-feeder structure ''[permits] U.S. taxable investors to take advantage of investing in a U.S. limited partnership feeder fund, which[,] through certain elections made at the time the structure is established, is tax effective for such U.S. taxable investors'' and ''[permits] [n]on-U.S. and U.S. tax-exempt investors [to] subscribe via a separate offshore feeder company so as to avoid coming directly within the U.S. tax regulatory net applicable to U.S. taxable investors.'' Effie Vasilopoulos & Katherine Abrat, *The Benefits of Master-Feeder Fund Structures for Asian-based Hedge Fund Managers,* Hedge Fund Monthly (April 2004), available at *http://www.eurekahedge.com/news/04apr_archive_Sidley_master_feeder.asp.* Other benefits can include efficiencies gained by the use of only a single trading entity, avoiding the need to split trade tickets, eliminating the need to duplicate agreements with counterparties and greater economies of scale in administering the fund. *Id.*

[649] Sidley notes that the typical FOF operates in this manner. *See generally* letter from Sidley for a more detailed discussion of these transactions.

[650] In this context, bona fide hedging purposes means bona fide hedging purposes within the meaning and intent of CFTC Regulation § 1.3(z)(1), except that the requirement therein that the transaction or position be on a DCM or SEF that is a trading facility will not be a factor in the bona fide hedging purpose analysis. *Compare* CFTC Regulation § 4.5(c)(2)(iii)(A) (relying in part on the bona fide hedging concepts in CFTC Regulations §§ 1.3(z)(1) and 151.5 to provide relief from the CPO definition). *See also* CPO/CTA Compliance Release

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respect to currency risk as being structured to avoid the look-through provision.[651] The ''participate in agreements, contracts, or transactions described in section 2(c)(2)(B)(i) or section 2(c)(2)(C)(i) of the Act'' language of CFTC Regulation § 1.3(m)(5)(ii) is aimed at exposure to retail forex transactions as an asset class, investment strategy, or an end in itself, not at exposure to retail forex transactions solely designed for bona fide hedging purposes with respect to foreign exchange exposure arising in the course of a commodity pool's business.[652]

In applying the limited look-through provision in the final rule, the Commissions would consider a Forex Pool's direct participants to include not only persons that initially hold interests in the level of the commodity pool structure that enters into retail forex transactions, but also persons that can acquire those interests or that subsequently hold those interests. As applied to exchange-traded products (''ETPs'') that are Forex Pools, any person that acquires an interest in the ETP Forex Pool in secondary market transactions would be a direct participant. ETPs typically issue shares only in the large aggregations or blocks (such as 50,000 ETP shares) called ''Creation Units.'' An authorized purchaser, usually an investment bank, broker dealer or large institutional investor, may purchase a Creation Unit. After purchasing a Creation Unit, the authorized purchaser may hold the Creation Unit, or sell some or all of the ETP shares in the Creation Unit to investors in secondary market transactions by splitting up the Creation Unit and selling the individual ETP shares on a national securities exchange or in off-exchange transactions. The ability to break up the Creation Unit into ETP shares permits other investors, such as non-ECPs, to purchase the individual ETP shares in secondary market transactions.

All participants in an ETP Forex Pool must be ECPs when they purchase or otherwise acquire an interest in the ETP Forex Pool. In addition, an ETP Forex Pool will not be able to verify whether the persons that acquire interests in the ETP Forex Pool in exchange transactions are ECPs. The ability of non-ECPs to acquire interests in an ETP Forex Pool and the inability of the ETP Forex Pool to verify ECP status with respect to exchange transactions create a presumption that ETP Forex Pools are not ECPs and, therefore, are Retail Forex Pools. This presumption would not apply in the case of a Forex Pool that is structured in a manner that does not involve exchange trading and in which the Forex Pool would be able to verify the ECP status of its participants.

One commenter suggested that the Commissions allow commodity pools and their counterparties to rely on participant ECP representations provided in connection with an initial investment.[653] The Commissions note that the obligation to determine that the parties to retail forex transactions are ECPs is imposed on the CPOs of Forex Pools and the counterparties looking to enter into retail forex transactions with Forex Pools. In making that determination, the Commissions expect CPOs and retail forex transaction counterparties to Forex Pools to be guided by the principles for verifying the ECP status of a swap dealer's or major swap participant's counterparty discussed in the CFTC's recently adopted external business conduct standards, including the safe harbor.[654] Thus, solely for purposes of CEA section 1a(18)(A)(iv) and CFTC Regulation § 1.3(m)(5), the Commissions will permit CPOs and retail forex transaction counterparties to rely on written representations from, as applicable, pool participants or potential pool participants that the person making the representation is an ECP (or is a non-U.S. person; as discussed below in this section III.B.4., solely for purposes of CEA section 1a(18)(A)(iv) and CFTC Regulation § 1.3(m)(5), the Commissions will consider Forex Pools whose participants are limited solely to non-U.S. persons (and which are operated by CPOs located outside of the U.S., its territories or possessions) to be ECPs), or from Forex Pools that the Forex Pool is an ECP, provided that the CPO or retail forex transaction counterparty has a reasonable basis to so rely, just as swap dealers and major swap participants are permitted to do pursuant to the safe harbor in new CFTC Regulation § 23.430(d), 17 CFR 23.430(d). Solely for purposes of CEA section 1a(18)(A)(iv) and CFTC Regulation § 1.3(m)(5), a CPO or retail forex transaction counterparty will have a reasonable basis to rely on such written representations if the person making the representation specifies therein the provision(s) of, as applicable, section 1a(18) of the CEA or CFTC Regulation § 4.7(a)(1)(iv) pursuant to which the person qualifies as an ECP or a non-U.S. person, respectively, unless it has information that would cause a reasonable person to question the accuracy of the representation.[655] Solely for purposes of CEA section 1a(18)(A)(iv) and CFTC Regulation § 1.3(m)(5), persons representing that they qualify as non-U.S. persons based on CFTC Regulation § 4.7(a)(1)(iv)(D) must represent that they are relying on such provision as modified as discussed below (*i.e.*, without the 10% carve-out for U.S. persons).

Furthermore, the CFTC recognizes that, despite a counterparty's reasonable good faith efforts to ensure that Forex Pools do not in fact have any U.S. participants, a situation may arise where a Forex Pool does turn out to have U.S. participants. If a counterparty has reasonable policies and procedures in place to verify the ECP status of Forex Pool counterparties and, notwithstanding such reasonable good faith efforts and following such policies and procedures, enters into retail forex transactions with such a Forex Pool in good faith and it was subsequently determined that U.S. participants represented no more than a *de minimis* number of participants or amount of ownership of the Forex Pool, absent other material factors, the CFTC would not expect to bring an enforcement action against the counterparty for entering into a retail forex transaction in contravention of the requirements of the retail forex regime. For purposes of this analysis only, and without this being viewed as a *de minimis* threshold for purposes of this rule or otherwise, the CFTC would consider as *de minimis,* ownership of units of participation of a Forex Pool held by U.S. participants of less than 10% of the beneficial interest in the Forex Pool. The fact that, absent other material factors, the CFTC would not expect to bring an enforcement action against a forex transaction counterparty in such case does not

at 11256–11257 (discussing and declining to adopt commenters' request to expand the definition of bona fide hedging to include risk management). Where a Forex Pool's counterparty, but not the Forex Pool, is hedging its risks, it is not the case that the Forex Pool is entering the retail forex transaction solely to hedge its own risk.

[651] The examples mentioned in text should not be construed to mean that any other fact pattern does or does not constitute evasion, which must be determined on a case-by-case basis.

[652] Based on the same reasoning, the Commissions do not believe it was the intent of the look-through proviso in CEA section 1a(18)(A)(iv) to subject to a retail forex regime a single level commodity pool engaging in retail forex transactions solely for bona fide hedging purposes with respect to foreign exchange exposure arising in the course of a commodity pool's operations. Consequently, the Commissions will interpret such a commodity pool as an ECP if it otherwise satisfies the terms of CEA section 1a(18)(A)(iv) even if such a pool has one or more non-ECP participants.

[653] *See* letter from Sidley.

[654] *See* CFTC, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties; Final Rule, 77 FR 9733 (Feb. 17, 2012).

[655] *Cf.* CFTC Regulation §§ 23.430(d), 23.402(d).

relieve any obligation on the part of the CPO of the Forex Pool either to register as a CPO, claim the 4.13(a)(3) exemption therefrom or redeem the U.S. participants as described above.

One commenter suggested that the Commissions allow commodity pools and their counterparties to rely on participant ECP representations provided in connection with an initial investment.[656] The Commissions believe that if participants make ECP representations in connection with an initial investment in a Forex Pool, absent an additional investment (which would require a new ECP verification, other than in the case of automatically reinvested distributions), the subsequent loss of a participant's ECP status would not cause the Forex Pool to lose its own ECP status for purposes of retail forex transactions so long as the operating agreement of the Forex Pool or the subscription or other agreement pursuant to which the participant invested in the Forex Pool requires the participant to advise the CPO of the Forex Pool promptly of a loss of the participant's ECP status. In the event of the loss of ECP status of a participant, the CPO would be required to redeem the non-ECP from the Forex Pool at the first opportunity following notification to avoid the Forex Pool losing its ECP status for subsequent retail forex transactions.

The Commissions are mindful that several commenters indicated that CPOs do not customarily include a question or representation as to ECP status in subscription agreements for pool participants, and stated that requiring CPOs to qualify or redeem existing participants due to the new look-through provision would be expensive, burdensome and disruptive.[657] In this regard, the Commissions note that the look-through requirement for commodity pools was imposed by statute. As a result of the Commissions adopting the limited look-through in the final rule (as compared to the proposed indefinite look-through), however, the number of commodity pools subject to the look-through provision should be dramatically reduced, reducing the number of pools subject to regulation of their retail forex transactions, and the associated costs, accordingly.[658]

Also, in response to commenter concerns that the look-through provision would be applied to entities other than commodity pools (*e.g.*, operating companies),[659] the Commissions revised the text of CFTC Regulation § 1.3(m)(5)(i) to reflect their intent to apply the look-through provision solely to commodity pools qualifying as ECPs, if at all, under clause (A)(iv) and clause (A)(v) of the ECP definition.[660] This is consistent with the statutory text, which is limited to looking through commodity pools under clause (A)(iv) of the ECP definition, and the intent behind the look-through provision, as it relates to clause (A)(v) thereof.

Commenters also stated that Retail Forex Pools will no longer be able to enter into retail forex transactions with foreign financial institutions.[661] As discussed in section III.B.1. above, however, this is not the case with respect to retail forex transactions described in CEA section 2(c)(2)(C)(i)(I)(bb). With respect to retail forex transactions described in CEA section 2(c)(2)(B)i)(I), this is a consequence of the express statutory text of the Dodd-Frank Act, which removed non-U.S. financial institutions from the list of Enumerated Counterparties eligible to enter into retail forex transactions with non-ECPs.[662]

Commenters further suggested generally that the Commissions create additional categories of ECPs to address the Commissions' concerns regarding the potential loophole of Retail Forex Pools that are unable to qualify as ECPs due to the new look-through provision in clause (A)(iv) of the ECP definition qualifying as an ECP under clause (A)(v) of the ECP definition. While one commenter proposed adopting a new rule clarifying that Forex Pools comprised entirely of QEPs and operated by persons subject to regulation under the CEA are ECPs,[663] Congress chose to look to ECP status of Forex Pool participants, not QEP status, as the basis for determining whether such Forex Pools are ECPs. Therefore, it is more appropriate to rely on Retail Forex Pool participants' ECP status than to rely on QEP status to establish ECP status.

One commenter stated a concern regarding what it characterized as the lack of clarity surrounding the extraterritoriality impact of the proposed ECP rules.[664] The Commissions recognize the potential consequences of the broad look-through language in CEA section 1a(18)(A)(iv)[665] and are providing guidance as to the application of the look-through to Forex Pools whose participants are limited solely to non-U.S. persons and which are operated by CPOs located outside the United States, its territories or possessions.

As discussed below, while foreign entities are not necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets, canons of statutory construction ''assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws,''[666] particularly when limited U.S. interests are at stake.[667]

[656] *See* letter from Sidley. The Commissions note that the obligation to determine that the parties to retail forex transactions are ECPs is imposed on the CPOs of Forex Pools and the persons looking to engage in retail forex transactions with Forex Pools.

[657] *See, e.g.*, letter from SIFMA AMG IV.

[658] The adoption of CFTC Regulation § 1.3(m)(8), discussed in part III.G, *infra,* also should reduce the number of pools subject to regulation of their retail forex transactions, and the associated costs, accordingly.

[659] *See, e.g.*, letter from Sandalwood Securities, Inc. (expressing concern that ''the Proposed Rule extends Dodd-Frank's limited look-through provision to all sub-sections of section la(12)'').

[660] Thus, for example, investment companies qualifying under clause (A)(iii) of the ECP definition and employee benefit plans qualifying under clause (A)(vi) of the ECP definition (and, as stated in each clause, ''a foreign person performing a similar role or function subject as such to foreign regulation'') would not be covered by the look-through provision. To the extent that other entities would otherwise be captured by the look-through as proposed (such as collective investment trusts whose investors are ERISA plans not excluded from the commodity pool definition by CFTC Regulation § 4.5(a)(4) and which qualify as ECPs under clause (A)(v) of the ECP definition), the Commissions believe that focusing on the level of the Forex Pool entering into the retail forex transactions, and such Forex Pool's direct participants (absent evasion), should alleviate such concerns.

[661] *Cf.* letters from Sidley and Millburn Ridgefield Corporation (''Millburn'').

[662] *See* section 742(c) of the Dodd-Frank Act, amending CEA section 2(c)(2)(B)(i)(II)(aa), 7 U.S.C. 2(c)(2)(B)(i)(II)(aa).

[663] *See* letter from Sidley. This commenter also suggested deeming non-U.S. persons to be ECPs by definition. The Commissions have addressed this comment below in this section in response to the comment regarding the extraterritorial impact of the proposed ECP rules.

[664] *See* letter from AIMA I.

[665] 7 U.S.C. 1a(18)(A)(iv).

[666] *See F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.,* 542 U.S. 155, 164 (2004), *citing Murray* v. *Schooner Charming Betsy,* 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (''[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains''); *Hartford Fire Insurance Co.* v. *California,* 509 U.S. 764 (1993) (Scalia, J., dissenting). *See also* Restatement (Third) Foreign Relations Law § 403 (scope of a statutory grant of authority must be construed in the context of international law and comity including, as appropriate, the extent to which regulation is consistent with the traditions of the international system).

[667] *See also* CFTC, Exemption From Registration for Certain Foreign Persons, 72 FR 63976 (Nov. 14, 2007) (where the CFTC stated that:

Given this agency's limited resources, it is appropriate at this time to focus [the Commission's] customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such areas)

Continued

The Commissions do not believe that Congress intended for Forex Pools with no U.S. participants and operated by CPOs located outside the United States, its territories or possessions to be subject to a U.S. retail forex regime and, therefore, will consider Forex Pools whose participants are limited solely to non-U.S. persons and which are operated by CPOs located outside the United States, its territories or possessions to be ECPs for purposes of CFTC Regulation § 1.3(m)(5). For this purpose, a Forex Pool participant is a non-U.S. person if it satisfies the definition of ''Non-United States person'' in CFTC Regulation 4.7(a)(1)(iv); *provided, however,* that, if a participant is an entity organized principally for passive investment, such as a pool, investment company or other similar entity, such entity will be considered to be a Non-United States person under paragraph (D) of CFTC Regulation 4.7(a)(1)(iv) for purposes of CFTC Regulation § 1.3(m)(5) solely if all units of participation in such passive investment vehicle participant are held by Non-United States persons.[668] A broader interpretation or relief is not appropriate at this time.[669]

C. ECP Status for Commodity Pools Under Clause (A)(v) vs. Under Clause (A)(iv) of the ECP Definition

1. Proposed Approach

The Commissions stated in the Proposing Release that they believe ''some commodity pools unable to satisfy the total asset or regulated status components of clause (A)(iv) of the ECP definition may rely on clause (A)(v) to qualify as ECPs instead.''[670] The Commissions further stated in the Proposing Release that ''a commodity pool that cannot satisfy the monetary and regulatory status conditions prescribed in clause (A)(iv) should not qualify as an ECP in reliance on clause (A)(v) of the ECP definition.''[671] Based on those views, the Commissions proposed to further define the term ''eligible contract participant'' to prevent such a commodity pool from qualifying as an ECP pursuant to clause (A)(v) of the ECP definition. This proposal applied to all commodity pools, not just Forex Pools engaged in retail forex transactions.

2. Commenters' Views

Two commenters argued that, had Congress wished to prevent commodity pools from relying on the general ECP provision for business entities in clause (A)(v), it could have expressly excluded commodity pools from clause (A)(v).[672] Another commenter attempted to illustrate that clause (A)(v) of the ECP definition is an independent basis for qualifying as an ECP by distinguishing clause (A)(v) from clause (A)(iv).[673]

One commenter expressed the view that it is unclear whether ''subject to regulation under this Act'' in CEA section 1a(18)(A)(iv)(II)[674] means a registered CPO or something else (*e.g.,* a person excluded from the definition of a CPO, a CPO exempt from registration conditioned in part upon making a filing to claim such relief).[675]

3. Final Rule

The Commissions are adopting CFTC Regulation § 1.3(m)(6) as proposed, which states that ''[a] commodity pool that does not have total assets exceeding $5,000,000 or that is not operated by a person described in subclause (A)(iv)(II) of section 1a(18) of the Act is not an eligible contract participant pursuant to clause (A)(v) of such Section.''[676] As noted, the Commissions are concerned that clause (A)(v) of the ECP definition may undermine the protections that specifically apply to commodity pool participants pursuant to the limitations on ECP status for commodity pools set forth in clause (A)(iv) of the ECP definition. Allowing a commodity pool that cannot satisfy the monetary and regulatory status conditions prescribed for commodity pools in clause (A)(iv) to qualify as an ECP under clause (A)(v) would undermine these protections.

The Commissions acknowledge the comments stating that clause (A)(v) of the ECP definition is an independent basis for qualifying as an ECP and that Congress did not explicitly provide that a commodity pool that fails to qualify as an ECP under clause (A)(iv) cannot do so under clause (A)(v). However, when specifically legislating for commodity pools, Congress determined that total assets of $5 million and operation by a person subject to regulation under the CEA (or a foreign equivalent) are necessary to assure appropriate protection for non-ECP participants in a commodity pool. Furthermore, the commenters' view that Congress's use of the disjunctive term ''or'' between clauses (A)(x) and (A)(xi) of the ECP definition means that an entity can rely on clause (A)(v) of the ECP definition, notwithstanding that such entity cannot satisfy a prong more specific to it, would largely render superfluous each clause under subparagraph (A) of the ECP definition other than clause (v) and clause (xi) (for individuals).[677] As such, the Commissions believe that the final rule adopted in this release is consistent with Congressional intent.

The Commissions also are mindful that one commenter expressed a concern that the Commissions' reliance on clause (A)(iv) of the ECP definition

(citing CFTC, Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; registration and Other Regulatory Requirements, 48 FR 35248, 35261 (Aug. 3, 1983)).

[668] CFTC Regulation § 4.7(a)(i)(iv)(D) lists the following as one category of non-United States person:

An entity organized principally for passive investment such as a pool, investment company or other similar entity; Provided, That units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool with respect to which the operator is exempt from certain requirements of part 4 of the Commission's regulations by virtue of its participants being Non-United States persons.

It would be inappropriate to disregard the presence of U.S. persons constituting as much as 10% of such entities' participants in the context of this interpretive guidance. As discussed elsewhere herein, however, entities described in CEA section 1a(18)(A)(iii) or (vi), 7 U.S.C. 1a(18)(A)(iii) or (vi), are not subject to the look-through and are ECPs irrespective of the ECP status of their participants.

[669] *Cf.* CPO/CTA Compliance Release at 11264 (stating that ''it is prudent to withhold consideration of a foreign advisor exemption until the [CFTC] has received data regarding such firms on Forms CPO–PQR and/or CTA–PR * * * to enable the [CFTC] to better assess [which] firms * * * may be appropriate to include within the exemption, should the [CFTC] decide to adopt one'').

[670] Proposing Release, 75 FR at 80185.

[671] *Id.*

[672] *See* letters from Sidley and Skadden.

[673] *See* letter from Akin Gump. Akin Gump noted that ''[a]s opposed to [clause] (A)(iv), [clause] (A)(v) includes as one means of satisfying its criteria that the entity be entering into a contract for hedging purposes.'' While correct, clause (A)(v) also includes as another means of satisfying its criteria that an entity enter into agreements, contracts or transactions in connection with the conduct of the entity's business, which would be a much lower standard.

[674] 7 U.S.C. 1a(18)(A)(iv)(II).

[675] *See* letter from SIFMA AMG IV. CEA Section 1a(18)(A)(iv)(II) refers to a commodity pool that ''is formed and operated by a person subject to regulation under this Act or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant) provided, however, that for purposes of section 2(c)(2)(B)(vi) and section 2(c)(2)(C)(vii), the term 'eligible contract participant' shall not include a commodity pool in which any participant is not otherwise an eligible contract participant.''

[676] The Commissions have made certain technical corrections to proposed CFTC Regulation § 1.3(m)(6)(i) as concerns its citations to the CEA.

[677] Interpreting statutory language as surplusage is disfavored. Effect should be given to every clause and word of a statute. *See Negonsott* v. *Samuels,* 507 U.S. 99 (1993).

might cause commodity pools to lose their ability to claim ECP status under clauses of the ECP definition, other than clause (v), and asked the Commissions to clarify the meaning of the phrase ''formed and operated by a person subject to regulation under the [CEA]'' in clause (A)(iv).[678] In response, the Commissions note that a commodity pool that does not qualify for ECP status under clause (A)(iv) of the ECP definition may still qualify as an ECP under either of the two clauses of the ECP definition other than clause (A)(v) applicable to subcategories of commodity pools. Thus, registered investment companies and foreign equivalents may qualify as ECPs under clause (A)(iii) of the ECP definition, and ERISA plans and the other entities described in clause (A)(vi) of the ECP definition may qualify as ECPs thereunder. The Commissions' actions in this release do not change that result.

Also, with regard to that commenter's request for clarification, for purposes of CFTC Regulation § 1.3(m)(6), the Commissions interpret the language ''subject to regulation under the [CEA]'' in clause (A)(iv) of the ECP definition as requiring lawful operation of the commodity pool by a person excluded from the CPO definition, a registered CPO, or a person properly exempt from CPO registration.[679] Congress did not limit ECP status under clause (A)(iv) to commodity pools operated by persons registered as CPOs; it used the more encompassing phrase ''subject to regulation'' under the CEA.[680] On the other hand, to construe that phrase to include any person operating a commodity pool would render the phrase superfluous.[681] The commenters' view would enable a CPO that fails to register as required to claim that the commodity pool it operates is an ECP under clause (A)(v) and thus is not subject to regulation of its retail forex transactions. The Commissions believe that construing the phrase ''formed and operated by a person subject to regulation under the [CEA]'' to refer to a person excluded from the CPO definition, registered as a CPO or properly exempt from CPO registration appropriately reflects Congressional intent.

D. Dealers and Major Participants as ECPs

1. Proposed Approach

The Commissions proposed to add swap dealers, security-based swap dealers, major swap participants and major security-based swap participants to the ECP definition on the basis that such persons ''are likely to be among the most active and largest users of swaps and security-based swaps.''[682]

2. Commenters' Views

Several commenters supported the proposed addition of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants to the ECP definition.[683] No commenter opposed this aspect of the proposal.

3. Final Rule

The Commissions are adopting the new ECP categories as proposed. The rules as adopted clarify that the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' and ''major security-based swap participant'' have their respective meanings as defined in the CEA and the Exchange Act and as otherwise further defined by the Commissions.[684]

E. Government Entities: Incorrect Cross-Reference

1. Description of the Issue

Clause (A)(vii) of the ECP definition conditions the ECP status of governmental entities, and their political subdivisions, agencies, instrumentalities and departments (collectively, ''government entities''), in part, on the identity of their counterparties. Specifically, a government entity may qualify as an ECP under the provision in clause (A)(vii) that requires the entity's counterparty to be ''listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii)'' of the CEA.[685] However, subclauses (I) through (III) of CEA section 2(c)(2)(B)(ii)[686] are unrelated to counterparty types (rather, they describe the dollar amounts that apply for purposes of retail forex transactions under CEA section 2(c)(2)(B)), and subclauses (IV) through (VI) of CEA section 2(c)(2)(B)(ii) no longer exist in the statute. Read literally, then, this provision of the ECP definition is inherently a nullity and, thus, cannot enable government entities to qualify as ECPs.[687]

2. Commenters' Views

One commenter traced the history of the relevant provisions and concluded that the reference to subclauses (I) through (VII) of CEA section 2(c)(2)(B)(ii) in clause (A)(vii) of the ECP definition is erroneous.[688] This commenter pointed instead to CEA section 2(c)(2)(B)(i)(II)[689] as the reference that should be included in clause (A)(vii) of the ECP definition because it lists the entities that are eligible to serve as counterparties in retail forex transactions.

This commenter noted that the cross-reference in clause (A)(vii) of the ECP definition was correct when it was added to the CEA as part of the CFMA, but that it became incorrect in 2008 when an unrelated amendment to the CEA was enacted[690] that changed the numbering of the CEA's provisions governing retail forex transactions but that failed to make a conforming amendment to clause (A)(vii) of the ECP definition. As a result of this 2008 amendment to the CEA, the list of entities that formerly appeared in subclauses (I) through (VI) of CEA sections 2(c)(2)(B)(ii) now appear in items (aa) through (ff) of CEA section

[678] *See* letter from SIFMA AMG IV.

[679] For these purposes, the Commissions would take the same approach to insignificant deviations from exemptive filings as the CFTC does in CFTC Regulation § 4.7(e).

[680] If the Commissions interpreted the ''subject to regulation under this Act'' language in CEA section 1a(18)(A)(iv)(II) to mean that the commodity pool operator must be registered as a CPO and limited CPOs to claiming ECP status solely under clause (iv) of the ECP definition, then the operators of all commodity pools trading swaps would have to register as CPOs to be ECPs. While more CPOs will be registering with the CFTC because the CFTC has withdrawn CFTC Regulation § 4.13(a)(4), *see* CPO/CTA Compliance Release, and the Dodd-Frank Act has expanded the scope of the transactions within the CFTC's jurisdiction, thus reducing the number of CPOs who can rely on the 5 percent threshold in CFTC Regulation § 4.13(a)(3) and thus claim the CPO registration exemption, the CFTC did not withdraw 4.13(a)(3), so some CPOs will be able to continue to rely on it. Also, not all persons operating commodity pools will be CPOs. *See* CFTC Regulation § 4.5 (exclusion from the definition of the term ''commodity pool operator''). The Commissions do not believe Congress intended commodity pool ECP status to require CPO registration by the commodity pools' operators in all cases.

[681] If the mere act of forming or operating a commodity pool means that a person is ''subject to regulation'' under the CEA, then the ''subject to regulation'' language would not be needed.

[682] Proposing Release, 75 FR at 80184.

[683] One representative commenter stated that ''the proposed definition in CFTC Proposed CFTC Regulation § 1.3(m)(1)–(4) fills important gaps left by Congress by ensuring that major swap participants, major security-based swap participants, swap dealers and security-based swap dealers are treated as ECPs.'' *See* letter from Sidley.

[684] These new ECP categories are set forth in new CFTC Regulation § 1.3(m)(1)–(4).

[685] CEA section 1a(18)(A)(vii)(cc), 7 U.S.C. 1a(18)(A)(vii)(cc).

[686] 7 U.S.C. 2(c)(2)(B)(ii)(I)–(III).

[687] A government entity, though, can still qualify as an ECP under the other provisions of clause (A)(vii) if it is a certain type of ''eligible commercial entity'' as defined in CEA section 1a(17), 7 U.S.C. 1a(17), or owns and invests on a discretionary basis $50 million or more in investments.

[688] *See* letter from Wells Fargo dated June 3, 2011 (''Wells Fargo I'').

[689] 7 U.S.C. 2(c)(2)(B)(i)(II).

[690] *See* section 13101 of the CRA.

2(c)(2)(B)(i)(II) instead.[691] This commenter requested that ''the Commissions correct this clearly erroneous reference in the definition of ECP through interpretive guidance, rulemaking or Commission order.'' [692]

3. Interpretive Guidance

Clause (A)(vii) of the ECP definition contains an erroneous cross-reference to subclauses (I) through (VI) of CEA section 2(c)(2)(B)(ii). Accordingly, the Commissions are issuing interpretive guidance by identifying the counterparties with which a governmental entity can enter into swaps to attain ECP status under the provision in clause (A)(vii) that requires the entity's counterparty to be ''listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii)'' of the CEA. The Commissions consider a government entity covered by the counterparty limitation in clause (A)(vii) to be an ECP with respect to an agreement, contract, or transaction that is offered by, and entered into with, a person that is listed in items (aa) through (ff) of section 2(c)(2)(B)(i)(II) of the CEA. The limitation of ECP status ''with respect to'' a particular transaction is consistent with Congress' determination that, for purposes of this provision of clause (A)(vii), governmental entities may derive their ECP status from the status of their counterparty.

F. Qualification as an ECP With Respect to Swaps Used To Hedge or Mitigate Commercial Risk in Connection With the Conduct of an Entity's Business

1. Proposing Release

In the Proposing Release, the Commissions requested comment on whether any additional categories should be added to the definition of ECP, ''such as the following categories suggested by commenters [on the ANPRM]: Commercial real estate developers; energy or agricultural cooperatives or their members; or firms using swaps as hedges pursuant to the terms of the CFTC's Swap Policy Statement.'' [693] As noted above, the ECP definition is important because the Dodd-Frank Act amended the CEA to prohibit a person that is not an ECP from entering into swaps other than on or subject to the rules of a DCM.[694]

2. Commenters' Views

Several commenters supported the addition of categories to the definition of ECP because, these commenters said, not all current swap market participants are ECPs. Many of these commenters said that non-ECPs have entered into swaps in reliance on the Swap Policy Statement.[695] Commenters highlighted, among other things, the importance of the Swap Policy Statement to pass-through entities used by farmers,[696] operating companies [697] and commercial property developers,[698] noting that such entities may not meet the ECP criteria. According to these commenters, these pass-through entities often are small and medium-sized businesses that enter into interest rate swaps with lending financial institutions in reliance on the Swap Policy Statement.[699] The commenters explained that the loans usually are guaranteed by the principals of the entity entering into the swap, and that the borrower would qualify as an ECP if structured as a single-level corporate entity or sole proprietorship.[700] Commenters said that if these non-ECP entities were limited to swaps that are available on or subject to the rules of a DCM, many regional bank borrowers would lose the ability to use swaps, real estate companies would have less flexibility in risk management, and smaller lenders would be at a competitive disadvantage.[701] Another commenter said that Dodd-Frank Act provisions such as the end-user clearing exception indicate that Congress intended to preserve the availability of swaps used for business reasons rather than for investment or speculation.[702]

To mitigate the impact of restricting non-ECPs to swaps that are available on or subject to the rules of DCMs, some commenters said that an entity should be able to qualify as an ECP based on the financial qualifications of related entities, so long as various conditions proposed by the commenters are satisfied. Some commenters said that an entity should be eligible to be an ECP if its swap obligations are guaranteed by an ECP,[703] or if its controlling entity qualifies as an ECP under clause (A)(v) of the statutory definition.[704] Another commenter suggested revisions to the

[691] 7 U.S.C. 2(c)(2)(B)(i)(II)(aa)–(ff).

[692] *See* letter from Wells Fargo I.

[693] *See* Proposing Release, 75 FR at 80185. The reference to the ''Swap Policy Statement'' is to the CFTC's Policy Statement Concerning Swap Transactions, 54 FR 30694 (July 21, 1989). The Swap Policy Statement ''identifie[d] those swap transactions which [were] not * * * regulated as futures or commodity option transactions under the [CEA] or the related regulations.'' 54 FR at 30694. One element of the Swap Policy Statement required that the swap be entered into in connection with each swap counterparty's line of business. *Id.* at 30697. The Swap Policy Statement was applicable to cash-settled swaps only, with foreign exchange considered to be cash for this purpose. *Id.* at 30696. The Swap Policy Statement required that the terms of the relevant swap be individually tailored, meaning that the material terms of the swap had to be negotiated, the parties had to make individualized credit determinations, and the swap documentation could not be fully standardized. *Id.* at 30696–97. The Swap Policy Statement did not apply to swaps subject to exchange-style offset, swaps that were cleared or subject to a margin system, or swaps marketed to the public. *Id.* As noted in the Product Definitions Proposal, the Dodd-Frank Act supersedes the Swap Policy Statement. 76 FR at 29829, n. 74.

[694] The discussion in this section relates only to swaps and has no effect on the laws or regulations applicable to security-based swaps, security-based swap agreements or mixed swaps.

As noted above, the Dodd-Frank Act also amended the Exchange Act and the Securities Act to make it unlawful for a person to effect a transaction in a security-based swap with or for a person that is not an ECP unless the transaction is effected on a national securities exchange registered with the SEC, and to make it unlawful for a person to offer to sell, offer to buy or purchase, or sell a security-based swap to a person that is not an ECP unless a registration statement under the Securities Act is in effect with respect to that security-based swap.

[695] *See* letter from CDEU. One commenter estimated that swap transactions completed by regional and community banks in reliance on the Swap Policy Statement constituted 30–40% of all of such banks' swaps, representing approximately 7,000 to 10,000 swaps per year and $15 to $20 billion in related loan principal. *See* letter from B&F I. Another commenter advised that it has entered 11 swaps, with a total notional of $26 million, since its formation in 2007, almost all of the counterparties to which ''qualified for the swap under the [Swap Policy Statement] business purpose exemption.'' *See* letter from Capstar. The CFTC stated when issuing the Swap Policy Statement that it ''reflects the [CFTC]'s view that at this time most swap transactions, although possessing elements of futures or options contracts, are not appropriately regulated as such under the [CEA] and [CFTC] regulations.'' Swap Policy Statement at 30694.

[696] *See, e.g.,* letter from Rabobank, N.A., Rabo AgriFinance, Inc. and Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (''Rabobank, New York Branch'') (relating that ''[f]or a variety of estate planning and regulatory purposes, farmers commonly hold their ownership interests in land, buildings and farm equipment indirectly, through a network of legal entities'').

[697] *See, e.g.,* letter from Fifth Third Bank and Union Bank, N.A. (advising that ''[i]t is common for an operating business to organize a separate limited liability company (for tax and legal reasons) to acquire * * * assets * * * and to lease these assets to the operating company[, which] becomes the borrow[er] * * * for the loan used to acquire those assets'' and that ''[t]he limited liability company often does not maintain sufficient capital to qualify as an ECP'').

[698] *See, e.g.,* letters from Capstar, Frost National Bank, FTN Financial Capital Markets, Midsize Banks and NAREIT.

[699] *See* letters from BB&T I and B&F I. Commenters said that these businesses may intentionally maintain less than $1 million in equity primarily for tax and legal reasons. *See* letters from Capital One and Columbia State Bank (stating that over 65% of its borrowers are structured as limited liability companies or S corporations and intentionally maintain less than $1 million in equity at the entity entering into the swap).

[700] *See* letter from Columbia State Bank. *See also* letter from BB&T I.

[701] *See* letters from BB&T I, Capital One, Capstar, Columbia State Bank, Midsize Banks, NAREIT and Wells Fargo II.

[702] *See* letter from FSR I.

[703] *See* letters from BB&T I, Midsize Banks and Wells Fargo II.

[704] *See* letters from CDEU and Regional Banks.

ECP definition that included looking to the ECP status or sophistication of the majority owner of an entity in determining if the entity itself is an ECP.[705] Other commenters suggested other provisions to allow non-ECPs to enter into swaps other than on or subject to the rules of a DCM, so long as the non-ECP meets various conditions indicating that the swap is used in connection with its line of business.[706]

Other commenters argued for per se ECP qualification based on their status as certain types of persons, such as farmers[707] or for ECP status based solely on a combination of a person's status and the swap being related to a person's line of business with no additional conditions.[708]

3. Final Rules and Interpretation

In response to the commenters' concerns, the CFTC is adopting CFTC Regulation § 1.3(m)(7) to permit an entity, in determining its net worth for purposes of subclause (A)(v)(III) of the ECP definition,[709] to include the net worth of its owners, solely for purposes of determining its ECP status for swaps used to hedge or mitigate commercial risk, provided that all of its owners are themselves ECPs (disregarding shell companies). Under CFTC Regulation § 1.3(m)(7) as adopted, an entity seeking to qualify under subclause (A)(v)(III) of the ECP definition in order to enter into a swap used to hedge or mitigate commercial risk is permitted to count the net worth of its owners in determining its own net worth, so long as all its owners are ECPs. This regulation applies only to entities that are otherwise eligible to rely on subclause (A)(v)(III) to determine ECP status; it does not expand or change the scope of application of that paragraph.[710]

CFTC Regulation § 1.3(m)(7) as adopted applies only when determining ECP status for swaps used to hedge or mitigate commercial risk. This new regulation does not apply when determining ECP status for other swaps or for security-based swaps, security-based swap agreements, mixed swaps, or agreements, contracts or transactions that are not swaps (regardless of the purpose for which they are used).

The Commissions have considered the comments indicating that, as currently structured, many businesses are owned by multiple legal entities and/or individuals, and the net worth of all the owners in the aggregate in some cases would satisfy the $1 million net worth requirement in subclause (A)(v)(III), even though the particular legal entity that enters into a swap does not have a net worth exceeding $1 million.[711] While the Commissions recognize that the requirement, in subclause (A)(v)(III)(aa) of the ECP definition, that the entity relying on that paragraph have a net worth exceeding $1 million evidences Congress' intent that only entities with this level of financial resources should be eligible for ECP status under this paragraph of the definition, the Commissions agree with commenters that application of this requirement in these circumstances would inappropriately limit the ability of business entities to use swaps to hedge or mitigate commercial risk. As a result, the Commissions are persuaded that in this limited situation, the entity should qualify as an ECP and be eligible to enter into swaps other than on or subject to the rules of a DCM, so long as the entity is using the swap to hedge or mitigate commercial risk and all of the owners of the entity are ECPs (other than shell companies).

In response to those commenters requesting per se ECP status or the ability to qualify as an ECP based on a combination of status and engaging in swaps related to a line of business, without further restriction, the Commissions do not believe it is necessary or appropriate to further define the term ECP to such an extent in order to address most commenters' concerns. The Commissions note that such approaches would undermine the prohibition in CEA section 2(e)[712] on non-ECPs executing swaps other than on or subject to the rules of a DCM. The Commissions also note that focusing solely on a link between a swap and a line of business would undermine the application of the ECP definition to swaps in that the various prongs of the ECP generally are linked to dollar thresholds, regulated status, or a combination of the two.

The Commissions also note that it currently is considering a draft petition for relief pursuant to CEA section 4(c)(6)(C)[713] for certain entities described in Federal Power Act section 201(f),[714] which may address the concerns of some commenters. Additionally, the Commissions are developing joint rules to further define the term ''swap,'' including the forward exclusion from the swap definition which, in turn, may result in certain transactions not being considered swaps. Further, the CFTC also is considering today a form of trade option exemption, which may further address commenters' concerns.

With respect to farmers, in response to the CFTC's Commodity Options and Agricultural Swaps rulemaking proposal,[715] commenters generally were of the view that the ECP definition is appropriate in its current form.[716] While

[705] *See* letter from NAREIT.

[706] *See* letters from the American Public Gas Association (''APGA''), Capital One and Gavilon dated December 23, 2010 (''Gavilon I'').

[707] *See* meeting with Ron Eliason on December 16, 2010 (in which Mr. Eliason contended that farmers should be able to enter into swaps, even if they do not meet the income or asset tests in the current ECP definition and, therefore, would not be permitted to enter into swaps other than on or subject to the rules of a DCM).

[708] *See* letter from APGA (requesting that ''the [CFTC] exercise its authority under section la(18)(C) of the Act and determine that public natural gas distribution companies, including member-owned co-operatives, that enter into swaps in connection with their business of supplying customers with natural gas are ECPs within the meaning of section la(18) of the Act'').

[709] CEA section 1a(18)(A)(v)(III) provides that the term ''eligible contract participant'' includes ''a corporation, partnership, proprietorship, organization, trust, or other entity * * * that (aa) has a net worth exceeding $1,000,000; and (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business.'' 7 U.S.C. 1a(18)(A)(v)(III).

[710] For example, if a commodity pool were precluded by CFTC Regulation § 1.3(m)(6) from relying on clause (A)(v) of the statutory definition to qualify as an ECP, such pool would not be able to rely on CFTC Regulation § 1.3(m)(7) to qualify as an ECP.

[711] *See, e.g.,* letters from B&F I (stating that ''[i]f the customer does not * * * [itself] meet the ECP definition, then the transaction would have to be guaranteed by any entity or individual who is an owner * * * [who] meets the $10,000,000 total asset test of section 1(a)(18)(A)(v)(I) of the Act or the $1,000,000 net worth test of section 1(a)(18)(A)(v)(III) of the Act.''), NAREIT (urging that the Commissions impute ECP status to non-ECP entities involved in specified real estate businesses to such entities whose ''majority owner or controlling entity'' is an ECP) and Midsize Banks (recommending that the ECP determination be made with respect to a non-ECP entity's owners based on criteria including qualifying natural persons as ECPs based on a $1,000,000 net worth).

[712] 7 U.S.C. 2(e).

[713] 7 U.S.C. 6(c)(6)(C).

[714] 16 U.S.C. 824(f).

[715] 76 FR 6095 (Feb. 3, 2011).

[716] *See, e.g.,* letters from NCFC dated April 4, 2011 (''NCFC II'') (stating ''[o]n behalf of the more than two million farmers and ranchers who belong to one or more farmer cooperative(s), the [NCFC] * * * [believes] the limitation on participation [in agricultural swaps] to [ECPs] outside of a DCM * * * should limit [agricultural swap] participation to appropriate persons'' and that ''[t]he ECP requirement with a threshold of $1 million in net worth to be allowed to use swaps and options, other than on a DCM, is appropriate for the products cooperatives offer their members''), ; letter from NGFA dated April 4, 2011 (''NGFA II'') (stating that ''[t]he use of agricultural swaps has been constrained relative to other swaps by virtue of being subject to CFTC regulatory requirements, while other swaps have been exempted from CFTC oversight,'' ''the Dodd-Frank Act * * * institutes a number of safeguards, including the limitation that

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the Commissions may consider providing further relief should experience show, after the ECP definition becomes effective, that further relief is warranted, neither the ECP definition nor the various actions cited in the foregoing paragraph are final, so providing further relief is premature. The Commissions' measured approach, which builds on the existing net worth requirement in the general entity ECP category, provides broad relief to many of the commenters (*e.g.,* borrowers generally) while otherwise adhering to the existing ECP categories.

The Commissions note that commenters said that, because of the way some businesses are structured for tax, estate planning or other purposes, they enter into swaps through a legal entity that does not, by itself, qualify as an ECP even though the net worth of the business and its owners, taken in the aggregate, would qualify as an ECP pursuant to subclause (A)(v)(III) of the ECP definition. The Commissions believe that the best way to address this concern is to allow such a business to consider the net worth of all its owners in determining whether the net worth requirement in subclause (A)(v)(III) is satisfied.[717]

CFTC Regulation § 1.3(m)(7) is available only to an entity that seeks to qualify as an ECP under subclause (A)(v)(III) of the statutory definition in order to enter into a swap that will be used to hedge or mitigate commercial risk. The Commissions limited CFTC Regulation § 1.3(m)(7) to subclause (A)(v)(III) because this provision of the ECP definition is available to a business entity that uses swaps in connection with the conduct of its business or to manage risks associated with assets or liabilities related to the conduct of its business.[718]

The purpose of CFTC Regulation § 1.3(m)(7) is to maintain the ability of business entities to enter into swaps other than on or subject to the rules of a DCM for limited purposes. This regulation therefore is available only with respect to a swap that is used to hedge or mitigate commercial risk within the meaning of CFTC Regulation § 1.3(kkk).[719] CFTC Regulation § 1.3(m)(7) applies only if all of an entity's owners qualify as ECPs under the provision of the ECP definition applicable to such owner. Although some commenters suggested that an entity should be able to qualify as an ECP based on the status of its majority or controlling owners,[720] the Commissions believe that CFTC Regulation § 1.3(m)(7) should be available only when all of an entity's owners qualify as ECPs. The Commissions do not believe it would be appropriate to impair the protection of non-ECPs that flows from the requirement that non-ECPs enter into swaps only on or subject to the rules of a DCM.[721] In order to maintain these protections and prevent evasion, CFTC Regulation § 1.3(m)(7) provides that any shell company will be disregarded, and in order to determine if the underlying entity may use CFTC Regulation § 1.3(m)(7), each owner of such shell company must be an ECP.[722]

Correspondingly, in aggregating net worth for purposes of determining the ECP status of an entity pursuant to CFTC Regulation § 1.3(m)(7), if the entity is owned by a shell company, then it is the net worth of the owners of that shell company that is relevant, not the net worth of the shell company.[723]

Last, also in order to prevent evasion, CFTC Regulation § 1.3(m)(7)(ii)(C) specifies that an individual may rely on the proprietorship provision of clause (A)(v) of the statutory definition for purposes of determining its status as an ECP owner of an entity only if the proprietorship[724] status arises independent of the business conducted by such entity[725] and the individual proprietor acquires his/her interest in such entity (i) in connection with the conduct of the individual's proprietorship or (ii) to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the proprietorship.[726] The Commissions are adopting CFTC Regulation § 1.3(m)(7)(ii)(C) because they believe that the only circumstance in which a proprietorship should be considered an ECP for purposes of CFTC Regulation § 1.3(m)(7)(i) is if it is making an investment related to the proprietorship.[727] The ECP status of an individual acting other than with respect to its proprietorship is determined based on the ECP clause applicable to individuals. The Commissions note that they have authority to take action to prevent evasion of the provisions regarding shell companies and proprietorships by entities relying on CFTC Regulation § 1.3(m)(7) to establish ECP status.

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only [ECPs] may engage in swaps unless entered into on a designated contract market,'' and ''[t]he NGFA believes that these safeguards provide more-than-ample protection in the swaps marketplace for both agricultural and non-agricultural swaps and that there is no compelling reason to place additional burdens on agricultural swaps.'').

[717] The Commissions note that this regulation provides an alternative means for certain business entities to qualify as ECPs. It neither diminishes nor qualifies in any way the requirement in CEA section 2(e) that persons that are not ECPs enter into swaps only on or subject to the rules of a DCM.

[718] CEA section 1a(18)(A)(v)(III)(bb), 7 U.S.C. 1a(18)(A)(v)(III)(bb). The Commissions note that an entity that would qualify as an ECP under subclause (A)(v)(III) without application of CFTC Regulation § 1.3(m)(7) is not required to meet the conditions stated in, this regulation.

[719] *See* part IV.C. The use of the phrase ''hedge or mitigate commercial risk'' in CFTC Regulations §§ 1.3(m)(7) and 1.3(kkk) is similar to the use of the same phrase in the exception to the mandatory clearing requirement in CEA section 2(h)(7), 7 U.S.C. 2(h)(7).

[720] *See, e.g.,* letter from NAREIT.

[721] *See* CEA section 2(e), 7 U.S.C. 2(e).

[722] *See* CFTC Regulation § 1.3(m)(7)(ii).

The term ''shell company'' means any entity that limits its holdings to direct or indirect interests in entities that are ECPs through reliance on CFTC Regulation § 1.3(m)(7). Any entity that holds at least one direct or indirect interest in an entity not relying on CFTC Regulation § 1.3(m)(7) would not be a shell company. The ECP status of owners of entities that are not shell companies is not relevant for purposes of CFTC Regulation § 1.3(m)(7), which should permit wider financing of small businesses using swaps to hedge or mitigate commercial risk.

To be clear, an individual will never be considered to be a shell company for purposes of CFTC Regulation § 1.3(m)(7).

[723] This provision may apply repeatedly in a ''chain.'' For example, if in determining whether an entity may rely on CFTC Regulation § 1.3(m)(7), an owner of that entity that is a shell company is disregarded, then if the owner of that shell company is also a shell company, that second shell company also is disregarded, and so on.

[724] A proprietorship generally is a business that a person operates in a personal capacity and with respect to which that person directly owns all the assets and directly is responsible for all of the liabilities, rather than through a corporation, partnership or other structure conveying limited liability. *See* letters from Midmarket Banks and Wells Fargo II (stating that ''proprietors . . . typically are not separate legal entities''); *see also* State of California Franchise Tax Board Web site (advising that ''[t]he business and the owner are one. There is no separate legal entity and thus no separate legal person''), at *https://www.ftb.ca.gov/businesses/bus_structures/soleprop.shtml.* A proprietorship is not a separate taxable entity but reports the income or loss of the business, which is taxed along with a sole proprietor's other income, on a separate schedule attached to his or her individual federal income tax return. *See* letter from Midmarket Banks. *See also* 2011 Form1040 Schedule C: Profit or Loss from Business (Sole Proprietorship), available at *http://www.irs.gov/pub/irs-pdf/f1040sc.pdf*; 2011 Instructions for Schedule C, available at *http://www.irs.gov/pub/irs-pdf/i1040sc.pdf.*

[725] CFTC Regulation § 1.3(m)(7)(ii)(C)(I) is designed to ensure that the individual qualifies as a proprietorship, if at all, other than due to its interest in either an entity seeking to qualify as an ECP under CFTC Regulation § 1.3(m)(7)(i) or in any other entity.

[726] *See* CFTC Regulation § 1.3(m)(7)(ii)(C)(IV). This language is modeled on the language in 7 U.S.C. 1a(18)(A)(v)(III)(bb).

[727] The Commissions note that this guidance regarding proprietorships applies only when an entity is relying on CFTC Regulation § 1.3(m)(7). The Commissions do not intend that this guidance would expand or limit the circumstances when a proprietorship may otherwise rely on clause (A)(v) of the statutory definition in establishing its ECP status.

G. ECP Status for Forex Pools Operated by Registered CPOs or CPOs Exempt From Registration Under Certain Conditions

1. Description of the Issue and Commenters' Views

Notwithstanding the modifications to the look-through provisions for Forex Pools discussed above in section III.B., the Commissions acknowledge commenters' concerns about the potential for unintended consequences arising from the look-through provisions of the Dodd-Frank Act. Several commenters asserted that many Forex Pools are operated by sophisticated, professional managers that do not need the protections of a retail forex regime designed to protect non-ECPs that are engaging in retail forex transactions.[728] More specifically, some commenters, based on CFTC enforcement actions involving Forex Pools, suggested that commodity pools of a sufficient size, and/or operated by a registered or exempt CPO, do not pose the risks of fraud and abuse of non-ECP customers that the statutory look-through provision is intended to address.[729]

As a result, commenters suggested that the look-through provision should not apply in determining ECP status of commodity pools that meet certain conditions. For example, commenters suggested that the look-through not be applied to a commodity pool with $10 million in total assets paired with another or other factors, such as not being structured to evade,[730] being subject to regulation under the CEA[731] or the CPO being registered as such.[732] Another commenter suggested requiring the total assets or minimum initial investment of a Forex Pool to be sufficiently large that, in general, only legitimate pools would exceed such thresholds.[733] This commenter suggested a total asset threshold of $50 million.[734]

Separately, one commenter also claimed that the statutory look-through, if strictly implemented, might inappropriately preclude Forex Pools and their CPOs, many of whom are registered, from engaging in retail forex transactions with swap dealers because swap dealers are not Enumerated Counterparties (and some swap dealers also may not be Enumerated Counterparties in a different capacity, such as being a U.S. financial institution).[735] This commenter stated that such a result could reduce close out netting opportunities in the event of the insolvency of a counterparty.

2. Final Rule

In response to commenters, the CFTC is adopting CFTC Regulation § 1.3(m)(8), pursuant to which certain Forex Pools may qualify as ECPs notwithstanding the look-through requirement. As adopted, CFTC Regulation § 1.3(m)(8) enables a Forex Pool that enters into a retail forex transaction to qualify as an ECP with respect thereto, irrespective of whether each participant in the Forex Pool is an ECP, if the Forex Pool satisfies the following conditions:

- It is not formed for the purpose of evading CFTC regulation under Section 2(c)(2)(B) or Section 2(c)(2)(C) of the CEA or related CFTC rules, regulations or orders governing Retail Forex Pools and retail forex transactions);
- It has total assets exceeding $10 million; and
- It is formed and operated by a registered CPO or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3).

CFTC Regulation § 1.3(m)(8) as adopted requires that the Forex Pool not be formed for the purpose of evading CFTC regulation of Retail Forex Pools and retail forex transactions under CEA Section 2(c)(2)(B) or (C). A Forex Pool that is formed for that purpose would not be an ECP under new CFTC Regulation § 1.3(m)(8).

CFTC Regulation § 1.3(m)(8) as adopted also requires that the Forex Pool have total assets exceeding $10 million to qualify as an ECP. The $10 million threshold is twice the current total asset threshold for a commodity pool to qualify as an ECP under CEA section 1a(18)(A)(iv). The Commissions believe the $10,000,000 threshold is appropriate in light of the potential regulatory burdens a higher threshold might impose on smaller commodity pools. The Commissions believe that such a threshold, coupled with the other conditions of the rule, is sufficiently high to assure that the protections provided to retail forex transactions are not needed for these types of commodity pools. The Commissions will vigilantly monitor developments with respect to Forex Pools, including enforcement activity, and revisit this total asset threshold if warranted by subsequent events.

Finally, CFTC Regulation § 1.3(m)(8) as adopted requires that Forex Pool be formed[736] and operated by a CPO registered as such with the CFTC or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3). The Commissions believe that the registered CPO aspect of this condition is appropriate for several reasons, including that it will ensure

[728] *See, e.g.,* letters from Millburn (characterizing the proposed rules as ''greatly limit[ing] the ability of entities managed by sophisticated money managers that are subject to registration and examination by regulators to qualify as ECPs'') and Sidley (describing ''[a] commodity pool, like a registered investment company or an employee benefit plan, [a]s a pool of assets from investors of varying (and, in some cases, undetermined) levels of sophistication that are advised by a sophisticated adviser'').

[729] *See* joint letter from the Global Foreign Exchange Division (''GXFD'') and MFA dated January 19, 2011 (''GFXD II'') (describing 35 CFTC Forex Pool enforcement cases from 2010 and 2011 and noting that in 80% of these cases, the amount at issue in the misconduct was less than $10 million, and that only one case involved a registered CPO where the amount at issue in the misconduct was more than $10 million; two additional cases involved misconduct involving CPOs exempt from registration as such under CFTC Regulation § 4.13(a). While the commenter did not characterize these amounts as ''total assets'' (instead, the commenter used terms such as ''fraudulently obtained'' or ''sustained losses of'' to modify the cited dollar amounts) in most cases, it is clear that these amounts are equivalent to, or subsets of, total assets. For instance, for a CPO to have fraudulently obtained $10 million from commodity pool participants, the CPO must have taken in $10 million from them, resulting in the commodity pool at one time having $10 million in total assets. *See also* letter from Sidley (providing 26 examples of CFTC Forex Pool-related enforcement cases, all but one of which involved Forex Pools with less than $50 million in total assets). A number of the cases cited by GXFD and Sidley overlap; in the aggregate, these commenters appear to have presented data on 45 different cases rather than 61.

[730] *See* letter from GFXD II.

[731] *See* letters from GXFD II and Skadden.

[732] *See* meeting with SIFMA on January 20, 2012 (in which representatives of SIFMA proposed a new non-exclusive set of criteria for a Forex Pool to qualify as an ECP, which included, as one of several alternatives in one element of the proposed criteria, that a Forex Pool be operated by a registered CPO). *See also* letter from Willkie Farr (observing that ''[i]t may be time to regulate certain previously unregulated transactions and traders, so that more CPOs are registered'' and that ''many commodity pools are operated and advised by registered professionals'').

[733] *See* letter from Sidley.

[734] *See id.*

[735] *See* joint letter from the GFXD and MFA dated January 10, 2012 (''GFXD I''). These commenters indicated that, while

[s]ome swap dealers may be dually licensed as a bank or a broker-dealer [and therefore] eligible to transact in OTC foreign exchange with retail investors as well as swaps with institutional investors * * * as an operational matter, it is not clear that firms will be able to and find it efficient to structure their business so that the retail foreign exchange platform is conducted from the same entity as the institutional swaps business.

[736] Given that (i) many CPOs will be registering as such for the first time due to the CFTC's recent rescission of the exemption from CPO registration set forth in CFTC Regulation § 4.13(a)(4) or its modification of the criteria for claiming the exclusion from the CPO definition in CFTC Regulation § 4.5 and (ii) such pools were formed prior to their CPOs' registration as such, commodity pools formed prior to December 31, 2012 need not have been ''formed'' by a registered CPO or by a CPO exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3) in order to be qualified as ECPs under the new prong, so long as they are operated by a registered CPO on or before such date.

that the NFA oversees compliance by those registered CPOs relying on this new regulation.[737] CPO registration also provides a clear means of addressing wrongful conduct.[738] Although some commenters suggested that a CPO need only be ''subject to regulation under the CEA'' in order for a Forex Pool operated by that CPO to qualify as an ECP notwithstanding the look-through requirements, CFTC Regulation § 1.3(m)(8) instead requires that the CPO of a Forex Pool be registered as a CPO or be a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3), alternative conditions supported by other commenters. The Commissions are requiring operation by a registered CPO, or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3), as a condition for a Forex Pool to qualify for ECP status under CFTC Regulation § 1.3(m)(8) because, based on the data presented by commenters, CFTC enforcement actions involving Forex Pools rarely involve registered CPOs or CPOs exempt from registration as such.[739]

While NFA oversight of CPOs operating Retail Forex Pools is a useful criterion to determine whether an exclusion from the look-through provisions of CEA section 1a(8)(A)(iv) and CFTC Regulation § 1.3(m)(5) is warranted, the Commissions believe that Retail Forex Pools operated by CPOs exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3) also merit relief from those look-through provisions. On September 10, 2010, the CFTC published in the **Federal Register** a final rule revising the CPO registration exemption in CFTC Regulation § 4.13(a)(3) to incorporate retail forex transactions into the transactions subject to the alternative caps on the use of commodity interests[740] by CPOs claiming the exemption.[741] The CFTC explained in the related **Federal Register** proposing release that the proposed change to CFTC Regulation § 4.13(a)(3) was part of a proposal to adopt a comprehensive regulatory scheme to implement the CRA with respect to retail forex transactions (''CRA-Related Forex Proposal'').[742] The CFTC also explained that ''the NFA-specified minimum security deposit for off-exchange retail forex transactions would be included among the amounts that cannot exceed 5 percent of the liquidation value of the pool's portfolio in order for the operator to claim the exemption from registration under Regulation 4.13(a)(3)''[743] and that ''such amounts are roughly equivalent to initial margin and option premiums).''[744] The CFTC also described the CRA-Related Forex Proposal as ''amend[ing] existing regulations as needed to clarify their application to, and inclusion in, the new regulatory scheme for retail forex.''[745] More recently, notwithstanding the Dodd-Frank Act's addition of the look-through provision in CEA section 1a(8)(A)(iv), the CFTC determined to retain the exemption from CPO registration under Regulation 4.13(a)(3), reasoning that ''overseeing entities with less than five percent exposure to commodity interests is not the best use of the Commission's resources.''[746]

Given that, shortly before the adoption of the Dodd-Frank Act, the CFTC proposed to add retail forex transactions to those that can be entered into by CPOs claiming relief from registration as such under CFTC Regulation § 4.13(a)(3), that it finalized that action shortly after the Dodd-Frank Act was adopted and that it recently left CFTC Regulation § 4.13(a)(3) in place despite having proposed to withdraw that CPO registration exemption, and for the reasons described above, the Commissions believe CPOs exempt from registration as such pursuant to CFTC Regulation 4.13(a)(3) and operating Retail Forex Pools should be able to continue to do so outside the retail forex regime.

Section 712(d)(2)(A) of the Dodd-Frank Act grants the Commissions the authority to adopt such rules related to the ECP definition as the Commissions determine are necessary and appropriate, in the public interest, and for the protection of investors. Based on commenters' views, the Commissions have determined that CFTC Regulation § 1.3(m)(8) as adopted is necessary and appropriate because the statutory look-through provision, if strictly implemented, would subject Forex Pools operated by CPOs that are sophisticated, professional asset managers to an array of additional compliance costs and deprive them of access to swap dealers as counterparties when engaging in retail forex transactions.[747] The Commissions also have determined that it is appropriate to limit the availability of ECP status under CFTC Regulation § 1.3(m)(8) to Forex

[737] *See* CPO/CTA Compliance Release at 11254 (noting that ''registration allows the Commission to ensure that all entities operating collective investment vehicles participating in the derivatives markets meet minimum standards of fitness and competency''). *See http://www.nfa.futures.org/NFA-registration/cpo/index.html* for an overview of registration and related requirements for CPOs, their principals and their associated persons and *http://www.nfa.futures.org/NFA-compliance/NFA-commodity-pool-operators/index.html* for an overview of the compliance regime for registered CPOs overseen by the NFA. The CFTC anticipates that more CPOs will register in the coming months now that it has withdrawn the CFTC Regulation § 4.13(a)(4) exemption from CPO registration, increasing the number of registered CPOs, in turn increasing the number of CPOs who can satisfy the registered CPO alternative under CFTC Regulation § 1.3(m)(8)(iii).

[738] *See* CPO/CTA Compliance Release at 11254 (stating that ''the [CFTC] has clear authority to take punitive and/or remedial action against registered entities for violations of the CEA or of the [CFTC''s regulations * * * [and] to deny or revoke registration, thereby expelling an individual or entity from serving as an intermediary in the industry'' and that the CFTC's reparations program and the NFA's arbitration program also are available avenues ''to seek redress for wrongful conduct by a [CFTC] registrant'').

[739] As discussed above in note 729, only one of the 45 unique cases presented by commenters involved a pool with more than $10 million in total assets and a registered CPO. Only two of those cases involved a pool operated by CPOs exempt from registration: in both of those cases, however, the CPO raised less than $10 million. In addition, one of those CPOs relied on the CFTC Regulation § 4.13(a)(4) CPO registration exemption. As discussed above, the CFTC has withdrawn that exemption.

[740] The term ''commodity interest'' is defined in CFTC Regulation § 1.3(yy), and includes ''[a]ny contract, agreement or transaction subject to [CFTC] jurisdiction under section 2(c)(2) of the [CEA].'' CFTC Regulation § 1.3(yy)(3).

[741] *See* CFTC, Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries; Final Rules, 75 FR 55410 (Sept. 10, 2010).

[742] CFTC, Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries; Proposed Rules, 75 FR 3282 (Jan. 10, 2010).

[743] Section 12 of the NFA's Financial Requirements impose the following minimum security deposit requirements for retail forex transactions: (i) 2% of the notional value of transactions in the British pound, the Swiss franc, the Canadian dollar, the Japanese yen, the Euro, the Australian dollar, the New Zealand dollar, the Swedish krona, the Norwegian krone, and the Danish krone; (ii) 5% of the notional value of other transactions; (iii) for short options, the above amount plus the premium received; and (iv) for long options, the entire premium. *See* NFA Manual, available at *http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=SECTION%2012&Section=7*.

[744] CFTC, Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries; Proposed Rules, 75 FR 3282, 3287 (Jan. 10, 2010).

[745] *Id.* at 3282.

[746] CPO/CTA Compliance Release at 11261. The CFTC also stated that:

[t]he Commission believes that trading exceeding five percent of the liquidation value of a portfolio, or a net notional value of commodity interest positions exceeding 100 percent of the liquidation value of a portfolio, evidences a significant exposure to the derivatives markets, and that such exposure should subject an entity to the Commission's oversight.

Id. at 11263.

[747] The nature of a swap dealer's business activities and assets may detract from what is considered regulatory capital for an FCM or RFED engaging in retail forex transactions, thereby making it difficult for some swap dealers to dually register both as such and as an FCM or RFED in order to do retail forex business. As an ECP, a Forex Pool's choice of retail forex transaction counterparties will not be limited to Enumerated Counterparties, and thus may include swap dealers.

Pools operated by registered CPOs or by CPOs exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3).[748] The conditions in CFTC Regulation § 1.3(m)(8) also are appropriate in that they require Forex Pools seeking ECP status thereunder to have total assets exceeding $10 million. Historically, CFTC enforcement actions have involved fewer instances of misconduct by CPOs of Forex Pools with total assets above this threshold.[749]

The Commissions have determined that CFTC Regulation § 1.3(m)(8) is in the public interest in that it will make available a category of counterparty (*i.e.,* swap dealers) that likely would not otherwise be available, and help to assure that sophisticated, professional managers operating qualifying Forex Pools can continue to engage in retail forex transactions. The Commissions have determined that the conditions of CFTC Regulation § 1.3(m)(8) are sufficient for the protection of investors for the reasons discussed above, such as a significant reduction in the incidence of Forex Pool misconduct among CPOs, whether registered as such or exempt therefrom, operating Forex Pools with more than $10 million in total assets. The Commissions intend to monitor developments in the Forex Pool area and will revisit the conditions of this regulation as warranted by subsequent events.

IV. Definitions of ''Major Swap Participant'' and ''Major Security-Based Swap Participant''

The statutory definitions of ''major swap participant''[750] and ''major security-based swap participant''[751] (collectively, ''major participant'') encompass any person that is not a swap dealer or security-based swap dealer[752] and that satisfy any one of three alternative statutory tests that encompass a person: (i) That maintains a ''substantial position'' in swaps or security-based swaps for any of the major swap categories as determined by the Commissions; (ii) whose outstanding swaps or security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets;[753] or (iii) that is a ''financial entity'' that is ''highly leveraged'' relative to the amount of capital it holds (and that is not subject to capital requirements established by an appropriate Federal banking agency) and maintains a ''substantial position'' in outstanding swaps or security-based swaps in any major category as determined by the Commissions.[754] The first—and only the first—of those three statutory tests explicitly excludes: (i) Positions held for ''hedging or mitigating commercial risk,'' and (ii) positions maintained by any employee benefit plan as defined in sections 3(3) and (32) of ERISA for the ''primary purpose of hedging or mitigating any risk directly associated with the operation of the plan.''[755]

The statutory definitions require the Commissions to define the term ''substantial position'' at the threshold determined to be prudent for the effective monitoring, management, and oversight of entities that are systematically important or can significantly impact the financial system of the U.S. In setting these thresholds, the Commissions are required to consider the person's relative position in uncleared as opposed to cleared swaps and may take into consideration the value and quality of collateral held against counterparty exposures.[756]

The statutory definitions further permit the Commissions to limit the scope of the major participant designations so that a person may be designated as a major participant in certain categories of swaps or security-based swaps, but not all categories.[757]

In addition, the ''major swap participant'' definition excludes certain entities whose primary business is providing financing *and* that use derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.[758] The ''major security-based swap participant'' definition does not contain this type of exclusion.

As detailed in the Proposing Release, the major participant definitions focus on the market impacts and risks associated with a person's swap and security-based swap positions.[759] This is in contrast to the definitions of ''swap dealer'' and ''security-based swap dealer,'' which focus on a person's activities and account for the amount or significance of those activities only in the context of the *de minimis* exception. However, persons that meet the major participant definitions in large part must follow the same statutory requirements that will apply to swap dealers and security-based swap dealers.[760] In this way, the statute applies comprehensive regulation to entities whose swap or security-based swap activities do not cause them to be dealers, but nonetheless could pose a high degree of risk to the U.S. financial system generally.[761]

Although the two major participant definitions are similar, they address instruments that reflect different types of risks and that can be used by end-users and other market participants for

[748] The Commissions note that the statistics presented by commenters indicate that Forex Pool misconduct by registered CPOs and those exempt from CPO registration is significantly rarer than Forex Pool misconduct by otherwise unregistered CPOs. *See* letter from the GFXD II.

[749] *See* letter from Sidley (showing that 6 of the 27 cases presented involved more than $10 million).

[750] CEA section 1a(33).

[751] Exchange Act section 3(a)(67).

[752] As discussed above, a person may be designated as a dealer for particular activities involving swaps or security-based swaps, or particular swap or security-based swap activities, without being deemed to be a dealer with regard to other categories or activities. *See* part II.E, *supra.* To the extent that a person is subject to that type of limited designation as a swap dealer or security-based swap dealer, the person may be subject to being a major swap participant or a major security-based swap participant in connection with positions that fall outside of that limited dealer designation.

[753] *See* CEA section 1a(33)(A)(ii); Exchange Act section 3(a)(67)(A)(ii)(II).

[754] *See* CEA section 1a(33)(A)(iii); Exchange Act section 3(a)(67)(A)(ii)(III).

[755] *See* CEA section 1a(33)(A)(i); Exchange Act section 3(a)(67)(A)(ii)(I).

[756] *See* CEA section 1a(33)(B) and Exchange Act section 3(a)(67)(B).

[757] *See* CEA section 1a(33)(C); Exchange Act section 3(a)(67)(C).

[758] *See* CEA section 1a(33)(D).

[759] *See* Proposing Release, 75 FR at 80185.

[760] In particular, under CEA section 4s and Exchange Act section 15F, dealers and major participants in swaps or security-based swaps generally are subject to the same types of margin, capital, business conduct and certain other requirements, unless an exclusion applies. *See* CEA section 4s(h)(4), (5); Exchange Act section 15F(h)(4), (5). *See also* CFTC, Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties; Final Rule, 77 FR 9733 (Feb. 17, 2012); Notice of Proposed Rulemaking: Capital requirements of swap dealers and major swap participants, 76 FR 27802 (May 12, 2011); and SEC, Notice of Proposed Rulemaking: Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Securities Exchange Act Release No. 64766, 76 FR 42396 (July 18, 2011).

[761] As discussed below, the tests of the major participant definitions use terms—particularly ''systemically important,'' ''significantly impact the financial system'' or ''create substantial counterparty exposure''—that denote a focus on entities that pose a high degree of risk through their swap and security-based swap activities. In addition, the link between the major participant definitions and risk was highlighted during the Congressional debate on the statute. *See* 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (colloquy between Senators Hagen and Lincoln, discussing how the goal of the major participant definitions was to ''focus on risk factors that contributed to the recent financial crisis, such as excessive leverage, under-collateralization of swap positions, and a lack of information about the aggregate size of positions'').

different purposes. Interpretation of the definitions must account for those differences as appropriate.

The Commissions in the Proposing Release proposed to further define the ''major swap participant'' and ''major security-based swap participant'' definitions, by specifically addressing: (i) The ''major'' categories of swaps or security-based swaps; (ii) the meaning of ''substantial position''; (iii) the meaning of ''hedging or mitigating commercial risk''; (iv) the meaning of ''substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets''; and (v) the meanings of ''financial entity'' and ''highly leveraged.'' The proposal also addressed the period of time that a major participant would have to register (as well as the minimum length of time for being a major participant), the limited purpose designations of major participants, the exclusion for ERISA plan hedging positions, and certain additional interpretive issues.

After considering commenters' views, the Commissions are adopting final rules further defining the meaning of major participant.

As discussed below, the Commissions also are directing their respective staffs to report separately as to whether changes are warranted to any of the rules implementing the major participant definitions. These staff reports will help the Commissions evaluate the ''major swap participant and ''major security-based swap participant'' definitions, including whether new or revised tests or approaches would be appropriate for identifying major participants.[762]

A. ''Major'' Categories of Swaps and Security-Based Swaps

1. Proposed Approach

The first and third tests of the statutory major participant definitions encompass entities that maintain a substantial position in a ''major'' category of swaps or security-based swaps.[763]

In the Proposing Release, the Commissions proposed to designate four ''major'' categories of swaps and two ''major'' categories of security-based swaps. These categories sought to reflect the risk profiles of the various types of swaps and security-based swaps, and the different purposes for which end-users use those instruments. The Proposing Release also noted the importance of not parsing the ''major'' categories so finely as to base the ''substantial position'' thresholds on unduly narrow risks and reduce those thresholds' effectiveness as risk measures.[764]

The proposed four ''major'' categories of swaps were rate swaps, credit swaps, equity swaps and other commodity swaps.[765] Rate swaps would encompass any swap which is primarily based on one or more reference rates, such as swaps of payments determined by fixed and floating interest rates, currency exchange rates, or other monetary rates. Credit swaps would encompass any swap that is primarily based on default, bankruptcy and other credit-related risks related to, or the total returns on, instruments of indebtedness (including loans), including but not limited to any swap primarily based on one or more broad-based indices related to debt instruments, and any swap that is a broad-based index credit default swap or total return swap. Equity swaps would encompass any swap that is primarily based on equity securities, such as any swap primarily based on one or more broad-based indices of equity securities, including any total return swap on one or more broad-based equity indices. Other commodity swaps would encompass any swap not included in any of the first three categories, and would generally include, for example and not by way of limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity. The four categories were intended to cover all swaps, and each swap would be in the category that most closely describes the primary item underlying the swap.[766]

The Commissions proposed to designate two ''major'' categories of security-based swaps.[767] The first category would encompass any security-based swap that is based, in whole or in part, on one or more instruments of indebtedness (including loans), or a credit event relating to one or more issuers or securities, including but not limited to any security-based swap that is a credit default swap, total return swap on one or more debt instruments, debt swaps, or debt index swaps. The second category would encompass any other security-based swaps not included in the first category, including for example, swaps on equity securities or narrow-based security indices comprised of equity securities.[768] These proposed categories were based on the different uses of these types of security-based swaps, and were consistent with market statistics and infrastructures that distinguish between those types of security-based swaps.[769]

2. Commenters' Views

Certain commenters requested clarification regarding how the major categories would be applied. One commenter particularly requested additional clarity as to how the proposed categories will apply to mixed swaps and to swaps that are based on debt that is convertible to equity,[770] while another commenter requested additional clarity as to the status of certain mortgage-related transactions.[771]

One commenter suggested that the final rules should include a catch-all provision to allow the Commissions to review large positions that appear to be structured to evade proper categorization, and that market participants should suggest the protocols for categorization of swaps or security-based swaps.[772]

One commenter suggested that the rate swap category should be divided between interest rates and currencies, and that energy, agriculture and metals swaps should be separate categories.[773] Another commenter expressed the view that creation of a separate category for cross currency swaps could lead to confusion among market participants who may feel obligated to bifurcate cross currency swaps between two categories.[774] Some commenters expressed general support for the major categories as proposed.[775]

3. Final Rules

After considering the issue in light of comments received, the Commissions are adopting final rules designating ''major'' categories of swaps and security-based swaps consistent with the proposal. Accordingly, the final rules provide that the four ''major'' categories of swaps are rate swaps,

[762] *See* part V, *infra*.

[763] *See* CEA section 1a(33)(A)(i), (iii); Exchange Act section 3(a)(67)(a)(2)(i), (iii).

[764] *See* Proposing Release, 75 FR at 80186–87.

[765] *See* proposed CFTC Regulation § 1.3(iii).

[766] The statutory definition of ''swap'' lists 22 different types of swaps.

[767] *See* proposed Exchange Act rule 3a67–2.

[768] The second category also encompasses all security-based swaps on narrow based indices that are comprised of both debt and equity components.

[769] *See* Proposing Release, 75 FR at 80187.

[770] *See* letter from ISDA I.

[771] *See* letter from Freddie Mac.

[772] *See* meeting with Professor Darrell Duffie, Stanford University Graduate School of Business (''Duffie'') on February 2, 2011.

[773] *See* letter from Better Markets I.

[774] *See* letter from ACLI.

[775] *See* letters from Barnard, ISDA I and MetLife; *see also* letter from American Insurance Association (''AIA'') (agreeing that the defined major categories would cover substantially all significant swaps and security-based swaps).

credit swaps, equity swaps and other commodity swaps.[776] The two ''major'' categories of security-based swaps are debt security-based swaps[777] and other security-based swaps.[778]

The Commissions believe that it is not necessary to further divide the proposed categories or add new categories for swaps and security-based swaps for purposes of the major participant definitions. We believe that maintaining a large number of narrow categories of swaps and security-based swaps would increase the possibility of confusion by market participants with regard to categorizing the swaps and security-based swaps in which they transact. The Commissions also continue to believe that it is important not to parse the ''major'' categories so finely as to base the ''substantial position'' thresholds on unduly narrow groupings that would reduce those thresholds' effectiveness as risk measures. Categories that are broad and clearly delineated further should help prevent action to evade designation as a major participant in a particular ''major'' category.

While we believe that these rules in general are sufficiently clear to allow each swap and security-based swap to be placed in the appropriate category, we are mindful of the commenters' request for guidance with regard to certain circumstances. In the case of mixed swaps, we would expect that the instrument would be placed in the ''swap'' and ''security-based swap'' categories that are consistent with the underlying attributes that cause such instrument to be a mixed swap.[779] Also, swaps or security-based swaps that are based on more than one item, instrument or risk, should be placed in the category that most closely describes the primary item, instrument or risk underlying the swap or security-based swap.[780]

B. ''Substantial Position''

1. Proposed Approach

The major participant definitions require that the Commissions define a ''substantial position'' in swaps or security-based swaps at a threshold that we determine to be ''prudent for the effective monitoring, management, and oversight'' of entities that are systemically important or can significantly impact the U.S. financial system. The definitions further require that we consider a person's relative position in uncleared and cleared swaps or security-based swaps, and permit us to consider the value and quality of collateral held against counterparty exposure.[781]

The proposed rules provided that a person would have a ''substantial position'' in swaps or security-based swaps if the daily average current uncollateralized exposure associated with its swap or security-based swap positions in a major category in a calendar quarter amounted to $1 billion or more (or $3 billion in the case of rate swaps).[782] A person also would have a ''substantial position'' if the daily average of the sum of the current uncollateralized exposure plus the potential future exposure associated with its positions in a major category in a calendar quarter amounted to $2 billion or more (or $6 billion for the rate swap category).[783]

The proposed rules did not prescribe any particular methodology for measuring current exposure or valuing collateral posted, and instead provided that the method used should be consistent with counterparty practices and industry practices generally.[784] The proposed rules also provided that an entity could calculate its current uncollateralized exposure by accounting for netting agreements on a counterparty-by-counterparty basis,[785] and the Proposing Release set forth a method for allocating any residual uncollateralized exposure to a counterparty that remains following netting.[786]

The proposed potential future exposure test was based on the risk-adjusted notional amount of the entity's swap and security-based swap positions, consistent with a test used by bank regulators for purposes of setting capital standards.[787] The test also excluded or lowered the potential exposure associated with certain lower-risk positions.[788] In addition, the measures of potential future exposure would be discounted by up to 60 percent to reflect the risk mitigation provided by netting agreements,[789] and would further be decreased by 80 percent for positions subject to central clearing or daily mark-to-market margining.[790]

2. Commenters' Views

a. Basis for Regulating Major Participants and Alternative Approaches for Identifying ''Substantial Positions''

Several commenters expressed the view that the major participant definition is intended to address entities whose swap or security-based swap positions pose systemic risk,[791] while one commenter took the contrary view that the definition also is intended to address the significance of an entity's swap or security-based swap positions (as well as the risk those positions pose).[792]

One commenter stated that the proposal inappropriately sought to account for the risk posed by the potential default of multiple entities, rather than a single entity.[793] Some commenters suggested that the analysis should account for the concentration of the risk posed by an entity's

[776] *See* CFTC Regulation § 1.3(iii). The four major categories of swaps are the same as the asset classes used in the CFTC Regulations relating to SDRs and reporting, except that the asset classes for interest rate swaps and foreign exchange transactions are combined into the single rate swap major category of swaps. *See* CFTC, Swap Data Repositories: Registration Standards, Duties and Core Principles; Final Rule, 76 FR 54538 (Sept. 1, 2011) and Swap Data Recordkeeping and Reporting Requirements; Final Rule, 77 FR 2136 (Jan. 13, 2012).

[777] The name of the first major category of security-based swaps has been changed to ''debt security-based swaps'' in this Adopting Release from ''security-based credit derivatives'' in the Proposing Release. This change more accurately reflects the products encompassed by this category, particularly total return swaps on debt instruments. *See* Exchange Act rule 3a67–2(a).

In addition, the final rules defining the major categories for purposes of the major participant definitions remove a cross-reference to the corresponding dealer definitions under the CEA or the Exchange Act to clarify that the rules apply only in the context of the major participant definitions, and not the dealer definitions. *See* CFTC Regulation § 1.3(iii); Exchange Act rule 3a67–2.

[778] *See* Exchange Act rule 3a67–2(b).

[779] The Commissions have proposed rules regarding the regulation of mixed swaps. *See* Product Definitions Proposal, note 3, *supra.*

[780] In the case of instruments on debt securities that are convertible into equity, in general we would expect the instrument to be categorized based on its status (as debt or equity) at the time of evaluation.

[781] *See* CEA section 1a(33)(B); Exchange Act section 3(a)(67)(B).

[782] *See* proposed CFTC Regulation § 1.3(jjj)(1); proposed Exchange Act rule 3a67–3(a)(1), (d).

[783] *See* proposed CFTC Regulation § 1.3(jjj)(1); proposed Exchange Act rule 3a67–3(a)(2), (d).

[784] *See* proposed CFTC Regulation § 1.3(jjj)(2)(ii); proposed Exchange Act rule 3a67–3(a)(2)(i).

[785] *See* proposed CFTC Regulation § 1.3(jjj)(2)(iii); proposed Exchange Act rule 3a67–3(b)(3).

[786] *See* Proposing Release, 75 FR at 80190.

[787] *See id.* at 80191–92.

[788] *See* proposed CFTC Regulation § 1.3(jjj)(3)(iii); proposed Exchange Act rule 3a67–3(c)(2)(i)(C), (D).

[789] *See* proposed CFTC Regulation § 1.3(jjj)(3)(ii)(B); proposed Exchange Act rule 3a67–3(c)(2)(ii).

[790] *See* proposed CFTC Regulation § 1.3 (jjj)(3)(iii)(A); proposed Exchange Act rule 3a67–3(c)(3)(i). This discount for daily margining would be available even in the presence of a threshold or a minimum transfer amount, so long as the threshold and the minimum transfer amount (if the latter exceeds $1 million) are separately added to the entity's current exposure for purposes of the current exposure plus potential future exposure test. *See* proposed CFTC Regulation § 1.3(jjj)(3)(iii)(B); proposed Exchange Act rule 3a67–3(c)(3)(ii).

[791] *E.g.,* letters from BlackRock I and MFA I.

[792] *See* letter from Better Markets I.

[793] *See* letter from BlackRock I.

positions,[794] and one commenter suggested that the analysis should not account for individual categories of swaps or security-based swaps.[795]

b. Levels of Proposed ''Substantial Position'' Thresholds

A number of commenters expressed the view that the proposed thresholds are inappropriately low.[796] Some commenters stated the thresholds initially should be high, with later revisions based on market data.[797]

Some commenters did not oppose the proposed thresholds or expressed support for the thresholds (though many of those commenters separately raised issues about the underlying tests),[798] while two commenters supported lowering the proposed thresholds.[799] Some commenters took the position that the thresholds should be adjusted over time to reflect factors such as inflation or market characteristics.[800]

c. Current Uncollateralized Exposure Test

Measures of exposure and valuation of collateral—A number of commenters supported the Proposing Release's position that the current exposure analysis not prescribe any methodology for measuring exposure or valuing collateral.[801] On the other hand, some commenters requested explicit approval of particular methodologies,[802] a good faith safe harbor,[803] or regulator-prescribed measurement standards.[804] Some commenters emphasized the need to be able to post non-cash collateral in connection with positions.[805] Two commenters requested codification of the proposal's position that operational delays associated with the daily exchange of collateral would not lead to current uncollateralized exposure for purposes of the analysis.[806]

Netting issues—Some commenters stated that the proposed netting provisions should be expanded to encompass additional products that may be netted for bankruptcy purposes.[807] One commenter took the view that these provisions should be expanded across multiple netting agreements to the extent that offsets are permitted.[808] One commenter asked for clarification as to the scope of the netting provisions,[809] and one commenter expressed general support for the proposed netting provisions.[810]

Allocation of uncollateralized exposure—Some commenters requested that the final rules incorporate the principles, articulated in the Proposing Release, for allocating any uncollateralized exposure that remains following netting.[811] Other commenters raised concerns that those principles were based on an unwarranted assumption that collateral is specifically earmarked to particular transactions.[812]

d. Potential Future Exposure Test

General concerns and suggested alternative approaches—Some commenters disagreed with the Proposing Release's statement that the potential future exposure analysis would evaluate potential changes in the value of a swap or security-based swap over the remaining life of the contract; those commenters stated that the test instead should focus on potential volatility during the time it would take for a non-defaulting party to close out a defaulting party's positions.[813]

Some commenters criticized the tables setting forth the risk adjustments used to calculate potential future exposure.[814] Commenters further suggested using, as alternatives, value-at-risk measures or other models,[815] or the ''standardized method'' under Basel II.[816] Commenters also argued that risk adjustments should provide a greater discount to credit swaps on ''investment grade'' instruments than to other credit swaps, that index CDS should be subject to a greater discount than single name CDS, and that there should be a lower discount factor for CDS of shorter maturity.[817] One commenter generally supported the proposed conversion factors and adjustments.[818]

Some commenters expressed the view that measures of potential future exposure should be superseded by negotiated independent amounts or regulator-required initial margin.[819] Some commenters also argued that

[794] *See* letters from Black Rock I (suggesting a two-step process that accounts for the reduced risk associated with entities whose positions are distributed among several counterparties); CCMR I and APG Algemene Pensioen Groep NV (''APG'').

[795] *See* letter from NYCBA Committee.

[796] *See* letters from ABC/CIEBA (indirectly referring to AIG Financial Products, and noting that it had $400 billion in notional positions and defaulted when it was required to post approximately $100 billion in collateral); BG LNG I (alluding to lack of systemic impact associated with Enron's failure, and suggesting that the Commissions convene an advisory committee to develop thresholds); NCGA/NGSA I (alluding to corporate financial losses involving derivatives that have exceeded the proposed thresholds without significantly impacting the U.S. financial system); ACLI (supporting increase in proposed thresholds under the CEA to $4 billion current uncollateralized exposure and $8 billion current uncollateralized exposure plus potential future exposure); and Chesapeake Energy.

[797] *See* letters from MFA dated February 25, 2011 (''MFA II'') (stating that thresholds initially should be set higher, while later survey-based thresholds should be based on potential systemic risk impact and the cost of performing the calculations); CCMR I (stating that the Commissions presently have insufficient data to determine appropriate thresholds, and that thresholds initially should be high); BlackRock I (stating that the Commissions should refrain from establishing thresholds if sufficient information is not available); and Freddie Mac. Two commenters particularly addressed the proposed thresholds applicable to rate swaps. *See* letters from ACLI and MetLife.

[798] *See, e.g.,* letters from ACLI, Fidelity, SIFMA AMG dated Feb. 22, 2011 (''SIFMA AMG II'') and Vanguard (supporting proposed limits for credit swaps, equity swaps and other commodity swaps, but not rate swaps).

[799] *See* letters from AFR (supporting use of a $500 million uncollateralized exposure threshold, or a $1 billion current exposure plus potential future exposure threshold, with higher thresholds for rate swaps) and Greenberger.

[800] *See, e.g.,* letters from MFA I (referring to inflation and measures such as the amount of equity in the U.S. banking system) and ISDA I (referring to evolution of the size and fundamental characteristics of the markets, and changes to valuation methodologies and economic conditions).

[801] *See* letters from Fidelity, ICI I, ISDA I and MFA I.

[802] *See* letter from BlackRock I. Consistent with the proposal, the final rules contemplate the use of industry standard practices in the calculation of current exposure and potential future exposure. As with other rules adopted by the Commissions, a market participant may raise questions with the Commissions about the participant's approach to addressing the final rules—including its use of particular methodologies—for further guidance as may be necessary or appropriate.

[803] *See* letter from FSR I (particularly noting difficulty of valuing illiquid or bespoke positions).

[804] *See* letter from Better Markets I.

[805] *See, e.g.,* letters from ACLI, CDEU and MetLife.

[806] *See* letters from SIFMA AMG II and Vanguard.

[807] *See* letters from ISDA I (specifically addressing securities contracts and forward contracts); NRG Energy (specifically addressing forwards); and APG (specifically addressing securities options and forwards).

[808] *See* letter from FSR I.

[809] *See* letter from Fidelity (seeking confirmation that ''master netting agreement'' can include an ISDA Master Agreement).

[810] *See* letter from ACLI.

[811] *See* letters from SIFMA AMG II and Vanguard.

[812] *See* letters from FSR I and ISDA I; *see also* letter from MetLife (suggesting pro rata allocation of uncollateralized current exposure among each major category with current exposure).

[813] *See* letters from SIFMA AMG II and Vanguard.

[814] *See* letters from Riverside Risk Advisors LLC (''Riverside Risk Advisors'') (criticizing, among other aspects, discontinuities in table, a failure to account for how far a swap is in or out of the money, the use of a single discount factor for credit default swaps, the fact that the risk factor for short-term equity swaps is lower than the risk factor for credit swaps, and the fact that equity swaps do not distinguish between high-volatility and low-volatility stocks, as well as the failure to address portfolio effects of diversification and correlation, and ''wrong-way'' risk in the form of ''an adverse correlation between counterparty default risk and the value of its derivatives contracts''); and ISDA I (noting that the conversion factors were calibrated more than 15 years ago and were not designed for later instruments such as credit products).

[815] *See* letters from Riverside Risk Advisors (supporting giving end-users the option to use a model-based approach); and Better Markets I (supporting use of a value-at-risk calculation).

[816] *See* letter from ISDA I.

[817] *See* letters from AIMA I and MFA I.

[818] *See* letter from MetLife.

[819] *See* letters from SIFMA AMG II and Vanguard.

excess posted collateral or net in-the-money positions should be offset against potential future exposure.[820]

Potential future exposure measures for lower-risk positions—Some commenters stated that the proposal to cap potential future exposure when a person buys credit protection using a credit default swap should be expanded to apply to any position with a fixed downside risk.[821] Commenters also suggested that the potential future exposure associated with purchases of credit protection be further discounted,[822] while one commenter took the position that purchases of credit default swaps should be excluded from the potential future exposure test.[823] Commenters also addressed the appropriate discount rate for calculating the net present value of unpaid premiums.[824]

Netting issues—One commenter stated that the proposal's netting provisions did not adequately account for the risk mitigation associated with hedged positions,[825] while another commenter asked that the proposed netting provisions be clarified and simplified.[826] One commenter supported the proposed netting approach.[827]

Discount for cleared or margined positions—Several commenters took the view that cleared positions should be excluded entirely from the potential future exposure analysis, rather than only being subject to an 80 percent discount,[828] and some commenters also supported a complete exclusion for positions subject to daily mark-to-market margining.[829] One commenter suggested a minimum 98 percent reduction for positions subject to central clearing or mark-to-market margining,[830] while one commenter suggested that there be a higher discount for positions subject to the posting of initial margin.[831]

Some commenters also stated that there should be a partial discount provided in connection with positions for which mark-to-market margining is done less than daily,[832] and that there should be a discount for positions that are margined using security interests or liens.[833] On the other hand, one commenter stated that there is no basis for providing any discount for marked-to-market positions.[834]

One commenter requested that the rule language codify language in the Proposing Release as to when a position is subject to daily mark-to-market margining.[835] A number of commenters addressed proposed rule language that was intended to clarify that the discount for daily mark-to-market margining would be available even in the presence of thresholds and minimum transfer amounts.[836]

Two commenters supported the proposed approach in general.[837] One commenter specifically supported the proposed 80 percent reduction for positions subject to daily mark-to-market margining,[838] and one commenter specifically supported a reduction for cleared positions.[839]

Additional issues regarding the potential future exposure test—Some commenters argued that the Commissions should clarify how the categories in the proposed potential future exposure tables would be applied, given how those differ from the proposed ''major'' categories of swaps and security-based swaps.[840]

Some commenters raised concerns that the proposed use of an instrument's ''effective notional'' amount is ambiguous.[841] Commenters also took the position that for purposes of the potential future exposure calculation, notional amounts should be adjusted to reflect delta weighting,[842] that the measure of duration for options on swaps should consider whether the underlying swap is cash-settled,[843] and that the adopting release should set forth examples of potential future exposure calculations.[844]

e. Cost Concerns

Some commenters emphasized the need to avoid an overbroad major participant definition, [845] and highlighted concerns about being subject to unnecessary regulation.[846]

f. Additional Issues

One commenter suggested there be an explicit presumption against imposing major participant (or dealer) regulation on end-users.[847] Some commenters requested that the current uncollateralized exposure test explicitly exclude cleared positions, net in-the-money positions, and fully collateralized out-of-the-money positions,[848] and one commenter also supported excluding those positions from the potential future exposure analysis.[849] That commenter also supported excluding swaps on government securities from the substantial position analysis.[850]

One commenter requested confirmation that dealers and major participants would not be required to compute, assist with, or verify computations for counterparties that may be major participants, and also that market participants can enlist third-party services to assist in performing the calculations.[851] One commenter requested clarification that the proposed focus on uncollateralized exposure does not mean that end-users themselves

[820] *See, e.g.,* letters from AIMA I, Fidelity, MFA I, SIFMA AMG II and Vanguard.

[821] *See* letters from MFA I (citing fixed portions of interest rate swaps), MetLife (citing purchased options as well as CDS), ACLI and Ropes & Gray.

[822] *See* letters from MFA I (arguing that the tightening of credit spreads would imply a healthy credit environment) and AIMA; *see also* meeting with MFA on February 14, 2011.

[823] *See* letter from Vanguard.

[824] *See* letter from MFA I (suggesting the possible use of the LIBOR/Swap rate) and AIMA I.

[825] *See* letter from ISDA I.

[826] *See* letter from SIFMA AMG II.

[827] *See* letters from ACLI.

[828] *See, e.g.,* letters from MFA I, SIFMA AMG II and Vanguard.

[829] *See* letters from BG LNG I, Fidelity and ICI I.

[830] *See* letter from ISDA I.

[831] *See* letter from FHLB I (suggesting 90 percent discount for cleared swaps and for uncleared swaps for which initial margin has been posted; alternatively suggesting that posted initial margin be subtracted from the calculated amount).

[832] *See* letters from Fidelity and Canadian Master Asset Vehicle I and Master Asset Vehicle II (''Canadian MAVs'').

[833] *See* letter from FHLB I (giving as an example swaps collateralized by security interests in real estate, oil or gas interests, or by first liens on financial assets).

[834] *See* letter from Better Markets I; *see also* letter from AFR (generally opposing use of risk adjustments, but suggesting that any such discounts should be larger for cleared positions).

[835] *See* letter from SIFMA AMG II.

[836] *See* letter from CDEU (stating that the proposal could overstate an entity's future exposure, and favoring use of the lower of the calculated potential future exposure or the CSA threshold); *see also* letters from SIFMA AMG II and Vanguard.

[837] *See* letters from ACLI and MetLife.

[838] *See* letter from Vanguard.

[839] *See* letter from Better Markets I.

[840] *See* letters from SIFMA AMG II and Vanguard.

[841] *See* letters from FSR I, SIFMA AMG II and Vanguard.

[842] *See* letters from MFA I and Ropes & Gray.

[843] *See* letter from MFA I.

[844] *See id.*

[845] *See* joint letter from Representatives Bachus and Lucas.

[846] *See, e.g.,* letters from SIFMA AMG II (stating that the commenter's suggested changes in connection with the substantial position analysis would reduce burdens and costs to market participants, and more closely align the tests with the objectives they are meant to achieve) and ABC/CIEBA; *see also* letter from NFPEEU (reserving the right to dispute the cost-benefit analysis associated with the proposed dealer and major participant rules until all relevant Dodd-Frank Act releases could be analyzed as a whole).

[847] *See* letter from CDEU.

[848] *See* letters from ICI I, SIFMA AMG II and Vanguard.

[849] *See* letter from ICI I.

[850] *See* letter from ICI I (noting size of government security market and Federal Reserve control over supply and demand, and stating that the proposed thresholds are ill-suited to address the ''vast'' government securities market).

[851] *See* letter from ISDA I.

should not demand collateral from dealers.[852]

3. Final Rules

a. Guiding Principles

The final rules defining ''substantial position'' focus on identifying persons whose large swap and security-based swap positions pose market risks that are significant enough that it would be ''prudent'' to regulate those persons. In developing these rules we have been mindful of the costs associated with regulating major participants, and have considered cost and benefit principles as part of the analysis of what level of swap and security-based swap positions reasonably form the lower bounds for identifying when it would be ''prudent'' that particular entities be subject to monitoring, management and oversight of entities that may be systemically important or may significantly impact the U.S. financial system.[853]

The final rules implementing the ''substantial position'' definition follow the basic approach that the Commissions proposed, including the combined use of current exposure and potential future exposure tests.[854] While we have carefully considered the views of commenters who suggested alternative approaches, we have concluded that it is appropriate to adopt the basic approach that was proposed, as described below.

• *Focus on default-related credit risks.* The final rules implement tests that seek to reflect the credit risk that a person's swap or security-based swap positions would pose in the event of default. In arguing that the analysis should consider factors in addition to default-related risks, commenters have noted that certain regulations applicable to major participants address business conduct issues that are distinct from systemic risk issues.[855] We nonetheless believe that the statutory definition of ''substantial position'' indicates that the analysis should focus on default-related credit risks, because a default-related approach is more closely linked to the statutory criteria that the definition focus on entities that are ''systemically important'' or can ''significantly impact'' the U.S. financial system than would be an approach that focuses on the potential for disruptive market movements.[856]

• *Failure of multiple entities close in time.* The final rules that implement the ''substantial position'' definition seek to reflect the risks that would be posed by the default of multiple entities close in time. Although one commenter took the view that the purpose of major participant regulation is to prevent the credit exposure of a *single* person from having a systemic impact,[857] we do not believe that the major participant definitions should be construed so narrowly. The events of recent years demonstrate that market stress may lead to the failure and near-failure of multiple entities with large financial positions over a relatively short time period. We do not believe that it would be prudent or well-reasoned to presume that recent history cannot repeat itself, and to assume that future failures of entities with large financial positions will be isolated events.

• *Aggregate risk.* The final rules address the aggregate risk posed by an entity's swap or security-based swap positions, rather than seeking to focus on principles of concentration (such as by using a threshold that addresses an entity's largest exposure to an individual counterparty) or on converse principles of interconnection. The statutory ''substantial position'' definition is specifically written in terms of market risk concerns (*i.e.,* ''systemically important'' and ''can significantly impact the financial system of the United States''), and measures of aggregate risk appear to be best geared to reflect this standard.[858]

• *Use of objective, quantitative criteria.* The final rules provide for a ''substantial position'' analysis that is based on objective, quantitative criteria that would permit a market participant to determine which level of swap or security-based swap positions would cause it to be a major participant. Although one commenter has suggested the use of a two-step approach that uses thresholds as a safe harbor and that would be accompanied by a second-level determination,[859] we do not believe that such an approach would be consistent with the statutory language or with principles of regulatory efficiency.[860] Accordingly, a person whose swap or security-based swap positions satisfy the applicable thresholds will be a major participant, with no further layer of review provided.[861]

b. Current Uncollateralized Exposure Test

Consistent with the proposal, the final rules implementing the ''substantial position'' definition include a test that accounts for the current uncollateralized exposure posed by an entity's swap or security-based swap positions in a major

[852] *See* letter from FHLB I.

[853] At the same time, as discussed above in the context of the *de minimis* exception to the dealer definitions, we are mindful that the benefits of financial regulation cannot be quantified. For example, while the regulation of major participants will comprise one component of Title VII's comprehensive regulatory framework that should be expected to help lessen the amount and frequency of financial crises, we cannot place a dollar figure on the contribution of major participant regulation to those benefits. In light of those factors, we believe that it would be ''prudent'' to regulate, as major participants, those persons whose swap or security-based swap positions are large enough to pose a material potential of causing significant counterparty impacts, consistent with the levels set forth in the final rules. The Commissions will further address the comparative costs and benefits associated with regulating major participants in the context of the substantive rules applicable to major participants.

[854] As with the proposal, the final rules apply these tests to swap and security-based swap positions in a ''major'' category. *See* CFTC Regulation § 1.3(jjj)(1); Exchange Act rule 3a67–3(a). The final rules have been modified from the proposal, however, by removing a reference to ''positions excluded from consideration.'' We have concluded that this reference is unnecessary because the first statutory major participant test explicitly provides that positions that are subject to the commercial risk hedging and the ERISA hedging exclusions of the first major participant test need not be considered for purposes of that test.

[855] *See, e.g.,* letter from Better Markets I.

[856] We also believe that the statutory definition should focus on all default-related credit risks associated with swap or security-based swap positions. We do not see a basis for excluding any class of risks (*e.g.,* risks associated with swaps based on government securities) from the analysis.

[857] *See* letter from BlackRock I.

[858] Moreover, a test that focuses on the concentration of an entity's swap or security-based swap exposure toward one or a few individual parties potentially poses a tension with the view that interconnections of exposure among multiple parties are important to establishing systemic risk.

[859] *See* letter from BlackRock I.

[860] The major participant definitions specifically require that the term ''substantial position'' be defined ''by rule or regulation'' via a ''threshold.'' That language would not appear to anticipate the use of a multi-tier approach that accounts for subjective criteria.

In this respect, the major participant definitions may be compared with section 113 of the Dodd-Frank Act, which authorizes the Financial Stability Oversight Council (''FSOC'') to provide for a non-bank financial company to be supervised by the Board if the FSOC ''determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States.'' Section 113 further provides that these designations will result from a vote of the FSOC based on a variety of factors. The ''major participant'' definition does not provide for this type of entity-specific determination, and we believe that the ''major participant'' definition more appropriately is implemented by objective factors that allow market participants to determine whether they will fall within the definition.

[861] In addition, the final rules provide that the ''substantial position'' analysis that implements the first (and third) major participant test will be based on the ''major'' categories of swaps and security-based swaps. Notwithstanding commenter concerns that this approach will require market participants to analyze their swaps and security-based swaps in new ways and will result in additional costs, this focus on ''major'' categories is dictated by the plain language of the statute.

category.[862] This provides a measure of the amount of potential risk that an entity would pose to its counterparties if the entity currently were to default.[863]

As with the proposal, a person would apply this test by examining the positions it maintains with each of its counterparties in a particular major category of swaps or security-based swaps. For each counterparty, the person would determine the dollar value of the aggregate current exposure arising from each of its swap or security-based swap positions with negative value in that major category by marking-to-market using industry standard practices, and deduct from that amount the aggregate value of the collateral the entity has posted with respect to the swap or security-based swap positions.[864] The ''aggregate uncollateralized outward exposure'' would be the sum of those uncollateralized amounts over all counterparties with which the person has entered into swaps or security-based swaps in that major category.[865]

The final rules implementing this test largely are the same as the rules the Commissions proposed, but with certain modifications to address issues raised by commenters.

i. Measure of Exposure and Valuation of Collateral

Consistent with the proposal, the final rules do not prescribe any particular methodology for measuring current exposure or for valuing collateral posted, but instead require the use of industry standard practices.[866] In this regard we do not concur with commenter requests that we approve or prescribe particular methodologies, or provide a safe harbor for measures or valuations made in good faith.[867] Instead, it is appropriate that the final rules provide market participants with the flexibility to use the same methodologies that they use in connection with their business activities. Accordingly, we would expect entities to value current uncollateralized exposure based on the amounts that would be payable if the transaction were terminated.

To the extent the measure of exposure or the valuation of collateral is subject to other rules or regulations, we also would expect those measures and valuations for purposes of the major participant calculations to be consistent with those other applicable rules.[868] In addition, the ''substantial position'' analysis may take into account the posting of non-cash collateral to the extent that the posting of such collateral, and the valuation of that collateral, is consistent with industry standard practices or applicable regulation.[869]

ii. Netting

The final rules build upon the proposal with regard to the measure of uncollateralized current exposure in the presence of netting arrangements. In particular, to address commenter concerns these provisions have been modified from the proposal to account for the fact that two counterparties may have multiple netting agreements for which offsets are permitted, and to extend the netting principles to any financial instruments that may be netted for purposes of applicable bankruptcy law (rather than limiting those instruments to swaps, security-based swaps and securities financing transactions).

Accordingly, the final rules provide that an entity may calculate its exposure on a net basis by applying the terms of one or more master netting agreements with a counterparty. The entity may account for offsetting positions entered into with that particular counterparty involving swaps or security-based swaps as well as securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements), and other financial instruments and agreements that are subject to netting offsets for purposes of applicable bankruptcy law, to the extent consistent with the offsets provided by those master netting agreements.[870] These revisions should permit the current uncollateralized exposure test to more accurately reflect the degree of credit risk that an entity poses to its counterparty in the event of default.

As discussed in the proposal, these netting provisions apply only to offsetting positions with a single counterparty.[871] The provisions do not extend to the market risk offsets associated with an entity's positions with multiple counterparties, because such offsets would not directly mitigate the risks that an individual counterparty would face in the event of the entity's default.[872]

iii. Allocation of Uncollateralized Exposure Following Netting

The final rules build upon the proposal by codifying the method, discussed in the Proposing Release, related to the allocation of any uncollateralized exposure that remains following netting and the posting of collateral. This type of allocation can be necessary because, with netting, it otherwise may not be possible to directly attribute residual uncollateralized exposure to a particular major category of swap or security-based

[862] CFTC Regulation § 1.3(jjj)(1); Exchange Act rule 3a67–3(b)(2). The final rules contain technical changes from the proposal to clarify the steps entailed by this calculation.

[863] *See* Proposing Release, 75 FR at 80188.

[864] As we noted in the Proposing Release, we recognize that there may be operational delays between changes in exposure and the resulting exchanges of collateral, and in general we would not expect that operational delays associated with the daily exchange of collateral would be considered to lead to uncollateralized exposure for these purposes. *See* Proposing Release, 75 FR at 80189 n.92. Although we are not codifying this principle within the final rules, we will be mindful of the principle when enforcing those rules.

[865] CFTC Regulation § 1.3(jjj)(2); Exchange Act rule 3a67–3(b)(2).

[866] CFTC Regulation § 1.3(jjj)(2); Exchange Act rule 3a67–3(b)(1). As we noted in the Proposing Release, collateral may be posted to a third-party custodian, directly to the counterparty, or in accordance with the rules of a derivatives clearing organization or clearing agency. *See* Proposing Release, 75 FR at 80189 n.94.

[867] *See* letters from BlackRock I, Better Markets I and FSR I.

[868] These principles should apply even in the case of valuing illiquid or bespoke positions. Market participants have the flexibility to use commercially reasonable approaches that are consistent with their financial statements, tax calculations and compliance with other regulations.

[869] For non-cash collateral to be considered for purposes of these calculations, the collateral must be available for the counterparty's use if the entity posting the collateral were to default. At a minimum, this would require that the counterparty possess a perfected security interest in that collateral. As we noted in the Proposing Release, while we expect that other regulatory requirements applicable to the valuation of swap or security-based swap positions and collateral would be relevant to certain calculations relating to major participant status, these rules would not necessarily be relevant for other purposes, such as in the context of capital and margin requirements. *See* Proposing Release, 75 FR at 80189 n.95.

[870] CFTC Regulation § 1.3(jjj)(2)(iii); Exchange Act rule 3a67–3(b)(3)(i). This provision provides for netting under the master netting agreement of any instruments, contracts or agreements (including contracts on physical commodities), that would qualify for netting under applicable bankruptcy law. As we noted in the Proposing Release, the proposed rules regarding possible offsets of various positions are for purposes of determining major participant status only. Other rules proposed by the Commissions may address the extent to which, if any, persons such as dealers and major participants may offset positions for other purposes. *See* Proposing Release, 75 FR at 80189 n.98. As proposed, Exchange Act rule 3a67–3(b)(3)(i) referred to ''security-based swaps (in any swap category)''; this reference has been revised in the final rule to ''security-based swaps (in any security-based category).''

[871] CFTC Regulation § 1.3(jjj)(2)(iii); Exchange Act rule 3a67–3(b)(3)(ii).

[872] The fact that positions with third parties do not offset exposure to a particular counterparty was recently highlighted by a decision finding that the Bankruptcy Code does not permit excess collateral held by one creditor to offset amounts that the debtor owed to the creditor's affiliates. *See In re Lehman Brothers Inc.,* Case No. 08–01420 (JMP) (SIPA), slip op. (Bankr. S.D.N.Y Oct. 4, 2011).

swap.[873] Some commenters have requested that the final rules codify this method to provide more certainty to market participants.[874]

Accordingly, the final rules incorporate a formula which, for purposes of the substantial position analysis, provides that the amount of net uncollateralized exposure that is attributable to a particular major category of swap or security-based swap would be allocated *pro rata* in a manner that compares the amount of the entity's out-of-the-money positions in that major category to its total out-of-the-money positions in all categories that are subject to the netting arrangements with that counterparty.[875] This approach does not require that any collateral be specifically earmarked to particular swaps or security-based swaps, and can be followed so long as collateral is posted based on the net exposure associated with all instruments subject to the applicable netting agreements with that particular counterparty.[876]

iv. Application of Current Exposure Test to Cleared, Fully Collateralized or Net In-the-Money Positions

Although certain commenters have requested that the current uncollateralized exposure test explicitly exclude swap or security-based swap positions that are cleared, fully collateralized or net in-the-money,[877] the final rules do not provide such exclusions. As we recognized in the Proposing Release, centrally cleared swaps and security-based swaps are subject to mark-to-market margining that would largely eliminate the uncollateralized exposure associated with a position, effectively resulting in the cleared position being excluded from the analysis.[878] Also, by definition, fully collateralized positions are not associated with current uncollateralized exposure, and thus would be excluded from the analysis. As such, we do not believe that it would be necessary to explicitly exclude such positions from the analysis.[879]

Similarly, we do not believe that it is necessary for the rules to explicitly exclude net in-the-money swap or security-based swap positions. If an entity does not have any current uncollateralized exposure to a particular counterparty—after accounting for the entity's netting agreement with that counterparty and the posting of collateral—then the entity may disregard its positions with that counterparty for purposes of calculating current uncollateralized exposure. Otherwise, it is appropriate to consider the contribution of all swaps or security-based swaps to current uncollateralized exposure, as determined by the allocation methodology discussed above.[880]

c. Potential Future Exposure Analysis

The ''substantial position'' analysis also will consider an entity's ''aggregate potential outward exposure,'' which would reflect the potential exposure of the entity's swap or security-based swap positions in the applicable ''major'' category of swap or security-based swaps, subject to certain adjustments.[881] The final rules implementing this test in general follow the proposed approach, but have been revised to address commenter concerns.

i. Purpose Underlying the Potential Future Exposure Test

As discussed in the proposal, a potential future exposure test addresses the fact that a sole focus on current uncollateralized exposure could fail to identify risky entities until some time after they begin to pose the level of risk that should subject them to regulation as major participants.[882] A potential future exposure test would allow the substantial position analysis to account for this risk by addressing how the value of an entity's swap or security-based swap positions may move against the entity over time.[883]

Accordingly, consistent with the proposal, the final rules incorporate a potential future exposure test that seeks to estimate how much the value of swaps or security-based swaps might change against an entity over the remaining life of the contract. Although some commenters took the view that this test should only address potential volatility during the period of time it would take for a non-defaulting party to close out positions and liquidate collateral,[884] we believe that it is more appropriate for the analysis to consider the risks that swaps or security-based swap positions pose over the lives of those positions. An exclusive focus on short-term risks would fail to account for the possibility that an entity's large swap or security-based swap positions can readily produce large losses in adverse market circumstances, potentially leading either to large uncollateralized exposure (if the posting of collateral is not required), or to large collateral calls that may lead to the entity's default (or to calls for extraordinary action) and that can threaten non-defaulting parties with significant costs and challenges in connection with liquidating and replacing those positions. The analysis should give appropriate weight to those risks.

ii. Risk Multipliers

Subject to modifications addressed below, the final rules implementing the ''substantial position'' analysis incorporate a potential future exposure test based on the proposal's general approach of adjusting notional positions using risk multipliers.[885] This approach incorporates and builds upon tests used by bank regulators for the purposes of setting prudential capital.[886] Through

[873] Such allocation would not be necessary, of course, to the extent that an entity has no current uncollateralized exposure to a counterparty following netting and the posting of collateral.

[874] *See* letters from SIFMA AMG II and Vanguard.

[875] CFTC Regulation § 1.3(jjj)(2)(iii)(A); Exchange Act rule 3a67–3(b)(4). Under this formula, for example, if an entity's exposure to a particular counterparty is $120 million after accounting for netting and the posting of collateral, and, subject to netting, the entity has $40 million in out-of-the-money positions in security-based credit derivatives, $90 million in out-of-the-money positions in other security-based swaps, and $120 million in out-of-the money positions in swaps and other instruments subject to the netting agreements, then $19.2 million in net uncollateralized exposure would be attributed to the ''security-based credit derivatives'' category (equal to $120 million · ($40 million/($40 million + $90 million + $120 million)), and $43.2 million in net uncollateralized exposure would be attributed to the ''other security-based swaps'' category (equal to $120 million · ($90 million/($40 million + $90 million + $120 million)).

[876] Although one commenter suggested that the analysis should further consider whether there are collateral posting requirements that are specific to a particular position, we believe that the test we are adopting is flexible enough to address that possibility. To the extent that the parties' collateral arrangements provide that collateral be earmarked to particular swap or security-based swap positions, an entity may calculate its potential future exposure with respect to that counterparty with regard to the applicable major category of swaps or security-based swaps, without accounting for netting across categories or instruments.

[877] *See* letters from ICI I, SIFMA AMG II and Vanguard.

[878] *See* Proposing Release, 75 FR at 80189 n.92.

[879] Moreover, to the extent that such positions are associated with uncollateralized amounts, such as those that arise from thresholds or minimum transfer amounts pursuant to the applicable credit support annex, then those amounts present counterparty risk that should be considered as part of the major participant analysis.

[880] Under that allocation approach, if none of the entity's swap or security-based swap positions in a major category with that counterparty are out-of-the-money, then none of the current exposure resulting from the netting agreement would be attributed to that major category.

[881] CFTC Regulation § 1.3(jjj)(3); Exchange Act rule 3a67–3(c).

[882] *See* Proposing Release, 75 FR at 80188.

[883] *See id.* at 80191.

[884] *See* letters from SIFMA AMG II and Vanguard.

[885] *See* CFTC Regulation § 1.3(jjj)(3)(ii)(A)(1); Exchange Act rule 3a67–3(c)(2)(i).

[886] *See* 12 CFR part 3, app. C, section 32 (Office of the Comptroller of the Currency capital adequacy guidelines for banks); 12 CFR part 325, app. D, section 32 (Federal Deposit Insurance Corp. capital adequacy guidelines for banks); 12 CFR part 208, app. F, section 32 (Federal Reserve System capital

this methodology, the final rules implement an objective approach that readily can be replicated by market participants.

Although some commenters have suggested the use of value-at-risk measures or internal models to evaluate potential future exposure,[887] we do not believe that such approaches would be well tailored to be implemented by a range of market participants, or would lead to comparable results across market participants with identical swap or security-based swap portfolios.

In adopting this approach, we are mindful of the significance of commenter concerns about the adequacy of the tables that set forth the risk multipliers that would be applied to notional positions. These comments address, among other issues: discontinuities in the tables; the failure to account for whether, and how much, a swap or security-based swap is in-the-money or out-of-the money; the failure of the multipliers applicable to interest rate swaps to distinguish between counterparties who pay floating rates and counterparties who pay fixed rates; the failure of the multipliers in the credit category to account for the volatility of the underlying instrument or the duration of the swap or security-based swap; the failure of the multipliers for equity and commodity swaps to distinguish between high-volatility and low-volatility stocks and commodities; the adequacy of how the test addresses diversification and correlation; the fact that the approach does not provide for delta weighting of options positions; and the fact that the factors do not distinguish between index and single-name credit default swaps.[888] While we acknowledge that it may be possible to develop revised risk multipliers that are more finely tuned to reflect relevant risk factors, at this time we believe that it would be most appropriate to implement the ''substantial position'' analysis by building upon an existing regulatory approach that is comparatively simpler to implement and leads to reproducible results, rather than seeking to develop a brand new approach.[889]

The final rules implementing the ''major security-based swap participant'' definition, however, modify the proposed risk multipliers in response to commenter concerns about how the ''major'' categories of security-based swaps should be applied to the risk multiplier categories. In particular, the final risk multiplier category for security-based swaps in the ''equity and other'' category encompasses all security-based swaps that are not credit derivatives, and the final rules eliminate the proposed category for ''other'' types of security-based swaps.[890]

iii. Potential Future Exposure Measures for Certain Lower-Risk Positions

Consistent with the proposal, the potential future exposure calculation will exclude purchases of options and other positions for which a person has prepaid or otherwise satisfied its payment obligations.[891] Also, in response to commenter concerns, the final rules expand on the proposal with regard to capping the potential future exposure associated with certain lower-risk swap and security-based swap positions. The final rules particularly cap—at the net present value of the unpaid premiums—the potential future exposure associated with positions by which a person buys credit protection using a credit default swap, and positions by which a person purchases an option for which the person retains additional payment obligations under the position.[892] This reflects the reduced risk associated with such positions. The final rules do not prescribe a particular discount rate for purposes of this analysis, and market participants instead should use a commercially appropriate discount rate.

In addition, to better align the results of the potential future exposure analysis with the risks that a person presents, the final rules have been modified from the proposal to also exclude swap or security-based swap positions for which, pursuant to regulatory requirement, a person has placed in reserve an amount of cash or Treasury securities that is sufficient to pay the person's maximum possible liability under the position, when the person is prohibited from using that cash or those securities without also liquidating the swap or security-based swap position.[893]

iv. Adjustments for Netting

Consistent with the proposal, and with the bank regulator standards that form the basis for these potential future exposure measures, the final rules provide that an entity may reduce the measure of its potential future exposure in a major category by up to 60 percent to reflect the risk mitigation effects of master netting agreements. We believe that this approach appropriately reflects the risk mitigating attributes of netting on potential future exposure. Moreover, in light of commenter requests for clarification of how these netting provisions would be applied,[894] the final rules have been revised from the proposal to provide that the risk reduction associated with netting should be estimated using the same *pro rata* allocation methodology that will be used to measure current exposure.[895]

adequacy guidelines for banks); 12 CFR part 225, app. G, section 32 (Federal Reserve System capital adequacy guidelines for bank holding companies).

[887] *See* letters from Riverside Risk Advisors and Better Markets I.

[888] *See, e.g.,* letters from Riverside Risk Advisors and MFA I.

[889] We also are not following a commenter suggestion to incorporate the ''standardized method'' prescribed as part of the ''Basel II'' bank capital methodology. *See* letter from ISDA I. The standardized method relies on counterparty credit ratings provided by external credit rating agencies for purposes of calculating risk-weighted capital measurements. *See* ''International Convergence of Capital Measurement and Capital Standards, A Revised Framework, Comprehensive Version,'' the Basel Committee on Banking Supervision, June 2006. Incorporating this reliance on credit ratings provided by external credit rating agencies into these final rules would be inconsistent with Section 939A of the Dodd-Frank Act, which required all Federal agencies to review and modify existing regulations ''to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations.''

[890] *See* Exchange Act rule 3a67–3(c)(2)(i). Aside from making the risk multipliers consistent with the ''major'' categories of security-based swaps, this change also should allow total return swaps on debt to be subject to the same risk multipliers as total return swaps on equity, rather than causing the debt swaps to be subject to higher multipliers (which may not accurately reflect the comparative risks of those instruments).

[891] *See* CFTC Regulation § 1.3(jjj)(3)(ii)(A)(3)(ii); Exchange Act rule 3a67–3(c)(2)(i)(C).

[892] *See* CFTC Regulation § 1.3(jjj)(3)(ii)(A)(4); Exchange Act rule 3a67–3(c)(2)(i)(D). The proposed rules would have applied this net present value caps only to the purchase of credit protection. The final rules expand this provision by also capping the potential future exposure associated with the purchases of options in which an entity retains payment obligations, to reflect the reduced risk associated with those positions.

[893] CFTC Regulation § 1.3(jjj)(3)(ii)(A)(3)(iii); Exchange Act rule 3a67–3(c)(2)(i)(C)(*3*). This exclusion of such positions from the major participant analysis may apply, for example, to certain swap or security-based swap positions of insurers where applicable law requires an amount equal to the maximum possible exposure of the insurer be segregated.

[894] *See* letter from SIFMA AMG II.

[895] Consistent with the proposal, the effects of netting are to be estimated using the formula: $P\ Net = 0.4 \times P\ Gross + 0.6 \times NGR \times P\ Gross$. Under that equation, *P Net* is the potential exposure adjusted for bilateral netting; *P Gross* is that potential outward exposure without adjustment for bilateral netting; and *NGR* is the net to gross ratio. The final rule has been revised from the proposal to clarify that the net to gross ratio equals the current exposure associated with the major category as calculated using the *pro rata* methodology discussed above, divided by what the measure of current exposure in connection with those out-of-the-money positions would be in the absence of that methodology.

Accordingly, for the example set forth in note 875, *supra,* the *NGR* for ''security-based credit derivatives'' and ''other security-based swaps'' both would equal 0.48 (equal to $19.2 million net

Continued

v. Adjustments for Cleared and Margined Positions

The final rules also provide for the measure of potential future exposure to be adjusted in the case of swap and security-based swap positions that are centrally cleared or that are subject to daily mark-to-market margining. This is consistent with the purpose of the potential future exposure test, which is to account for the extent to which the current outward exposure of positions (though possibly low or even zero at the time of measurement) might grow to levels that can lead to high counterparty risk to counterparties or to the markets generally. The practice of the periodic exchange of mark-to-market margin between counterparties helps to mitigate the potential for large future increases in current exposure.

Consistent with the proposal, the final rules reflect this ability to mitigate risk by providing that the potential future exposure associated with positions that are subject to daily mark-to-market margining will equal 0.2 times the amount that otherwise would be calculated. However, in response to commenters' opinions about the risk-mitigating effects of central clearing, and the additional level of rigor that clearing agencies may have with regards to the process and procedures for collecting daily margin, the final rules further provide that the potential future exposure associated with positions that are subject to central clearing will equal 0.1 (rather than the proposed 0.2) times the potential future exposure that would otherwise be calculated.[896]

Although some commenters supported the complete exclusion of cleared positions from the potential future exposure analysis,[897] and we are mindful of the risk mitigating attributes of central clearing, we also recognize that central clearing cannot reasonably be expected to entirely eliminate counterparty risk.[898] We conclude, however, that the use of a 0.1 factor (in lieu of the proposed 0.2) would be appropriate for cleared positions, reflecting the strong risk mitigation features associated with central clearing, particularly the procedures regarding the collection of daily margin and the use of counterparty risk limits, while recognizing the presence of some remaining counterparty risk.

Moreover, although some commenters opposed any deduction from the measure of potential future exposure for uncleared positions that are margined on a daily basis,[899] we believe that the risk-mitigating attributes of daily margining warrant an adjustment given that the goal of the potential future exposure test is to account for price movements over the remaining life of the contract.[900] The use of a 0.2 factor also reflects our expectation that the risk mitigation associated with uncleared but margined positions would be less than the risk mitigation associated with cleared positions.

While higher or lower alternatives to the 0.1 and 0.2 factors may also be reasonable for positions that are cleared or margined on a daily basis, we believe that the factors of the final rules reasonably reflects the risk mitigating (but not risk eliminating) features of those practices. The final rules also retain and clarify provisions addressing when daily mark-to-market margining occurs for purposes of this discount.[901]

vi. Application of ''Effective Notional'' Amounts

Consistent with the proposal (as well as the rules implementing the *de minimis* exception to the dealer definitions), the potential future exposure test is based on the ''effective notional'' amount of the swap or security-based swap when the stated notional is leveraged or enhanced by the structure of the swap or security-based swap.[902]

Moreover, as discussed in the Proposing Release,[903] in the case of positions that represent the sale of an option on a swap or security-based swap (other than the sale of an option permitting the person exercising the option to purchase a credit default swap), we would view the effective notional amount of the option as being equal to the effective notional amount of the underlying swap or security-based swap, and in general we would view the duration used for purposes of the formula as being equal to the sum of the duration of the option and the duration of the underlying swap or security-based swap.[904]

exposure divided by $40 million in out-of-the-money positions in the case of ''security-based credit derivatives,'' or $43.2 million net exposure divided by $90 million in out-of-the-money positions in the case of ''other security-based swaps''). If an entity has no current exposure to a counterparty following the application of netting arrangements and collateralization, the *NGR* for those positions would equal zero, and the potential exposure would equal 40 percent of what it would equal otherwise.

[896] *See* CFTC Regulation § 1.3(jjj)(3)(iii)(A); Exchange Act rule 3a67–3(c)(3)(i). The final rules further have been revised to clarify that the 0.1 factor applies to positions cleared by a registered clearing agency or by a clearing agency that has been exempted from registration.

[897] *See, e.g.,* letters from MFA I and SIFMA AMG II.

[898] Central clearing helps to mitigate counterparty credit risk by improving risk management and, among other things, mutualizing the risk of counterparty failure. If multiple members of a central counterparty fail beyond the level to which such risk is managed, however, the central counterparty would also be at risk of failure. *Cf.* Basel Committee on Banking Supervision, Consultative Document, ''Capitalisation of bank exposures to central counterparties,'' Nov. 25, 2011 (available at: *http://www.bis.org/publ/bcbs206.pdf*) (proposing that the capital charge for trade exposures to a qualifying central counterparty should carry a low risk weight, reflecting the relatively low risk of default of the qualifying central counterparty). In addition, as we discussed in the Proposing Release, *see* 75 FR at 80192 n.115, for example, central counterparties that clear credit default swaps do not necessarily become the counterparties of their members' customers (although even absent direct privity those central counterparties benefit customers by providing for protection of collateral they post as margin, and by providing procedures for the portability of customer positions in the event of a member's default). As a result, central clearing may not eliminate the counterparty risk that the customer poses to the member, although required mark-to-market margining should help control that risk, and central clearing would be expected to reduce the likelihood that an entity's default would lead to broader market impacts.

[899] *See* letter from Better Markets I; *see also* letter from AFR.

[900] We do not believe that it is appropriate to have this type of discount when mark-to-market margining is done less than daily, however.

[901] We recognize that at times, market participants whose agreements provide for the daily exchange of variation margin in connection with swaps or security-based swaps in practice may not exchange collateral daily, if the amounts at issue are relatively small (such as through the use of collateral thresholds and minimum transfer amounts). We do not believe that such practices would be inconsistent with providing a discount for daily margining practices. The proposed rules sought to accommodate those practices by providing that positions would be considered to be subject to daily mark-to-market margining for purposes of the ''uncollateralized outward exposure'' plus ''potential outward exposure'' analysis, so long as the total of such thresholds, and the total of such minimum transfer amounts above $1 million are deemed to be ''uncollateralized outward exposure'' for those purposes.

In light of commenter concerns, which indicated that the proposal was not fully clear about the mechanics and purpose of this approach, the relevant rule language has been revised to clarify that this attribution of thresholds and minimum transfer amounts is solely for the purpose of determining whether certain positions are subject to daily mark-to-market margining for purposes of the analysis. In addition, the final rules have been revised from the proposal to provide that the attribution of thresholds as ''uncollateralized outward exposure'' for these purposes will be reduced by initial margin posted, up to the amount of the threshold. *See* CFTC Regulation § 1.3(jjj)(iii)(B); Exchange Act rule 3a67–3(c)(3)(ii).

[902] As discussed above, this may occur, for example, if the exchange of payments associated with an equity swap is based on a multiple of the return associated with the underlying equity. As is the case for measuring current exposure, the final rules do not prescribe any particular methodology for calculating the notional amount or effective notional amount used in the calculation of potential future exposure, but instead contemplate the use of industry standard practices.

[903] *See* Proposing Release, 75 FR 80192 n.110.

[904] The effective notional amount of the underlying instrument is used for these purposes because that amount fairly reflects the basis for measuring the potential counterparty risk associated with the instrument. The sum of the

vii. Treatment of Initial Margin or Overcollateralization

The final rules retain the proposed approach of not modifying the measure of potential future exposure to reflect collateral that a person has posted to its counterparty in excess of current exposure. Although we recognize that the posting of excess collateral may mitigate the future credit risk that the potential future exposure measure is intended to estimate, that mitigating effect is not certain, and any such mitigation may not reflect the full value of the excess collateral. Moreover, while we believe that the measure of potential future exposure associated with swap or security-based swap positions reasonably estimates the credit risk that may be posed by those positions for purposes of the substantial position analysis, we also recognize that particular positions may prove to pose a far higher amount of credit risk.[905] Given how the credit risk associated with a swap or security-based swap position can far exceed the associated measure of potential future exposure, we do not believe that it would be appropriate to offset that measure to account for overcollateralization.[906]

d. Thresholds

The final rules retain the proposed thresholds for the amount of current uncollateralized exposure and potential future exposure that will cause an entity to be deemed to be a major participant. Accordingly, for a person to have a ''substantial position'' in a major category of swaps, it would be necessary for that person to have a daily average current uncollateralized exposure of at least $1 billion (or $3 billion for the rate swap category), or a daily average current uncollateralized exposure plus potential future exposure of $2 billion (or $6 billion for the rate swap category).[907] To have a ''substantial position'' in a major category of security-based swaps, it would be necessary for the person to have a daily average current uncollateralized exposure of at least $1 billion, or a daily average current uncollateralized exposure plus potential future exposure of at least $2 billion.[908]

As the Proposing Release noted, the proposed thresholds sought to reflect: (i) The financial system's ability to absorb losses of a particular size; (ii) the recognition that it would not be appropriate for the substantial position test to encompass entities only after they pose significant risks to the market through their swap or security-based swap activity; and (iii) the need to account for the possibility that multiple market participants may fail close in time.[909] While some commenters took the position that the proposed thresholds were inappropriately low, those commenters did not present empirical data or analysis in support of that view. Moreover, the Commissions do not concur with the suggestion [910] that the major participant definitions can reasonably be read to require that we defer this rulemaking until we have gathered additional data. Instead, the definitions direct us to set a standard that is ''prudent,'' which is what we have sought to do.

Some commenters who supported an increase in the proposed thresholds attempted to support their positions via analogy to past events, with the most significant of these being an analogy to AIG Financial Products (''AIG FP'').[911] The analogy to AIG FP [912] actually argues against an increase in these thresholds, however, particularly given that the credit derivative portfolio that significantly contributed to the liquidity problems that AIG FP faced amounted to $72 billion in notional amount.[913] Under the final rules, in the presence of central clearing or daily marking to market it would take a credit derivative portfolio in excess of that amount to trigger the potential future exposure threshold under the ''substantial position'' analysis.[914] This indicates that the thresholds are not inappropriately low, particularly given our view that the major participant definition is intended to encompass entities before their swap or security-based swap positions pose significant market threats.[915] Conversely, while

duration of the option and the underlying instrument is used for these purposes because that sum reflects the length of time of the potential counterparty risk associated with the instrument.

At the same time, we agree with a commenter's view that if the underlying swap or security-based swap is cash settled, the calculation of duration will only include the duration of the option, and not the duration of the swap, because counterparty exposure would exist only until the option expiration date. *See* letter from MFA I.

[905] For example, if a person writes a CDS that provides $10 billion in protection on a reference entity, with the CDS being subject to daily mark-to-market margining, then for purposes of the substantial position analysis that CDS would be associated with a potential future exposure measure of no more than $200 million (reflecting the 0.1 conversion factor and the additional 0.2 multiplier for margined positions), even before accounting for netting. Yet if the reference entity were to default, the writer of the CDS could pose up to $10 billion in credit risk to its counterparty.

[906] However, as discussed above, *see* note 901, *supra,* initial margin may be considered when determining if a collateral threshold is to be attributed to current uncollateralized exposure for purposes of determining whether certain positions are subject to daily mark-to-market margining for purposes of the substantial position analysis.

[907] CFTC Regulation § 1.3(jjj)(1).

[908] Exchange Act rule 3a67–3(a).

[909] As discussed above, we do not believe it would be prudent to presume that entity failures will be separated in time during periods of financial stress.

[910] *See* letters from BlackRock I and CCMR I.

[911] *See* letter from ABC/CIEBA. One commenter's analogy to Enron also is unpersuasive. *See* letter from BG LNG I. In particular, the $18.7 billion in Enron derivatives exposure cited by that commenter does not account for collateral posted in connection with those positions. Also, the market impact of Enron's bankruptcy was substantially mitigated by the sale of Enron's derivatives trading arm to a third party.

Moreover, although one commenter generally alluded to corporate financial losses in the derivatives markets that exceeded the proposed $1 billion and $2 billion thresholds, *see* letter from NCGA/NGSA II, the relevant question does not focus on losses that market participants have incurred, but instead focuses on what degree of credit risk to counterparties in the swap and security-based swap markets presents such a potential to cause significant market impact that it would be prudent to regulate persons who pose that degree of credit risk in connection with their swap or security-based swap positions.

[912] Our discussion of how the major participant analysis may apply to an entity that has a portfolio of a size equivalent to that of AIG FP should not be read to imply that a person may engage in swap and security-based swap activities akin to those of AIG FP without registering as a swap dealer or security-based swap dealer.

[913] *See, e.g.,* Congressional Oversight Panel, *The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy* 22–24 (2010) (discussing how the risk in AIG's CDS business largely was the result of a ''multi-sector'' CDO book that amounted to $72 billion notional as of September 2008, and how the losses to AIG were driven by 125 of the roughly 44,000 contracts entered into by AIG FP).

[914] For cleared security-based credit default swaps (in which we assume daily margining requirements result in no current uncollateralized exposure) achieving $2 billion of potential future exposure would require writing $200 billion notional of credit default swap protection (reflecting the 0.10 multiplier in the risk adjustment tables, and the additional 0.10 multiplier for positions that are cleared). Similarly, it would take a $100 billion notional portfolio of uncleared but marked-to-market security-based credit default swaps to meet that same threshold (reflecting the 0.20 multiplier for positions that are subject to daily mark-to-market margining). The total might be even higher if such instruments were subject to counterparty netting agreements.

Even in the absence of clearing or daily mark-to-market margining, it would take a minimum $20 billion notional portfolio of written protection on credit (reflecting the 0.10 multiplier in the risk adjustment tables) to meet the $2 billion potential future exposure threshold. Accounting for netting (which can reduce potential future exposure measures by up to 60 percent) could materially increase that required amount.

[915] The case of Long-Term Capital Management (''LTCM'') also is instructive in connection with the current exposure thresholds of the major participant analysis. Had LTCM failed, its top 17 counterparties would have suffered estimated total losses of between $3 and $5 billion. *See* President's Working Group on Financial Markets, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* (April 1999) at 17 (*http://www.treasury.gov/resource-center/fin-mkts/Documents/hedgfund.pdf*). The government acted in connection with LTCM because the rushed close-

Continued

additional data and analysis may warrant a reduction of these thresholds in the future, commenters who supported a reduction in those thresholds have not persuaded us that the proposed thresholds should be lowered.

e. Additional Issues

The final rules applying the ''substantial position'' analysis and the major participant definitions generally apply to all types of swaps or security-based swaps that a person maintains. Although one commenter suggested that swaps on government securities should be excluded from the analysis, the rules will not provide such an exclusion. To the extent that a person presents credit risk as a result of swaps referencing government securities, there is no basis for disregarding that risk when determining whether the person is a major participant.

In addition, in light of one commenter's concern,[916] the Commissions believe that it is important to emphasize that these rules should not be interpreted to deter end-users from requesting margin from dealers or major participants who are their counterparties to swaps or security-based swaps.

Also, in light of a point raised by another commenter,[917] the Commissions note that these rules implementing the major participant definitions do not place any independent calculation or other obligations upon counterparties to potential major participants, and that the rules do not preclude a potential major participant from seeking the assistance of a third party to perform the relevant calculation.

C. ''Hedging or Mitigating Commercial Risk''

1. Proposed Approach

a. General Availability of the Proposed Exclusion

The first test of the major participant definitions excludes positions held for ''hedging or mitigating commercial risk'' from the substantial position analysis.[918] In the Proposing Release, we preliminarily concluded that positions that hedge or mitigate a person's commercial risk may qualify for this exclusion regardless of whether the entity is financial or non-financial in nature.[919] That conclusion in part was prompted by the fact that the statutory major participant definitions do not explicitly make the exclusion unavailable to financial entities; in contrast to the Title VII exceptions from mandatory clearing requirements in connection with hedging commercial risk,[920] which explicitly are unavailable to financial entities.[921] The conclusion also was prompted by the presence of the third major participant test—which specifically applies the substantial position analysis to certain non-bank financial entities but (unlike the first test) does not exclude commercial risk hedging positions from the analysis.[922]

In the Proposing Release, we also preliminarily concluded that the question of whether an activity is commercial in nature should not be determined solely by a person's organizational status as a for-profit, non-profit or governmental entity, but instead should depend on whether the underlying activity is commercial in nature.[923]

The proposal did not preclude the exclusion from being available in connection with hedges of a person's ''financial'' or ''balance sheet'' risks. In addition, the proposal solicited comment as to whether the exclusion should extend to activities in which a person hedges an affiliate's risk.

b. Proposed Definition Under the CEA Exception

The proposed interpretation of ''hedging or mitigating commercial risk'' for purposes of the CEA's definition of ''major swap participant'' premised the exclusion on the principle that swaps necessary to the conduct or management of a person's commercial activities should not be included in the calculation of the entity's substantial position.[924]

The CFTC noted first that the phrase ''hedging or mitigating commercial risk'' as used with respect to the major swap participant definition is virtually identical to Dodd-Frank provisions granting an exception from the mandatory clearing requirement to non-financial entities that are using swaps to hedge or mitigate commercial risk.[925] Also noted was that although only non-financial entities that use swaps or security-based swaps to hedge or mitigate commercial risk generally may qualify for the clearing exemption, no such statutory restriction applies with respect to the exclusion for hedging positions in the first test of a major participant. We therefore concluded that positions established to hedge or mitigate commercial risk may qualify for the exclusion, regardless of the nature of the entity—*i.e.,* whether or not the entity is financial (including a bank) or non-financial.[926]

The CFTC preliminarily believed that whether a position hedges or mitigates commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the entity's overall hedging and risk mitigation strategies. However, the swap could not be held for a purpose that is in the nature of speculation, investing or trading. We anticipated that a person's overall hedging and risk management strategies would help inform whether or not a particular position is properly considered to hedge or mitigate commercial risk. Further, the exclusion under the Proposing Release included swaps hedging or mitigating any of a person's business risks, regardless of the

out of LTCM's positions would have affected other market participants, and the spread of losses would have led to market uncertainty, likely causing a number of credit and interest rate markets to experience extreme price moves and possibly not function for a period of time. *See* Statement by William J. McDonough, President Federal Reserve Bank of New York before the Committee on Banking and Financial Services U.S. House of Representatives (October 1, 1998) (*http://www.newyorkfed.org/newsevents/speeches_archive/1998/mcd981001.html*).

[916] *See* letter from FHLB I.

[917] *See* letter from ISDA I.

[918] *See* CEA section 1a(33)(A)(i)(I); Exchange Act section 3(a)(67)(A)(i)(I).

[919] *See* Proposing Release, 75 FR at 80194.

[920] *See* CEA section 2(h)(7)(A); Exchange Act section 3C(g)(1)(B).

[921] As we discussed in the Proposing Release, had the Dodd-Frank Act intended the phrase ''hedge or mitigate commercial risk'' to apply only to activities of, or positions held by, non-financial entities, it would not have been necessary for the mandatory clearing exceptions to include additional provisions generally restricting the availability of the exceptions to non-financial entities. *See* Proposing Release, 75 FR at 80194.

[922] As we discussed in the Proposing Release, the third statutory major participant test would be redundant if the hedging exclusion in the first major participant test were entirely unavailable to financial entities. *See* Proposing Release, 75 FR at 80194 n.125.

[923] *See* Proposing Release, 75 FR at 80194.

[924] The scope of the proposed exclusion is based on our understanding that when a swap or security-based swap is used to hedge a person's commercial activities, the gains or losses associated with the swap or security-based swap itself will generally be offset by losses or gains in the person's commercial activities, and hence the risks posed by the swap or security-based swap to counterparties or the industry will generally be mitigated.

[925] *See* CEA section 2(h)(7)(A); Exchange Act section 3C(g)(1)(B) (exception from mandatory clearing requirements when one or more counterparties are not ''financial entities'' and are using swaps or security-based swaps to ''hedge or mitigate commercial risk'').

[926] The presence of the third major participant test suggests that financial entities generally may not be precluded from taking advantage of the hedging exclusion in the first test. The third test, which does not account for hedging, specifically applies to non-bank financial entities that are highly leveraged and have a substantial position in a major category of swaps or security-based swaps. That test would be redundant if the hedging exclusion in the first major participant test were entirely unavailable to financial entities.

swap's status under accounting guidelines or the bona fide hedging exemption.

c. Proposed Definition Under the Exchange Act Exception

For purposes of the Exchange Act's ''major security-based swap participant'' definition, the proposed rule defining ''hedging or mitigating commercial risk'' would require that a security-based swap position be ''economically appropriate'' to the reduction of risks in the conduct and management of a commercial enterprise, where those risks arise from the potential change in the value of assets, liabilities and services connected with the ordinary course of business of the enterprise.[927] The Proposing Release stated that the SEC preliminarily planned to interpret the concept of ''economically appropriate'' based on whether a reasonably prudent person would consider the security-based swap to be appropriate for managing the identified commercial risk. It further stated that the SEC also preliminarily believed that for a security-based swap to be deemed ''economically appropriate'' in this context, it should not introduce any new material quantum of risks (*i.e.,* it could not reflect over-hedging that could reasonably have a speculative effect) and it should not introduce any basis risk or other new types of risk (other than the counterparty risk that is attendant to all security-based swaps) more than reasonably necessary to manage the identified risk.[928]

The proposed rules further provided that the security-based swap position could not be held for a purpose that is in the nature of speculation or trading—a limitation that would make the exclusion unavailable to security-based swap positions that are held intentionally for the short term and/or with the intent of benefiting from actual or expected short-term price movements or to lock in arbitrage profits, including security-based swap positions that hedge other positions that themselves are held for the purpose of speculation or trading.[929] The proposal also provided that a security-based swap position could not be held to hedge or mitigate the risk of another security-based swap position or swap position unless that other position itself is held for the purpose of hedging or mitigating commercial risk.[930] Finally, the proposal would have conditioned the entity's ability to exclude these security-based swap positions on the entity engaging in certain specified activities related to documenting the underlying risks and assessing the effectiveness of the hedge in connection with the security-based swap positions.[931]

2. Commenters' Views

a. In General

Several commenters generally supported the broad concepts underlying the proposed rules for identifying hedges of commercial risk, and particularly supported the proposed use of an ''economically appropriate'' standard instead of the ''highly effective'' standard that is used to identify hedges for accounting purposes.[932] On the other hand, one commenter stated that the definition should incorporate all manner of risks associated with commercial operations, including interest rate and currency risks, risks from incidental activities to commercial activities and risks from financial commodities.[933] One commenter further stated that the definition should encompass positions that facilitate asset optimization and dynamic hedging.[934]

Commenters further stated that the exception should include any position taken as part of a bona fide risk mitigation strategy,[935] and that Congress included ''mitigation'' in the exception for the purpose of covering risk reduction strategies that may not clearly be hedges but mitigate risk.[936] Some commenters also criticized the Proposing Release's position equating the terms ''hedging'' and ''mitigating.''[937] One commenter also expressed concern that entities would find it difficult to analyze their positions with respect to the Proposing Release's statement, in the context of the Exchange Act definition, that ''economically appropriate'' security-based swaps would not add a new quantum of risk.[938]

Conversely, some commenters suggested that the proposed interpretation was too broad,[939] and that a broad interpretation could allow evasion,[940] or permit corporate end users to accumulate very large positions without becoming major swap participants.[941] One commenter stated that to include ''financial risks'' within the exclusion's scope would be improper because a ''commercial risk'' is one that is inherent in a person's commercial activities, while interest rate and currency risks arise from choices about how a person structures and finances its operations.[942] Some commenters stated that the rule should not include hedging of financial risks because Congress deleted the reference in an earlier version of the Dodd-Frank Act to hedging of ''balance sheet risk.''[943] One commenter urged that we consider using accounting hedge treatment or the bona fide hedging exemption as guideposts for determining the availability of the exclusion.[944] Commenters also raised concerns about differences between the proposed approaches under the CEA and Exchange Act definitions of the terms.[945]

One commenter suggested that the definition should be expanded to include as commercial risks the risks faced by government entities because their need to manage risk is no different than the need of commercial firms.[946] Additional commenters suggested that commercial risk be interpreted to include risks faced by non-profit firms.[947]

Some commenters also supported modification of the rule text for specific purposes such as including risks from ''transmitting'' to cover activities of electricity companies,[948] to encompass risks ''arising from'' an asset rather than just risks arising from changes in value

[927] *See* proposed Exchange Act rule 3a67–4(a).

[928] *See* Proposing Release, 75 FR at 80195 n.129.

[929] *See* proposed Exchange Act rule 3a67–4(b)(1), and Proposing Release, 75 FR at 80195 n.131.

[930] *See* proposed Exchange Act rule 3a67–4(b)(2).

[931] *See* proposed Exchange Act rule 3a67–4(c).

[932] *See* letters from ACLI, Barnard, CDEU, COPE I, EEI/EPSA, FSR I, ISDA I, Kraft, MetLife, NAIC, Philip Morris International Inc. (''Philip Morris'') and Utility Group.

[933] *See* letter from CDEU.

[934] *See* letter from Peabody.

[935] *See* letter from ISDA I.

[936] *See* letter from CDEU.

[937] *See* letters from APG, CDEU and ISDA I.

[938] *See* letter from SIFMA AMG II.

[939] *See* letters from AFR and AFSCME. The CFTC also received submissions of a substantially identical letter from approximately 193 individuals and small businesses urging the CFTC to define commercial risk narrowly to include only risks arising from physical commodity price fluctuations, and not financial risks, and to construe the exception for captive finance companies narrowly. *See, e.g.,* letter from Needham Oil & Air, LLC. In addition, the CFTC received submissions from approximately 535 individuals of a different letter, which also urged the CFTC to define commercial risk narrowly. *See, e.g.,* letter from Christie Hakim.

[940] *See* letters from Sen. Carl Levin (''Senator Levin''), Commodity Markets Oversight Coalition (''CMOC'') and Greenberger and meeting with MFA on February 14, 2011.

[941] *See* meeting with SIFMA AMG on February 4, 2011.

[942] *See* meeting with AFR and Better Markets on March 17, 2011.

[943] *See* letters from AFR and CMOC, and meeting with Duffie on February 2, 2011.

[944] *See* letter from Senator Levin.

[945] *See* letters from Senator Levin, NAIC and SIFMA AMG II.

[946] *See* letter from Milbank, Tweed, Hadley & McCloy LLP (''Milbank'').

[947] *See* letters from CDEU and NFPEEU.

[948] *See* letter from Edison Int'l.

of the asset,[949] and to encompass the use of swaps by structured finance special purpose vehicles to hedge interest rate risk in structured financing.[950]

b. Availability of Exclusion to Financial Entities

Several commenters supported making the exclusion available to financial companies.[951] Some commenters further stated that there should be no special limits on financial entities with regard to the exclusion,[952] and that commercial risk should be defined broadly to include all of the commercial activities of a person, whether or not those activities relate to financial or non-financial commodities.[953] Two commenters discussing the use of swaps by insurance companies stated that making the exclusion available to financial companies is consistent with CFTC practice in the futures markets, that there is no fundamental difference in how an insurance company or a commercial enterprise uses swaps to reduce its risk, and that commercial risk encompasses financial risk.[954] In addition, these commenters noted that insurance regulators allow insurance companies to use swaps to hedge risk.[955]

On the other hand, some commenters opposed allowing financial entities to avail themselves of the exclusion, arguing that there is no benefit from allowing a financial firm to avoid major participant regulation through the hedging exclusion,[956] that the exclusion would allow financial companies to engage in risky trades,[957] and that the exclusion should be narrowly interpreted to cover hedging of only risks related to products.[958]

c. Hedging Risks of Affiliates and Third Parties

Some commenters expressed support for allowing persons to take advantage of the hedging exclusion when they use swaps to hedge the commercial risks of affiliates or third parties. Some commenters suggested that a person that aggregates and hedges risk within a corporate group should be allowed to use the exclusion despite the fact that it is the affiliates' risks that are hedged.[959] One commenter further stated that providers of risk management services should be allowed to take advantage of the exclusion because they are hedging commercial risk on behalf of their clients.[960]

One commenter, on the other hand, stated that the exclusion should be read narrowly for captive finance companies because the hedging entity may have to liquidate positions rapidly without access to affiliate's funds.[961]

d. Hedge Effectiveness and Documentation

Many commenters suggested that the rule should not test hedge effectiveness, explaining that requiring demonstration of hedge effectiveness would impose a subjective standard and would not reduce systemic risk.[962] In this regard, some commenters that addressed the proposed procedural requirements in the Exchange Act definition argued that these procedures would place unnecessary regulatory burdens on entities not regulated under the Dodd-Frank Act.[963] Conversely, one commenter that supported testing hedge effectiveness stated that the subdivided parts of a hedge should line up exactly with the subdivided parts of the risk.[964]

Some commenters agreed that the relationship between hedging and risk should be documented. One commenter expressed the view that documentation would facilitate audits.[965] Others took the view that a person should be required to demonstrate that the hedge does not create additional risk, that the risk may be hedged by swaps, and that there is a link between the swap and the risk.[966]

Several commenters suggested that once initiated, a hedge should not be retested over time, regardless of whether the position continues to serve a hedging purpose.[967] Other commenters disagreed, stating that a position that is no longer a hedge should not be covered by the exclusion.[968]

e. Swaps That Hedge Positions Held for Speculative, Investment or Trading Purposes

Many commenters took the view that swaps or security-based swaps used to hedge positions held for speculative, investment or trading purposes should qualify as hedges of commercial risk.[969] A few commenters stated that speculation, investment and trading are fundamental to commercial activity, and thus cannot be differentiated from other types of commercial activity.[970] Other commenters suggested the exclusion should cover swap positions that hedge other swap or security-based swap positions that are not themselves hedging positions.[971] Some commenters asserted that trading is different from speculating (taking an outright view on market direction) and investing (entering into a swap for appreciation in value of the swap position), and that swaps held for ''trading'' should be able to qualify for the exclusion.[972]

Some commenters requested that the definition under the CEA clarify how swaps that qualify as bona fide hedges are treated for the major swap participant definition if the underlying position had a speculative, investment or trading purpose,[973] and clarify that while the hedging exclusion would not apply to swap positions that hedge other swap positions that are held for speculation or trading, the hedging provision would apply to swap positions that hedge other non-swap positions held for speculation or trading.[974] Commenters also requested that the final rules provide that the hedging exclusion be available for physical positions in exempt or agricultural commodities and arbitrage positions relating to price differences between physical commodities at

[949] *See* letter from Milbank.

[950] *See* letter from American Securitization Forum (''ASR'').

[951] *See* letters from ACLI, American Express Company (''Amex''), California State Teachers' Retirement System (''CalSTRS'') dated Feb. 28, 2011 (''CalSTRS I''), ISDA I, MetLife, NAIC and Peabody.

[952] *See* letters from Amex, CalSTRS I and Peabody.

[953] *See* letter from Amex.

[954] *See* letters from ACLI and MetLife.

[955] *Id.*

[956] *See* letter from Senator Levin (further highlighting the need to add strict standards and controls to prevent evasion).

[957] *See* letters cited in note 939, *supra.*

[958] *See* letter from AFR.

[959] *See* letters from CDEU, EDF Trading, Kraft, Metlife and Philip Morris.

[960] *See* letter from EDF Trading.

[961] *See* meeting with Duffie on February 2, 2011.

[962] *See* letters from EEI/EPSA and EDF Trading; *see also* letters from CDEU, Kraft Metlife, NRG Energy and Philip Morris (that such a test would be overly prescriptive).

[963] *See* letters from FSR I and SIFMA AMG I.

[964] *See* letter from Better Markets I.

[965] *See* letter from Metlife (but opposing ongoing evaluation of hedge effectiveness).

[966] *See* letters from AFR and Senator Levin.

[967] *See* letters from CDEU, EDF Trading, EEI/EPSA, Kraft, Metlife, NRG Energy and Philip Morris.

[968] *See* letters from Better Markets I and Senator Levin.

[969] *See* letters from BG LNG II, COPE I, EPSA, FSR I, Metlife, Peabody, Vitol and WGCEF dated February 22, 2011 regarding the major swap participant definition (''WGECF II''), and meeting with Bunge; *see also* letter from ISDA I (taking the view that swaps and security-based swaps used to hedge speculative positions should qualify as hedges and stating that failure to treat them as hedges would ''invariably result in there being more unhedged speculative risk in the market'').

[970] *See* letters from Vitol and WGCEF II and meeting with Bunge.

[971] *See* letters from BG LNG II, FSR I, ISDA I and Metlife.

[972] *See* letters from COPE I, EPSA and Peabody.

[973] *See* letters from Vitol and WGCEF dated June 3, 2011 regarding the major swap participant definition (''WGECF VI'').

[974] *See* letter from BG LNG II.

different locations.[975] One commenter, on the other hand, suggested that even swap positions that hedge other swap positions which are not hedging positions should be treated as hedging commercial risk because they are risk reducing.[976]

Four commenters took the position that swaps held for a purpose that is in the nature of speculation, investing or trading should not qualify as hedges of commercial risk.[977] One commenter pointed out that experience has shown that market participants sometimes inaccurately characterize positions as hedges (*e.g.,* the inaccurate characterization occurs because the nature of positions change over time), and that excluding swap positions that hedge speculative, investment or trading positions would be especially inappropriate for financial firms that frequently use swaps to speculate, invest or trade.[978] One commenter stated that any swap position hedging another swap position could never be considered to be hedging commercial risk because the second swap is only adjusting the first swap position, meaning that neither swap would be congruent with risk reduction.[979] Another commenter stated that the hedging exclusion should not cover any swap hedging a speculative position.[980]

3. Final Rules—General Availability of the Exclusions

As with the proposed rules, the final CEA and Exchange Act rules implementing this exclusion are different in certain regards to reflect the different ways that swaps and security-based swaps may be expected to be used to hedge commercial risk, as well as differences in existing regulations under the CEA and the Exchange Act. Notwithstanding these differences, the two rules follow parallel approaches and address certain key issues in similar ways.

a. Availability to Financial Entities

Consistent with the position we took in the Proposing Release, the final rules with regard to both major participant definitions do not foreclose financial entities from being able to take advantage of the commercial risk hedging exclusion in the first major participant test. This conclusion in part is guided by the fact that the statutory text implementing this hedging exclusion does not explicitly foreclose financial entities from taking advantage of the exclusion—in contrast to Title VII's exceptions from mandatory clearing requirements for commercial risk hedging activities. The conclusion also results from the need to avoid an interpretation that would cause the third major participant test to be redundant.[981]

In reaching this conclusion, we recognize that some commenters stated that there would be no benefit from allowing financial firms to avoid regulation as a major swap participant through the hedging exclusion, and that the exclusion should cover only risks related to non-financial commercial activities, or else the exclusion would allow financial companies to engage in risky transactions.[982] We believe that not allowing the exclusion to cover swaps or security-based swaps used for speculation or trading (or investments, in the case of swaps) will be sufficient to limit financial entities' ability to engage in risky transactions. We also are not persuaded that ''commercial risk'' should be limited to only risks related to non-financial activities.

We nonetheless recognize the significance of concerns that financial entities may seek to depict speculative positions as hedges to take advantage of the exclusion. We also are mindful of the need to give appropriate meaning to the term ''commercial risk'' within the exclusion. We believe that the standard set forth in the final rules, including the provisions that make the exclusions unavailable to swap or security-based swap positions of a speculative or trading nature (or investment purposes, in the case of swaps), apply the statutory test in a manner that appropriately addresses those other concerns. As discussed below, those standards limit the ability of financial entities to take advantage of the exclusion.[983]

b. Availability to Non-Profit and Governmental Entities

Under the final rules, a person's organizational status will not determine the availability of this hedging exclusion. The exclusion thus may be available to non-profit or governmental entities, as well as to for-profit entities, if the underlying activity to which the swap or security-based swap relates is commercial in nature.

c. Hedges of ''Financial'' or ''Balance Sheet'' Risks

Under the final rules, the exclusion is available to positions that hedge ''financial'' or ''balance sheet'' risks. While we recognize that some commenters oppose the exclusion of those positions,[984] we nonetheless believe that the exclusion would be impermissibly narrow if it failed to extend to the ''financial'' or ''balance sheet'' risks that entities may face as part of their commercial operations, given that those types of risks (*e.g.,* interest rate and foreign exchange risks) may be expected to arise from the commercial operations of non-financial end-users of swaps and security-based swaps. We do not believe the exclusion was intended to address those risks differently from other commercial risks, such as risks associated with the cost of physical inputs or the price received for selling products.[985]

d. Hedging on Behalf of an Affiliate

The final rules further provide that the exclusion is not limited to the hedging of a person's own risks, but also would extend to the hedging of the risks of a person's majority-owned affiliate.[986]

[975] *See* letters from BGLNG II and WGCEF VI.

[976] *See* letters from MetLife.

[977] *See* letters from AFR, Better Markets I and Senator Levin and meeting with Duffie on February 2, 2011.

[978] *See* letter from Senator Levin.

[979] *See* letter from Better Markets I.

[980] *See* meeting with Duffie on February 2, 2011.

[981] While we recognize that commenters have identified policy reasons as to why financial entities should be entirely excluded from being able to take advantage of the hedging exclusion, we continue to believe the language of the major participant definitions dictates a contrary approach.

[982] *See* letters from AFR and Senator Levin.

[983] We also do not believe that the size of an entity or an entity's position is determinative of whether a position hedges commercial risk. Moreover, given that the major participant definitions implicitly require large swap or security-based swap positions as triggers, a rule that made the hedging exclusion unavailable to entities with large positions could negate the statutory hedging exclusion.

[984] *See* notes 942 and 943, *supra.*

[985] Moreover, it is questionable as to what types of security-based swap positions—if any—would fall within the exclusion for purposes of the ''major security-based swap participant'' definition if the exclusion did not extend to hedges of ''financial'' or ''balance sheet'' risks. Security-based swaps such as single-name credit default swaps and equity swaps would not appear amenable to hedging a commercial entity's non-financial risks, such as price risks associated with non-financial inputs or sales. We do not believe that it would be appropriate to interpret the exclusion in such a way as to make it a nullity in the context of the ''major security-based swap participant'' definition.

[986] *See* CFTC Regulation § 1.3(kkk)(1)(i); Exchange Act rule 3a67–4(a)(1). For these purposes—consistent with the standards regarding the application of the dealer and major participant definitions to inter-affiliate swaps and security based swaps, *see* parts II.C and IV.G—we would view the counterparties to be majority-owned affiliates if one party directly or indirectly holds a majority ownership interest in the other, or if a third party directly or indirectly holds a majority interest in both, based on holding a majority of the equity securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership. *See* note 348, *supra.*

This approach reflects the fact that a corporate group may use a single entity to face the market to engage in hedging activities on behalf of entities within the group. In our view, it would not be appropriate for the swap or security-based swap positions of the market-facing entity to be encompassed within the first major participant test if those same positions could have been excluded from the analysis if entered into directly by the affiliate.[987] Of course, the exclusion will only be available to the market-facing entity if the position would have been subject to the exclusion—*e.g.,* not for a speculative or trading purpose—had the affiliate directly entered into the position.

4. Final Rules—''Major Swap Participant'' Definition Under the CEA

a. In General

The general scope of the rule regarding ''hedging or mitigating risk'' will be adopted substantially as proposed.[988] The CFTC, however, is adopting CFTC Regulation § 1.3(kkk) with a modification to paragraph (1)(iii) to include a reference to qualified hedging treatment for positions meeting Government Accounting Standards Board (''GASB'') Statement 53, Accounting and Financial Reporting for Derivative Instruments. The CFTC believes that this minor modification to CFTC Regulation § 1.3(kkk) is necessary in order to include swaps that qualify for hedging treatment issued by GASB.[989]

As noted above, the CFTC will not prohibit financial companies from using the hedging exclusion because the exclusion for positions held for hedging or mitigating commercial risk set forth in CEA section 1a(33)(A)(i)(1) does not limit its application based on the characterization or status of the person or entity. Unlike the end-user clearing exemption of section 2(h)(7), the major swap participant hedging exclusion is not foreclosed to financial entities.[990] In addition, the hedging exclusion will extend to entities hedging the risks of affiliates in a corporate group, but not to third parties outside of a corporate group.

Like the proposed rule, the final rule under the CEA does not require a demonstration of hedge effectiveness, periodic retesting or specific documentation in order to apply the hedging exclusion from the definition of major swap participant.

b. Swaps That Hedge Positions Held for Speculation, Investment, or Trading

Swaps that hedge positions held for speculation, investment or trading will not qualify for the exclusion. In the Proposing Release, the CFTC explained that swap positions held for the purpose of speculation, investment or trading are those held primarily to take an outright view on market direction, including positions held for short term resale, or to obtain arbitrage profits.[991] Additionally, the Proposing Release stated that swap positions that hedge other positions that themselves are held for the purpose of speculation, investment or trading are also speculative, investment or trading positions.[992]

We note that some commenters suggested that swaps that hedge speculative, investment or trading positions should qualify for the exclusion because speculation, investment or trading are fundamental to commercial activity and cannot be differentiated from other types of commercial activity. Similarly, commenters that support allowing speculative, investment or trading positions to qualify for the exception stated that a swap hedging the risk of another swap (regardless of that swap's nature) is risk reducing and therefore hedges commercial risk. We believe that these commenters' interpretation of ''commercial'' is not consistent with congressional intent or the meaning of ''commercial'' in the Dodd-Frank Act with respect to the first test of the major participant definition or the end-user exception to the clearing mandate. We are unconvinced that allowing swap positions to qualify for the exception would be appropriate when used to hedge speculative, investment or trading positions because the swap would not hedge or mitigate the risks associated with the underlying position, or at least not in the manner intended by Congress. In addition, we believe that doing so would undermine the effectiveness of the major participant definition in that entities would be able to characterize positions for speculative, investment or trading purposes as hedges and therefore evade regulation as major participants.

Under CFTC Regulation § 1.3(kkk)(2)(i), swap positions executed for the purpose of speculating, investing, or trading are those positions executed primarily to take an outright view on market direction or to obtain an appreciation in value of the swap position itself, and not primarily for hedging or mitigating underlying commercial risks.[993] For example, swaps positions held primarily for the purpose of generating profits directly upon closeout of the swap, and not to hedge or mitigate underlying commercial risk, are speculative or serve as investments. Further, as an alternative example, swaps executed for the purpose of offsetting potential future increases in the price of inputs that the entity reasonably expects to purchase for its commercial activities serve to hedge a commercial risk.

The CFTC notes that the use of ''trading'' in this context is not used to mean simply buying and selling. Rather, a party is using a swap for the purpose of trading under the rule when the party is entering and exiting swap positions for purposes that have little or no connection to hedging or mitigating commercial risks incurred in the ordinary course of business. ''Trading,'' as used in CFTC Regulation § 1.3(kkk)(2)(i), therefore would not include simply the act of entering into or exiting swaps if the swaps are used for the purpose of hedging or mitigating commercial risks incurred in the ordinary course of business.[994]

[987] The exclusion, however, would not be available to the extent that a person enters into swaps or security-based swaps in connection with the hedging activities of an unaffiliated third party. Such activities, moreover, may indicate that the person is acting as a swap dealer or security-based swap dealer.

[988] The final rule text of CFTC Regulation § 1.3(kkk)(2) has been revised to include the conjunction ''and'' between clauses (i) and (ii). In the proposed text of this rule, there was no conjunction between these two clauses, while the conjunction ''and'' was used in the parallel rule, § 240.3a67–4(b), under the Exchange Act. Thus, the revision of the final rule text conforms the CEA rule to the Exchange Act rule.

Also, the final rule text of CFTC Regulation § 1.3(kkk)(1)(E) has been revised to include interest and currency rates to be consistent with § 1.3(kkk)(1)(F). Both provisions address similar financial risks arising from rate ''movements'' and ''exposures,'' respectively.

[989] Local government entities that use GASB accounting standards may not be able to use comparable FASB hedge accounting as a demonstration that a swap is a hedge. Although the two standards are not the same, they are similar in effect and degree in respect of determining whether a swap hedges a risk.

[990] Although CEA section 1a(33)(A)(iii), 7 U.S.C. 1a(33)(A)(iii) provides that financial entities that are highly leveraged and not subject to capital requirements established by a Federal banking agency are effectively precluded from applying the hedging exclusion, other financial entities are not so precluded. Thus, availability of the hedging exclusion to some financial entities for purposes of the major swap participant definition is contemplated in the statutory text.

[991] *See* 75 FR at 80195 n.128.

[992] *Id.*

[993] The Commissions note that the SEC interprets the availability of the hedging exclusion differently in the context of the ''major security-based swap participant'' definition, and that the SEC's guidance in this area controls for purposes of that definition.

[994] The CFTC further clarifies that merchandising activity in the physical marketing channel qualifies as commercial activity, consistent with the Commission's longstanding bona fide hedging exemption to speculative position limits. *See* § 1.3(kkk)(1)(ii).

The CFTC acknowledges that some swaps that may be characterized as ''arbitrage'' transactions in certain contexts may also reduce commercial risks enumerated in CFTC Regulation § 1.3(kkk)(1). The discussion in footnote 128 of the Proposing Release was intended to focus on clarifying that swaps are speculative for purposes of the rule if entered into principally and directly for profit and not principally to hedge or mitigate commercial risk. The reference to ''arbitrage profits'' in footnote 128 was intended to provide an example of what is commonly a speculative swap, not to characterize all arbitrage swaps as speculative.

c. ''Economically Appropriate'' Standard

The CFTC has determined to adopt the ''economically appropriate'' standard as proposed. We believe that this standard will help the CFTC and market participants distinguish which swaps are, or are not, commercial hedges thereby reducing regulatory uncertainty and helping prevent abuse of the hedging exclusion. CFTC Regulation 1.3(kkk)(1)(i) of the final rules enumerates specific risk shifting practices that are deemed to qualify for purposes of the hedging exclusion.[995] Whether a swap is economically appropriate to the reduction of risks will be determined by the facts and circumstances applicable to the swap at the time a swap is entered into. While we acknowledge that this standard leaves room for judgment in its application, we believe this flexibility is needed given the wide variety of swaps and hedging strategies the rule applies to. We believe the economically appropriate standard together with the identification of the six different categories of permissible commercial risks listed in final CFTC Regulation § 1.3(kkk)(1)(i) is specific enough, when reasonably applied, to distinguish whether a swap is being used to hedge or mitigate commercial risk.

The Commission has determined not to adopt a ''congruence'' standard because that standard may be too restrictive and difficult to use given the range of potential types of swaps and hedging strategies available.

5. Final Rules—''Major Security-Based Swap Participant'' Definition Under the Exchange Act

a. ''Economically Appropriate'' Standard

The final rules retain the proposed ''economically appropriate'' standard, by which a security-based swap position that is used for hedging purposes[996] would be eligible for exclusion from the first major participant analysis if the position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, when those risks arise from the potential change in the value of assets, liabilities and services in connection with the ordinary course of business of the enterprise.[997]

Consistent with the Proposing Release, we interpret the concept of ''economically appropriate'' to mean that the security-based swap position cannot materially over-hedge the underlying risk such that it could reasonably have a speculative effect,[998] and that the position cannot introduce any new basis risk or other type of risk (other than counterparty risk that is attendant to all security-based swaps) more than reasonably is necessary to manage the identified risks.

For example, a manufacturer that wishes to hedge the risk associated with a customer's long-term lease of a product may purchase credit protection using a single-name credit default swap on which the customer is the reference entity. The credit default swap may be excluded from the first major participant analysis even if it is for a shorter term than the anticipated duration of the lease so long as the use of such a shorter-term instrument is reasonable as a hedge, such as due to cost or liquidity reasons.[999] Also, the credit default swap may be excluded from the first major participant test if it hedges an amount of risk that is lower than the total amount of risk associated with the long-term contract.[1000]

In adopting this rule, we have considered commenter views that we should consider limiting the exclusion to positions that are recognized as hedges for accounting purposes.[1001] We nonetheless do not believe that the requirements that are appropriate to identifying hedging for accounting purposes are needed to limit the availability of the hedging exclusion. Moreover, linking the availability of the exclusion to accounting standards—which themselves may evolve over time—may lead the availability of the exclusion to evolve over time in unforeseen ways. We accordingly believe that the exclusion should be available if a security-based swap position is economically appropriate for hedging purposes (and not otherwise precluded from taking advantage of the exclusion).

We also have considered commenter concerns that the ''economically appropriate'' standard is too broad,[1002] and the additional suggestion that the exclusion instead should be limited to circumstances in which the hedge is ''congruent'' to the underlying risk.[1003]

[995] In the alternative to meeting the requirements of CFTC Regulation § 1.3(kkk)(1)(i), a swap may also be eligible for the hedging exclusion if the swap qualifies as a bona fide hedge for purposes of an exception from position limits under the CEA as provided in CFTC Regulation § 1.3(kkk)(1)(ii), or if it qualifies for hedging treatment under FASB Accounting Standards Codification Topic 815 or under GASB Statement 53 as provided in CFTC Regulation § 1.3(kkk)(1) (iii). Consequently, the universe of swaps that can qualify for the hedging exclusion is broader than the universe of swaps that qualify as bona fide hedges for purposes of an exception from position limits under the CEA as provided in CFTC Regulation § 1.3(kkk)(1)(ii).

[996] In the Proposing Release we stated that we did not believe the use of the term ''mitigating'' in the exclusion to mean something significantly more than ''hedging.'' *See* Proposing Release, 75 FR 80194 n.127. As noted above, some commenters disagreed, and argued that ''mitigating'' should be interpreted more broadly to encompass general risk mitigation strategies. *See, e.g.,* letters from ISDA and CDEU. In our view, the final rules we are adopting—including the use of ''economically appropriate'' standards and the exclusions for certain positions—encompass positions that may reasonably be described as ''hedging'' or ''mitigating'' commercial risk.

[997] Exchange Act rule 3a67–4(a)(1). Under this standard, the first major participant analysis need not account for security-based swap positions that pose limited risk to the market and to counterparties because the positions are substantially related to offsetting risks from a person's commercial operations. These hedging positions would include activities, such as the management of receivables, that arise out of the ordinary course of a person's commercial operations, including activities that are incidental to those operations. *See* Proposing Release, 75 FR at 80195.

In addition, the security-based swap positions included within the rule would not be limited to those recognized as hedges for accounting purposes. *See id.*

[998] In the Proposing Release, we described the ''economically appropriate'' standard as excluding positions that introduce ''any new material quantum of risks.'' *See* Proposing Release, 75 FR 80194 n. 129. The interpretation in this release is consistent with that approach, but does not make use of the same ''quantum of risks'' terminology.

[999] In other words, the entity may determine that the use of a credit default swap for a term that is shorter than the lease is justified if that shorter-term instrument costs less or is more liquid than a bespoke instrument that matches the duration of the contract. While the shorter-term credit default swap does not eliminate the underlying commercial risk, the instrument's use may be commercially reasonable for hedging purposes, and hence appropriately excluded from the first major participant test.

[1000] The use of a credit default swap for an amount that is smaller than the underlying risk may be justified as part of an entity's risk management strategy. For example, an entity may choose to engage in a partial hedge because a credit default swap for a smaller amount than the underlying risk may cost less or be more liquid than a bespoke instrument that more closely matches the amount of the risk.

[1001] *See* letter from Senator Levin.

[1002] *See* letters from AFR and AFSCME.

[1003] *See* letter from Better Markets I. We nonetheless do not believe that such a requirement would be consistent with the exclusion's

Continued

We recognize the significance of commenters' concerns as to the practical application of the ''economically appropriate'' standard, particularly with regard to hedges that are not perfectly correlated with the underlying risk.[1004] The standard embeds principles of commercial reasonableness that should assuage those implementation concerns, however. These principles necessarily account for the fact that the reasonable use of security-based swaps to hedge a person's commercial risk may result in residual basis risk, and that the mere presence of this basis risk should not preclude the availability of the exclusion. Moreover, the mere presence of residual basis risk need not run afoul of the restriction against materially over-hedging the underlying risk, which is instead intended to prevent the hedging exclusion from applying to positions that are entered into for speculative purposes or that have speculative effect (such as by being based on a notional amount that is disproportionate to the underlying risk).[1005]

We also acknowledge that an ''economically appropriate'' standard does not provide the compliance assurance that would accompany quantitative tests or safe harbors. Nonetheless, grounding the hedging exclusion in principles of commercial reasonableness permits the standard to be sufficiently flexible to appropriately address an end-user's particular circumstances and hedging needs. Use of an ''economically appropriate'' standard also is consistent with the fact that entities should be expected to use their reasonable business judgment when hedging their commercial risks.

To provide additional guidance to entities hedging commercial risk, moreover, the final rule incorporates examples of security-based swap positions that, depending on the applicable facts and circumstances, may satisfy the ''economically appropriate'' standard.[1006] These are:

- Positions established to manage the risk posed by a customer's, supplier's or counterparty's potential default in connection with: financing provided to a customer in connection with the sale of real property or a good, product or service; a customer's lease of real property or a good, product or service; a customer's agreement to purchase real property or a good, product or service in the future; or a supplier's commitment to provide or sell a good, product or service in the future.[1007]
- Positions established to manage the default risk posed by a financial counterparty (different from the counterparty to the hedging position at issue) in connection with a separate transaction (including a position involving a credit derivative, equity swap, other security-based swap, interest rate swap, commodity swap, foreign exchange swap or other swap, option, or future that itself is for the purpose of hedging or mitigating commercial risk pursuant to the rule or the counterpart rule under the Commodity Exchange Act);
- Positions established to manage equity or market risk associated with certain employee compensation plans, including the risk associated with market price variations in connection with stock-based compensation plans, such as deferred compensation plans and stock appreciation rights;
- Positions established to manage equity market price risks connected with certain business combinations, such as a corporate merger or consolidation or similar plan or acquisition in which securities of a person are exchanged for securities of any other person (unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States), or a transfer of assets of a person to another person in consideration of the issuance of securities of such other person or any of its affiliates;
- Positions established by a bank to manage counterparty risks in connection with loans the bank has made; and
- Positions to close out or reduce any of the positions addressed above.

b. Treatment of Speculative or Trading Positions

The final rule, consistent with the proposal, provides that this hedging exclusion does not extend to security-based swap positions that are in the nature of speculation or trading.[1008] The exclusion thus does not extend to security-based swap positions that are held for short-term resale and/or with the intent of benefiting from actual or expected short-term price movements or to lock in arbitrage profits, or to security-based swap positions that hedge other positions that themselves are held for the purpose of speculation or trading.[1009]

The Commissions recognize that some commenters take the position that the exclusion should extend to security-based swap positions that hedge speculative or trading positions.[1010] In support, these commenters have stated that the proposed approach would lead to more unhedged risk in the market, and that the proposed approach could lead entities that use security-based swaps to hedge speculative positions to be major participants, in contrast to unhedged (and presumably riskier) entities. Commenters further requested clarification regarding how entities may distinguish speculative or trading positions from other security-based swap positions.[1011]

The Commissions nonetheless do not believe that it would be appropriate to extend the hedging exclusion to speculative or trading positions, including security-based swap positions that themselves hedge other positions that are for speculative or trading

''commercial risk'' terminology or underlying intent. A congruence standard particularly would not appear to adequately reflect the fact that commercially reasonable hedging activities can leave residual basis risk.

[1004] *See* letter from SIFMA AMG II.

[1005] For example, non-material basis risk or a non-material over-hedge may occur due to the use of a standardized instrument. A commercial entity may reasonably determine that it is cost effective to use a standardized security-based swap to hedge the underlying risk, even if use of the standardized instrument introduces non-material basis risk or reflects a non-material amount of over-hedging compared to what would be the result of using a bespoke security-based swap to hedge that risk.

[1006] Exchange Act rule 3a67–4(a)(2). We previously noted that the proposed definition would facilitate those types of security-based swap positions. *See* Proposing Release, 75 FR at 80196.

[1007] As discussed in the Proposing Release, *see* 75 FR at 80196 n.135, the references here to customers and counterparties do not include swap or security-based swap counterparties.

[1008] Exchange Act rule 3a67–4(b)(1). The commercial risk hedging exclusion for the purposes of the ''major security-based swap participant'' definition (in contrast to the commercial risk hedging exclusion in connection with the ''security-based swap dealer'' definition) does not turn upon whether a position is ''primarily'' for speculative or trading purposes. For the ''major security-based swap participant'' definition, a security-based swap position with any speculative or trading purpose cannot take advantage of the commercial risk hedging exclusion regardless of whether speculation or trading constitutes the ''primary'' purpose of the position.

[1009] *See generally* Basel Committee on Banking Supervision, ''International Convergence of Capital Measurement and Capital Standards, A Revised Framework, Comprehensive Version'' (June 2006) at ¶¶ 685–689(iii) (defining the term ''trading book'' for purposes of international bank capital standards, and stating that positions that are held for short-term resale and/or with the intent of benefiting from actual or expected short-term price movements or to lock in arbitrage profits are typically considered part of an entity's trading book).

In contrast to the CEA rule implementing the commercial risk hedging definition in the context of the ''major swap participant'' definition, the Exchange Act rule does not explicitly exclude security-based swaps held for the purpose of investing. We note, however, that security-based swaps held for the purpose of investing (*i.e.,* held primarily to obtain an appreciation in value of the security-based swap position) would not meet the ''economically appropriate'' standard set forth above, and hence would not be eligible for the exclusion.

[1010] *See, e.g.,* letters from FSR I and ISDA I.

[1011] *See, e.g.,* letter from CDEU.

purposes. Those limitations are appropriate to help give meaning to the concept of ''commercial'' risk, and to reflect the legislative intent to limit the impact of Title VII on commercial end-users of security-based swaps.[1012] Indeed, the use of security-based swap positions in connection with speculative and trading activity often may be expected either to have the purpose of locking-in arbitrage profits associated with those activities or producing an adjusted risk profile in connection with perceptions of future market behavior—neither of which would eliminate the speculative or trading purpose of the activity.[1013] We do not believe that it would be appropriate, or consistent with the Dodd-Frank Act, to interpret the term ''commercial risk'' to accord the same regulatory treatment to security-based swap positions for speculative or trading purposes as is accorded to the use of security-based swap positions in connection with commercial activities such as producing goods or providing services to customers.[1014]

Moreover, the Commissions believe that it would undermine the major participant definition to attribute a non-speculative or non-trading purpose to security-based swap positions that hedge speculative or trading positions. When a person uses a security-based swap position to help lock in profits or otherwise control the volatility associated with speculative or trading activity, or to cause that speculative or trading activity to reflect a particular market outlook or risk profile, the security-based swap position serves as an integral part of that speculative or trading activity. It thus would not appear appropriate or consistent with economic reality to seek to distinguish the security-based swap component from the other speculative or trading aspects of that activity. In fact, if ''hedges'' of speculative or trading positions were excluded from the first major participant test, entities could readily label a wide range of security-based swap positions entered into for speculative or trading purposes as being excluded hedges.[1015] Taken to its natural conclusion, such an approach largely may exclude security-based swap positions from the first major participant test, effectively writing that test out of the statutory definition.

We are aware of commenters' views that regulation of major participants has the potential to create a disincentive against certain entities' use of security-based swaps to manage risk in connection with their speculative or trading activities.[1016] Under this view, regulation potentially could result in those entities electing not to reduce the risks that they otherwise would seek to hedge, to avoid being regulated as major participants.[1017] That potential result, however, is an unavoidable consequence of the legislative decision to regulate persons whose security-based swap positions cause them to be major participants. It would not be appropriate to use the hedging exclusion to negate part of the underlying statutory definition simply to avoid disincentives that are an unavoidable consequence of the legislative decision to regulate major participants.

At the same time, we are mindful that market participants have requested further guidance as to how to distinguish between hedging positions that are subject to this exclusion, and speculative or trading positions that fall outside the exclusion. In our view, analysis of this issue is simplified by the nature of security-based swaps, and by the limited circumstances in which a person may be expected to have a commercial risk such that the use of a security-based swap may be economically appropriate for managing that commercial risk (rather than being for speculation or trading purposes).

In the case of security-based swaps that are credit derivatives, the final rule provides examples of the use of credit default swaps to purchase credit protection that, depending on the applicable facts and circumstances, may appropriately be excluded from the first major participant test (*e.g.,* the use of a credit default swap to purchase credit protection in connection with the potential default of a customer, supplier or counterparty, or in connection with loans made by a bank). Certain other purchases of credit protection using credit default swaps—such as the purchase of credit protection to manage the risks associated with securities that a non-financial company holds in a corporate treasury and that are not held for speculative or trading purposes—may also meet the standard under these rules.[1018] The sale of offsetting credit protection may also reasonably be expected to fall within the exclusion to the extent that this sale is reasonably necessary to address changes (particularly reductions) in the amount of underlying commercial risk hedged by the initial security-based swap position.[1019]

[1012] In addition, this limitation is consistent with the exclusion from the first major participant test in connection with ERISA plans. That exclusion particularly addresses security-based swap positions with the primary purpose of ''hedging or mitigating any risk directly associated with the operation of the plan.'' It is not clear why that scope of the ERISA exclusion would need to be incorporated into the first major participant test if the ''commercial risk'' exclusion already were broad enough to encompass hedges of trading or speculative positions.

[1013] As an example, one speculative/trading strategy involving security-based swaps can be to purchase short-dated credit protection in conjunction with a long-dated bond, to reflect a view that a particular company is likely to fail in the current credit environment. Combined, those positions can produce losses if the current credit environment did not change or if spreads were to widen, but could produce profits either if the company were to default or if spreads were to narrow and funding costs were to decrease. *See* Morgan Stanley, *Credit Derivatives Insights* 156–58 (4th ed., 2008). In other words, under that strategy the purchase of the credit protection would offset a portion of the risks associated with the ownership of the bond, but for the purpose of taking a directional view of the market with the hope for profit if the purchaser's view of future market dynamics is correct (and the reality of losses if the purchaser's view of the market is wrong). It would require an extraordinarily liberal construction of ''commercial risk'' to subsume this type of speculative security-based swap activity.

At the same time, we recognize that an entity hedging a commercial risk (in contrast to a risk arising from a speculative or trading strategy) reasonably may choose to use a security-based swap that is shorter-dated than the underlying risk, with the security-based swap appropriately excluded from the first major participant definition.

[1014] This approach does not reflect any value judgment about the role of speculation in the market for security-based swaps, or about the relative market benefits or risks associated with speculation. This position simply represents an attempt to give meaning to the statutory use of the term ''commercial risk'' in a way that reflects Title VII's special treatment of commercial end-users, and (as discussed below) avoid an interpretation that effectively undermines the first major participant test.

[1015] As noted by one participant to the roundtable on these definitions: ''[B]eing a hedge fund manager, there's nothing in my portfolio I can't claim to be hedging a risk. There's nothing. There's not a trade I do ever that I can't claim it to be a hedge against interest rates, or inflation, or against equity. You know, the fact of the matter is, if you're a capital market participant, your business is taking risks.'' Roundtable Transcript at 325 (remarks of Michael Masters, Better Markets).

[1016] *See* letter from ISDA I.

[1017] Of course, this would only be the case where the entity's hedging and speculative activities combined were at a level in excess of the major participant thresholds.

[1018] This is not to say that the purchase of credit protection on a security that a person owns would necessarily be entitled to the hedging exclusion. If the underlying security itself is held for speculative or trading purposes, the credit protection would not be excluded from the first major participant analysis, and in any event would not reasonably be construed as hedging ''commercial risk.''

[1019] Apart from that example, it is more difficult to foresee circumstances in which the sale of credit protection using a credit default swap would be expected to fall within the exclusion. We recognize, for example, that a person that has a short position in a security of a reference entity may have an incentive to sell credit protection on that reference entity to offset movements in the price or value of that short position (and/or lock in arbitrage profits in connection with that short position). While that sale of credit protection may mitigate the risks

Continued

As for security-based swaps that are not credit derivatives—such as equity swaps and total return swaps—the final rule provides examples of how the use of those security-based swaps in connection with certain business combinations may, depending on the applicable facts and circumstances, appropriately be excluded from the first major participant test. The use of equity swaps or total return swaps to manage the risks associated with securities that are held in a corporate treasury (and that are not held for speculative or trading purposes) may also appropriately be subject to the exclusion. Other uses of equity swaps or total return swaps to offset risks associated with long or short positions in securities, however, may not appropriately be excluded from the first major participant test, because such positions would be expected to have an arbitrage purpose or other speculative or trading purpose, and would be inconsistent with the ''commercial risk'' limitation to the hedging exclusion.

c. Treatment of Positions That Hedge Other Swap or Security-Based Swap Positions

The final rule, consistent with the proposal, provides that the hedging exclusion does not extend to a security-based swap position that hedges another swap or security-based swap position, unless that other position itself is held for the purposing of hedging or mitigating commercial risk.[1020] This provision allows the first major participant analysis to exclude a person's purchase of credit protection to help address the risk of default by a counterparty in connection with an interest rate swap, foreign exchange swap or other swap or security-based swap that the person has entered into for the purpose of hedging or mitigating commercial risk.

d. Procedural Conditions

In contrast to the proposal, the final rule does not incorporate procedural requirements in connection with the hedging exclusion from the first test of the major security-based swap participant definition.[1021] In making this change, we have been mindful of concerns that have been expressed that such procedural requirements would lead to undue costs in connection with hedging activity.[1022]

We understand, however, that many entities engaging in legitimate hedging of commercial risks do, as a matter of business practice, identify and document those risks and evaluate the effectiveness of the hedge from time to time. The presence of supporting documentation consistent with such procedures would help support a person's assertion that a security-based swap position should be excluded from the first major participant analysis, should the legitimacy of the exclusion become an issue.

Also, although we are not requiring the entity to monitor the effectiveness of the hedge over time, that absence of this requirement does not change the underlying need for a security-based swap position to be economically appropriate for the commercial risks facing the entity to be excluded from the first major participant definition. Thus, for example, if a person's underlying commercial risk materially diminishes or is eliminated over time, a security-based swap position that may have been economically appropriate to the reduction of risk at inception at a certain point in time may, depending on the facts and circumstances, no longer be reasonably included within the exclusion.[1023] As part of the reports required in connection with possible future changes to the major participant definitions,[1024] the staffs are directed to address whether the continued availability of the hedging exclusion should be conditioned on assessment of hedging effectiveness and related documentation.

D. Exclusion for Positions Held by Certain Plans Defined Under ERISA

1. Proposed Approach

The first statutory test of the major participant definitions excludes swap and security-based swap positions that are ''maintained'' by any employee benefit plan as defined in sections 3(3)[1025] and 3(32)[1026] of ERISA ''for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan.''[1027]

The proposed rules incorporated that statutory exclusion without additional interpretation or refinement.[1028] In the Proposing Release, moreover, the Commissions expressed the preliminary view that we did not ''believe that it is necessary to propose a rule to further define the scope of this exclusion.'' We further noted that the exclusion for those plans identified in the statutory definition is not strictly limited to ''commercial'' risk, and that this may be construed to mean that hedging by those ERISA plans should be broadly excluded. The Commissions also solicited comment as to whether this exclusion should be made available to additional types of entities.[1029]

2. Commenters' Views

Some commenters requested clarification that the ERISA hedging exclusion is broader than the commercial risk hedging exclusion, and that the ERISA hedging exclusion can encompass positions that are not solely for hedging purposes.[1030] One

associated with that short position, or produce an arbitrage profit in connection with that short position, that security-based swap position would not appear to constitute the hedging of ''commercial risk'' for purposes of the exclusion.

[1020] Exchange Act rule 3a67–4(b)(2).

[1021] Those proposed provisions would have conditioned the exclusion on the person identifying and documenting the underlying risks, establishing and documenting a method of assessing the hedge effectiveness, and regularly assessing the effectiveness of the security-based swap as a hedge. *See* proposed Exchange Act rule 3a67–4(c).

[1022] *See, e.g.,* letter from FSR I.

[1023] Factors that may be relevant to determining whether a security-based swap position is economically appropriate to the reduction of risk may include the costs associated with terminating or reducing that position.

[1024] *See* part V, *infra.*

[1025] Section 3(3) of Title I of ERISA defines the term ''employee benefit plan'' to include ''an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.'' *See* 29 U.S.C. 1002(3). The terms ''employee welfare benefit plan'' and ''employee pension benefit plan'' are further defined in Sections 3(1) and (2) of ERISA. *See* 29 U.S.C. 1002(1) and (2).

[1026] Section 3(32) of Title I of ERISA defines the term ''governmental plan'' to mean a plan that the U.S. government, state or political subdivision, or agencies and instrumentalities establish or maintain for its employees, as well as plans governed by the Railroad Retirement Acts of 1935 and 1937, plans of international organizations that are exempt from taxation pursuant to the International Organizations Immunities Act, and certain plans established and maintained by tribal governments or their subdivisions, agencies or instrumentalities. *See* 29 U.S.C. 1002(32).

[1027] CEA section 1a(33)(A)(i)(I); Exchange Act section 3(a)(67)(A)(ii)(I).

[1028] *See* proposed CFTC Regulation § 1.3(hhh)(1)(ii)(A); proposed Exchange Act rule 3a67–1(a)(2)(i).

[1029] *See* Proposing Release, 75 FR at 80201, *supra.*

[1030] *See* letters from BlackRock I (noting that the ERISA hedging exclusion applies to positions with the ''primary purpose'' of hedging, ''which suggests plans may exclude swap positions even if they serve a purpose in addition to hedging or mitigating''), the ERISA Industry Committee (''ERISA Industry Committee'') (stating that if ERISA Title I plans are not excluded from the major participant definition, the rules should clarify that the ERISA hedging exclusion is broader than the commercial hedging exclusion and encompasses a variety of risks associated with the value of a plan's assets or the measures of its liabilities; also stating that the ERISA exclusion should not omit positions in the nature of investing, and particularly discussing the use of swaps to provide diversification), ABC/CIEBA (expressing the view

commenter cautioned against interpreting the ERISA hedging exclusion broadly.[1031]

Commenters also requested that the Commissions clarify that the ERISA hedging exclusion applies to positions maintained by trusts that hold plan assets,[1032] or by pooled funds.[1033] One commenter, in contrast, stated that the exclusion should not be available to trusts holding plan assets.[1034]

One commenter stated that the exception should be extended to all public pension plans,[1035] and one commenter particularly took the view that the exclusion should be available to church plans.[1036] Some commenters stated that the exclusion should be available to non-U.S. plans.[1037]

3. Final Rules

Consistent with the position expressed in the Proposing Release, the Commissions interpret the ERISA hedging exclusion in the first statutory major participant test to be broader than that test's commercial risk hedging exclusion. This reflects the facts that the ERISA hedging exclusion is not limited to ''commercial'' risk, and that the ERISA hedging exclusion addresses positions that have a ''primary'' hedging purpose (which suggests that those positions may have a secondary non-hedging purpose).

a. Types of Excluded Hedging Activities

The Commissions are mindful of commenters' request for additional clarity regarding the scope of the ERISA hedging exclusion. In that regard, we note that we generally would expect swap or security-based swap positions to have a primary purpose of hedging or mitigating risks directly associated with the operation of the types of plans identified in the statutory definition—and hence eligible for the exclusion—when those positions are intended to reduce disruptions or costs in connection with, among others, the anticipated inflows or outflows of plan assets, interest rate risk, and changes in portfolio management or strategies.

Conversely, we believe that certain other types of positions would less likely have the primary purpose of hedging or mitigating risks directly associated with the operation of the plan, as anticipated by the statutory definition.[1038]

b. Availability of Exclusion

The Commissions recognize the significance of comments that these plans may use separate entities such as trusts or pooled vehicles to hold plan assets, and that the exclusion should not be interpreted in a way that deters the use of those vehicles. We believe that the same principles that underpin the exclusion for hedging positions directly entered into by the types of plans identified in the statutory definition also warrant making the exclusion applicable to plan hedging positions that are entered into by those other parties that hold assets of those types of plans. Otherwise, the major participant analysis would have the effect of deterring efficiencies in plan operations for no apparent regulatory purpose.

Accordingly, the Commissions interpret the meaning of the term ''maintain''—in the context of the statutory provision that the swap or security-based swap position be ''maintained by'' an employee benefit plan—not only to include positions in which the plan is a counterparty, but also to include positions in which the counterparty is a trust or pooled vehicle that holds plan assets. Thus, for example, the exclusion would be available to trusts or pooled vehicles that solely hold assets of the types of plans identified in the statutory definition.[1039] The exclusion further may be available to entities that hold such plan assets in conjunction with other assets, but only to the extent that the entity enters into swap or security-based swap positions for the purpose of hedging risks associated with the plan assets. The exclusion does not extend to positions that hedge risks of other assets, even if those are managed in conjunction with plan assets.[1040]

The Commissions also are mindful of commenter concerns that the exclusion should explicitly be made available to other plans, such as church plans and non-U.S. plans.[1041] In this regard, the Commissions believe that the boundaries of the exclusion are set by the explicit statutory language, which states that it applies to any employee benefit plan as defined in paragraphs (3) and (32) of section 3 of ERISA. This reference is disjunctive—that is, a plan is eligible for the exclusion if it is within the scope of paragraph (3) (which refers to employee benefit plans)

that the ERISA hedging exclusion extends beyond ''traditional'' hedges, and stating that the exclusion should encompass swaps with purposes in addition to hedging, and that the exclusion should encompass positions for the purpose of rebalancing, diversification and gaining asset class exposure) and CalSTRS I (requesting that regulations provide for an ERISA hedging exclusion that is broader than the commercial risk hedging exclusion, and that encompasses positions for the purpose of investing).

One commenter alluded to the incorporation of efficient portfolio theory principles within the exception. *See* letter from Russell Investments.

[1031] *See* letter from AFSCME (stating that while the statutory exclusion may encompass swaps to mitigate currency risk of cash market investments, the exclusion should not encompass swaps used for investment purposes such as to gain asset class exposure or avoid transaction costs associated with a direct investment).

[1032] *See* letters from ERISA Industry Committee (stating that the rules should provide that the exclusion applies to positions maintained by any trust holding plan assets) and ABC/CIEBA (stating that the rules should provide the relevant entity for purposes of the exclusion is the counterparty to the swap, further stating that if a trust enters into a swap as a counterparty, it is the trust that should be tested as a possible major participant, even if the trust also holds non-ERISA assets).

[1033] *See* letters from BlackRock I (discussing how plan fiduciaries may invest plan assets ''in pooled investment vehicles such as registered investment companies, private funds and bank maintained collective trust funds,'' and stating that not including pooled funds within the exclusion would limit plans' ability to avail themselves of the efficiencies associated with pooling), ERISA Industry Committee (stating that there is ''no reason'' why the exception should not also extend to position held by a pooled investment trust on behalf of multiple employee benefit plans) and ABC/CIEBA (stating that if a pool within a trust is the counterparty, it is that pool that should be tested as a possible major participant, and noting Department of Labor regulations providing that a collective investment vehicle would be viewed as holding plan assets if the vehicle is not a registered investment company, and plans hold at least 25 percent of the interests in the vehicle).

[1034] *See* letter from AFSCME (stating that ''it is important to limit the exemption to plans themselves, not to entities holding 'plan assets' '').

[1035] *See* letter from Russell Investments.

[1036] *See* letter from Church Alliance (stating that the exclusion also should encompass church plans defined in paragraph 3(33) of ERISA, on the grounds that Congress would not have intended to discriminate against church plans, and that church plans are considered ''special entities'' that should be the beneficiaries of extra protection).

[1037] *See* letters from ABC/CIEBA, APG and BTPS.

The Commissions intend to issue separate releases that address the application of the major participant definitions, and Title VII generally, to non-U.S. entities.

[1038] For example, we do not foresee that the use of a swap or security-based swap position to replicate exposure to a foreign market or to a particular asset class to be for the primary purpose of hedging risks directly associated with the operation of these types of plans. While we recognize that an asset manager may perceive benefits in using swaps or security-based swaps in that manner, it also is necessary to give effect to the statutory language limiting the exclusion to positions that have a ''primary purpose'' of hedging risks ''directly associated'' with the ''operations'' of a plan. We recognize that lack of diversification may be viewed as a risk, but it is not an ''operations'' risk.

[1039] This interpretive guidance is intended solely in the context of the interpretation of the first test of the statutory major participant definitions. The guidance is not based on or relevant to the interpretation of other regulations relating to ERISA.

[1040] As appropriate, for purposes of the first major participant analysis an entity may need to allocate the exposure associated with swap or security-based swap positions between the amount that is attributable to plan assets (and hence eligible for exclusion) and the amount that is attributable to other assets.

[1041] As previously noted, the Commissions intend to issue separate releases that address the application of the major participant definitions, and Title VII generally, to non-U.S. entities.

or of paragraph (32) (which applies to government plans). Accordingly, the scope of the cited definitions in paragraphs (3) and (32) should be determined in accordance with all law that applies in the interpretation of ERISA.[1042]

E. ''Substantial Counterparty Exposure''

1. Proposed Approach

The major participant definitions' second statutory test encompasses persons whose outstanding swaps or security-based swaps ''create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets.'' [1043] In contrast to those definitions' first statutory test, which relates to persons with a ''substantial position'' in swaps or security-based swaps in a ''major'' category,[1044] this second test is not limited to positions in a single category. Also, unlike the first test, the second statutory test does not explicitly exclude certain commercial risk hedging positions or ERISA hedging positions.

For the ''major swap participant'' definition, the Proposing Release provided that a person's swap positions pose ''substantial counterparty exposure'' if those positions present a daily average current uncollateralized exposure of $5 billion or more, or present daily average current uncollateralized exposure plus potential future exposure of $8 billion or more.[1045] For the ''major security-based swap'' definition, the proposal provided that a person's security-based swap positions pose ''substantial counterparty exposure'' if those positions present daily average current uncollateralized exposure of $2 billion or more, or present daily average current uncollateralized exposure plus potential future exposure of $4 billion or more.[1046]

Under the proposal, those measures would be calculated in the same manner as would be used for the first major participant test, except that the ''substantial counterparty exposure'' analysis would consider all of a person's swap or security-based swap positions rather than solely considering positions in a particular ''major'' category, and that the ''substantial counterparty exposure'' analysis would not exclude positions to hedge commercial risks or ERISA plan risks.

The proposed ''substantial counterparty exposure'' thresholds were set higher than the proposed ''substantial position'' thresholds in part to reflect the fact that the former test accounts for a person's positions across four major swap categories or two major security-based swap categories.[1047] The proposed ''substantial counterparty exposure'' thresholds also reflected the fact that this second test (unlike the first major participant test) encompasses certain hedging positions that, in general, we would expect to pose a lesser degree of risk to counterparties and the markets.

2. Commenters' Views

a. General Comments

In light of the similarity between the proposed tests, a number of the concerns that commenters expressed with regard to the proposed ''substantial position'' definition also apply to the proposed ''substantial counterparty exposure'' definition. In addition, some commenters took the view that the proposed ''substantial counterparty exposure'' thresholds were too low,[1048] with several of those commenters stating that the thresholds should be raised to a level that reflects systemic risk.[1049] A few commenters took the view that the proposed thresholds were too high.[1050] Some commenters generally supported the approach to the definition of ''substantial counterparty exposure'' proposed by the Commissions.[1051]

Some commenters took the view that the ''substantial counterparty exposure'' test should focus on the size of an entity's exposure to specific counterparties.[1052] Several commenters suggested that the thresholds should be adjusted over time for inflation and changes in the swap and security-based swap markets.[1053] One commenter urged that the analysis consider the interconnectedness of the entity.[1054]

One commenter addressed the application of the second major participant test to insurance companies, arguing that substantial counterparty exposure should be decided by the FSOC in consultation with the relevant state insurance commissioner, and that hedges should be excluded from the calculation for insurers.[1055]

b. Lack of Exclusion for Hedging Positions

A number of commenters took the view that the second major participant

[1042] We are not taking a view as to whether church plans or non-U.S. plans constitute employee benefit plans as defined by section 3(3) of ERISA.

[1043] CEA section 1a(33)(A)(ii); Exchange Act section 3(a)(67)(A)(ii)(II).

[1044] CEA section 1a(33)(A)(i); Exchange Act section 3(a)(67)(A)(ii)(I).

[1045] *See* proposed CFTC Regulation § 1.3(lll).

[1046] *See* proposed Exchange Act rule 3a67–5.

[1047] Thus, these proposed thresholds in part would account for a person that has large positions in more than one major category of swaps or security-based swaps, but that does not meet the substantial position threshold for any single category of swaps or security-based swaps.

[1048] *See, e.g.,* letters from ATAA (supporting higher thresholds to measure substantial counterparty exposure), CCMR I (suggesting that the thresholds be set high initially, capturing only a few entities until the Commissions are able to collect and analyze data that supports lowering the thresholds), BG LNG I (stating that proposed threshold should be increased substantially), WGCEF II (stating that the Commissions should adopt substantial position and substantial counterparty exposure tests that account for current conditions in swap markets), ABC/CIEBA (requesting that the Commissions raise the thresholds to better target persons creating or causing systemic risk as set forth in the a major swap participant and major security-based swap participant definitions), BlackRock I (stating that proposed thresholds for the substantial counterparty exposure test are too low so that they could encompass market participants that do not have systemically important swap positions) and ACLI (supporting increasing the thresholds under the CEA definition to $7 billion in daily average aggregate uncollateralized outward exposure or $14 billion in daily average aggregate uncollateralized outward exposure plus daily average aggregate potential outward exposure), and meeting with MFA on February 14, 2011 (requesting that the Commissions raise the thresholds for measuring substantial counterparty exposure until the Commissions conduct a market survey to determine how many entities would need to perform the calculations regularly and whether those entities have characteristics capable of causing systemic risk).

[1049] *See* letters from ABC/CIEBA, BlackRock I, ISDA I, WGCEF II, and meeting with MFA on February 14, 2011.

[1050] *See* letters from Greenberger (in connection with thresholds relating to substantial position) and AFR (Commissions should define a major swap participant or major security-based swap participant as any person that maintains $500 million in daily average, uncollateralized exposure for any category of swaps other than rate swaps, for which the daily average could be up to $1.5 billion).

[1051] *See, e.g.,* letters from ATAA (supporting the proposed definitions of ''substantial position'' and ''substantial counterparty exposure,'' with the caveat that higher thresholds be used to measure ''substantial counterparty exposure''), Dominion Resources (supporting the Commissions proposed definitions of ''substantial position'' and ''substantial counterparty exposure''), Fidelity (threshold levels set at appropriate levels but should be periodically reviewed for adjustment), and Kraft (thresholds as proposed are appropriate).

[1052] *See* letters from MFA (stating that the calculation of substantial counterparty exposure should measure the exposure that a person has to each individual counterparty that is a systemically important financial institution excluding cleared swap transactions) and CCMR I (stating that the ''substantial counterparty exposure'' and ''substantial position'' thresholds should apply to the largest exposure that a person has to another market participant, with any aggregate test being set at a higher level).

[1053] *See* letters from CDEU, COPE I, Fidelity, ISDA I, and MFA I.

[1054] *See* letter from CDEU.

[1055] *See* letter from NAIC (stating that the Commissions should defer to FSOC when considering the designation of insurers under the second test, and should exclude from the analysis swaps and security-based swap positions used for hedging provided that such positions are subject to state investment laws and ongoing monitoring by a state insurance regulatory authority).

test should exclude commercial risk hedging positions from the analysis.[1056] Some commenters also supported excluding ERISA hedging positions from the analysis.[1057] One commenter opposed any such exclusions for hedging positions.[1058]

3. Final Rules

Consistent with the Proposing Release, the final rules defining the term ''substantial counterparty exposure'' generally are based on the same current uncollateralized exposure and potential future exposure tests that are used to identify a ''substantial position.''[1059] As with the Proposing Release, moreover, the ''substantial counterparty exposure'' analysis addresses all of a person's swap or security-based swap positions (rather than being limited to positions in a ''major'' category), and does not exclude hedging positions.[1060] The final rules also incorporate the quantitative thresholds that were proposed for those tests.[1061]

In adopting these final rules we have considered commenter views that the ''substantial counterparty exposure'' analysis should exclude certain commercial risk and ERISA hedging positions. We nonetheless believe that the structure of the major participant definitions—particularly the fact that those definitions specifically exclude hedging positions from the first statutory test but not from the second test—necessitates the conclusion that the second test not exclude those hedging positions.

We also have considered commenter views that the ''substantial counterparty exposure'' analysis should account for the maximum exposure that a person poses to any single counterparty. We nonetheless believe that the statutory test—particularly its focus on serious adverse effects on financial stability or financial markets—more appropriately is addressed by measures of the aggregate counterparty risk that an entity poses through its swap or security-based swap positions. Also, consistent with our views regarding the ''substantial position'' definition, we believe that the ''substantial counterparty exposure'' analysis appropriately is addressed via objective and quantitative criteria (rather than a multi-tier approach), and appropriately takes into account current uncollateralized exposure and potential future exposure.

Consistent with the Proposing Release, the thresholds to implement the second major participant test are higher than the corresponding thresholds for the first major participant test. These differences reflect the fact that the second test encompasses four ''major'' categories of swaps or two ''major'' categories of security-based swaps, as well as the fact that this second test does not exclude hedging positions that would appear to pose a lesser degree of counterparty risk than non-hedging positions.

While we are mindful of commenter views that the proposed ''substantial counterparty exposure'' thresholds were too low,[1062] we believe that the same principles that support the proposed standards in the context of the ''substantial position'' definition also support the proposed standards for this second test. As with the ''substantial position'' analysis, the ''substantial counterparty exposure'' analysis seeks to reflect a standard that encompasses large market participants before the counterparty risk posed by their swap and security-based swap positions present too large a problem, as well as the financial system's ability to absorb losses of a particular size, and the need to account for the possibility that multiple market participants may fail close in time.[1063] Commenters have not presented empirical or analytical evidence in support of a different standard. In the future, the Commissions may review and potentially adjust these thresholds to reflect evolving market structures and additional data.

F. ''Highly Leveraged'' and ''Financial Entity''

1. Proposed Approach

The third statutory test of the major participant definitions encompasses any non-dealer that: (i) Is a ''financial entity'' (other than one that is ''subject to capital requirements established by an appropriate Federal banking agency''), (ii) is ''highly leveraged relative to the amount of capital it holds,'' and (iii) maintains a ''substantial position'' in any ''major'' category of swaps or security-based swaps.[1064] In contrast to the first statutory test—which also encompasses persons with a ''substantial position'' in swaps or security-based swaps in a ''major'' category—this third test does not exclude positions that hedge commercial risk or ERISA risks.

a. ''Financial Entity''

The Proposing Release defined the term ''financial entity'' for purposes of the major participant definition in the same general manner as Title VII defines that term for purposes of the end-user exemption from mandatory clearing,[1065] but with certain technical changes to avoid circularity.[1066]

[1056] *See* letters from SIFMA AMG II (noting that the Commissions have suggested that hedging positions may not raise the same degree of risk as other swap positions), NAIC (supporting exclusion of commercial risk hedging positions subject to state investment laws and ongoing monitoring by state insurance regulators), AIA (supporting hedging exclusion to avoid capturing entities such as property-casualty insurers), CDEU (suggesting that inclusion of hedging positions is inconsistent with goal of mitigating systemic risk), APG (supporting exclusion of positions held by regulated foreign pension plans), and NRG Energy (suggesting that a lack of an exclusion would cause end-users to curtail hedging activities and increase systemic risk); *see also* letter from AIMA I (supporting an exemption or discount if the swap transaction is cleared, an off-set for the value and quality of any collateral, and consideration of the directional moves of particular swap contracts).

[1057] *See* letters from ABC/CIEBA and SIFMA AMG II. One commenter further requested that ERISA Title I plans be explicitly excluded from the second test. *See* letter from ERISA Industry Committee. Another commenter requested an exclusion for ERISA plans generally. *See* letter from CalSTRS I.

[1058] *See* letter from Better Markets I (stating that excluding hedging positions would be inappropriate because the Dodd-Frank Act did not provide for any such exclusion in the second test, hedge positions may still contribute to counterparty exposure, and the thresholds already reflect the lower level of risk posed by hedge positions).

[1059] Accordingly, changes that the final rules made to the proposal with regard to the ''substantial position'' definition, *see* part IV.B.3, *supra,* also are carried over to the definition of ''substantial counterparty exposure.''

[1060] *See* CFTC Regulation § 1.3(lll); Exchange Act rule 3a67–5.

[1061] Accordingly, consistent with the proposal, the threshold for the ''major swap participant'' definition is $5 billion or more in daily average current uncollateralized exposure, or $8 billion or more in daily average uncollateralized exposure plus potential future exposure. The threshold for the ''major security-based swap participant'' is $2 billion or more in daily average current uncollateralized exposure, or $4 billion or more in daily average uncollateralized exposure plus potential future exposure.

[1062] *See* notes 1051 and 1052, *supra.*

[1063] As with the ''substantial position'' analysis, our decision to adopt these thresholds is informed by events related to AIG Financial Products and LTCM. *See* part IV.B.3.d, *supra.*

[1064] CEA section 1a(33); Exchange Act section 3(a)(67).

[1065] CEA section 2(h)(7); Exchange Act section 3C(g)(3)(A).

[1066] *See* proposed CFTC Regulation § 1.3(mmm)(1); proposed Exchange Act rule 3a67–6(a). For both sets of rules, the ''financial entity'' definition would include any: commodity pool (as defined in section 1a(10) of the CEA); private fund (as defined in section 202(a) of the Investment Advisers Act of 1940); employee benefit plan as defined in paragraphs (3) and (32) of section 3 of ERISA; and person predominantly engaged in activities that are in the business of banking or financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956).

To avoid circularity, the use of the term ''financial entity'' in the context of the ''major swap participant'' definition also would encompass any ''security-based swap dealer'' and ''major security-based swap participant,'' but would not include any ''swap dealer'' or ''major swap participant'' (even though the latter terms also are found in the

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b. ''Highly Leveraged''

The Proposing Release set forth two alternative approaches for determining whether a particular entity would be deemed ''highly leveraged.'' [1067] Under one approach, an entity would be ''highly leveraged'' if the ratio of its liabilities to equity exceeded 8 to 1; this proposed alternative reflected the fact that the third statutory major participant test excludes certain types of entities.[1068] Under the alternative approach, an entity would be ''highly leveraged'' if the ratio of its liabilities to equity exceeded 15 to 1; this proposed alternative reflected standards for maximum leverage in certain circumstances found in Title I of the Dodd-Frank Act.[1069] The proposal further provided that leverage would be measured at the close of business on the last business day of the applicable fiscal quarter, and that liabilities and equity would be determined in accordance with U.S. generally accepted accounting principles (''GAAP'').[1070]

In proposing these alternative standards for identifying ''highly leveraged'' entities, the Commissions recognized that traditional balance sheet measures of leverage are limited as tools for evaluating an entity's ability to meet its obligations—in part because such measures do not directly account for potential risks posed by specific instruments held on the balance sheet, or for financial instruments held off of the balance sheet. At the same time, the Commissions preliminarily concluded that it was not necessary to use more complex measures of risk-adjusted leverage for these purposes, in part because the third test's ''substantial position'' analysis already accounts for such risks. The Commissions also noted the costs that would be associated with causing entities to engage in complex calculations of risk-adjusted leverage.[1071]

The Proposing Release solicited comment on a variety of issues related to the proposed leverage ratios, including the relative merits of the alternative 8 to 1 and 15 to 1 standards, and potential alternative standards.[1072]

2. Commenters' Views

a. ''Financial Entity''

Some commenters recommended that certain types of entities should be excluded from the definition of ''financial entity,'' on the grounds that those types of entities are more appropriately treated as non-financial end users of swaps for purposes of the Dodd-Frank Act.[1073] Commenters specifically suggested that the ''financial entity'' definition exclude: (i) Centralized hedging and treasury subsidiaries in corporate groups; [1074] (ii) employee benefit plans; [1075] and (iii) cooperative structures.[1076] Commenters also requested clarification as to which entities would not be ''subject to capital requirements established by an appropriate Federal banking agency,'' and hence not subject to the third statutory test.[1077] In addition, commenters addressed the application of the ''financial entity'' definition to non-U.S. persons.[1078]

b. ''Highly Leveraged''

A number of commenters supported the proposed 15 to 1 alternative leverage ratio over the 8 to 1 alternative, with some commenters further suggesting that the final rule should set a leverage ratio higher than 15 to 1, or that the ratio should be reconsidered when more information is available regarding leverage among swap users.[1079] One commenter supported the proposed 8 to 1 alternative,[1080] and one commenter

''financial entity'' definition used for purposes of the end-user clearing exception). *See* proposed CFTC Regulation § 1.3(mmm)(1). In the context of the ''major security-based swap participant'' definition, the term ''financial entity'' also would encompass any ''swap dealer'' or ''major swap participant,'' but would not include any ''security-based swap dealer'' and ''major security-based swap participant.'' *See* proposed Exchange Act rule 3a67–6(a).

[1067] *See* proposed CFTC Regulation § 1.3(mmm)(2); proposed Exchange Act rule 3a67–6(b).

[1068] The Proposing Release particularly noted that the third statutory major participant test excludes financial institutions subject to capital requirements set by Federal banking agencies, and recognized the possibility those entities were excluded based on the presumption that they generally are highly leveraged. The Proposing Release noted, based on analysis of financial statements, that it appears that those institutions generally have a leverage ratio of 10 to 1, and that this suggested that the ''highly leveraged'' threshold would have to be lower for those institutions to potentially be subject to the third test. *See* Proposing Release, 75 FR at 80199.

[1069] The Proposing Release noted that Title I provides that the Board must require a bank holding company with total consolidated assets equal to or greater than $50 billion, or a nonbank financial company supervised by the Board, to maintain a debt to equity ratio of no more than 15 to 1 if the FSOC determines ''that such company poses a grave threat to the financial stability of the United States and that the imposition of such requirement is necessary to mitigate the risk that such company poses to the financial stability of the United States.'' *See* Dodd-Frank Act section 165(j)(1). The Proposing Release further noted that this 15 to 1 ratio may represent an upper limit to acceptable leverage and that the major participant analysis should use a lower threshold, or, alternatively, that the 15 to 1 ratio provides an appropriate test of whether an entity poses the systemic risk concerns implicated by the major participant definitions. *See* Proposing Release, 75 FR at 80199.

[1070] The Proposing Release also stated that entities that file quarterly reports on Form 10–Q and annual reports on Form 10–K with the SEC would determine their total liabilities and equity based on the financial statements included with such filings while all other entities would calculate the value of total liabilities and equity consistent with the proper application of U.S. GAAP. *See id.*

[1071] *See id.* at 80198–99.

[1072] *See id.* at 80199–200.

[1073] *See, e.g.,* letters from CalSTRS dated June 15, 2011 (''CalSTRS II''), Kraft, Newedge, NRU CFC I and Philip Morris.

[1074] *See* letters from Kraft and Philip Morris.

[1075] *See* letter from CalSTRS II (asserting that there is not a basis to treat ERISA plans as ''financial entities'' for purposes of the major participant definitions solely to maintain consistency with an ''anomalous'' statutory provision).

[1076] *See* letter from NRU CFC I.

[1077] *See* letters from ACLI (requesting confirmation that the exclusion from the third statutory test extends to entities subject to bank or financial holding companies, entities deemed systemically important under Title I of the Dodd-Frank Act, and any other persons subject to capital regulation established by a Federal banking regulator) and MetLife (requesting clarification that the exclusion extends to persons subject to regulation and capital requirements on a consolidated basis under federal banking law, and persons that are individually or systemically important financial institutions under Title I).

[1078] One commenter took the view that non-U.S. governments and their agencies should be excluded from the ''financial entity'' definition for purposes of the major participant definition and the Title VII end-user exemption from mandatory clearing. *See* letter from Milbank. On the other hand, one commenter favored the inclusion of non-U.S. governments in the ''financial entity'' definition. *See* meeting with Duffie on February 2, 2011 (suggesting that foreign governments and other foreign jurisdictions, such as municipalities, should be treated as ''financial entities'' for purposes of the major swap participant definition and other requirements under the Dodd-Frank Act on the grounds that such entities could become sources of systemic risk).

The Commissions intend to issue separate releases addressing the application of Title VII to non-U.S. persons.

[1079] *See* letters from ISDA I (suggesting that the wide use of leverage by financial institutions means that the definition should capture only entities with the ''very highest'' leverage ratios, and that the 15 to 1 ratio should be viewed as a floor for identifying highly leveraged entities given that it is used in Title I to address entities that have already been determined to pose a ''grave threat'' to the stability of the U.S. financial system), MFA I (stating that 15 to 1 is the more appropriate of the two choices, and that the Commissions could subsequently adjust the ratio after receiving market data on the use of leverage), AIMA I (encouraging the Commissions to adopt the 15 to 1 leverage threshold until an assessment of the impact of the major participant definitions can be completed); Amex (supporting the use of the 15 to 1 ratio, noting that it is consistent with the maximum leverage allowed to entities designated as a grave threat to financial stability under Title I of the Dodd-Frank Act) and CDEU (recommending use of the 15 to 1 standard, based on its consistency with the leverage limit in Title I of the Dodd-Frank Act for entities posing a grave threat to the United States financial system and that ''it would be unreasonable to propose a stricter leverage threshold under the major participant test for nonbank financial end-users,'' and expressing concern that entities comfortably falling under the 8 to 1 ratio could unexpectedly exceed this threshold during periods of market stress and that sudden designation as a major participant ''could seriously hinder a company from meeting its obligations'').

[1080] *See* letter from Better Markets I (stating that the 8 to 1 threshold would better serve the purposes

suggested that the final rule should set a leverage ratio lower than 8 to 1.[1081] One commenter suggested a ratio of 12 to 1, consistent with certain capital requirements.[1082]

Commenters also suggested a variety of methods and adjustments for calculating leverage ratios.[1083]

Some commenters further suggested that specific leverage tests be applied to particular types of financial entities. For employee benefit plans, commenters particularly stated that a plan's obligations to pay benefits should not be considered a liability for purposes of the analysis, and the value of the plan's assets should be used as the denominator for the ratio in lieu of using the non-applicable term ''equity.'' [1084] Another commenter—which obtains a substantial amount of funding by issuing subordinated debt, rather than equity—expressed the view that the leverage calculation should allow it to treat subordinated debt as equity.[1085]

Several commenters addressed the application of the leverage ratio to insurance companies in light of the applicable regulatory regimes and their use of statutorily required accounting methods rather than GAAP.[1086] Those commenters took the view that an insurance company's leverage should be tested based on its risk-based capital ratio or on its statutory accounting statements, with certain adjustments to account for different types of liabilities,[1087] or based on whether its insurance regulator believes that it is adequately capitalized.[1088] One commenter said that the leverage ratio test should not apply to insurance companies,[1089] and another said that application of the leverage ratio test to insurance companies should be coordinated with the FSOC.[1090]

3. Final Rules

a. ''Financial Entity''

Consistent with the Proposing Release, the final rules defining ''financial entity'' for purposes of the third major participant test are based on the corresponding ''financial entity'' definition used in the Title VII exception from mandatory clearing for end users, with certain adjustments to avoid circularity.[1091] In this regard, while we are mindful of one commenter's views that the differences between the major participant definitions and the end-user clearing exception necessitate different ''financial entity'' definitions,[1092] we do not concur with the view that the term ''financial entity'' should be interpreted independently in these two contexts. Both sets of provisions distinguish between financial and non-financial entities in a way that limits the impact of Title VII on the latter set of entities, and we believe that the definitions should be consistent in light of those parallel purposes.

The Commissions are aware, however, that the major participant definitions differ from the mandatory clearing requirements in how they address affiliates. The mandatory clearing requirements include a provision that specifically addresses affiliates of persons that qualify for the exception from mandatory clearing for end users,[1093] while no such specific provision is included in the major participant definitions. Given this absence, the Commissions believe it is appropriate to modify the final rules defining ''financial entity'' for purposes of the major participant definitions from the proposal to exclude certain centralized hedging and treasury entities.[1094] The Commissions understand that a primary function of such centralized hedging and treasury entities is to assist in hedging or mitigating the commercial risks of other entities within their corporate groups. Although those entities' activities could constitute being ''in the business of banking or financial in nature,'' we do not believe that it would be appropriate to treat a person as a ''financial entity'' for the purposes of the major participant definitions if the person would fall within that definition solely because it facilitates hedging activities involving swaps or security-based swaps by majority-owned affiliates that themselves are not ''financial entities.'' [1095] Absent this change, the major participant analysis would exclude hedging positions that do not use centralized hedging facilities, but would not exclude identical hedging positions that make use of a centralized hedging facility.[1096] Such a result would inappropriately discourage the use of centralized hedging and treasury entities.

While the Commissions also have considered the views of commenters that the ''financial entity'' definition should exclude certain other types of entities—such as employee benefit plans, and cooperatives—the final rules do not provide any such exclusions. As a general matter, the Commissions believe that the ''financial entity'' definition should be the same for purposes of the major participant

of the Dodd-Frank Act by ''ensuring that more, rather than fewer, financial entities are covered by the risk mitigation and business conduct standards that Congress established'' for major participants, and that use of the 15 to 1 leverage ratio from Title I of the Dodd-Frank Act is inappropriate because the Title I ratio is used for the ''relatively draconian'' purpose of imposing leverage limits, while this ratio would be used for ''the more modest purpose of imposing registration requirements'').

[1081] *See* letter from Greenberger (suggesting that the leverage test should be set at a ratio that is lower than either of the two proposed levels).

[1082] *See* meeting with MFA on February 14, 2011 (MFA representatives making point that ''highly leveraged'' should be defined in coordination with other regulations under the Dodd-Frank Act, and for example, a requirement that banks hold 8% capital implies a leverage ratio of approximately 12:1).

[1083] The suggested adjustments were: to measure the ratio of net current credit exposure to Tier I capital, in a manner similar to that used by bank regulators (*see* letter from Greenberger); to include as liabilities all unfunded exposures on swaps, both current and potential (*see* letter from Better Markets I); and to account for the different risk levels of various classes of assets and liabilities and for other factors affecting a person's riskiness (*see* letters from CCMR I and MFA I).

[1084] *See* letters from CalSTRS I (also stating that for purposes of determining leverage ratios, the value of the plan's assets should be determined as of most recent annual valuation rather than quarterly) and APG (stating that only investment-related liabilities, rather than anticipated shortfalls in benefit obligations, should be considered in the leverage calculation, and the test should be adjusted to take into account legally binding investment restrictions and other constraints that could be just as effective, or more effective, at reducing insolvency risk as capital requirements that would limit leverage).

[1085] *See* letter from NRU CFC I (stating that this application of the leverage test would be consistent with its financial statements).

[1086] *See* letters from ACLI, FSR I, MetLife and NAIC.

[1087] *See* letters from ACLI, FSR I and NAIC.

[1088] *See* letter from MetLife.

[1089] *See* letter from FSR I.

[1090] *See* letter from NAIC.

[1091] *See* CFTC Regulation § 1.3(mmm)(1); Exchange Act rule 3a67–6(a). Accordingly, this general definition encompasses commodity pools, private funds, ERISA plans, and persons predominately engaged in activities that are in the business of banking or financial in nature, as well as certain dealers or major participants. *See* note 1066, *supra.*

[1092] *See* letter from CalSTRS II (ERISA plans should not be included in the definition of ''financial entity'' for purposes of the major participant definitions).

[1093] *See* CEA section 2(h)(7)(D); Exchange Act section 3C(g)(4).

[1094] *See* CFTC Regulation § 1.3(mmm)(2); Exchange Act rule 3a67–6(b).

[1095] Consistent with the general inter-affiliate exceptions from the dealer and major participant definitions, *see* parts II.C and IV.G, for purposes of these rules, the counterparties are majority-owned affiliates if one party directly or indirectly holds a majority ownership interest in the other, or if a third party directly or indirectly holds a majority interest in both, based on holding a majority of the equity securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership. *See* CFTC Regulation § 1.3(mmm)(1); Exchange Act rule 3a71–6(b)(2).

[1096] We also note that this result is parallel to the Title VII end-user exception from mandatory clearing, which extends to hedging activities of financial entities on behalf of non-financial affiliates. *See* CEA section 2(h)(7)(D); Exchange Act section 3C(g)(4).

definition as it is for purposes of the end-user exception from mandatory clearing.[1097]

We also have considered the views of some commenters that subsidiaries of bank holding companies, financial holding companies or systemically important financial institutions should be considered to be ''subject to capital requirements established by an appropriate Federal banking agency,'' and hence not subject to the third statutory major participant test. We nonetheless interpret the term ''subject to capital requirements established by an appropriate Federal banking agency'' to specifically apply to persons for whom a Federal banking agency directly sets capital requirements. We do not believe that the term should be interpreted to apply to other persons by virtue of their being part of a holding company that is subject to those capital requirements, or otherwise being affiliated with persons subject to those capital requirements, because we do not believe that the mere fact of that relationship is sufficient to control or mitigate the credit risk that those persons pose to their counterparties.

b. ''Highly Leveraged''

i. Leverage Ratio Level

After considering commenters' views, the Commissions are adopting final rules that define ''highly leveraged'' to generally mean a ratio of liabilities to equity in excess of 12 to 1.[1098] Our adoption of this 12 to 1 standard, rather than the proposed 8 to 1 or 15 to 1 alternatives, takes into account commenters' views on the alternatives, as well as one commenter's support for a 12 to 1 ratio.[1099]

In general, we believe that the structure of the third statutory major participant test—which, unlike the first statutory test, does not permit the exclusion of certain hedging positions—reasonably may be interpreted as reflecting the determination that: (a) higher leverage indicates that an entity poses a heightened risk of being unable to meet its obligations; and (b) such entities should not be permitted to exclude hedging positions from the ''substantial position'' analysis in light of the counterparty risks those positions pose (even recognizing that these may be lower than counterparty risks posed by comparable non-hedging positions).

Commenters who addressed the proposed leverage ratio raised diverse points of view in support of the 8 to 1 and 15 to 1 alternatives, or other standards. A number of those commenters, however, appeared to focus on the outcome of particular leverage ratios—*i.e.,* that a lower leverage ratio likely would lead to more major participants, and that a higher leverage ratio likely would lead to fewer major participants—and to base their conclusions on their views of that outcome. In general, the comments did not reflect an attempt to identify typical leverage ratios for financial entities, or to address the link between leverage and risk.

Some commenters specifically supported the use of a 15 to 1 leverage ratio in light of Title I's use of that ratio.[1100] While considering this perspective, we believe it also is appropriate to consider the different purposes for which leverage is addressed in the Title I and major participant contexts. The 15 to 1 leverage provision in Title I reflects a maximum allowable threshold of leverage for certain bank holding companies and nonbank financial companies when a determination has been made that such entities pose a ''grave threat to the financial stability of the United States'' and that the imposition of this limitation is necessary to mitigate the risks posed by such entities—in essence serving as a hard leverage cap for certain entities that have been deemed risky to the U.S. financial system.[1101] In contrast, leverage serves a type of gatekeeper function in the major participant definitions by identifying the amount of leverage that will require a non-bank financial entity to engage in the ''substantial position'' analysis without excluding hedging positions, rather than seeking to limit the maximum leverage available to those entities. Just as concepts of ''maximum leverage'' are distinct from concepts of ''high leverage,'' the use of a 15 to 1 maximum leverage ratio in Title I does not mandate the conclusion that the same 15 to 1 ratio must be used for interpreting the meaning of ''highly leveraged'' in the major participant definitions.[1102]

In considering the definition of the term ''highly leveraged'' based on the reasoning outlined above, we also are mindful that, as the Proposing Release noted,[1103] broker-dealer capital regulations include special provisions that apply when a broker-dealer's leverage exceeds 12 to 1.[1104] While we recognize that these capital regulations have limitations as tools for defining ''highly leveraged'' for purposes of the major participant definitions due to differences in how leverage would be calculated,[1105] we also believe that these regulations are informative regarding the use of leverage in the major participant context given that they highlight an existing link between increased regulatory oversight and the amount of leverage an entity maintains.

In light of the reasons noted above for using a leverage ratio below 15 to 1, commenter concerns that a ratio of 8 to 1 would be too low, one commenter's suggestion of a 12 to 1 leverage ratio, and leverage tests found in broker-dealer capital regulations, the Commissions have determined that a 12 to 1 leverage ratio reflects an appropriate basis for identifying ''highly leveraged'' financial entities. In making this determination we recognize that other approaches also may be reasonable (*e.g.,* lower thresholds based on the analysis of the leverage of certain financial entities also may be reasonable, as may higher thresholds based on Title I and on other aspects of broker-dealer capital rules). We also recognize, however, that the need to implement the major participant definitions requires that we draw a line. In our view, a 12 to 1 ratio reflects a

[1097] Similarly, the Commissions in general are not adopting categorical requests for exclusions from the major participant definitions. *See* part IV.J, *infra.*

[1098] *See* CFTC Regulation § 1.3(mmm)(2); Exchange Act rule 3a67–7(a). The final rules defining ''highly leveraged'' have been renumbered from the proposal for the sake of clarity.

[1099] *See* note 1082, *supra,* and accompanying text.

[1100] *See, e.g.,* letters from Amex and CDEU.

[1101] *See* Dodd-Frank Act section 165(j)(1).

[1102] We also note that the use of the 15 to 1 ratio of Title I in this context could lead to potentially incongruous results. In particular, if the Commissions were to use the 15 to 1 leverage ratio for the ''highly leveraged'' definition, then an entity that is deemed to be such a threat to the United States financial system that its leverage has been capped pursuant to Title I also would effectively be excepted from the third statutory test of the major participant definitions due to that cap. The 12 to 1 leverage ratio that we are adopting today does not give rise to the same result and therefore does not present the same question of interpretation as to whether this result would be appropriate.

[1103] *See* Proposing Release, 75 FR at 80199 n.152.

[1104] Exchange Act rule 15c3–1 provides that a broker-dealer may determine its required minimum net capital, among other ways, by applying a financial ratio that provides that its aggregate indebtedness shall not exceed 1500 percent of its net capital (*i.e.,* a 15 to 1 aggregate indebtedness to net capital ratio). In addition, Exchange Act rule 17a–11 further requires that broker-dealers that use such method to establish their required minimum net capital must provide notice to regulators if their aggregate indebtedness exceeds 1200 percent of their net capital (*i.e.,* a 12 to 1 aggregate indebtedness to net capital ratio).

[1105] The measure of aggregate indebtedness in rule 15c3–1 excludes certain secured liabilities, and the measure of net capital excludes certain illiquid assets but includes certain subordinated debt. As a result, the ratios discussed above would not necessarily be equivalent to 15:1 or 12:1 ratios when converted to a balance sheet ratio of liabilities to equity.

reasonable location for this line that is appropriate for purposes of the third major participant test, and that reasonably accounts for commenter concerns and the other considerations discussed above.

ii. Leverage Ratio Calculation

Consistent with the proposal, the final rules defining ''highly leveraged'' generally measure leverage as a ratio of a person's liabilities to equity, as determined in accordance with GAAP.[1106] Also, consistent with the proposal, these leverage ratios should be calculated as of the close of business on the last business day of the applicable fiscal quarter, as we do not believe there is any relevant difference among financial entities that would require timing variations.

In general, moreover, the Commissions believe that all types of financial entities should be subject to the same methods of measuring leverage, to facilitate the even application of the leverage test. At the same time, we are mindful of the significance of commenter concerns that calculating leverage as a ratio of liabilities to equity consistent with GAAP would lead to inappropriate results for certain types of financial instruments or financial entities.

We believe that these concerns are significant enough to warrant one modification of the proposed approach to measuring leverage. In particular, the final rules provide that certain employee benefit plans may: (i) Exclude obligations to pay benefits to plan participants from their measure of liabilities for purposes of the leverage calculation; and (ii) substitute the total value of plan assets for equity for purposes of the leverage calculation.[1107] We believe that this change will allow the measure of leverage to more appropriately reflect the risk that those entities pose.

Otherwise, we do not believe that it would be appropriate to depart from GAAP measures of equity and liabilities for purposes of identifying highly leveraged entities.[1108]

G. Application to Inter-Affiliate Swaps and Security-Based Swaps

1. Proposed Approach and Commenters' Views

In the Proposing Release, we stated that the major participant analysis should consider the economic reality of swaps and security-based swaps between affiliates, and preliminarily concluded that swaps or security-based swaps among wholly owned affiliates ''may not pose the exceptional risks to the U.S. financial system that are the basis for the major participant definitions.''[1109]

A number of commenters concurred that swaps among affiliates should be excluded from the major participant analysis.[1110] At the same time, no commenters expressed support for the Proposing Release's suggestion that this interpretation be limited to transactions among wholly owned subsidiaries. Instead, several commenters expressed the view that the swaps or security-based swaps should not be counted for purposes of the major participant analysis when the counterparties are under common control,[1111] or otherwise are affiliates.[1112] One commenter suggested that the analysis exclude swaps or security-based swaps between entities that are under common control and whose financial statements are consolidated.[1113]

2. Final Rule

After considering commenters' views, we have concluded that the major participant definitions should not encompass a person's swaps or security-based swaps for which the counterparty is a majority-owned affiliate. As noted in our discussion of inter-affiliate activities in the context of the dealer definitions, market participants may enter into such inter-affiliate swaps or security-based swaps for a variety of purposes. When swaps and security-based swaps are entered into to allocate risk within a corporate group and do not pose a high likelihood of risk to the broader market—as we believe would be the case with majority ownership—we do not believe that their swaps and security-based swaps raise the systemic risk and other concerns that major participant regulation is intended to address. For this reason, we do not believe that this interpretation needs to be limited to swaps or security-based swaps among wholly owned affiliates, as the Proposing Release had indicated.

Accordingly, the final rules provide that a person may exclude particular swaps or security-based swaps from the analysis of whether the person is a major participant, so long as the counterparties to those swaps or security-based swaps are majority-owned affiliates.[1114]

In taking this approach, we have also considered alternatives suggested by commenters. For example, while one commenter suggested that we allow the exclusion of all swaps or security-based swaps between entities under common control, we believe that such an approach would be overly inclusive for the purpose of identifying transactions that should be excluded from the major participant analysis, given that common control by itself does not ensure that two entities' economic interests are sufficiently aligned.[1115] Also, one commenter suggested that the inter-affiliate exclusion should apply to swaps and security-based swaps between affiliates whose financial statements are consolidated, but, as we

[1106] *See* CFTC Regulation § 1.3(mmm)(2); Exchange Act rule 3a67–7(b). The accounting standard setters are currently working on a number of projects that may impact how leverage would be calculated using GAAP. The Commissions will review and potentially adjust their rules in the future to reflect changes in GAAP.

[1107] *See* CFTC Regulation § 1.3(mmm)(2)(ii); Exchange Act rule 3a67–7(b). These provisions specifically apply to employee benefit plans as defined by paragraph (3) and (32) of section 3 of ERISA, consistent with the ERISA exclusion from the first statutory major participant test.

[1108] Although commenters raised issues with regard to the application of leverage ratios to insurers, *see, e.g.,* letter from FSR I, we do not believe that it would be appropriate to create a special leverage test for insurers. We note that insurers that are publicly traded companies already file financial statements consistent with GAAP. Also, smaller insurers that do not file GAAP-based financial statements would be able to take advantage of the safe harbor from the major participant calculations. *See* part IV.M, *infra.*

[1109] *See* Proposing Release, 75 FR at 80202.

[1110] *See, e.g.,* letters from COPE I, FSR I and Encana Marketing (USA) Inc. dated February 22, 2011 (''Encana I'').

Some commenters explained the widespread use of central hedging desks to allocate risk within affiliate groups or to gather risk from within a group and lay off that risk on the market. *See, e.g.,* letters from CDEU, EEI/EPSA, Encana I and FSR I. Also, some commenters noted that including these inter-affiliate transactions within the major participant analysis would result in many cases in double-counting of an entity's swap or security-based swap activity. *See* letters from CDEU and FSR I.

[1111] *See* letter from Amex and CDEU. One commenter specifically suggested that we adopt the definition of ''control'' found in the Bank Holding Company Act. *See* joint letter from The Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd. and Sumitomo Mitsui Banking Corporation.

[1112] *See, e.g.,* letters from COPE I, EEI/EPSA, FSR I, Encana I and Utility Group.

[1113] *See* joint letter from ABA Securities Association, ACLI, FSR, FIA, Institute of International Bankers, ISDA and SIFMA.

[1114] *See* CFTC Regulation § 1.3(hhh)(4); Exchange Act rule 3a67–3(e). A person's market-facing swap or security-based swap positions, including those taken to lay off risk assumed from a majority-owned affiliate, must still be included in the person's substantial position and counterparty exposure calculations.

For the purposes of this rule, and consistent with the general inter-affiliate exception from the dealer definitions, *see* part II.C, *supra,* counterparties are majority-owned affiliates if one party directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both, based on the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

[1115] *See* part II.C.2, *supra.*

addressed in the context of the dealer definitions, we do not believe that the scope of this exclusion should be exposed to the risk of future changes in accounting standards.[1116]

H. Application to Positions of Affiliated Entities and to Guarantees

1. Proposed Approach

The Proposing Release expressed the preliminary view that when a parent is the majority owner of a subsidiary entity, the subsidiary's swap or security-based swap positions may be aggregated at the parent for purposes of the major participant analysis, on the grounds that the parent effectively is the beneficiary of the transaction. At the same time, the Proposing Release acknowledged that there could remain questions as to whether the requirements applicable to major participants—such as capital, margin and business conduct requirements—should be placed upon the parent or the subsidiary.[1117]

The Proposing Release solicited comment on a number of aspects of these issues, including whether attribution would be appropriate when there is less than majority ownership, or when a parent provides guarantees on behalf of its subsidiaries. The Proposing Release also solicited comment with regard to implementation issues.[1118]

2. Commenters' Views

A number of commenters expressed the view that the Commissions should not aggregate the positions of affiliates to the parent, arguing that legal separation should be respected unless there is some evidence that separate affiliates are being used to evade regulation.[1119] Other commenters took the view that aggregation of affiliates' positions may be appropriate in some circumstances, such as when aggregation would accurately reflect the structure of a corporate group or its participation in the derivatives market.[1120] One commenter recommended that if the Commissions choose to require the aggregation of affiliate positions for purposes of the major participant test, the Commissions also should provide a mechanism for entities to receive ''disaggregation'' relief upon a showing that the affiliates are acting autonomously.[1121]

Some commenters argued that positions should not be consolidated for purposes of the major participant analysis even when a parent guarantees the obligations of a subsidiary.[1122] Other commenters, however, expressed less opposition to aggregation in the presence of a guarantee or credit support.[1123]

Commenters also addressed the application of these principles to particular types of entities. Some commenters took the view that positions guaranteed by financial guarantors should not be attributed to those entities for purposes of the major participant analysis.[1124] Other commenters stated that the positions of a special purpose vehicle should not be aggregated with its sponsor where there is no recourse to the sponsor for the vehicle's obligations.[1125] One commenter requested clarification that positions of joint ventures would not be aggregated with those of another entity if the positions are not consolidated on the other entity's balance sheet.[1126] Commenters further took the view that ERISA plans should not be aggregated with those of plan sponsors for purposes of the major participant tests, noting that plans and sponsors are separate legal entities, file separate financial statements, are subject to separate regulatory schemes, and that plan sponsors are prohibited from providing credit support or guarantees to ERISA Title I plans.[1127]

Two commenters addressed operational compliance issues that would be raised if positions are aggregated for purposes of the major participant analysis. One commenter suggested that a corporate group that falls within the major participant definition due to its aggregate positions should be able to designate a single entity to undertake compliance on behalf of the other affiliates.[1128] Another commenter stated that when the aggregated positions of a corporate group results in major participant designation, the Commissions should

[1116] *See* text accompanying note 350, *supra.*

[1117] The Proposing Release further recognized that it may be appropriate at times to place the requirements upon the subsidiary to the extent the subsidiary is acting on behalf of the parent. *See* Proposing Release, 75 FR at 80202.

[1118] *See id.*

[1119] *See* letters from FSR I, ISDA, MetLife and Newedge. Certain of those commenters also warned of problems that could arise if the positions of international affiliates were aggregated, due to conflicting regulations potentially applicable to such entities. *See* letters from ISDA I, MetLife and Newedge. The Commissions are addressing issues related to the application of the major participant definitions to non-U.S. persons in separate releases.

[1120] *See* letters from CDEU (suggesting that control should be interpreted narrowly for purposes of the major participant test such that affiliated positions would only be aggregated if there is whole ownership or consolidation for accounting purposes, and exercise of actual control in terms of ownership and management) and ACLI (suggesting flexibility such that an entity with independent credit and no guarantee or credit support from a parent could be treated separately, but a corporate group could consolidate its affiliates' positions if that would accurately reflect its participation in the derivatives market).

[1121] *See* letter from Newedge.

[1122] *See* letters from APG (stating that the aggregation of inter-affiliate guaranteed transactions would raise costs without providing a corresponding benefit to the financial system, and that principal obligors and guarantors pose separate credit risks, which are already priced into the positions, and that guarantees are not traditionally regulated as swaps), CDEU (objecting to attributing the positions of an end-user affiliate that relies on a parent for credit support, primarily out of concern that an end-user that might otherwise avail itself of the end-user clearing exception might be forced to clear its transactions if they were attributed to the major participant parent), ISDA I and Twelve Firms (stating that the statutory major participant definitions do not indicate that they encompass contingent credit support arrangements, and that credit exposures of subsidiaries already will be addressed through regulation of the subsidiary).

[1123] *See* letters from FSR I (suggesting that there may be some situations in which the positions of different entities in a corporate group should be aggregated, such as when ''a parent entity guarantees the obligations of its subsidiaries that are engaging in swaps'') and MetLife (stating that ''it is not appropriate to require aggregation of subsidiaries' swaps at the parent level unless the parent is providing a guarantee or credit support for the subsidiaries' obligations''); *see also* letter from ACLI (stating that the positions of entities that do not have a guarantee or credit support from a parent are entitled to an individualized determination of their status under the major participant test).

[1124] *See* letters from AFGI (arguing against attribution on the grounds that the guarantors are typically not exposed to a fluctuating termination value of interest rate swaps for these types of transactions due to the fact that they do not guarantee that amount, but rather only guarantee continued payments of these policies, and also that they are subject to the standard underwriting process and thus are subject to comprehensive regulation) and joint letter from MBIA Inc., MBIA Insurance Corp. and National Public Finance Guarantee Corp. (''MBIA'') (arguing against attribution on the grounds that the economic exposure to the financial guarantor is the equivalent of having underwritten a fixed rate bond issued by the particular municipal entity, and such exposures are subject to the normal underwriting process and significant risk management and regulatory oversight).

[1125] *See* letters from American Securitization Forum (suggesting that aggregation is not appropriate when the risk is contained within the special purpose vehicle, and noting that special purpose vehicles often bear the entire economic risk of a security-based swap transaction and are bankruptcy remote, so the failure of a special purpose vehicle to meet its obligations would not have a rippling effect onto its sponsor) and FSR I (stating that the major participant determination should focus on a special purpose entity itself, and not its sponsor or transferor, in circumstances where securitization vehicles have been consolidated with sponsors or transferors for financial accounting purposes but a counterparty would have to conduct a separate credit analysis on the special purpose entity, and its obligations are nonrecourse to the sponsor or transferor).

[1126] *See* letter from CDEU (noting that non-consolidated joint ventures typically enter into their own swaps and these transactions are not included on the balance sheet of a minority holder in a joint venture).

[1127] *See* letters from CDEU and ERISA Industry Committee.

[1128] *See* letter from FSR I (suggesting that a corporate group should be permitted to designate a single entity or a small number of entities as the registered major participant, with other entities in the group relying on that entity for compliance).

exempt from major participant regulation all affiliates in the corporate group that otherwise would qualify for the end-user clearing exception.[1129]

3. Final Interpretation

After considering commenter concerns and the underlying issues, we are revising certain of the preliminary views we expressed in the Proposing Release. In particular, we no longer take the position that a subsidiary's swap or security-based swap position as a matter of course should be attributed to the subsidiary's majority-owner parent. Instead, consistent with the approach discussed below with regard to managed accounts,[1130] an entity's swap or security-based swap positions in general would be attributed to a parent, other affiliate or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions would have recourse to that other entity in connection with the position. Positions would not be attributed in the absence of recourse.[1131] We believe this approach in general appropriately reflects the risk focus of the major participant definitions by providing that entities will be regulated as major participants when they pose a high level of risk in connection with the swap and security-based swap positions they guarantee.[1132] Indeed, the events surrounding the failure of AIG FP highlights how the guarantees can cause major risks to flow to the guarantor.[1133]

Even in the presence of a guarantee, however, we do not believe that it is necessary to attribute a person's swap or security-based swap positions to a parent or other guarantor if the person already is subject to capital regulation by the CFTC or SEC (*i.e.,* swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, FCMs and broker-dealers) or if the person is a U.S. entity regulated as a bank in the United States. Positions of those regulated entities already will be subject to capital and other requirements, making it unnecessary to separately address, via major participant regulations, the risks associated with guarantees of those positions.[1134]

We recognize that attribution of swap or security-based swap positions to a parent or guarantor for purposes of the major participant analysis can raise special issues with regard to operational compliance. These include, for example, issues as to the application of the transaction-focused requirements applicable to registered major participants (*e.g.,* certain requirements related to trading records and transaction confirmations), given that the entity that directly is the party to the swap or security-based swap may be better positioned to comply with those requirements. For those transaction-focused requirements, we believe that an entity that becomes a major participant by virtue of swaps or security-based swaps directly entered into by others must be responsible for compliance with all applicable major participant requirements with respect to those swaps or security-based swaps (and must be liable for failures to comply), but may delegate operational compliance with transaction-focused requirements to entities that directly are party to the transactions. The entity that is the major participant, however, cannot delegate compliance duties with the entity-level requirements applicable to major participants (*e.g.,* requirements related to registration and capital).[1135]

I. Application to Managed Accounts

1. Proposed Approach

The Proposing Release expressed the preliminary view that the major participant definitions should not be interpreted to cause asset managers or investment advisers to be major participants by virtue of the swap and security-based swap positions of the accounts that they manage.[1136] In addition, the Proposing Release expressed the preliminary view that the managed positions for which a person is a beneficial owner should be aggregated with the person's other positions for the purpose of determining whether the beneficial owner is a major participant.[1137]

2. Commenters' Views

Numerous commenters supported the view that the major participant definitions should not be construed to aggregate the accounts managed by asset managers or investment advisers when determining whether a manager or adviser itself is a major participant.[1138] One commenter requested that the final rules codify this principle.[1139]

Some commenters opposed the possibility that the swap or security-based swap positions of mutual funds would be attributed to fund investors for purposes of the major participant analysis, emphasizing that the fund is the entity that bears the credit exposure.[1140] Some commenters also opposed the possibility that a swap or security-based swap position of a managed account may be attributed to the account's beneficial owner when the counterparty to the position does not

[1129] *See* letter from CDEU.

[1130] *See* part IV.I, *infra.*

[1131] In taking this position, we are not suggesting that the presence of a guarantee would be determinative of other issues arising under Title VII. For example, the fact that a parent that is a ''financial entity'' guarantees a subsidiary's swap or security-based swap positions would not foreclose the subsidiary from taking advantage of the exception from mandatory clearing that is available to commercial end-users.

[1132] In reaching this conclusion, we have been mindful of views expressed by some commenters that the mere fact of a guarantee should not be enough to require the attribution of a position to a guarantor. We believe, however, that this approach is best suited to address the risk focus of the major participant definitions. We further believe that the statutory definition's language that addresses persons who ''maintain'' substantial positions or ''whose'' positions create substantial counterparty exposure is consistent with this approach.

We also have considered arguments that the major participant definition should not extend to financial guarantee insurers. We nonetheless believe that when an insurer guarantees the performance of other parties' swap or security-based swap positions, in an amount that is greater than the applicable major participant thresholds, it would be appropriate to regulate that entity as a major participant. When the guaranteed positions are large enough, the risks associated with those positions and the repercussions of the guarantor's default would appear to be within the ambit of the risks that that the major participant definitions were intended to capture. In reaching this conclusion, the Commissions are not expressing a view regarding whether financial guarantee insurance is a swap or security-based swap. *See* Product Definitions Proposal, note 3, *supra.*

[1133] ''AIGFP's obligations were guaranteed by its highly-rated parent company * * * an arrangement that facilitated easy money via much lower interest rates from the public markets, but ultimately made it difficult to isolate AIGFP from its parent, with disastrous consequences.'' *The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy,* note 913, *supra,* at 20.

[1134] As a result of this interpretation, holding companies will not be deemed to be major participants as a result of guarantees to certain U.S. entities that already are subject to capital regulation. The Commissions intend to address guarantees provided to non-U.S. entities, and guarantees by non-U.S. holding companies, in separate releases.

[1135] This type of attribution may also be expected to raise special issues of application in the context of guarantees involving swap or security-based swap positions of non-U.S. entities. The Commissions intend to address those issues in separate releases.

[1136] In reaching this preliminary conclusion, we considered the text of the major participant definitions, as well as a colloquy on the Senate floor that addressed the status of managed accounts for purposes of the major participant definitions. *See* Proposing Release, 75 FR at 80201 & n.162.

The Proposing Release also noted that the Commissions have anti-evasion authority to the extent that persons seek to allocate swaps or security-based swaps among different accounts to seek to evade the regulations applicable to major participants. *See id.* at 80201.

[1137] *See id.*

[1138] *See, e.g.,* letters from BlackRock I and Fidelity.

[1139] *See* letter from Fidelity (particularly addressing fund managers).

[1140] *See* letter from BlackRock and joint letter from ICI and SIFMA AMG.

have recourse to the beneficial owner's assets.[1141]

One commenter encouraged the Commissions to consider developing anti-evasion measures if necessary, but cautioned that the rules should recognize that there are legitimate business reasons to structure separate, individually managed funds.[1142] Another commenter dismissed concerns that entities may spread assets among many asset managers or use separate trading agreements to avoid regulation.[1143]

In addition, commenters raised related issues regarding the potential attribution of positions for purposes of the major participant analysis. Some commenters expressed the view that insurance company separate accounts should be excluded from the major participant determination for the insurer, because those separate accounts generally are segregated from the insurance company's other accounts.[1144] Two commenters requested clarification as to how swap and security-based swap positions of funds with a ''master-feeder'' structure should be allocated for the major participant determinations.[1145]

3. Final Interpretation

Consistent with the approach set forth in the Proposing Release, the Commissions do not believe that it is necessary to consider the swap or security-based swap positions of the client accounts managed by asset managers or investment advisers when determining whether those entities are major participants. In reaching this conclusion we particularly are influenced by the fact that the statutory definitions specifically address entities that ''maintain'' substantial positions or ''whose'' outstanding swaps and security-based swaps create substantial counterparty exposure. Our conclusion also is influenced by the fact that it would not appear appropriate to impose certain regulations applicable to major participants (*e.g.,* capital) upon those entities.[1146]

Separately, after carefully considering commenters' views and the purposes of major participant regulation, we are modifying the preliminary views expressed in the Proposing Release regarding the application of the major participant analyses to the beneficial owners of managed swap and security-based swap positions. In particular, we conclude that the major participant analysis that applies to the beneficial owners of those positions should focus on where the risk associated with those positions ultimately resides, given how the statutory major participant definitions focus on the risks posed by large swap or security-based swap positions. Thus, for example, if the counterparties to a swap or security-based swap position within a managed account have recourse only to the assets of that account in the event of default—and lack recourse to other assets of the beneficial owners—we do not believe that it would be appropriate to attribute that position to its beneficial owner. [1147] Conversely, to the extent that the counterparty to that position also has recourse to the beneficial owner, it would be appropriate to attribute the positions to the beneficial owner for purposes of the major participant analysis.[1148]

We believe that this general approach of attributing positions when recourse is possible also is applicable with respect to related issues raised by commenters, including issues related to insurance company separate accounts and master-feeder fund arrangements. For those situations the same principle would apply—positions within an account or entity may be attributed to another entity for purposes of the major participant analysis if the counterparties to those positions can seek recourse from that other entity.

J. Requests for Exclusion of Certain Entities From the Major Participant Definitions

1. Proposed Approach

In advance of the Proposing Release, a number of commenters argued that the Commissions should exclude various types of entities from the major participant definitions.[1149] While the proposed rules did not incorporate any such exclusions, the Proposing Release solicited comment as to potential exclusions for: Entities that maintain legacy portfolios, investment companies, ERISA plans, registered broker-dealers and/or registered FCMs, sovereign wealth funds, banks, state-regulated insurers, private and state pension plans, and registered DCOs or clearing agencies.[1150]

2. Commenters' Views

Several commenters supported categorical exclusions from the major participant definitions for various types of entities. Commenters particularly urged the Commissions to provide exclusions for:

- Entities that maintain legacy portfolios of swaps and security-based swaps that are in run-off;[1151]
- Registered investment companies and related investment advisers;[1152]
- ERISA plans, other pension funds, and endowments;[1153]

[1141] *See* letters from SIFMA AMG II (stating that ISDA Master Agreements commonly provide that the counterparty to the transaction does not have recourse to the accountholder's other assets held in different accounts) and Fidelity (stating that when counterparties look solely to the credit and assets of an individual account, the actual risks to the counterparty are tied to and limited by the activities of the account; also stating that requiring aggregation of separate accounts based on beneficial ownership would be complicated, costly, and present substantial operational and legal complexities); *see also* letter from BlackRock I (stating the understanding that the Proposing Release's reference to beneficial ownership to require that separate account positions be attributed to the owner of the separate account, and stating that this result would be consistent with the definitions' focus on the persons whose positions create credit risk).

Commenters also emphasized potential impracticalities of requiring asset managers to be responsible for making major participant determinations on behalf of beneficial owners. *See, e.g.,* letter from SIFMA AMG II.

[1142] *See* letter from AIMA I.

[1143] *See* letter from SIFMA AMG II (arguing that it would be unlikely for this sort of evasion to actually occur since such tactics would be prohibitively expensive and operationally burdensome, and further stating that the Commissions could address such concerns through their anti-evasion authority).

Also, one commenter suggested that major participant obligations should be limited in their territorial scope and should only apply to U.S. funds or those funds that are otherwise regulated in the U.S. *See* letter from AIMA I. The Commissions are addressing issues related to the application of the major participant definitions to non-U.S. persons in separate releases.

[1144] *See* letters from ACLI, FSR I and MetLife.

[1145] *See* letters from MFA I (stating that in master-feeder fund structures, money that is invested flows to the master fund for actual investing or trading, and further explaining that the master fund: Is the party to the master trading agreements; negotiates the individual transactions; holds assets; receives the margin calls; is ultimately responsible for posting collateral; and is the entity to whom recourse is generally limited) and CCMR I.

[1146] We do not believe that it is necessary to codify this interpretation.

[1147] Thus, for example, there would not be recourse to the owners of shares in a registered investment company that maintains swap or security-based swap positions.

[1148] For example, under some circumstances the positions within the managed account may make use of a credit support annex entered into by the beneficial owner. In that case, the counterparty to the account's swaps and security-based swaps may have legal recourse to the beneficial owner, making it appropriate to attribute the position to the beneficial owner for purposes of the major participant analysis.

[1149] These comments were submitted in response to the ANPRM. *See* notes 4 and 5, *supra.*

[1150] *See* Proposing Release, 75 FR at 80202–03.

[1151] *See, e.g.,* letters from Canadian MAVs, ISDA I and MBIA.

[1152] *See* letters from Fidelity and Vanguard and joint letter from ICI and SIFMA AMG.

[1153] *See* letters from CDEU, ERISA Industry Committee and SIFMA AMG II (addressing ERISA plans); *see also* letters from ABC/CIEBA, CalSTRS I, Fidelity and SIFMA AMG II, (addressing government plans) and letter from Government of Singapore Investment Corp. (''GIC'') (addressing other pension plans and endowments). *But see* letter from AFSCME (urging caution with respect to

- Insurance companies;[1154]
- Certain registered FCMs and broker-dealers.[1155]
- End users; [1156] and
- Various types of non-U.S. persons, including: foreign governments and their agencies and instrumentalities (such as central banks, treasury ministries, export agencies and governmental financing authorities),[1157] international organizations and multilateral development banks,[1158] sovereign wealth funds,[1159] and non-U.S. entities subject to comparable foreign regulation.[1160]

Commenters articulated a range of rationales in support of such exclusions. These included arguments that particular types of entities: (i) Are unlikely to meet one or more of the major participant tests; [1161] (ii) already are subject to regulation (and in some cases are subject to prudential limits on their use of swaps or security-based swaps);[1162] (iii) do not pose systemic risk [1163] and/or the type of counterparty risk contemplated by Title VII; [1164] or (iv) do not raise concerns given that they would remain subject to the clearing, exchange trading, and reporting requirements of Title VII.[1165] Also, some commenters maintained that regulating non-U.S. entities as major participants would raise issues with respect to extra-territoriality, international comity and sovereignty.[1166]

In contrast to these requests, one commenter urged that the benefits arising from regulation of major participants be considered in determining whether to create carve-outs from the participant definitions that are not provided in the statute.[1167]

3. Final Rules

After considering the comments received and the underlying issues, the Commissions have determined not to provide categorical exclusions from the major participant definitions for the types of entities discussed by commenters.

a. Entities That Maintain Legacy Portfolios

Commenters that supported the exclusion of entities with legacy portfolios of swaps or security-based swaps emphasized that those portfolios are in run-off, and that those entities generally do not engage in ongoing swap or security-based swap activity.[1168] Several of those commenters further expressed concerns that imposing the regulations applicable to major participants—particularly margin and capital rules—upon these entities could cause them to default on their obligations and lead to market disruption.[1169]

In the view of the Commissions, the fact that these entities no longer engage in new swap or security-based swap transactions does not overcome the fact that entities that are major participants will have portfolios that are quite large and could pose systemic risk to the U.S. financial system.

We are mindful of the significance of concerns that regulating entities that maintain legacy portfolios has the potential to lead to defaults and disruption. We do not believe, however, that these concerns are best addressed by excluding those entities from major participant regulation. Instead, in adopting substantive rules applicable to major participants, the Commissions intend to pay particular attention to the special issues raised by the application of those rules to legacy portfolios.[1170] Moreover, to the extent that these types of concerns remain following the promulgation of those final substantive rules, the Commissions may entertain requests for relief or guidance on a case-by-case basis.

b. Other Domestic Entities

Commenters also raised concerns regarding duplicative regulation for entities that already are subject to other types of regulation (*e.g.,* state-regulated insurers, SEC-regulated registered investment companies and broker-dealers, and CFTC-regulated registered FCMs). The final rules nonetheless provide no such exclusion. The Dodd-Frank Act provided for the regulation of major participants against the backdrop of existing state and federal regulation, without opting to categorically exclude particular types of entities. Indeed, the definitions explicitly anticipate that

a full exclusion of plan swaps from major participant consideration).

[1154] *See* letters from AFGI (supporting exclusion for state-regulated insurers), NAIC (supporting exclusion for state-regulated insurers to the extent they are using derivatives for the purpose of hedging and not engaging in systemically significant derivatives activities determined by the Financial Stability Oversight Counsel), ACLI (supporting exclusion for life insurers) and AIA (supporting exclusion for property-casualty insurers).

[1155] *See* letter from Newedge (supporting exclusion for registered FCMs and broker-dealers that engage principally in customer swap facilitation activities but not in other activities of swap or security-based swap dealers).

[1156] Commenters making this point varied in their phrasing of the requested exclusion. One request asked for the exclusion of any company (regardless of its primary business) that uses swaps predominantly to hedge business risks and that does not pose systemic risk. *See* letter from CDEU. Another commenter asked for the exclusion of any end user employing prudent risk management. *See* letter from NAIC. And one commenter asked for the exclusion of energy companies that use swaps to hedge commercial risks. *See* letter from EDF Trading.

[1157] *See* letters from Milbank Tweed and Norges Bank Investment Management and meeting with Kreditanstalt für Wiederaufbau (''KfW'').

[1158] *See* letter from World Bank Group.

[1159] *See* letters from China Investment Corporation (''CIC'') and GIC.

[1160] *See* letters from Newedge and SIFMA AMG II.

[1161] *See* letters from AIMA I (addressing hedge fund managers registered as investment advisers); AIA (addressing property-casualty insurers) and Newedge (addressing FCMs and broker-dealers).

[1162] *See* letters from Fidelity and Vanguard and joint letter from ICI and SIFMA AMG (addressing registered investment companies and their advisors), ABC/CIEBA, CDEU, ERISA Industry Committee and Fidelity (addressing ERISA plans and government benefit plans), ACLI (addressing life insurers), AIA (addressing property-casualty insurers), NAIC (addressing state-regulated insurers), Newedge (addressing FCMs and broker-dealers) and GIC (addressing sovereign wealth funds).

[1163] *See* letters from ABC/CIEBA and CDEU (addressing ERISA plans), ICI I and Vanguard (addressing registered investment companies), ACLI (addressing life insurers), CDEU and NAIC (addressing end users), and letter from CIC and meeting with Weil (addressing sovereign wealth funds).

[1164] *See* letters from CDEU and ERISA Industry Committee (addressing ERISA plans) and letter from GIC and meeting with Weil (addressing sovereign wealth funds).

[1165] *See* letters from Vanguard (addressing registered investment companies), Newedge (addressing FCMs and broker-dealers), and CIC (addressing sovereign wealth funds).

[1166] *See* letters from CIC, GIC, and Milbank Tweed and meeting with KfW (addressing foreign governments and their agencies and instrumentalities), meeting with Weil (addressing sovereign wealth funds)and letter from World Bank Group (addressing international organizations and multilateral development banks).

[1167] *See* letter from AFSCME.

[1168] *See* letters from AFGI, BlackRock I, Canadian MAVs, ISDA I and MBIA and meetings with Athilon Structured Investment Advisors (''Athilon'') on April 18, 2011 and with Cypress Group, Invicta Financial Group, Primus Asset Management, Inc., and Quadrant Structured Investment Advisors on April 7, 2011.

Although the Proposing Release specifically addressed granting an exclusion in connection with legacy positions entered into by monoline insurers and credit derivative product companies, commenters expressed the view that such an exclusion should apply to other types of entities that maintain legacy portfolios, such as certain special purpose vehicles. *See* letters from BlackRock I, Canadian MAVs and ISDA.

[1169] *See* letters from Athilon, BlackRock I, Canadian MAVs, and ISDA I.

[1170] For example, in conjunction with the SEC's proposed margin and capital rules applicable to major participants, the SEC expects to request comment on how the rules should apply to entities with legacy portfolios.

pension plans [1171] and banks [1172]—both of which are subject to existing regulation—may be major participants. Major participant regulation provides a regulatory structure prescribed by the Dodd-Frank Act to address the risks posed by entities whose swap or security-based swap positions are large enough to satisfy the major participant definitions. Other types of regulations to which these entities may be subject serve different objectives [1173] that are not substitutes for major participant regulation.[1174]

The Commissions expect that only a very few entities within a given category may meet the test of being a major swap participant—or even be close to the various thresholds for meeting that test. Entities that do not meet the thresholds of the major participant definitions do not need an exclusion from those definitions. Further, as noted elsewhere in this Adopting Release, the Commissions are permitting entities to rely on a ''safe harbor'' when their positions are far below any threshold for any particular quarter. Some of the entities for which exclusion has been sought may be expected to fall within the safe harbor. Those comparatively fewer entities that will be closer to a particular threshold, by contrast, should not be excused on a *per se* basis from completing the calculations set forth in these rules and, if the calculations demonstrate that the entity meets the test of a major participant, from compliance with the requirements for major participants set forth by Congress.

At the same time, the Commissions recognize the benefits of efficiently regulating major participants that are separately registered with and regulated by the CFTC or SEC (such as registered FCMs or broker-dealers).[1175] If any such registrants are required also to register as major participants, the CFTC and SEC would seek to coordinate their regulatory oversight as appropriate to achieve the independent purposes of major participant regulation and those separate regulatory requirements, while avoiding unnecessary duplication.[1176]

c. Foreign Entities

Commenters [1177] discussed the major participant definitions in the context of foreign governments and various entities related to foreign governments [1178] (*i.e.,* foreign central banks,[1179] international financial institutions [1180] and sovereign wealth funds). The CFTC provides the following guidance with respect to the major swap participant definition and the swap dealer definition.[1181]

As an initial matter, foreign entities are not necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets.[1182] In accordance with

[1171] The first major participant test (but not the second or third tests) excludes positions maintained by certain employee benefit plans for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan. *See* CEA section 1a(33)(A)(i)(II); Exchange Act section 3(a)(67)(A)(ii)(I). This tailored exclusion of certain pension plan positions suggests that Congress did not intend to broadly exclude such plans from the other two prongs or from the major participant definitions as a whole. The fact that, as two commenters noted (*see* letters from ABC/CIEFA and CDEU), the CFTC previously has relied on the regulatory structure already governing ERISA plans as a basis to not regulate these plans in other certain unrelated contexts does not alter this conclusion.

[1172] The third major participant test excludes entities that are subject to bank capital standards, which suggests that such entities may be eligible to be major participants under the first and second tests. Also, the capital and margin requirements applicable to major swap participants and major security-based swap participants (*see* Dodd-Frank Act sections 731 and 764, respectively) do not apply to major participants subject to capital rules set by bank regulators, which further indicates that such entities may be major participants.

[1173] As some commenters noted, entities excluded from the major participant definitions nonetheless may be subject to other requirements of general applicability imposed by Title VII, such as clearing, trade execution, and reporting requirements. Even where that is the case, though, these requirements serve separate and independent purposes. They do not stand as a substitute for the protections that Congress has prescribed with respect to major participants in particular.

[1174] For example, as noted above, some commenters stated that the major participant definitions should not apply to investment companies registered under the ICA. *See, e.g.,* letters from Fidelity, ICI I and Vanguard. However, we are not adopting any such exclusions in part because the major participant definitions focus on the market impacts of an entity's swap and security-based swap positions and the risk to the U.S. financial system generally, areas that are not the focus of the regulation of investment companies under the ICA. Moreover, based on our understanding of the swap and security-based swap activity of registered investment companies, we believe that registered investment companies generally are not likely to meet the thresholds of the major participant definitions. We will continue to monitor the effects of the rules we are adopting today to help ensure that they do not result in any inadvertent consequences for registered investment companies, or other entities registered with the SEC or CFTC.

[1175] The Commissions also sought comment as to whether the major participant definitions should apply to derivatives clearing organizations or clearing agencies, but received no comments in response to this inquiry. Nonetheless, the Commissions do not believe that Congress intended derivatives clearing organizations registered with the CFTC or clearing agencies registered with the SEC to be registered or regulated as major participants. The CFTC and the SEC already exercise substantive regulatory oversight over these clearinghouses, authority that was enhanced by Title VII. Further, Title VIII of the Dodd-Frank Act provides for the supervision of systemically important derivatives clearing organizations and clearing agencies. *See* Dodd-Frank Act Title VIII. We do not believe that Congress intended to place a third layer of oversight on those entities by subjecting them to additional regulation as major participants, and we do not interpret the major participant definitions to do so.

[1176] For many years, the Commissions have coordinated their examination of dually-registered FCM/BDs through working groups including the Joint Audit Committee and the Intermarket Financial Surveillance Group. Moreover, pursuant to Title IV of the Dodd-Frank Act, the CFTC and SEC have issued joint reporting rules for advisors to private funds that are dually registered with the SEC as investment advisers and with the CFTC as commodity pool operators or commodity trading advisors. *See* CFTC and SEC, Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF; Final Rule, 76 FR 71127 (Nov. 16, 2011).

[1177] *See* letters from CIC, GIC, Milbank Tweed, Norges Bank Investment Management and the World Bank, and meetings with KfW and Weil.

[1178] For this purpose, we consider that the term ''foreign government'' includes KfW, which is a non-profit, public sector entity responsible to and owned by the federal and state authorities in Germany, mandated to serve a public purpose, and backed by an explicit, full, statutory guarantee provided by the German federal government.

[1179] For this purpose, we consider the Bank for International Settlements, in which the Federal Reserve and foreign central banks are members, to be a foreign central bank. *See http://www.bis.org/about/orggov.htm.*

[1180] For this purpose, we consider the ''international financial institutions'' to be those institutions defined as such in 22 U.S.C. 262r(c)(2) and the institutions defined as ''multilateral development banks'' in the Proposal for the Regulation of the European Parliament and of the Council on OTC Derivative Transactions, Central Counterparties and Trade Repositories, Council of the European Union Final Compromise Text, Article 1(4a(a)) (March 19, 2012). There is overlap between the two definitions, but together they include the following institutions: the International Monetary Fund, International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, Inter-American Investment Corporation, Council of Europe Development Bank, Nordic Investment Bank, Caribbean Development Bank, European Investment Bank and European Investment Fund. (The term international financial institution includes entities referred to as multilateral development banks. The International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency are parts of the World Bank Group.)

[1181] The SEC intends to address issues related to the application of the major security-based swap participant definition to non-U.S. entities as part of a separate release that the SEC is issuing in connection with the application of Title VII to non-U.S. persons. The SEC is also able to address concerns related to the individual substantive rules applicable to major security-based swap participants on a case-by-case basis.

[1182] *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 (''under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned * * * Claims of foreign states to

the general rule, a per se exclusion for foreign entities from the CEA's major swap participant or swap dealer definition, therefore, is inappropriate. A foreign entity's swap activity may be commercial in nature and may qualify it as a swap dealer or major swap participant. Registration and regulation as a swap dealer or major swap participant under such circumstances may be warranted.[1183] This is particularly true for foreign corporate entities and sovereign wealth funds, which act in the market in the same manner as private asset managers.

On the other hand, the sovereign or international status of foreign governments, foreign central banks and international financial institutions that themselves participate in the swap markets in a commercial manner is relevant in determining whether such entities are subject to registration and regulation as a major swap participant or swap dealer. Canons of statutory construction ''assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'' [1184] There is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by including foreign governments, foreign central banks and international financial institutions within the definitions of the terms ''swap dealer'' or ''major swap participant,'' thereby requiring that they affirmatively register as swap dealers or major swap participants with the CFTC and be regulated as such.[1185] The CFTC does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants.

K. Financing Subsidiary Exclusion From Major Swap Participant Definition

In connection with the definition of major swap participant, CEA section 1a(33)(D) excludes certain entities from the definition of a major swap participant whose primary business is providing financing and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company (the ''captive finance company exception'').[1186] This provision of the Dodd-Frank Act is not applicable to major security-based swap participants.

1. Proposal

The Proposing Release restated the statutory captive finance company exception but did not further define or detail its scope or parameters. Accordingly, the CFTC did not propose a specific rule excluding certain financing subsidiaries from the definition of major swap participant in the Proposing Release.

2. Commenters' Views

Commenters generally believed that the captive finance company exception should be broadly construed to cover financing of products being sold by the parent company or its authorized dealers, financing of service and labor, financing of component parts and attachments, and other general financing of the distribution network.[1187] One commenter said the exception should be read narrowly, because the physical positions (in inventory, etc.) related to swaps may not be able to be liquidated to mitigate the risks of the swaps.[1188]

3. Final Rules

The CFTC believes that the exception set forth in CEA section 1a(33)(D) should be construed (consistent with the statute) to provide practical relief to those captive finance companies whose ''primary business'' is financing and who uses swaps for the purpose of hedging named underlying commercial risks related to interest rate and foreign currency exposures. As an initial matter, the Commission notes that a captive finance subsidiary or other similar entity is required to provide financing as its primary business, *i.e.,* this is not a supplementary or complementary activity of the entity.[1189]

In connection with the exception, commenters generally focused on the second part of Section 1a(33)(D) of the CEA, requesting the CFTC to interpret the phrase ''90% or more of which are manufactured by the parent company or another subsidiary of the parent company'' to include component parts, attachments, systems and other products that may be manufactured by others but sold together with the company's products as well as attachments and labor costs that are incidental to the primary purchase.[1190]

The CFTC believes that the captive finance exception must be interpreted in a manner consistent with the intention of Congress. As a result, a person that seeks to fall within the exemption must be in the ''primary business'' of providing financing of purchases from its parent company. Consistent with this initial requirement, the CFTC maintains that the captive finance exception can be applied when this financing activity finances the purchase of the products sold by the parent company in a broad sense, including service, labor, component parts and attachments that are related to the products.

immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.''). *See also Mendaro* v. *World Bank,* 717 F.2d 610 (DC Cir. 1983) (multilateral development banks generally do not have immunity in connection with their commercial dealings in the United States); *Osseiran* v. *International Financial Corp.,* 552 F.3d 836 (DC Cir. 2009) (same); *Vila* v. *Inter-American Investment Corp.,* 570 F.3d 274 (DC Cir. 2009) (same).

[1183] Such a registration requirement would have to satisfy the requirements of CEA section 2(i), 7 U.S.C. 2(i), which provides that the provisions of Title VII relating to swaps ''shall not apply to activities outside the United States unless those activities—(1) Have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by'' Title VII of the Dodd-Frank Act.

[1184] *See F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.,* 542 U.S. 155, 164 (2004), *citing Murray* v. *Schooner Charming Betsy,* 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (''[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains''); *Hartford Fire Insurance Co.* v. *California,* 509 U.S. 764 (1993) (Scalia, J., dissenting). *See also* Restatement (Third) Foreign Relations Law § 403 (scope of a statutory grant of authority must be construed in the context of international law and comity including, as appropriate, the extent to which regulation is consistent with the traditions of the international system).

[1185] To the contrary, section 752(a) of the Dodd-Frank Act requires the CFTC to consult and coordinate with other regulators ''on the establishment of consistent international standards with respect to the regulation (including fees) of swaps [and] swap entities * * *''

[1186] 7 U.S.C. 1a(33)(D).

[1187] *See* letters from CDEU, U.S. Chamber of Commerce, Center for Capital Markets Competiveness (''Chamber'') dated December 30, 2011 (''Chamber II'') and NRU CFC I.

[1188] *See* meeting with Duffie on February 2, 2011. In addition, another commenter also suggested that the exception not be interpreted broadly due to concerns regarding potential abuse. *See* letter from CMOC.

[1189] Commenters generally did not focus on this initial requirement instead commenting on other issues relating to application of the exception.

[1190] *See* letters from CDEU and Chamber II. Another commenter suggested that it should be viewed as a captive finance subsidiary of the entities that own it in a cooperative structure. *See* letter from NRU CFC I. This commenter also discussed whether the captive finance company exception should be available when it provides financing to its member-owners to support their general business activities, rather than to finance purchases from its member-owners. The CFTC does not believe it would be appropriate to apply the captive finance company exception in this situation.

L. Implementation Standard, Re-Evaluation Period and Minimum Period of Status

1. Proposed Approach

The proposed rules provided that a person would be deemed to be a major participant upon the earlier of: (i) The date on which it submits a complete application for registration, or (ii) two months after the end of the quarter in which a person meets the definition of major participant.[1191]

The proposed rules also provided that a person that has met the criteria for designation as a major participant as a result of its swap or security-based swap activities in a fiscal quarter, but without exceeding any applicable threshold by more than 20 percent, would not immediately be subject to the timing requirements discussed above. Instead, the person would be subject to the timing requirements noted above as soon as its daily average swap or security-based swap positions over any fiscal quarter exceed any of the applicable daily average thresholds.[1192]

Finally, the proposed rules provided that a person would retain the status of a major participant if its swap positions or security-based swap positions do not fall below all of the thresholds for four consecutive quarters.[1193] At that time, such entity may de-register as a major swap participant or major security-based swap participant.

2. Commenters' Views

Some commenters took the view that the time for compliance should be more than two months.[1194] One commenter suggested that entities be given the flexibility to have an additional evaluation period if abnormal market events or price movements cause the failure of the first reevaluation.[1195] Some commenters further expressed the view that the minimum amount of time a person would have to be registered as a major participant would be two quarters, rather than four quarters.[1196]

3. Final Rules

a. Timing

Consistent with the proposal, the final rules provide that a person would be deemed to be a major participant upon the earlier of the date on which it submits a complete application for registration, or two months after the end of the quarter in which it meets the criteria to be a major participant.[1197] In adopting these rules, the Commissions are mindful of commenters' concerns that market entities be given an adequate amount of time to come into compliance with the requirements applicable to major participants. At the same time, it is important to recognize that a person may submit a completed application for major participant registration prior to the time in which it must come into compliance with the requirements applicable to major participants.[1198] We believe that two months provides a reasonable amount of time for a person to submit a completed application for registration as a major participant.[1199]

b. Re-Evaluation Period

Consistent with the proposal, the final rules provide that if any entity meets the criteria for qualifying as a major participant, but does not exceed any applicable threshold by more than 20 percent in that particular quarter, the entity will not immediately be subject to the timing requirements noted above, but will become subject to the timing requirements at the end of the next fiscal quarter if such entity exceeds any of the applicable daily average thresholds in that next fiscal quarter.[1200] We believe that this standard will appropriately help to avoid applying major participant requirements to entities that meet the major participant criteria for only a short time due to unusual activity.[1201]

c. Minimum Period of Status

Consistent with the proposal, the final rules provide that a person would retain major participant status until it does not exceed any of the applicable thresholds for four consecutive quarters following registration.[1202] We believe that this time period appropriately addresses the concern that persons may move in and out of major participant status on a rapid basis. While we recognize that some commenters requested that this period be reduced to two quarters, we believe that a shorter period likely would lead to administrative confusion and burdens, as a shorter time period may be expected to lead entities to move in and out of major participant status more frequently.

M. Calculation Safe Harbor

1. Proposed Approach and Commenters' Views

In the Proposing Release, we expressed the understanding that only a limited number of persons currently have swap or security-based swap positions of a size that potentially could cause them to fall within the major participant definitions.[1203] Without disagreeing with that view, some commenters expressed concern about the costs and burdens associated with performing the applicable calculations on a daily basis, particularly citing the calculations' complex nature.[1204] Certain commenters further suggested

[1191] *See* proposed CFTC Regulation § 1.3(hhh)(3); proposed Exchange Act rule 3a67–7(a).

[1192] *See* proposed CFTC Regulation § 1.3(hhh)(4); proposed Exchange Act rule 3a67–7(b).

[1193] *See* proposed CFTC Regulation § 1.3(hhh)(5); proposed Exchange Act rule 3a67–7(c).

[1194] *See* letters from BlackRock I (requesting that market participants have eight months after they have exceeded any of the applicable thresholds to complete the registration process and come into compliance with applicable rules) and MetLife (suggesting that one year would be an adequate amount of time to come into compliance with the applicable rules); *see also* letters from ISDA I (suggesting a grace period of three quarters following the effectiveness of the proposed rules to permit analysis of whether a person is a major participant) and Capital One (recommending establishment of an 18 month provisional registration period for major participants and for dealers, as well as a phase-in period for applicable regulatory requirements).

[1195] *See* letter from MFA I.

[1196] *See, e.g.,* letters from ACLI, BG LNG I, MetLife and MFA I (also suggesting that there be an alternative method of termination if an entity falls below an applicable threshold by more than 20 percent).

[1197] *See* CFTC Regulation § 1.3(hhh)(3); Exchange Act rule 3a67–8(a).

[1198] The proposed rules regarding the registration of major security-based swap participants would provide that a person who files a completed registration application will be conditionally registered as a major security-based swap participant for four months (unless a person files a certification with the SEC, which would extend the conditional registration for an additional 30 days). *See* proposed Exchange Act rules 15Fb2–1(d)(1) and 15Fb3–1(b)(2), 76 FR 65784, 65821, 65823 (Oct. 24, 2012). In other words, under this proposal, a person who meets the criteria for being a major security-based swap participant may have up to six months, or longer, to come into compliance with the requirements applicable to major security-based swap participants.

[1199] The SEC has estimated that it would take an entity approximately one week to be able to complete and file Form SBSE, the most complex application form for registration as a major security-based swap participant. The other forms for application as a major security-based swap participant are simpler, and the SEC estimates that they would take less time to complete. *See* 76 FR at 65814 at nn.130, 131, 133.

[1200] *See* CFTC Regulation § 1.3(hhh)(4); Exchange Act rule 3a67–8(b).

[1201] While we are mindful that one commenter suggested that this standard be extended from one quarter to four quarters, *see* letter from ISDA I, we do not believe that approach would be consistent with the goal of not causing persons to become major participants as a result of short-term unusual activity.

[1202] *See* CFTC Regulation § 1.3 (hhh)(5); Exchange Act rule 3a67–8(c).

[1203] For example, in connection with the major security-based swap participant definition, we preliminarily estimated that no more than ten entities that would not otherwise be security-based swap dealers would have uncollateralized mark-to-market positions or combined uncollateralized exposure and potential future exposure that may rise close enough to the proposed thresholds to necessitate monitoring to determine whether they meet those thresholds. *See* Proposing Release, 75 FR at 80207–08.

[1204] *See* letters from MFA I and Vanguard.

that participants in the swap and security-based swap markets may perceive an obligation to conduct the relevant calculations on a daily basis even if they are not reasonably likely to be major participants. Those commenters requested that the Commission adopt a safe harbor by which persons with swap or security-based swap positions below a certain notional threshold would not have to perform the major participant calculations, or by which persons would not have to perform those calculations more than monthly when the results of those calculations are significantly below the levels required to be a major participant.[1205]

2. Final Rule

We continue to believe that under the rules we are adopting only a limited number of persons potentially may be major participants. Nonetheless, we recognize the significance of commenter concerns that some persons may perceive an obligation to conduct the major participant calculations as part of their compliance procedures even when there is not a significant likelihood that they would be major participants. We thus believe that a safe harbor can promote certainty and regulatory efficiency by helping market participants appropriately focus their compliance efforts and avoid undue compliance costs in circumstances when they would be highly unlikely to be major participants.

Accordingly, the Commissions are adopting a rule to incorporate a safe harbor into the major participant analysis. A person may take advantage of this safe harbor in any of three situations. First, a person will not be deemed to be a major participant if: (i) the express terms of the person's arrangements relating to swaps and security-based swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $100 million to all such counterparties, including any exposure that may result from the application of thresholds or minimum transfer amounts established by credit support annexes or similar arrangements;[1206] and (ii) the person does not maintain notional swap or security-based swap positions of more than $2 billion in any major category of swaps or security-based swaps, or more than $4 billion in aggregate.[1207]

Alternatively, a person will not be deemed to be a major participant if: (i) The express terms of the person's arrangements relating to swaps and security-based swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $200 million to all such counterparties, including any exposure that may result from thresholds or minimum transfer amounts;[1208] and (ii) the person performs the major participant calculations (*e.g.,* the ''substantial position'' and ''substantial counterparty exposure'' calculations associated with the major participant tests) as of the end of every month, and the results of each of those monthly calculations indicate that the person's swap or security-based swap positions lead to no more than one-half of the level of current exposure plus potential future exposure that would cause the person to be a major participant.[1209]

Finally, a person will not be deemed to be a major participant if the person's current uncollateralized exposure is in connection with a major category of swaps or security-based swaps is less than $500 million (or less than $1.5 billion with regard to the rate swap category) and the person performs certain modified major participant calculations (*e.g.,* the ''substantial position'' and ''substantial counterparty exposure'' calculations, simplified based on assumptions that are adverse to the person)[1210] as of the end of every month, and the results of each of those monthly calculations indicate that the person's swap or security-based swap positions in each major category of swaps or security-based swaps are less than one-half of the substantial position threshold.[1211] This test addresses the commenter suggestion that a safe harbor be set at one-half of the threshold triggering major participant designation.[1212] In addition, we have provided a more simplified alternate version of this test whereby a person will not be deemed to be a major participant if its monthly calculations indicate that the person's swap or security-based swap positions across all major categories of swaps or security-based swaps are significantly less than the substantial counterparty exposure threshold.[1213] This alternative provides a simple safe harbor for entities to apply without undertaking additional analysis to divide their swap or security-based

[1205] *See* letters from SIFMA AMG I (recommending safe harbor when the notional amount of a person's positions is less than the applicable thresholds for current uncollateralized exposure plus potential future exposure, or when a person's end-of-month analysis indicates exposures that are at least 50 percent below the definitions' applicable current exposure plus potential future exposure thresholds), Association of Institutional Investors (''AII'') and Vanguard.

[1206] *See* CFTC Regulation § 1.3(hhh)(6)(i)(A); Exchange Act rule 3a67–8(a)(1)(i).

[1207] *See* CFTC Regulation § 1.3(hhh)(6)(i)(B); Exchange Act rule 3a67–8(a)(1)(ii). For purposes of this second condition, the measure of swap or security-based swap positions in a major category shall include all positions in that major category. This measure shall not exclude the hedging or ERISA positions that are excluded from the first major participant test.

[1208] *See* CFTC Regulation § 1.3(hhh)(6)(ii)(A); Exchange Act rule 3a67–8(a)(2)(i).

[1209] *See* CFTC Regulation § 1.3(hhh)(6)(ii)(B); Exchange Act rule 3a67–8(a)(2). In the case of security-based swaps, for example, the monthly test must indicate that the person has no more than $1 billion in aggregate uncollateralized current exposure plus potential future exposure in a major category (equal to one-half the thresholds of the first and third major participant tests). A person also must have no more than $2 billion in aggregate uncollateralized current exposure plus potential future exposure with regard to all of its security-based swap positions (equal to one-half the thresholds of the second major participant test).

For purposes of conducting this analysis with regard to positions in a major category, if the person is subject to the third major participant test (*i.e.,* the person is a highly leveraged financial entity that is not subject to bank capital requirements), the analysis must account for all of the person's swap or security-based swap positions in that major category (without excluding hedging positions). If the person is not subject to the third major participant test (*i.e.,* the person is not ''highly leveraged'' or is not a ''financial entity'' potentially subject to the test) the analysis may exclude those hedging positions that also are excluded from the first major participant test.

For purposes of conducting this analysis with regard to all of its swap or security-based swap positions, the analysis may not exclude hedging positions (consistent with the lack of a hedging exclusion in the second major participant test).

[1210] *See* CFTC Regulation § 1.3(hhh)(6))iii)(A); Exchange Act rule 3a67–9(a)(3). The simplifications and assumptions applied to this portion of the safe harbor include the fact that a person must use the exposure reports of its dealer counterparties when calculating aggregate uncollateralized outward exposure to such entities, and that potential future exposure must be calculated without taking into account offsets for clearing, mark-to-market margining, or netting.

[1211] *See* CFTC Regulation § 1.3(hhh)(6)(iii)(A); Exchange Act rule 3a67–9(a)(3)(i)(A).

[1212] As identified above, three commenters requested that the Commissions provide a ''safe harbor'' in connection with the status of a major participant. *See* letters from AII, SIFMA AMG II and Vanguard. For example, one commenter stated that ''market participants that are otherwise required to perform the calculations should be able to do so on a less frequent basis if the entity is below every applicable threshold by at least 50%.'' *See* letter from SIFMA AMG I at 5.

[1213] *See* CFTC Regulation § 1.3(hhh)(6)(iii)(B); Exchange Act rule 3a67–9(a)(3)(i)(B). The thresholds for this version of the safe harbor are consistent with the thresholds for the safe harbor set forth in CFTC Regulation § 1.3(hhh)(6)(iii)(A) and Exchange Act rule 3a67–9(a)(3)(i)(A), other than with respect to interest rate swaps. We recognize that the major participant thresholds for swaps and security-based swaps across all major categories (*i.e.,* substantial counterparty exposure) are much larger than those for each individual major category (*i.e.,* substantial position). However, given the purposes of the safe harbor, we do not believe that it is appropriate to use a higher level for the test related to all major categories as compared to the test for each individual category.

swap positions into major categories.[1214]

In each of these circumstances, we believe that a safe harbor would be warranted because it would be sufficiently unlikely that the person's swap or security-based swap positions would cause the entity to be a major participant.[1215] The Commissions believe that for compliance purposes, persons should be able to rely on the proposed safe harbors noted above. This would benefit the swap and security-based swap marketplace and related market participants by avoiding unnecessary costs for various entities that, because of compliance concerns, would engage in major participant calculations even though it would be very unlikely that the major participant thresholds would be met.

The rule further provides that even if a person does not meet the conditions required to take advantage of the safe harbor, that fact by itself will not lead to a presumption that a person is required to perform the calculations required to determine if it is a major participant.[1216] This is consistent with the safe harbor's intent to promote certainty and efficiency in compliance efforts. While we are not prescribing when a person should perform the major participant calculations, participants in the swap and security-based swap markets should be mindful that they are responsible for determining whether they meet the major participant definitions, and that they will face liability if they knowingly or unknowingly meet one of those definitions without registering as a major participant.

N. Limited Designation as a Major Swap Participant or Major Security-Based Swap Participant

1. Proposed Approach

The ''major swap participant'' and ''major security-based swap participant'' definitions provide that the Commissions may designate a person as a major participant for a single category of swap or security-based swap.[1217] Unlike the limited designation provisions of the dealer definitions, the major participant definitions do not refer to limited designations in connection with particular swap and security-based swap activities. Also, unlike the dealer definitions (which refer to limited designations in connection with a particular ''type,'' ''class'' or ''category'' of swap or security-based swap), the major participant definitions specifically state that a person may be designated as a major participant for one or more ''categories'' of swap or security-based swap, without being a major participant for all ''classes'' of swap or security-based swap.

The proposal provided that a person who is a major participant in general would be considered to be a major participant with respect to all categories of swaps or security-based swaps, unless the person's designation is limited.[1218] We further stated that we anticipated that a major participant could seek a limited designation at the same time as its initial registration or at a later time, and we observed the difficulty of setting out the conditions that would allow a person to receive a major participant limited designation.[1219]

2. Commenters' Views

As discussed above, commenters generally addressed concerns regarding limited purpose major participant designations in conjunction with comments regarding limited purpose dealer designations.[1220] A few comments addressed these issues specifically in the context of the major participant definitions.

One commenter recommended that persons that exceed the first major participant threshold in a major category should presumptively be considered a limited major participant only for those categories of swaps or security-based swaps for which they crossed the threshold.[1221] Another suggested a similar approach when a major participant's swaps are concentrated in one major category.[1222] Two commenters suggested that limited major participant designations should not be confined to the proposed major swap categories.[1223]

3. Final Rules and General Principles Applicable to Limited Major Participant Designations

Consistent with the proposal, the final rules retain the presumption that a person that meets one of the major participant definitions will be deemed to be a major participant in connection with all categories of swaps or security-based swaps.[1224] As discussed in the Proposing Release, a person may apply for a limited designation when it submits a registration application, or later.[1225] The final rules also contain one change from the proposal, in that the provisions of the final rules related to limited major participant designation do not refer to the major participant's activities in connection with swaps or security-based swaps, in contrast to the proposal, because the relevant statutory provisions do not refer to limited designations related to activities.

Many of the principles discussed above in the context of limited designation of dealers also are relevant to the limited designation of major participants. Significantly, as with limited dealer designations, it is appropriate for major participants to be subject to a default presumption that they should be regulated as major

[1214] When calculating its potential future exposure across all major swap or security-based swap categories for purposes of this portion of the safe harbor, the person must use the same specified conversion factor for all swaps or security-based swaps, with such factor reflecting the highest risk weight applied to a major category of swaps or security-based swaps, as applicable. *See* CFTC Regulation § 1.3(hhh)(6)(iii)(B)(*2*); Exchange Act rule 3a67–9(a)(3)(i)(B)(*2*).

Also, for all three tests within the safe harbor, the person should use the effective notional amount of a position rather than the stated notional amount of that position if the stated notional amount is leveraged or enhanced by the structure of the position. *See* CFTC Regulation § 1.3(hhh)(6)(iv); Exchange Act rule 3a67–9(b).

[1215] Although commenters suggested a safe harbor based on a notional standard or on monthly testing, the rule we are adopting also accounts for the maximum exposure that is possible under a person's counterparty arrangements (including the aggregate amount of thresholds and minimum transfer amounts provided for by the applicable credit support annexes). This is intended to better focus the application of the safe harbor toward those entities that are highly unlikely to be, or become, major participants.

[1216] *See* CFTC Regulation § 1.3(hhh)(6)(v); Exchange Act rule 3a67–8(c).

[1217] *See* CEA section 1a(33)(C); Exchange Act section 3(a)(67)(C).

[1218] *See* proposed CFTC Regulation § 1.3(hhh)(2); proposed Exchange Act rule 3a71–1(c).

[1219] *See* Proposing Release, 75 FR at 80200–80201.

[1220] *See* part II.E.2, *supra.*

[1221] *See* letter from ICI I (recommending that entities that exceed the thresholds of the first major participant test be registered as major participants only for the relevant major category, while those entities qualifying as major participants under the other tests would be designated as major participants for all categories, but would still be able to apply for limited designations).

[1222] *See* letter from BG LNG I (recommending that if 50 percent of a major participant's swaps fall within one category of swaps, and its swaps in other categories would not separately exceed any of the proposed thresholds, that should be presumed to be a major participant for only that one category of swap).

[1223] *See* letters from BG LNG I (specifically addressing energy firms); and NCGA/NGSA I (asserting that while the major participant definition is to be based on the major categories, the limited designations should be based on a finer set of categories).

[1224] *See* CFTC Regulation § 1.3(hhh)(2); Exchange Act rule 3a71–1(c).

[1225] *See* Proposing Release, 75 FR at 80200. The SEC expects to address the process for submitting an application for limited designation as a major security-based swap participant, along with principles to be used by the SEC in analyzing such applications, as part of separate rulemakings.

participants for all of their swaps or security-based swaps.[1226]

Although a commenter suggested that different principles should apply in the context of the first major participant test[1227]—which is based on an entity's swap or security-based swap position in a single major category—we do not concur. The substantive requirements applicable to major participants do not contemplate treating entities that exceed the first and third thresholds of the major participant definition differently than those exceeding the second threshold. Instead, those requirements indicate that each entity that falls within the major participant definition must comply with registration and other substantive requirements triggered by such designation for all of its swap or security-based swap positions and activities. This conclusion also is supported by the fact that the limited designation authority provided to the Commissions is permissive rather than mandatory, and by the challenges of demonstrating compliance with the substantive requirements applicable to major participants in the context of a limited designation.

Indeed, as with limited dealer designation, one of the key requirements to overcoming the default presumption of full designation is an applicant's ability to comply with major participant regulation in the context of a limited designation. As with limited dealer designation, the Commissions will not designate a person as a limited purpose major participant unless the person can demonstrate compliance with the statutory and regulatory requirements applicable to major participants. Accordingly, an applicant to limited purpose designations must not only demonstrate the ability to comply with the transaction-level major participant requirements (*e.g.,* certain business conduct standards and requirements related to trading records, documentation and confirmations) in the context of a limited designation, but also to entity-level major participant requirements (*e.g.,* requirements related to registration, capital, risk management, supervision, and chief compliance officer).

V. Commission Staff Reports

To review and evaluate the operation of the ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant'' and ''major security-based swap participant'' definitions, the CFTC and SEC are directing their respective staffs to undertake future studies regarding the rules being adopted in connection with these definitions and the related interpretations. These studies will include the analysis of market data and the input of public comment.

The CFTC staff is further directed to report the results of this study to the CFTC on a date that is no later than 30 months following the date that a swap data repository first receives swap data under the CFTC's regulations.[1228] The SEC staff is further directed to report the results of this study to the SEC no later than three years following the later of: (i) the last compliance date for the registration and regulatory requirements for security-based swap dealers and major security-based swap participants under Section 15F of the Exchange Act; and (ii) the first date on which compliance with the trade-by-trade reporting rules for credit-related and equity-related security-based swaps to a registered security-based swap data repository is required.[1229] These staff reports will be made available for public comment.

A. Objectives of the CFTC Staff Report

In general, the CFTC's staff report—together with the associated public comment—is intended to help the CFTC thoroughly evaluate the practical implications and effects of the ''swap dealer'' and ''major swap participant'' definitions following the regulation of dealers and major participants under Title VII. In addition, the staff report is intended to assist the CFTC in evaluating whether new or revised tests or approaches would be appropriate for identifying swap dealers and major swap participants or for providing greater clarity as to whether particular entities do or do not fall within these definitions. The staff report is also intended to assist the CFTC more specifically in evaluating the potential implications of terminating the phase-in thresholds associated with the *de minimis* exception to the definition of a ''swap dealer.''

To this end, the staff report generally should review each significant aspect of the rules being adopted in connection with the definitions and related interpretations. With respect to the ''swap dealer'' definition, such aspects include: (i) the factors associated with the definition (including the application of the dealer-trader distinction for identifying swap dealing activity); (ii) the extent of the exclusion of swaps entered into in connection with the origination of loans; (iii) the exclusion of certain swaps from the dealer analysis (*i.e.,* swaps between affiliated parties, swaps between a cooperative and its members and swaps entered into for the purpose of hedging as defined in the rule); and (iv) the tests and thresholds used to implement the *de minimis* exception. With respect to the ''major swap participant'' definition, such aspects include: (i) The tests and thresholds associated with the ''substantial position'' definition; (ii) the definition of ''hedging or mitigating commercial risk''; (iii) the tests and thresholds associated with the ''substantial counterparty exposure'' definition; and (iv) the definition of ''highly leveraged''.

To facilitate this review, the CFTC staff report should address—as may be practicable in light of the data made available under the swap regulatory reporting regime or otherwise—a range of descriptive analytics that may be helpful in characterizing the nature of the swap market, its participants, and their activities. Such descriptive analytics could help inform the CFTC as to how the definitions in the final rules are being applied in practice and whether any adjustments to such definitions should be considered. For example, these analytics could indicate whether the population of registered swap dealers and major swap participants is substantially larger or smaller than expected, and, to some extent, what elements of the definitions are responsible for any significant differences. These analytics could also illuminate dynamics in the market that may require new or different treatment in the definitions. These analytics may also assist the CFTC in considering whether it would be practical and appropriate to apply new or different objective and readily verifiable tests or standards for determining whether particular entities are or are not swap dealers or major swap participants,

[1226] *See* part II.E.3.a, *supra,* discussing the statutory and policy basis for this presumption.

[1227] *See* letter from ICI I.

[1228] The CFTC has designated a period of 30 months to ensure that the report reflects two years of security-based swap transaction data, and six months for the staff to analyze the data and prepare the report. The Commissions expect that swap data repositories and security-based swap data repositories will begin to receive data at different times. Currently, swap data repositories are expected to begin to receive swap data approximately 60 days after publication of the rules further defining the term ''swap.'' *See* CFTC, Final Rule: Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012); CFTC, Final Rule: Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011). The SEC has not yet adopted final rules for the receipt of security-based swap data by security-based swap data repositories. Because of this difference, the timing of the changes to the *de minimis* thresholds for swaps and security-based swaps will be different.

[1229] The SEC has designated a period of three years to ensure that the report reflects two years of security-based swap transaction data, and one year for the staff to analyze the data and prepare the report.

including through the possible use of safe harbors, presumptions, thresholds, or defaults based on these tests or standards.

Depending on the availability and reliability of data and the developments in the market and regulatory framework, among other factors, the CFTC staff report could consider: how swaps differ among registered swap dealers, registered major swap participants and unregistered entities; differences among swaps in the major swap categories; differences among swap dealing activity of entities at various levels, including around the *de minimis* threshold; and estimates of quantitative information regarding use of swaps, including notional values, effective notional values, and collateralized and uncollateralized exposure.

The CFTC staff report should also address, as may be practicable, the nature and extent of the impact that the final rules and interpretations implementing the definitions have had on certain aspects of the swap market. Depending on the available information and other factors, the CFTC staff report could address the impact of these final rules and interpretations on competition in the swap market, market participants' ability to enter into swaps with various registered and unregistered entities, including IDIs, and the terms of swaps.

B. Objectives of the SEC Staff Report

In general, the report of the SEC staff—together with the associated public comment—is intended to help the SEC thoroughly evaluate the practical implications and effects of the dealer and major participant definitions following the regulation of dealers and major participants pursuant to Title VII. In addition, the staff report is intended to assist the SEC in evaluating whether new or revised tests or approaches would be appropriate for identifying dealers and major participants or for providing greater clarity as to whether particular entities do or do not fall within these definitions. The staff report also is intended to assist the SEC more specifically in evaluating whether it is necessary or appropriate to set higher or lower thresholds for the *de minimis* exception to the definition of ''security-based swap dealer.''

To this end, the staff report generally should review each significant aspect of the rules being adopted in connection with the definitions and related interpretations. With respect to the security-based swap dealer definition, such aspects include: (i) The factors associated with the definition (including the application of the dealer-trader distinction for identifying dealing activity); (ii) the exclusion of inter-affiliate transactions from the dealer analysis (including the provisions limiting that exclusion to transactions among majority-owned affiliates); and (iii) the tests and thresholds used to implement the *de minimis* exception. With respect to the major security-based swap participant definition, such aspects include: (i) The tests and thresholds associated with the ''substantial position'' and ''substantial counterparty exposure'' definitions; (ii) the definition of ''hedging or mitigating commercial risk'' (including whether the definition inappropriately permits the exclusion of certain positions from the first test of the major participant definitions, and whether the continued availability of the exclusion should be conditioned on assessments of hedging effectiveness and related documentation); (iii) the definition of ''highly leveraged''; and (iv) the exclusion of inter-affiliate transactions from the major participant analysis (including the provision limiting that exclusion to transactions among majority-owned affiliates).

C. Descriptive Analytics in the SEC Report

To facilitate this review, the report of the SEC staff should address—as may be practicable in light of the data made available under the applicable regulatory reporting regime or otherwise [1230]—a range of descriptive analytics that may be helpful in characterizing the nature of the security-based swap market, as well as entities within that market and those entities' activities. Such descriptive analytics could help inform the SEC as to how the definitions in the final rules are being applied in practice and whether any adjustments to such definitions should be considered. For example, these analytics could indicate whether the populations of dealers and major participants are substantially larger or smaller than expected, and, to some extent, what elements of the definitions are responsible for any significant differences. These analytics could also illuminate dynamics in the security-based swap market that may require new or different treatment in the definitions. For example, the analytics could indicate that the activity in certain segments of the security-based swap market—*e.g.,* equity swaps—has significantly increased or decreased since the adoption of the final rules. These analytics may also assist the SEC in considering whether it would be practical and appropriate to apply new or different objective and readily verifiable tests or standards for determining whether particular entities are or are not dealers or major participants, including through the possible use of safe harbors, presumptions, thresholds or defaults based on these tests or standards.

The precise nature of the descriptive analytics included in the SEC staff report of course will depend on a number of considerations, including the availability and reliability of data and the developments in the market and regulatory framework. However, some salient candidates for descriptive analysis that could be considered at the time of the staff report include:

- Characteristics of, and differences among, the security-based swap transactions and positions of three segments of participants in those respective markets—registered dealers, any registered major participants, and unregistered entities.[1231]
- Characteristics of, and differences among, security-based swap transactions and positions connected with the broad product segments identified in the final rules (*e.g.,* credit default swaps and other security-based swaps).[1232]
- Characteristics of, and differences among, the apparent dealing activity of entities at various levels (including the $3 billion and $150 million *de minimis* levels established in the final rule in connection with the security-based swap dealer definition) based on their transactions and positions; [1233]

[1230] The Dodd-Frank Act mandates that market participants publicly report certain security-based swap transaction and pricing data. *See* Exchange Act section 13(m). The SEC has proposed rules to implement these requirements, which will give the Commissions and the general public additional insight into the security-based swap markets. *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 FR 75208 (Dec. 2, 2010).

[1231] Such characteristics could include: (i) The types of market participants in each segment; (ii) their activity and positions (in terms of notional value, number of transactions, average aggregate uncollateralized outward exposures, and average aggregate potential outward exposure); (iii) the type and number of their counterparties (including the registered/unregistered status of such counterparties); and (iv) a network analysis of the concentration of activity by counterparty.

[1232] Such characteristics could include: (i) The types of market participants in each segment, including their registration status; (ii) the amount of their activity (in terms of notional value and number of transactions); and (iii) the type and number of their counterparties.

[1233] Such characteristics could include a range of quantitative criteria indicative of apparent dealing activity, similar in some respects to the approach taken in the CDS Data Analysis. Differences that could be reviewed include variations in the number and size of trades and counterparties.

• Characteristics of the security-based swap trading activity of ''special entities''; [1234]

• Characteristics of entities entering and exiting the security-based swap markets, using a variety of baselines; [1235]

• Estimates of security-based swap entities' current uncollateralized exposure and potential future exposure at various levels of security-based swap positions; [1236] and

• Estimates of security-based swap entities' ratios of total liabilities to equity.[1237]

D. Additional Analyses in the SEC Staff Report

To further facilitate this review, the SEC staff report should also address, as may be practicable, the nature and extent of the impact that the final rules and interpretations implementing the definitions have had on certain aspects of the security-based swap market. However, many economic, regulatory, and other factors—both related and unrelated to the implementation of Title VII—could impact the market going forward. The extent to which the staff report will be able to provide retrospective analyses regarding the effect of the definitions on the security-based swap markets (and the robustness of any such analysis) in significant part will be based on the nature and role of future exogenous factors that have also affected the market. Depending on these future factors and the potential challenges associated with addressing them in the staff reports, some salient candidates for retrospective impact analysis that could be considered at the time of the report include:

• *Effects on competition.* The report may be able to explore connections between the definitions and the entry and exit of various entities in the security-based swap markets. For example, to what extent is an entity's entry or exit correlated with its registration status or its approaching or crossing any of the thresholds established by the definitions (*e.g.,* the *de minimis* thresholds for dealers or the ''substantial position'' thresholds for major participants)? Has the current concentration of the dealer market dissipated, persisted, or strengthened over time? [1238]

• *Effects on investor protection.* The report may be able to explore connections between the definitions and the nature and scope of transactions with certain classes of counterparties. For example, to what extent do unregistered entities in the security-based swap markets transact with counterparties such as ''special entities,'' natural persons, small businesses, or commercial entities? Have the nature and scope of trades by special entities or other classes of counterparties changed since 2011? Have unregistered entities—such as dealers operating under the *de minimis* threshold—emerged to engage in transactions with special entities or other particular classes of counterparties?

• *Effects on access.* The report may be able to explore connections between the definitions and the ability of certain classes of counterparties to access products in the security-based swap market. For example, to what extent is an entity's registration status or its approaching or crossing any of the thresholds established by the definitions correlated with the entity ceasing transactions with certain classes or sizes of counterparties?

• *Effects of the dealer-trader distinction.* The report may be able to explore connections between market dynamics and quantifiable metrics indicative of dealing activity. For example, are there identifiable, objective differences between the registered security-based swap dealers and unregistered market participant populations in terms of number of counterparties, buy/sell ratios, posting of initial margin, concentrations by counterparty or otherwise? If so, how does the amount of the activity (in terms of notional value and number of transactions) of those entities change when they move above or below the thresholds implied by those differences? How do the characteristics of their counterparties (in terms of number and nature) change?

• *Effects of de minimis thresholds.* The report may be able to explore connections between market dynamics and the *de minimis* thresholds established by the definitions. For example, how does the amount of the activity (in terms of notional value and number of transactions) of security-based swap entities change when they move above or below the *de minimis* thresholds? How do the characteristics of their counterparties (in terms of number and nature) change?

• *Effects of major participant thresholds.* The report may be able to explore connections between market dynamics and the major participant thresholds established by the definitions. For example, how have total notional security-based swap positions changed over time for large market participants that are not registered and that do not bear any indicia of dealing activity? For those large participants, have overall notional levels moved toward, or away from, the levels required to trigger the major participant thresholds?

• *Other effects of the definitions.* To what extent do entities registered security-based swap dealers have overall trading characteristics suggesting that they may not be dealers? To what extent have entities *not* registered as dealers have trading characteristics suggesting that they may be acting as dealers? In either case, do any discrepancies between firms' registration status and their trading characteristics suggest any gaps or areas of uncertainty regarding the scope of the dealer definitions that may require potential modifications?

VI. Effective Date and Implementation

Consistent with sections 754 and 774 of the Dodd-Frank Act, these final rules will be effective on 60 days following publication in the **Federal Register**. The Commissions, however, are providing for a phase-in period for persons engaged in dealing activity below certain amounts.

If any provision of these joint rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

A. CEA Rules

As explained below and as noted elsewhere in this Adopting Release, the compliance date for various regulatory requirements is contingent upon the adoption and effectiveness of other,

[1234] Such characteristics could include: (i) The size and nature of their counterparties; (ii) the registration status of their counterparties; and (iii) the size and number of their transactions.

[1235] Such characteristics could include: (i) The extent to which those entities bear indicia of dealing activity, including those identified in the CDS Data Analysis; and (ii) the extent to which those entities have registered as security-based swap dealers. Potential baseline could include, for example: (i) The adoption of these final rules; (ii) December 31, 2011, the end of the time period considered by the CDS Data Analysis; and (iii) the last effective date of the registration and regulatory requirements for security-based swap dealers and major security-based swap participants under Section 15F of the Exchange Act.

[1236] Such estimates could be useful in ascertaining the application of the various ''substantial position'' thresholds used in connection with the ''major security-based swap participant'' definition.

[1237] Such estimates could be useful in connection with evaluating the operation of the third prong of the major participant definition.

[1238] *See* notes 478 through 485 and accompanying text, *supra.*

related, regulatory provisions and definitions. Because the CFTC believes that the suite of rules implementing the Dodd-Frank Act are complex and interconnected, it has determined that implementation in certain cases can best be accomplished through separate rulemakings. The Commissions received comments related to implementation and phase-in that largely resulted from the CFTC's re-opening of the comment period for several rulemakings, and a request for comment on the order in which it should consider final rulemakings made under the Dodd-Frank Act.[1239] The CFTC notes that swap dealers and major swap participants will require an implementation or compliance period based on separate registration and regulatory requirements that are the subject of separate rulemakings by the Commission.[1240]

As the CFTC stated recently in another rulemaking related to CPOs:

> [while t]he [CFTC] recognizes that entities will need time to come into compliance with the [CFTC]'s regulations * * * [b]ased on the comments received indicating that a certain portion of entities currently claiming relief [from CPO registration] under § 4.13(a)(4) already have robust controls in place independent of [CFTC] oversight, the [CFTC] believes that entities currently claiming relief under § 4.13(a)(4) should be capable of becoming registered and complying with the [CFTC]'s regulations within 12 months following the issuance of the final rule. For entities that are formed after the effective date of the rescission, the Commission expects the CPOs of such entities to comply with the Commission's regulations upon formation and commencement of operations.[1241]

The Commissions are taking the same approach with respect to implementing CFTC Regulations §§ 1.3(m)(5) and 1.3(m)(6). The loss of ECP status for Forex Pools currently operating other than pursuant to the retail forex regime of a federal regulator described in CEA section 2(c)(2)(E)(i) [1242] may involve significant structural and operational changes. The loss of a commodity pool's ability to rely on CEA section 1a(18)(A)(v) if it does not fall within CEA section 1a(18)(A)(iv) may require significant structural and operational changes. Because additional time may enable a Forex Pool affected by CFTC Regulation § 1.3(m)(5) to restructure to avoid being subject to the retail forex regime (*e.g.,* by redeeming U.S. non-ECP participants) and may allow a commodity pool affected by CFTC Regulation § 1.3(m)(6) time to satisfy the terms of CEA section 1a(18)(A)(iv) (*e.g.,* by the pool's CPO registering as such or claiming an exemption therefrom or by the pool raising its level of total assets above $5 million), the Commissions are delaying the effective date of CFTC Regulations §§ 1.3(m)(5) and 1.3(m)(6) until December 31, 2012, which is the compliance date for commodity pools no longer permitted to claim exemption from CPO registration pursuant to recently withdrawn CFTC Regulation 4.13(a)(4).[1243]

CFTC Regulation § 1.3(m)(8) conditions ECP status in part on a requirement that a commodity pool be ''formed and operated'' by a registered CPO or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3). Due to the revocation of CFTC Regulation § 4.13(a)(4), the Commissions anticipate that many CPOs will be registering as such in the future. However, the compliance date for registration for CPOs required to register as such due to the withdrawal of CFTC Regulation § 4.13(a)(4) is December 31, 2012. Furthermore, such CPOs may have formed the commodity pools that they currently operate when such CPOs were not registered as such.

Consequently, compliance with the formation element of CFTC Regulation § 1.3(m)(8)(iii) is not required with respect to a commodity pool formed prior to December 31, 2012. To be clear, however, while pools in existence before December 31, 2012 need not have been formed by a registered CPO, or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3), in order to satisfy the formation aspect of CFTC Regulation § 1.3(m)(8)(iii), such commodity pools nevertheless must be operated by a registered CPO, or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3), on December 31, 2012 to satisfy the ''operated by a registered CPO'' element of CFTC Regulation § 1.3(m)(8)(iii).

B. Exchange Act Rules

Because the SEC has not yet promulgated final rules implementing the substantive requirements imposed on dealers and major participants by Title VII of the Dodd-Frank Act, persons determined to be dealers or major participants under the regulations adopted in this Adopting Release need not register as such until the dates provided in the SEC's final rules regarding security-based swap dealer and major security-based swap participant registration requirements, and will not be subject to the requirements applicable to those dealers and major participants until the dates provided in the applicable final rules.[1244]

Moreover, as discussed above in the context of the *de minimis* exception to the security-based swap dealer definition,[1245] the SEC is making an extended compliance period available to persons engaged in dealing activity involving credit default swaps between $3 billion and $8 billion in trailing annual notional amount, and to persons engaged in dealing activity involving other types of security-based swaps between $150 million and $400 million in trailing annual notional amount. Persons taking advantage of that extended compliance period will be deemed not to be security-based swap dealers during that period, and will not be subject to registration requirements and other requirements associated with status as a security-based swap dealer during that period.

The SEC previously provided limited exemptive relief in connection with Exchange Act section 6(l),[1246] added by the Dodd-Frank Act, which prohibits any person from effecting a security-based swap transaction with a person that is not an ECP, unless effected on a national securities exchange. That relief expires as of the effective date of final rules further defining ECP.[1247] Accordingly, following the effective date of these final rules, dealers and major participants—and all other persons—will be subject to the prohibition of section 6(l) under the definition of ECP as amended by Title VII and as further defined by the rules.[1248]

[1239] *See* CFTC, Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274 (May 4, 2011).

[1240] *See* CFTC, Final Rule: Registration of Swap Dealers and Major Swap Participants, 775 FR 713792613 (Jan. 19, 2012).

[1241] CPO/CTA Compliance Release at 11265.

[1242] 7 U.S.C. 2(c)(2)(E)(i).

[1243] *See* CPO/CTA Compliance Release.

[1244] *See* Securities Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (''Effective Date Release'') (granting exemptive relief and providing guidance in connection with Exchange Act provisions concerning security-based swaps that were added or amended by Title VII).

[1245] *See* part II.D.5, *supra.*

[1246] 15 U.S.C. 78f(l).

[1247] *See* Effective Date Release, 76 FR at 36307.

[1248] Because the exemptive relief that the SEC granted in connection with section 6(l) will expire as of the effectiveness of the ECP definition, the relief that the SEC provided from the rescission provisions of Exchange Act section 29(b) in connection with section 6(l) also will expire at that time. *See id.*

VII. Administrative Law Matters—CEA Revisions (Definitions of ''Swap Dealer'' and ''Major Swap Participant,'' and Amendments to Definition of ''Eligible Contract Participant'')

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider the impact of its rules on ''small entities.'' [1249] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[1250] In its proposal, the CFTC stated that ''[t]he rules proposed by the CFTC provide definitions that will largely be used in future rulemakings and which, by themselves, impose no significant new regulatory requirements. Accordingly, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.''[1251]

In response to the Proposing Release, one commenter stated that the CFTC's ''rule-makings [are] an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFPEEU members, who seek to transact in energy commodity swaps only to hedge the commercial risks of their not-for-profit public service activities.'' [1252] In general, the commenter said that since the Small Business Administration (''SBA'') has determined that many rural electric cooperatives are ''small entities'' for purposes of the RFA, if the definition of swap dealer were to cover a substantial number of rural electric cooperatives the rule further defining swap dealer may have a significant economic impact on a substantial number of small entities.[1253] Thus, the commenter concluded that the CFTC should conduct a regulatory flexibility analysis for each of its rulemakings under the Dodd-Frank Act, including this rulemaking.

The commenter also said that the requirement in section 2(e) of the CEA, as amended by the Dodd-Frank Act, that a person who is not an ECP must execute swaps on a designated contract market would have the potential to have a significant economic impact on a substantial number of small entities if a substantial number of rural electric cooperatives were not covered by the definition of ECP.[1254] Another commenter said that in considering the economic impact on small entities of the swap dealer definition rules, the CFTC should consider whether the availability and cost of swaps to small entities could be affected by potential uncertainty among persons who engage in the activities covered by the definition about whether they are required to register as swap dealers.[1255]

The commenters did not provide specific information on how the further defining swap dealer would have a significant economic effect on a substantial number of small entities. Nonetheless, the CFTC has reevaluated this rulemaking in light of the statements made to it by these commenters. After further consideration of those statements, the CFTC has again determined that this final rulemaking will not have a significant economic effect on a substantial number of small businesses. With regard to the definition of swap dealer, the CFTC expects that if any small entity were to engage in the activities covered by the definition, most such entities would be eligible for the *de minimis* exception from the definition.[1256] Additionally, the Commission does not expect that the small entities identified by NFPEEU will be subject to registration with the Commission as a major swap participant, as most entities with total electric output not exceeding 4 million megawatt hours are not expected to maintain outstanding swap positions that would exceed the applicable thresholds. In general, the major swap participant definition applies only to persons with very large swap positions, and therefore the definition of major swap participant is incompatible with small entity status.

With regard to the definition of ECP, the CFTC notes that the costs of executing swaps on a designated contract market raised by the commenter arise from a requirement of the CEA, and not from any rule promulgated by the CFTC. Last, regarding the comment that there may be an economic impact on small entities in terms of the availability and cost of swaps, the definition of swap dealer is being adopted to limit uncertainty with respect to which entities will be required to register as a swap dealer. Thus, the definition of swap dealer is intended to avoid creating the substantial economic effect which concerns the commenter.

Accordingly, the Chairman, on behalf of the CFTC, certifies, pursuant to 5 U.S.C. 605(b), that the actions to be taken herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [1257] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. The Proposing Release stated that the proposed rules would not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget (''OMB'') under the PRA, and invited public comment on the accuracy of the CFTC's estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the proposed rules.[1258]

One commenter said that the regulatory requirements imposed on swap dealers and major swap participants (including swap end users that may potentially be misclassified as swap dealers or major swap participants) will entail reporting and record keeping requirements.[1259] Specifically, the commenter noted that the CFTC stated in the Proposing Release that ''any entity determined to be a swap dealer or major swap participant would be subject to registration, margin, capital, and business conduct requirements * * * all activities that will have associated reporting and additional recordkeeping requirements.'' [1260] Another commenter said that the CFTC should consider the implications under the PRA of all of its rulemakings under the Dodd-Frank Act as a whole.[1261]

As with the proposed rules, these final rules will not impose any new information collection requirements that require approval of OMB under the PRA. All reporting and recordkeeping

[1249] 5 U.S.C. 601 *et seq.*

[1250] 5 U.S.C. sections 601(2), 603, 604 and 605.

[1251] 75 FR 80203.

[1252] *See* letter from NFPEEU.

[1253] *See* letter from NFPEEU and meeting with NFPEEU on January 19, 2011.

[1254] *See* letter from NFPEEU.

[1255] *See* letter from Dominion Resources.

[1256] The number of small entities that could conceivably be covered by the definition of swap dealer is likely to be further reduced if transactions between entities described in section 201(f) of the Federal Power Act (which generally includes rural electric cooperatives) are exempted from the requirements of the CEA, as contemplated by section 4(c)(6) of the CEA.

[1257] 44 U.S.C. 3501 *et seq.*

[1258] 75 FR 80203.

[1259] *See* letter from Dominion Resources.

[1260] *See id.* at 6.

[1261] *See* letter from NFPEEU.

requirements applicable to swap dealers and major swap participants instead result from other rulemakings, for which the CFTC has sought OMB approval. The CFTC submitted an information collection request to OMB for each proposed rulemaking containing reporting or recordkeeping requirements, including the recordkeeping and reporting requirements referenced by the first commenter,[1262] which estimated the implications of the proposed collections on prospective respondents.[1263]

Moreover, in appropriate rulemakings, the CFTC sought to rely upon information collections that already had been proposed, in order to avoid imposing unnecessary additional burdens upon prospective respondents.[1264] Parties wishing to review the CFTC's information collections on a global basis may do so at *www.reginfo.gov*, at which OMB maintains an inventory aggregating each of the CFTC's currently approved information collections, as well as the information collections that presently are under review.

C. Cost Benefit Considerations

CEA section 15(a) requires the CFTC to consider the costs and benefits of its action before promulgating a regulation under the CEA, specifying that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (i) Protection of market participants and the public; (ii) efficiency, competitiveness and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations.[1265]

1. Introduction

The terms ''major swap participant'' and ''swap dealer'' are defined in CEA sections 1a(33) and 1a(49), as added by the Dodd-Frank Act, to include any person that holds swap positions above a certain level (in the case of the term ''major swap participant'') or that engages in certain activities (in the case of the term ''swap dealer''), with certain exclusions and exceptions, all as discussed in parts II and IV of this Adopting Release. Section 712(d)(1) of the Dodd-Frank Act directs the CFTC and the SEC, in consultation with the Board, jointly to further define these and other terms. Also, CEA section 1a(49)(D) directs the CFTC to promulgate regulations to establish factors with respect to the making of the determination to apply the *de minimis* exception to the definition of the term ''swap dealer.''

The provisions of the Dodd-Frank Act that direct the further definition of the terms ''swap dealer'' and ''major swap participant'' should be viewed in the context of Congress' consideration of the consequences that would arise from regulating persons and activities that were previously free from regulation. The Dodd-Frank Act is, in part, a response to a financial crisis in which unregulated swaps played a major role.[1266] It includes provisions to regulate swap dealers and major swap participants in order to address concerns about this previously unregulated market. In this context, the Dodd-Frank Act requires that rules should ''further define'' the terms ''swap dealer'' and ''major swap participant'' by establishing and providing guidance with respect to the criteria for determining if a person is covered by one of the statutory definitions and therefore should be subject to certain regulatory requirements under Title VII; the Dodd-Frank Act does not direct the Commissions to define those terms in a vacuum. So, even in the absence of these rules, Title VII would require the regulation of persons that act as swap dealers or hold positions causing them to be major swap participants. Consequently, a large part of the costs and benefits resulting from the regulation of swap dealers and major swap participants result from the Dodd-Frank Act itself and not from these definitional rules.

2. General Cost and Benefit Considerations

In considering the comments on the proposed rules and the various alternatives available for the final rules, the CFTC sought to promulgate final rules that will help swap market participants and the public to apply the statutory definitions of the terms ''swap dealer'' and ''major swap participant'' in an efficient, uniform and accurate manner. We believe that doing so will protect market participants and the public, promote the efficiency, competitiveness and financial integrity of the swap markets, facilitate price discovery, encourage sound risk management practices and advance the public interest in general. That is, by providing direction and guidance as to which factors are relevant in applying the statutory definitions, and how to apply those factors to particular situations in the swap markets, the CFTC believes the final rules will provide benefits by reducing the cost of determining whether a particular person is covered by the statutory definitions, helping to make similar determinations for persons that are similarly situated, and promoting application of the terms ''swap dealer'' and ''major swap participant'' in conformity with the statutory definitions.

The costs and benefits considered in this final rule fall in two categories: First, those an entity will experience in determining whether it is a ''swap dealer'' or ''major swap participant'' as further defined in this rulemaking; and second, those attributable to the fact that, as interpreted in this rule, a greater or fewer number of entities at the boundaries of the statutory definitions may be deemed within them.

With respect to the first category, and as discussed further in sections V.A.3.j. and V.A.4.b. below, the CFTC has endeavored to approximate the costs of making these determinations. At the same time, the CFTC believes that the careful consideration of, and detailed response in this Adopting Release to, comments regarding the application of the statutory definitions will provide useful, practical guidance, yielding a substantial if unquantifiable benefit to entities making such determinations.

The costs and benefits in the second category—those associated with the rules being more or less inclusive—were a primary concern of the CFTC and commenters throughout this rulemaking. Commenters stated that if the CFTC's final rules were to lead to interpretations of the statutory definitions that are over-inclusive, the result would be that entities would likely incur significant, unjustifiable costs attributable to various regulatory requirements intended for actual swap dealers and major swap participants.[1267] Other commenters were concerned that if the rules were to lead to under-inclusive interpretations, the benefits expected from Title VII would be dampened.[1268]

The CFTC does not dismiss these potential unintended results and we

[1262] *See, e.g.,* 75 FR 71379, 71386 (Nov. 23, 2010) (proposed registration rules); 75 FR 70881, 70884 (Nov. 19, 2010), 75 FR 71397, 71401 (Nov. 23, 2010), 75 FR 71391, 71394 (Nov. 23, 2010), 75 FR 80638, 80656 (Dec. 22, 2010), and 76 FR 33066, 33076 (Jun. 7, 2011); and 76 FR 27802, 27819 (May 12, 2011) (collectively, the information collection requests for the proposed business conduct rules).

[1263] *See* 44 U.S.C. 3506 (PRA program requirements) and 3507 (PRA submission requirements).

[1264] *See, e.g.,* 75 FR 80638, 80656 (Dec. 22, 2010).

[1265] 7 U.S.C. 19(a).

[1266] *See, e.g.,* S.Rep. 111–176, *The Restoring American Financial Stability Act of 2010* at 29.

[1267] *See* letters from API I, Atmos Energy, BG LNG I, Dominion Resources, Hess, NCGA/NGSA I, NFPEEU, Vitol and WGCEF VIII.

[1268] *See* letters from AFR, Better Markets I and Greenberger.

have responded to these comments in the policy determinations made above.[1269] We recognize that these definitional rules are ''gating'' rules, and that this gating function will affect whether entities at the boundaries of the statutory definitions incur costs attributable to the regulatory regime that Congress has prescribed and the CFTC has implemented through other substantive regulations. Correspondingly, these definitional rules will also affect the extent of benefits for the swap market and the public resulting from those regulations. It is important to also recognize, however, that as stated above, the regulation of persons acting as swap dealers or who hold positions causing them to be major swap participants is required by the Dodd-Frank Act. For entities that are not on the boundaries of the statutory definitions, but rather squarely within them or entirely outside of them, these rules will not affect the costs and benefits that result from their inclusion or exclusion. The latter group of costs and benefits are a consequence of the statutory definitions prescribed by Congress.

In this rulemaking, we considered that more inclusive rules and guidance would cause some entities at the boundaries of the definitions to be covered by one of the definitions and therefore incur both initial and recurring direct costs of complying with Dodd-Frank Act requirements, while less inclusive rules and guidance would have the opposite effect.[1270] Thus, as more or fewer entities are covered by the definitions, the amount of such direct compliance costs incurred by entities in the aggregate will vary. However, this variance in the aggregate compliance costs resulting from the CFTC's definitional guidance in this rulemaking must be distinguished from the compliance costs that any particular entity will incur stemming from the other rulemakings prescribing regulations applicable to swap dealers and major swap participants. Consideration of the specific costs and benefits attendant to various substantive regulations applicable to swap dealers and major swap participants is beyond the limited scope of this rulemaking.

Moreover, the variance in aggregate compliance costs resulting from this rulemaking will not track, on a ''one for one'' basis, the number of entities included in the definitions as the rules are more or less inclusive. This is because the initial and recurring compliance costs for any particular swap dealer or major swap participant will depend on the size, existing infrastructure, level of swap activity, practices and cost structure of the entity designated as such.[1271] Another reason that the aggregate costs resulting as more or fewer entities are included in the definitions will not precisely track the number of such entities is that indirect costs are likely to result as market participants seek to avoid the regulations attendant to swap dealer or major swap participant status by, among other things, reducing their swap activities.[1272] We do not expect that the extent of these indirect costs will be directly related to the number of entities included in the definitions.

The CFTC likewise acknowledges that more or less inclusive definitions may increase or decrease the systemic benefits expected from the composite regulation of swap dealers and major swap participants. These include improved transparency and market orderliness, as well as the reduction of excess leverage and systemic risk. The CFTC believes that less inclusive final rules could negatively impact these interests in several ways: Those who engage in swaps with entities that elude swap dealer or major swap participant status and the attendant regulations could be exposed to increased counterparty risk; customer protection and market orderliness benefits that the regulations are intended to provide could be muted or sacrificed, resulting in increased costs through reduced market integrity and efficiency;[1273] and entities that elude swap dealer or major swap participant status may gain an unwarranted competitive advantage over other market participants.[1274]

Generally, rules that capture more entities are likely to increase these benefits, while rules that capture fewer entities are likely to have the opposite effect, though there are several additional factors that also have a bearing on the presence and magnitude of increased or decreased benefits. These factors include the number and size of entities whose status changes

[1269] *See, e.g.,* parts II.A.4.g, II.D.3.a and IV.B.3.a.

[1270] For example, the final rules specify criteria related to application of the *de minimis* exception, the range of transactions that are eligible for the exclusion of swaps in connection with the origination of loans, and the requirements for limited designation as a swap dealer, each of which will impact the total number of entities that are subject to swap dealer regulation. The final rules also specify criteria related to the thresholds for major swap participant status, factors that may be considered in the major swap participant calculations, and the threshold for ''highly leveraged'' status, each of which will impact the number of entities that are major swap participants.

[1271] It is likely that a swap dealer or major swap participant would incur direct compliance costs related to technology, personnel and capital. *See* CFTC, Registration of Swap Dealers and Major Swap Participants; Final Rule, 77 FR 2613 (January 19, 2012); CFTC, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties; Final Rule, 77 FR 9733 (February 17, 2012) and CFTC, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants; Final Rule, 77 FR 20128 (April 3, 2012).

[1272] For example, those entities would lose the profits they may have gained from those activities, and potentially from related business activities if their customers cut back their business relationships because the abstaining entities no longer engage in those swap activities.

We recognize that small entities are more likely than large entities to abstain from swap activities in order to avoid being covered by the swap dealer definition. Smaller entities are less likely to have existing technology and procedures that would comply with new regulations and therefore their initial costs of compliance with the requirements applicable to swap dealers are likely to be larger. Moreover, the same fixed costs will have a proportionally greater effect on small entities.

Other market participants may also bear some costs if entities abstain from dealing activities or if large users of swaps reduce their activities to avoid major swap participant status. These costs could include transition costs as the other market participants identify new counterparties with which to enter into the same swaps. In addition, and likely more important, as more entities abstain from swap activities, other entities that are seeking to enter into swaps may have a reduced choice of counterparties, which may lead to unfavorable financial terms for swaps and imperfect matches between risks and the swaps that are available. These factors may increase the cost of risk mitigation in general, as entities use more costly risk management strategies in place of swaps.

See generally letters from API I, BG LNG I, BOK dated February 22, 2011 (''BOK III''), COPE I, Midsize Banks, NEM, NCGA/NGSA I, NGFA I, Chevron Federal Credit Union, M&T I, Sidley and WGCEF I. *See also* Roundtable Transcript at 39 (remarks of Eric Chern, Chicago Trading Company), 133–34 (remarks of Brenda Boultwood, Constellation).

[1273] More uniform compliance with regulations leads to more uniform expectations that market participants may reasonably have about the financial integrity of various swap dealers and major swap participants. Less uniform compliance, on the other hand, could introduce additional uncertainty about the financial integrity of an individual swap dealer or major swap participant. This could result in reduced market efficiency. Moreover, foreseeable ''network effects'' could magnify these costs. That is, since requirements promoting transparency and orderly documentation are expected to increase market participants' general level of certainty about the swap positions held by others in the market, the wider the market application the greater the benefit. For example, in the 2008 financial crisis, uncertainty about the potential obligations of various market participants led to actions to restrict credit and reduce leverage that may not have been taken if there was greater confidence about market participants in general; this uncertainty also hampered regulatory efforts. Significant pockets of unregulated swap activity attributable to less inclusive definitions of the terms ''swap dealer'' and ''major swap participant'' may result in costs related to uncertainty and lack of information.

[1274] The extent of any such competitive advantage would depend on the number of entities that are inaccurately not covered by the definitions and the extent of their swap activities relative to the market in which they are active.

under more or less inclusive rules, the number of swaps they engage in, their connectedness to other institutions and role in the financial system, and the types of financial instruments they would have utilized in the absence of swap dealer and major swap participant regulations.

At this time, it is also not possible to quantify the impact of these rules on the direct and indirect costs and benefits that result from changing the status of an entity that is on the boundaries of the Dodd-Frank Act's definitions of the terms ''swap dealer'' or ''major swap participant.'' The CFTC does not have adequate information about market participants' swap activities to determine which entities will change their activities in response to the definitions, which would be necessary in order to determine the significance of the impact on costs and benefits of including or excluding those entities from the regulations pertaining to swap dealers and major swap participants. Costs may not be estimated in an accurate or meaningful way for many reasons, including because all of the regulations pertaining to swap dealers and major swap participants have not yet been issued in their final form, and because the CFTC does not have adequate information about market participants' existing technology, infrastructure, use of swaps, or cost structure.[1275] Changes in the total benefits resulting from the definitional regulations are also difficult to quantify, since many of the benefits of the swap dealer and major swap participant regulations are indirect, rather than direct. As a consequence, the CFTC may recognize and describe the impact of these rules on the overall costs and benefits deriving from swap dealer and major swap participant regulations, but it is not possible to quantify them at this time.

The applicable provisions of the Dodd-Frank Act regarding the term ''eligible contract participant'' are somewhat different, in that the statute modifies a particular clause in the pre-existing statutory definition of the term and also provides general authority to further define the term. The final rules adopted in this regard provide guidance for the application of these provisions.

3. Comments on the Discussion of Costs and Benefits in the Proposing Release

Some commenters suggested that the discussion in the Proposing Release of the costs and benefits of the proposed rules further defining the terms ''swap dealer, '' ''major swap participant'' and ''eligible contract participant'' was inaccurate or inadequate.[1276] For example, commenters suggested that in considering the final rules, the CFTC should consider empirical data regarding the costs and benefits flowing from the rules,[1277] opportunity costs associated with regulatory uncertainty,[1278] and alternatives that would impose fewer costs.[1279] One commenter suggested that the CFTC should issue a second analysis of the costs and benefits of the rules for public comment,[1280] while another commenter said that the consideration of cost and benefits should include the cumulative cost of interrelated regulatory burdens arising from all the rules proposed under the Dodd-Frank Act.[1281]

Another commenter said that the cost-benefit analyses in the Proposing Release may have understated the benefits of the proposed rules, because focusing on individual aspects of all the rules proposed under the Dodd-Frank Act prevents consideration of the full range of benefits that arise from the rules as a whole, in terms of providing greater financial stability, reducing systemic risk and avoiding the expense of assistance to financial institutions in the future.[1282] This commenter said the consideration of benefits of the proposed rules should include the mitigated risk of a financial crisis.[1283]

We have endeavored to address the commenters' concerns in this Adopting Release by undertaking careful consideration of various alternatives proposed by commenters as described in this section. With regard to the comments suggesting that we consider empirical data, the CFTC found that no comprehensive, publicly available empirical data related to the usage of swaps in all markets is available, and commenters provided very little empirical data to aid us in this rulemaking.

4. Costs and Benefits of the Rules Further Defining ''Swap Dealer''

The Proposing Release proposed certain factors that could be relevant to market participants when determining whether they are covered by the statutory definition of the term ''swap dealer.'' The CFTC received comments in response to numerous issues and considered a variety of alternatives in light of those comments, weighing the costs and benefits of each. In particular, we considered alternatives with respect to the activities indicative of holding oneself out as, or being commonly known as, a dealer in swaps, making a market in swaps, entering into swaps as a ''regular business,'' the exclusion available to IDIs for swaps offered in connection with the origination of loans, inter-affiliate swaps, swaps hedging physical positions, limited dealer status, and the possibility of providing particularized treatment under the definition for various types of entities.

As noted above, in considering these alternatives the CFTC's primary objective was to promulgate a rule under which market participants could efficiently and accurately determine whether they are engaged in any of the activities that are included in the statutory definition of swap dealer, and whether they are covered by any of the exclusions in the statutory definition. The scope of our consideration of these alternatives included the five factors specified in section 15(a) of the CEA. That is, we considered how the promulgation of final rules that would promote application of the definition of the term ''swap dealer'' in a manner that is consistent with the statutory definition would protect market participants and the public, promote the efficiency, competitiveness and financial integrity of the markets,[1284] facilitate price discovery, encourage sound risk management practices and serve the public interest. Rather than describing in a separate section how we applied the elements of section 15(a) in the final rule further defining the term ''swap dealer,'' the discussion below highlights the application of those elements where appropriate.

[1275] Currently, prior to the implementation of Title VII, the U.S. swap market generally is not subject to substantive regulation, and market participants generally do not disclose detailed information about their swap activities and positions. This lack of data reduces our ability to analyze the swap activities of individual market participants, as well as the market as a whole, and thus impacts our ability to analyze the costs and benefits of these rules. Our analysis, out of necessity, is based on data that currently is available.

[1276] *See* letters from API I, NFPEEU, Regional Banks, Sidley and WGCEF I, II and VIII; *see also* letter from FSR III.

[1277] *See* letters from WGCEF I and II.

[1278] *See* letter from Dominion Resources.

[1279] *See* letters from NextEra I and NFPEEU.

[1280] *See* letters from WGCEF I and II.

[1281] *See* letter from NFPEEU.

[1282] *See* letter from Better Markets II.

[1283] Better Markets cited estimates that the worldwide cost of the 2008 financial crisis in terms of lost output was between $60 trillion and $200 trillion, depending primarily on the long term persistence of the effects. *See id.*

[1284] Although by its terms, CEA section 15(a)(2)(B) applies to the futures (not swaps) markets, the CFTC finds this factor useful in analyzing the costs and benefits of these regulations further defining the terms ''swap dealer,'' ''major swap participant'' and ''eligible contract participant'' as well.

a. Indicia of Holding Oneself Out as a Dealer in Swaps or Being Commonly Known in the Trade as a Dealer in Swaps

As discussed above, the Proposing Release set forth activities that could indicate that a person is holding oneself out as a dealer or is commonly known in the trade as a dealer in swaps.[1285] Commenters on this point said that persons who are not swap dealers also engage in some of the activities identified in the proposed rule. In other words, these commenters asserted that these activities are not accurate indicators of swap dealer status.[1286]

Commenters were concerned that if the rule included, as bright-line tests of swap dealer status, the proposed indicators of holding oneself out as, or being commonly known as, a swap dealer, then the rule would lead to an interpretation of the statutory definition that would be more inclusive. This, in turn, would lead to the costs of a more inclusive rule, and possibly the costs of entities abstaining from swap activities to avoid being covered by the definition, as discussed above.[1287]

While we are cognizant that providing no guidance about how to apply the statutory provision stating that the term ''swap dealer'' includes any person who holds itself out as a dealer in swaps or is commonly known in the trade as a dealer or market maker in swaps would deprive market participants of interpretive guidance—thus increasing the direct and indirect costs to apply the rule—we considered the commenters' concern that use of the proposed characteristics as bright-line indicators of swap dealer status could potentially result in significant costs. Therefore, to mitigate the costs of applying the rule and the costs that would result if the rule were more inclusive, the Adopting Release clarifies that the identified activities are not per se conclusive, and could be countered by other facts and circumstances indicating that an entity is not a swap dealer. The CFTC believes that providing guidance about the factors that are correlated with holding oneself out as or being commonly known as a swap dealer—even if not perfectly so—mitigates the risk that the rule would include entities that are not actually covered by the statutory definition and provides benefits in reducing the costs of application of the rule.

[1285] *See* part II.A.1, *supra.*

[1286] *See* part II.A.2.a, *supra.*

[1287] *See* part VII.C.2, *supra.*

b. Making a Market in Swaps

Commenters on this point provided several perspectives on what does and does not constitute market making.[1288] With those comments in view, we considered a number of characteristics for potential inclusion in the rule, and evaluated potential costs and benefits of each before determining that making a market in swaps is best described as ''routinely standing ready to enter into swaps at the request or demand of a counterparty.'' We also further described various activities that constitute routinely standing ready, such as routinely quoting bid or offer prices for swaps, routinely responding to requests made directly by potential counterparties for bid or offer prices, etc. The alternative options we considered are discussed below in light of the five broad areas specified in section 15(a) of the CEA.

Offer swaps on both sides of the market. The proposed rule stated our view that an entity may be a market maker in swaps even if the entity does not enter into swaps on both sides of the market. Several commenters suggested the rule should require that an entity enter into swaps on both sides of the market as a prerequisite to market maker status.[1289] We have considered these comments and concluded that an entity could be a market maker by offering swaps on one side of the market, while entering into transactions on the other side of the market using other financial instruments.

Accordingly, using presence on both sides of the market as a determinative factor in applying the definition of the term ''swap dealer'' could cause the final rule to be under-inclusive by excluding entities that function as market makers by entering into swaps on one side of the market. In addition, some entities may limit their swap dealing activities to one side of the market in an attempt to avoid being covered by the definition, again leading to the rule being under-inclusive.

Excluding cleared swaps from consideration. Some commenters said cleared swaps should not be considered in determining whether an entity is a swap dealer.[1290] Moreover, they suggested that dealers operating through clearinghouses might choose to exit the market if required to register as swap dealers, which would reduce liquidity.[1291]

It is possible that some entities whose swap dealing activities are limited to cleared swaps will abstain from those activities in order to avoid being covered by the definition, leading to costs associated with entities abstaining from the market, as described above. Other such entities may continue their swap dealing activities and incur the initial and ongoing costs of compliance with swap dealer regulations. Benefits are linked to these compliance costs, however. For example, the swap dealer business conduct requirements are expected to provide benefits in terms of protecting market participants and the public. In any case, we note that the statutory definition of the term ''swap dealer'' does not include any factor considering whether the swaps that an entity enters into are cleared as opposed to not cleared. Therefore, the costs raised by commenters resulting from the absence of an exclusion of cleared swaps are costs that result from the statutory definition and not the final rule.

c. Regularly Entering Into Swaps With Counterparties as an Ordinary Course of Business

The final rule incorporates the statutory provisions that the term swap dealer includes a person that ''regularly enters into swaps with counterparties as an ordinary course of business for its own account'' and ''does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.'' The CFTC believes that the determinative issue in interpreting these provisions is whether an entity's activity of entering into swaps is part of its usual and normal course of business and is identifiable as a swap dealing business, as discussed above.[1292] This Adopting Release also describes certain activities that constitute both entering into swaps ''as an ordinary course of business'' and ''as a part of a regular business.''[1293]

The CFTC believes that dealers frequently engage in the activities described in this Adopting Release, while non-dealers do not.[1294] As a consequence, such activities are useful indicators of swap dealing activity and it is appropriate to incorporate them in

[1288] *See* part II.A.2.b, *supra.*

[1289] *See* letters cited in notes 52 to 54, *supra.*

[1290] *See* letters from Newedge and Traders Coalition. The commenters said that considering cleared swaps in determining if an entity is a swap dealer may cause entities to reduce their use of cleared swaps, which would be contrary to the general purpose of the Dodd-Frank Act to encourage clearing.

[1291] *See* letters from CMC and Traders Coalition.

[1292] *See* part II.A.4.c, *supra.*

[1293] *See id.*

[1294] For example, commenters suggested that these types of activities are indicative of swap dealing. *See* letters from EEI/EPSA, Hess, NextEra I, Utility Group and Vitol.

the guidance interpreting the final rule in order to properly apply the statutory definition.

d. The Dealer-Trader Distinction

The Adopting Release incorporates the dealer-trader distinction as a consideration when identifying swap dealers. While not dispositive, the CFTC anticipates that the dealer-trader distinction will be useful as a consideration, particularly in light of the degree to which it overlaps with many of the other characteristics identified in the Adopting Release that are indicative of dealing activity. The dealer-trader distinction is likely to be familiar to some market participants that must determine whether they are swap dealers, and to the extent that this is true, the CFTC believes that its incorporation as a factor in the swap dealer analysis will help to reduce uncertainty for those entities, thereby reducing their costs of determining whether they are dealers.[1295] By incorporating the dealer-trader distinction as one consideration within a broader facts and circumstances approach, the CFTC has minimized the costs of under inclusion that could arise if the distinction were used as a bright line test to exempt entities that would otherwise be subject to regulation as swap dealers.[1296]

e. Limited Designation as a Swap Dealer

The Proposing Release provided that ''a person who is a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into'' but explained that an entity could apply for limited designation. Several commenters suggested that the CFTC should allow for the possibility of ''presumptive limited designation'' as a swap dealer in order to reduce costs.[1297] We have decided, however, not to provide for a presumptive limited designation in the final rule. While a presumptive limited designation would, for the entities that seek it, mitigate the costs of applying for limited designation and any costs related to uncertainty about whether limited designation will be granted,[1298] it could also lead to costs arising from the rule being less inclusive. Persons engaged in a broad range of activities that are all covered by the definition of the term ''swap dealer'' would have a significant incentive to improperly claim eligibility for a presumptive limited designation. This would hinder the application of swap dealer regulations to all of their swap dealing activities and thereby increase costs in terms of lesser protection of market participants and the public, as well as impairment of sound risk management practices.

Commenters suggested that to reduce the costs of determining whether a particular person is eligible for a limited designation as a swap dealer, the CFTC should set out certain criteria that would be relevant to that determination, such as the degree of complexity of an entity's swap activities, what percentage of an entity's total swap activities are dealing activities, the relationship between the entity and its swap counterparties, and how difficult it would be to distinguish between its ''designated'' and ''non-designated'' swaps.[1299]

Rather than setting forth specific factors to be considered with respect to limited designation as a swap dealer, this Adopting Release takes a facts and circumstances approach, stating that all relevant factors will be considered in the determination. This Adopting Release also states that an important factor in determining whether a swap dealer qualifies for a limited designation is whether the swap dealer can demonstrate that the internal structure to which the limited designation applies (*e.g.,* a division or business unit) complies with the swap dealer requirements. If such a structure is not pre-existing, the swap dealer will incur costs in creating a structure for its swap dealing activity in a manner that would qualify for limited designation. These costs depend on the circumstances of that swap dealer and cannot be quantified at this time; however, such costs are likely to be significant for at least some swap dealers. On the other hand, swap dealers who do qualify for the limited designation will benefit from reduced ongoing compliance costs since some swap dealer requirements are expected to apply to only those activities encompassed by the limited designation.[1300] This flexible approach will allow entities to organize themselves in a manner that allows them to maximize the value of limited designation, so long as they are able to demonstrate that they will comply with swap dealer requirements. In settling on this flexible approach, we considered how the use of a limited designation would allow entities to minimize the effect of swap dealer registration on their swap activities, which fosters efficiency while also promoting sound risk management practices through swap dealer regulation.

The facts and circumstances approach to limited designation will likely lead to some costs arising from uncertainty among market participants about whether steps they have taken or may take will permit them to qualify for a limited designation. However, we believe that market participants may mitigate such uncertainty costs by contacting staff to discuss changes under consideration, or by applying for limited designation on the basis of planned changes (rather than making the changes and then submitting the application).

f. *De Minimis* Exception

The Dodd-Frank Act requires that the CFTC exempt from designation as a swap dealer any entity ''that engages in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of customers,'' and that the CFTC ''promulgate regulations to establish factors with respect to the making of this determination to exempt.''[1301]

The proposed rule set out certain quantitative standards for identifying those entities whose swap activities were sufficiently small that applying swap dealer regulations to them would not be warranted.[1302] Commenters raised several points regarding the potential costs and benefits of the proposed approach. We considered these points, addressed below, in preparing the final rule, which provides

[1295] *See* letters from CCMR I and MFA I.

[1296] *See* letter from AFSCME.

[1297] *See* part II.E.2.a, *supra.* Several commenters stated that it is unduly burdensome to require swap dealers to apply swap dealer requirements to all of their swaps (including swaps not resulting from dealing activity) while they pursue limited designation. *See, e.g.,* letters from Capital One, Farm Credit Council I and FHLB I. Another commenter suggested that not allowing for a presumptive limited designation could cause some community lenders to cease offering swaps. *See* letter from Capital One.

Another commenter suggested that to reduce costs, presumptive limited designation should be available for any formal division of an entity, to avoid the costs that would arise if any entity were to reorganize its operations without certainty that limited designation would be available to the reorganized entity. *See* letter from WGCEF VII.

[1298] Entities that apply for limited designation as a swap dealer will be required to prepare a submission to the CFTC demonstrating their compliance with swap dealer regulations in the context of limited designation.

[1299] *See* letters from Capital One and FHLB I.

[1300] Some swap dealer regulations may be applied at the transactional level, while others may affect the operations and capital structure of the entity beyond the swaps or activities for which it has a limited designation. On this topic, some commenters suggested that limited designation should allow the swap dealer to limit operational compliance with swap dealer requirements to the portion of the business that is designated as a swap dealer. *See* letters from FSR I and WGCEF VII. Another commenter stated that the CFTC should not require additional reporting regarding the non-dealing activities. *See* letter from Cargill.

[1301] CEA section 1a(49)(D), 7 U.S.C. 1(a)(49)(D).

[1302] *See* part II.D.1, *supra.*

that an entity qualifies for the *de minimis* exception if the notional amount of its swap positions or security-based swap positions over the prior 12 months arising from its dealing activity is $3 billion or less, and the notional amount of such positions with ''special entities'' is $25 million or less. However, during a phase-in period following the effective date of the final rules, an entity will not be required to register as a swap dealer if the notional amount of the swap positions it enters into over the prior 12 months arising from its dealing activities is $8 billion or less.[1303]

In determining the level of the notional amount thresholds for the *de minimis* exception, we considered comments stating that if the thresholds were set inappropriately low, persons engaged in a smaller quantity of swap dealing would face a choice between reducing their swap dealing activities to a level below the thresholds or registering as a swap dealer and incurring the costs of compliance with swap dealer regulation.[1304] It follows from these comments that these entities would incur costs in making a decision about the extent to which they should engage in swap dealing, although none of the commenters specifically quantified the costs of making that decision. Commenters also expressed a concern that if many entities chose to reduce or cease their swap dealing activities in response to the *de minimis* thresholds, the availability of swaps may be reduced, particularly to the smaller swap users that typically engage in swaps with such entities, which could lead to costs for those smaller swap users.[1305] Some commenters said that the CFTC should justify the final thresholds for the *de minimis* exception with an economic analysis; however, these commenters did not propose specific analyses the CFTC should perform or provide specific information that should be included in the analysis.[1306]

The CFTC evaluated data regarding index CDS that was provided by the SEC, and made that analysis available to the public.[1307] The data showed that 80.8% of all participants in the index CDS market entered into index CDS with an aggregate notional amount of less than $3 billion during 2011, and 88.7% of such market participants entered into index CDS with an aggregate notional amount of less than $8 billion during the same period of time. However, the 19.2% and 11.3% of market participants above those respective thresholds, accounted for 98.9% and 97.8% of the total notional amount of index CDS entered into during that time, which suggests that a relatively small number of entities are responsible for a large majority of activity in the index CDS market. The data also showed that 91.7% of all entities with 3 or more counterparties that are not recognized by ISDA as dealers entered into index CDS with an aggregate notional amount of $9 billion or more during 2011, suggesting that a large majority of dealers in index CDS likely enter into index CDS with an aggregate notional amount of $9 billion or more per year.

These observations, and any conclusions derived from them, however, must be qualified by limitations of the data, including: (i) Although we expect that the data covers a very large part of the index CDS market, we cannot verify what percentage of all index CDS are represented in the data; (ii) the data is not filtered to reflect activity that would constitute swap dealing under the Dodd-Frank Act, so it is not possible to use the data to draw conclusions regarding any specific entity's status as a swap dealer and (iii) the data does not cover other classes of swaps that are relevant to the *de minimis* threshold for swap dealers, such as interest rate swaps, equity swaps, foreign exchange swaps or other commodity swaps.[1308] In light of these limitations, any conclusions drawn from the index CDS data must be regarded as provisional.

We note that no matter the level at which the *de minimis* thresholds are set, there will always be some entities engaged in a quantity of swap dealing at or above the threshold level that will face the choice described by the commenters. As noted above, we considered the costs and benefits of dealer regulation in determining the notional amount standards in the final rule.[1309] Among the costs we considered were those that would result if entities reduce or cease their swap dealing activities in response to the *de minimis* threshold and swaps become less available in smaller or niche markets. We considered that this could impact the competitiveness of those markets and undermine the ability of market participants to practice sound, cost-effective risk management.[1310] In principle, a higher threshold would promote a larger pool of swap-dealing entities (since entities with swap dealing activity below the threshold need not incur costs to comply with swap dealer regulations), meaning more potential counterparties available to swap users. On the other hand, a greater quantity of swap dealing would be undertaken without the customer protection, market orderliness and market transparency benefits of dealer regulation. This, in turn would impair the protection of market participants and the public, and undermine sound risk management practices, as described above.[1311] We considered these factors in determining the level of the notional amount standard in the final rule.

Some commenters advocated use of alternative measures (such as an entity's current uncollateralized exposure from swaps, or the number or frequency of swaps) as the *de minimis* gauge.[1312] Some commenters suggested that various types of entities should be subject to different *de minimis* thresholds,[1313] or that the rule should vary the *de minimis* threshold by type of swap.[1314] Some commenters suggested that the *de minimis* exception should take into account the purpose of an entity's swap dealing activities or the entity's general characteristics.[1315]

The CFTC believes that these proposed alternatives are unlikely to better promote the efficiency, competitiveness and financial integrity of the markets, or yield other benefits to a greater extent than the approach adopted in the final rule.[1316] On the

[1303] *See* CFTC Regulation § 1.3(ggg)(4)(ii).

[1304] *See, e.g.,* letters and meetings cited in notes 377 to 381, *supra.*

[1305] *See, e.g.,* letters and meetings cited in note 378, *supra. See also* Roundtable Transcript at 201 (remarks of John Janney, Large Public Power Council).

[1306] *See* letters from API I, FSR VI, Midsize Banks, Regional Banks and WGCEF I.

[1307] *See* memorandum to the public comment file from the CFTC Office of the Chief Economist.

[1308] *See id.*

[1309] *See* part II.D.3.a, *supra.* In particular, we note here that the higher notional amount standard in the final rule, as compared to the proposed rule, should reduce the number entities that will face the choice described by the commenters.

[1310] As noted above, it is not possible to quantify these potential costs with mathematical precision. *See* note 421, *supra.* The commenters on these points did not provide quantifications of such costs.

[1311] Commenters expressed various views as to what level of benefits flow from dealer regulation. *See, e.g.,* Roundtable Transcript at 137–43 (remarks of John Janney, Large Public Power Council, Bella Sanevich, NISA Investment Advisors, LLC, and Brenda Boultwood, Constellation)

[1312] *See* letters cited in notes 384 and 385, *supra.*

[1313] *See* letters from COPE I, Farm Credit Council I and MFX II and meeting with Electric Companies on April 13, 2011.

[1314] *See* letters from Gavilon II and ISDA I.

[1315] *See* letters from Farm Credit Council I, FHLB I and MFX II.

[1316] We considered the proposed options in terms of whether they would promote: protection of market participants and the public; financial integrity and efficiency of swap markets; price discovery; sound risk management principles; and other public interest considerations. The commenters suggesting other measures did not offer

Continued

other hand, requiring market participants to consider more variables in evaluating application of the *de minimis* exception would likely increase their costs to make this determination. In light of these considerations, we concluded that to establish a single notional threshold for all of an entity's swap dealing would best protect the markets and the public, foster efficiency and competitiveness and serve the public interest.

We believe that using a *de minimis* threshold based on current uncollateralized exposure would lead to costs of calculation, which are discussed below in connection with the definition of major swap participant. Also, while current uncollateralized exposure may be a useful measure of the risk arising from a swap position, it fails to address the significance of an entity's swap dealing activity in terms of customer protection and market orderliness, which are significant elements in the determination of whether an entity is engaged in a *de minimis* quantity of swap dealing.[1317]

In response to commenters' suggestions, we considered the feasibility of assessing the breakeven point at which a potential swap dealer would earn enough profit from its swap dealing to support the costs to comply with swap dealer regulation.[1318] However, this assessment would require access to non-public, proprietary data regarding the gross margins associated with the swap dealing activity of a wide variety of market participants. Such data is not available to the CFTC.

One commenter suggested that the *de minimis* threshold for swaps related to a particular physical commodity should increase if the general price of the commodity increases, so that a constant quantity of the commodity could be hedged through a particular swap dealing entity without that entity exceeding the threshold.[1319] However, this approach, which eschews reliance on the dollar value of swaps, would raise the complex question of when the level of dealing in swaps relating to the physical quantity of various commodities becomes more than *de minimis.* We do not believe that this approach would provide sufficient additional benefits beyond those resulting from the final rule to justify the additional costs of application.

Commenters also suggested that, in order to simplify application of the *de minimis* exception and thereby reduce costs, the final rule should include an overall threshold that considers an entity's swaps and its security-based swaps.[1320] However, the statute includes two different *de minimis* exceptions regarding the quantity of an entity's swap dealing and its security-based swap dealing. Therefore, the suggested approach would be contrary to the statute.

The final rule provides for a lower *de minimis* gross notional threshold (*i.e.,* $25 million over the course of twelve months) for swaps in which the counterparty is a ''special entity,'' as that term is defined in CEA section 4s(h)(2)(C) and CFTC Regulation § 23.401(c)). While it is possible that, for the reasons noted above, this lower threshold could reduce the number of potential providers of swaps to special entities, which may constrain the ability of special entities to practice sound risk management strategies in a cost-effective manner, we note that the Dodd-Frank Act provides special entities with additional protections from market practices that could increase the risks they face in using swaps.[1321] We believe the threshold in the final rule reflects an appropriate consideration of these potential costs and the benefits that result in terms of serving the public interest.

Several commenters responded to the proposed *de minimis* thresholds limiting the number of an entity's counterparties and swaps, suggesting that the factors would not be useful in identifying entities engaged in a *de minimis* quantity of swap dealing.[1322] The final rule omits these factors. We believe that, in general, entities which will restrict their activities so as to remain under the *de minimis* notional amount threshold are likely to be those entities that are most willing to provide swaps with lower notional values. Counting an entity's number of counterparties or swaps as *de minimis* factors could inappropriately discourage entities from providing swaps in smaller notional amounts. This, in turn, would likely make it more difficult for persons seeking small notional amount swaps to find dealers willing to provide them, which may increase their costs of hedging and discourage sound risk management practices.

g. Exclusion of Swaps Entered Into by IDIs in Connection With the Origination of Loans

The statutory definition of the term ''swap dealer'' excludes an IDI ''to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.'' [1323] The proposed rule would implement this statutory exclusion by providing that an IDI's swaps with a customer in connection with originating a loan to that customer are disregarded in determining if the IDI is a swap dealer. To prevent evasion, the proposed rule further provided that the statutory exclusion does not apply where the purpose of the swap is not linked to the financial terms of the loan, the IDI enters into a ''sham'' loan, or the purported ''loan'' is actually a synthetic loan such as a loan credit default swap or loan total return swap.

Commenters on the costs and benefits of the proposed approach focused on the benefits of a flexible application of the exclusion, which they asserted would promote the offering of swaps by IDIs in connection with loans and thereby more closely tailor the risks of a loan to the borrower's and the lender's needs, and promote the risk-mitigating effects of swaps.[1324] In terms of costs, commenters were concerned that a narrow application of the loan origination exclusion would cause IDIs to seek to avoid being covered by the definition of the term ''swap dealer'' by limiting their offering of swaps in connection with the origination of loans. Commenters said that the IDIs' limitation of their swap offerings could lead borrowers to take steps with negative ramifications, such as reduced usage of swaps for risk mitigation (which could lead to costs from an increased risk of default by the borrower), shifting from the lending institution to another institution for the swap (which could lead to inefficiency costs since two different institutions would be involved), or shifting to

a systematic analysis of whether the measures would lead to more accurate determinations in all or even most cases, and we do not believe such an analysis would be possible at this time due to the lack of information regarding how swaps are used in all markets. *See generally* part II.D.4.a, *supra.*

[1317] *See* part II.D.3.e, *supra.*

[1318] *See* Roundtable Transcript at 193–94 (remarks of James Cawley, Javelin Capital Markets, and Camille Rudge, The PrivateBank and Trust Company).

[1319] *See* letter from NCFC I.

[1320] *See* letter from NYCBA Committee.

[1321] *See generally* Roundtable Transcript at 210–15 (remarks of Mary-Margaret Collier, Tennessee Comptroller of the Treasury, John Janney, Large Public Power Council and Bella Sanevich, NISA Investment Advisors, LLC).

[1322] Some commenters suggested that the number of counterparties and the number of swaps are not indicators of systemic risk. *See* letters cited in note 387, *supra.* Others claimed that the *de minimis* standard should not limit the number of an entity's counterparties for policy reasons. *See* letters from Chesapeake Energy and Land O'Lakes I. Commenters also suggested that using number of counterparties or number of swaps as a factor would create an uneven playing field because it would discourage provision of swaps to small end users. *See* letters from EEI/EPSA and NMPF.

[1323] *See* CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A).

[1324] *See, e.g.,* letter from B&F Capital I.

another institution for both the loan and the swap (which could increase risk by increasing concentration in the markets for loans and swaps).[1325] To mitigate these costs, commenters suggested that the loan origination exclusion should be construed broadly, particularly with respect to the range of loans covered,[1326] the type of swaps covered,[1327] the required timing for entering into a swap relative the corresponding loan's origination,[1328] and which financial institutions could be eligible for this exclusion.[1329]

The final rule limits the loan origination exclusion to swaps with terms that are directly related to the financial terms of the associated loan, or are required by loan underwriting criteria to to be in place as a condition of the loan in order to hedge commodity price risks incidental to the borrower's business. We believe that extending the loan origination exclusion further, to encompass a broader range of swaps connected to a borrower's other business activities would expand the exclusion beyond its statutory limits. This would lead to the costs associated with the rule becoming less inclusive, such as decreased protection of market participants and the public, as well as impaired risk management practices and market efficiency, as described above.

This Adopting Release also includes guidance that the term ''loan'' should be construed for this purpose in accordance with the common law definition of the term, in order to efficiently allow all interested parties to determine which transactions and instruments are eligible to be a basis for the exclusion. The CFTC believes that a detailed definition of the term ''loan'' covering all of the potential variations in how loans may be structured would be both costly to apply (because of the level of analysis required to determine if a particular instrument qualifies as a loan) and unnecessary (because a common law definition of the term ''loan'' has already been established).

We believe that extending the loan origination exclusion to cover any swap entered into by an IDI and a borrower at any point during the life of the loan would be contrary to the statutory terms of the exclusion, which focuses specifically on swaps entered into in connection with the ''origination'' of loans, and could lead to the costs of the rule being less inclusive described above. Rather, since a primary element of a loan is the transfer of money from the lender to the borrower, the final rule provides that the loan origination exclusion can cover an otherwise eligible swap if the swap is entered into during a specified period around either the execution of the loan agreement or any draw of principal under the loan. We believe that this aspect of the final rule accurately reflects the statutory terms of the exclusion and will serve the public interest by being neither over-inclusive nor under-inclusive.

Commenters generally agreed with the statement in the Proposing Release that the exclusion should be available to IDIs in a loan syndicate, purchasers of a loan, assignees of a loan, and participants in a loan.[1330] We believe that allowing the loan origination exclusion to extend to IDIs that participate in loans accurately reflects the statutory terms of the exclusion, so long as the IDIs' participations are meaningful. Therefore, the rule includes a minimum participation requirement in order to avoid inappropriate exploitation of the exclusion—*i.e.,* IDIs participating minimally in a loan syndication to gain eligibility for the exclusion — which could lead to costs of under-inclusion. The final rule allows the exclusion to be applied to a swap (which is otherwise covered by the exclusion) even if the notional amount of the swap is different from the amount of the loan tranche assigned to the IDI, so long as the IDI meets the minimum participation requirements in the loan. This provision is expected to facilitate minimization of the number of swaps borrowers enter into, and the number of counterparties they face with respect to those swaps, when entering swaps in connection with loans, thereby reducing the operational costs and risks born by borrowers.

h. Inter-Affiliate Swaps

The Proposing Release stated that the dealer analysis should consider the economic reality of swaps between affiliates, and preliminarily concluded that swaps ''between persons under common control may not involve the interaction with unaffiliated persons that we believe is a hallmark of the elements of the definitions that refer to holding oneself out as a dealer or being commonly known as a dealer.'' Commenters generally agreed with the proposed approach.[1331] Some commenters expressed the view that the proposed approach would facilitate the use by affiliated corporate groups of centralized market-facing conduits, which would promote efficient risk management.[1332]

The final rule interprets the dealer definition not to encompass a person's activities with respect to swaps between legal entities that are under common majority ownership. The final rule also provides that the swap dealer definition does not encompass the activities of a cooperative with respect to swaps between the cooperative and its members. We believe that such swaps generally serve to allocate or transfer risks within an affiliated group, rather than to move those risks out of the group to an unaffiliated third party, and therefore to include such swaps in the determination of whether an entity is a swap dealer would not be consistent with the statutory definition, nor would it serve the public interest or promote the protection of markets or the public. We also agree with commenters that the use of conduit structures to enter into swaps on behalf of commonly controlled entities has the potential to promote sound risk management practices and the efficiency of the swap markets. Therefore, including these swaps in the determination of whether a person is covered by the definition of ''swap dealer'' is not likely to provide significant benefits, but to include entities in the definition by virtue of these swaps would lead to the costs of the rule being overinclusive, as described above.

i. Exclusions of Swaps Entered Into for Hedging Physical Positions

Several commenters said that swaps used to hedge risks should not be considered in determining whether a person is a swap dealer. While the statutory definition of the term ''swap dealer'' does not specifically address hedging activity, the Commissions believe that in certain situations, entering into a swap for the purpose of hedging a physical position is not indicative of, and is not, swap dealing.

[1325] Commenters said that if, because of concern about triggering the *de minimis* threshold, IDIs were not willing to offer swaps at times when the borrower's hedging needs change due to loan related events, borrowers would have an incentive to seek out lenders who are not so constrained, and this incentive would be particularly strong if a borrower was not able to provide collateral to secure both a loan and a related swap from two separate counterparties. *See* letters from BOKIII, FSR VI and Rabobank, New York Branch. One commenter suggested that the impact of a narrow loan origination exclusion should be considered in tandem with the *de minimis* exception, because an expansion of one of the exceptions could offset some of the costs that result from a narrow interpretation of the other. *See* letter from FSR VI.

[1326] *See* letters cited in notes 308 to 313, *supra.*

[1327] *See* letters cited in notes 299 to 301313, *supra.*

[1328] *See* letters cited in notes 302 to 304313, *supra.*

[1329] *See* letters cited in notes 314 to 317304313, *supra.*

[1330] *See* letters cited in note 305313, *supra.*

[1331] *See* letters cited in note 341, *supra.*

[1332] *See* letters from Kraft, ONEOK and Shell Trading II.

An interim final rule provides that the determination of whether a person is a swap dealer will not consider a swap that the person enters into for the purpose of offsetting or mitigating certain price risks as defined in the rule, if the swap meets conditions specified in the rule.

When a person enters into a swap for the purpose of hedging the person's own risks in specified circumstances, an element of the swap dealer definition—the accommodation of the counterparty's needs or demands—is absent. Therefore, consistent with our overall interpretive approach to the definition, the activity of entering into such swaps (in the particular circumstances defined in the rule) does not constitute swap dealing. Providing an exclusion of such swaps from the swap dealer analysis reduces costs that persons using such swaps would incur in determining if they are swap dealers.

j. Exclusions of Certain Swaps Entered Into by Floor Traders

The CFTC believes that it would be inappropriate to require persons who are registered with the CFTC as floor traders to include in the swap dealer analysis swaps that they enter into, using only proprietary funds, on or subject to the rules of a DCM or SEF and submit for clearing to a DCO, and that meet certain other conditions specified in the rule. The CFTC believes that a requirement that these persons register as swap dealers (if the swap dealer registration requirement were to apply) could lead to duplicative regulation, since they are already registered as floor traders.

Providing an exclusion of such swaps from the swap dealer analysis reduces costs that persons using such swaps would incur if such swap activity were to require them to register as swap dealers. Since the swaps are entered into on an exchange, by a person who is registered with the CFTC and cleared, we expect that the potential impact on the transparency, market orderliness and other goals of dealer registration from excluding these swaps from the dealer analysis would be minimal. Importantly, the rule requires that the person comply with the record keeping and risk management requirements of CFTC Regulation §§ 23.201, 23.202, 23.203, and 23.600 with respect to each such swap as if the person. were a swap dealer. The requirement to comply with these important provisions reduces the potential for negative consequences from this rule.

k. Exclusions for Particular Types of Entities

Several commenters said the CFTC should interpret the statutory definition of ''swap dealer'' to include per se exemptions from the definition for certain types of persons or persons who engage in certain activities.[1333] These commenters argued, in general, that there would be little or no benefit from construing the statute as covering these persons or activities because they did not contribute to the causes of the recent financial crisis or they do not pose systemic risk.[1334] These commenters also asserted that to interpret the statutory definition to cover these types of persons or activities would lead to the costs of the rule being more inclusive, as noted above.[1335]

As stated previously, we note that the statutory definition of the term ''swap dealer'' applies to ''any person'' who engages in the activities described in the statute and who does not fall within the specific exceptions and exclusions in the statute. Therefore, the costs of applying the statutory definition to certain types of persons identified by the commenters arise from the provisions of the statute and not from the CFTC's rulemaking. In addition, to provide the requested per se exemptions from the statutory definition could also introduce the costs of the rule being less inclusive discussed above, such as decreased protection of market participants and the public, as well as impaired risk management practices and market efficiency.

Regarding the argument that there is no or little economic benefit from interpreting the statutory definition to cover persons whose failure would not create systemic risk, the commenters making this point did not provide evidence or analysis to indicate whether there would be systemic risk concerns if they were to fail. While some of these commenters asserted that their swap activities are not comparable to the activities of the financial institutions that are generally considered to have had a significant role in the recent crisis, and some asserted that persons eligible for the claimed exemptions did not play a role in the crisis, even if these assertions are taken as true they are not determinative of whether persons of this type could in fact be a source of systemic risk. We emphasize that the relevant question in this regard would not be whether the failure of any one person within the class covered by a suggested exemption would be the source of systemic risk, but rather whether a failure of several or many such persons would impact the efficiency, competitiveness and financial integrity of the markets, impair sound risk management practices or otherwise affect the protection of markets and the public.[1336] To be clear, we do not believe and we are not asserting that any of the types of persons discussed by the commenters in this regard necessarily could be the source of systemic risk concerns, but rather we point out that the comments in this regard were general assertions rather than a presentation of specific evidence or analysis to support the claimed exemptions from the statutory definition. Thus, even if the statute allowed for such exemptions, which we do not believe it does, none of the commenters provided substantial support for their assertions. Also, as noted above we believe that the dealer definitions should be construed in the light of several benefits of dealer regulation (including protection of the markets and the public, encouraging the efficiency, competitiveness and financial integrity of the swap markets, and the overall public interest) and not just in terms of mitigating potential systemic risk.

In any case, we believe that the final rule and the guidance in the Adopting Release provide clarifications that in many respects mitigate the costs that were raised by some of the commenters seeking per se exemptions from the definition.

l. Other Comments on the Rule Further Defining the Term ''Swap Dealer''

Commenters cited other potential costs that could arise from the proposed approach to interpreting the statutory definition of the term ''swap dealer,'' suggesting that the proposed approach was not sufficiently clear, may result in multiple interpretations, and risks

[1333] *See* part II.A.2.f, *supra.*

[1334] *See id.*

[1335] In addition, comments along these lines asserted that to apply dealer regulation to certain persons who are already subject to different financial regulations would be duplicative and could create additional costs. *See* letters from Farm Credit Council I, FERC Staff, Fidelity, GIC, MFA I, and NARUC and joint letter from ICI and SIFMA AMG.

[1336] This is so because the commenters requested per se exemptions for broad classes of persons and activities, rather than for specific persons. Whether a particular type of market participant, as a group, can be the source of systemic risk depends on, among other things, the financial strength of each entity in the group, the number and financial strength of their counterparties, the total amount of swap business conducted, the amount and types of margin posted by the entities in question as well as by their counterparties, what portion of their swap positions are cleared, the volatility of each swap's value as well as the covariance in value for all the swaps in their portfolio, and numerous other economic factors.

covering entities that would not actually be covered by the statutory definition, if it were correctly interpreted.[1337] Other commenters suggested that there could be high costs from application of the swap dealer regulations due to erroneous interpretation of the statutory definition of the term ''swap dealer,'' including high costs of regulatory uncertainty,[1338] and therefore it is particularly important that the final rule provide guidance on the application of the statutory definition.[1339] For example, these commenters said that if the final rule does not adequately clarify application of the statutory definition, market participants may incur unnecessary costs to avoid being covered by the definition of ''swap dealer,'' including by avoiding swap activities that are associated with areas of uncertainty under the rule.[1340]

Some commenters said that the proposed rule captures too broad a range of entities in its further definition of the term ''swap dealer,'' [1341] and that the asserted over-inclusiveness of the proposed rule could lead to direct costs for covered entities as well as indirect costs for covered entities, other swap market participants, and the public.[1342] For example, the commenters assert that as entities change their swap activities in reaction to the rule, the objectives they previously achieved through swaps may either be compromised, accomplished through less suitable means, or both.[1343] As another example, the commenters assert that changes in swap activities may reduce the choice of counterparties available to market participants, which may lead to unfavorable financial terms for swaps and imperfect matches between risks and swaps, which could in turn lead to reduced usage of swaps and lower liquidity in the swap markets, resulting ultimately in increased costs of risk mitigation in general.[1344]

The commenters did not quantify the extent of these costs that may arise when entities change their swap activities in reaction to the rule further defining the term ''swap dealer.''

We believe that by addressing the concerns regarding the costs and benefits of specific aspects of the rule, discussed above in section V.C.5., the final rule will also mitigate the indirect costs that may arise from the rule. While it is impossible to completely eliminate the costs that entities will incur in interpreting the rule and applying it to their particular swap activities, we believe the final rule mitigates these costs by providing detailed guidance. Also, these costs may decrease over time as precedents are established to provide further guidance on the application of the statutory definition.

For example, the final rule and the guidance in this Adopting Release mitigate the costs of uncertainty in application of the statutory definition by providing more detail about the interpretation of the statute's inclusion of any person who ''makes a market in swaps'' and the statute's exclusion of a person that enters into swaps, ''but not as a part of a regular business.'' The guidance describes activities that are indicative of making a market in swaps and of entering into swaps as a part of a regular business. The final rule also provides details regarding the scope of the statutory exclusion of swaps in connection with the origination of loans and the *de minimis* exception. Also, the final rule provides that swaps between majority-owned affiliates, swaps entered into by a cooperative with its members, swaps entered into for hedging physical positions as defined in the rule, and certain swaps entered into by floor traders, are excluded from the swap dealer determination. These provisions will reduce the costs that market participants incur in determining whether they are covered by the statutory definition of the term ''swap dealer.''

While it is possible that some entities could choose to cease or reduce their swap dealing activities to avoid the costs of compliance with swap dealer regulations, which could impair the efficiency and competitiveness of the swap markets, there are also likely to be significant benefits derived from swap dealer regulation, including reduced counterparty risk, better protection of the markets and the public, and more assured financial integrity of the markets and improved market transparency. Moreover, whether such reductions in activity will lead to reduced liquidity in the swap markets, as some commenters assert, is not certain. For example, if such reductions in swap activity occur, new swap dealers may organize themselves or existing swap dealers may expand to accommodate the demand for swaps, although the time that would be required for this to occur and the extent to which it would occur are uncertain.

In addition, indirect costs could arise from the rule being less inclusive. For example, if the rule considered factors that are not relevant to whether an entity is actually covered by the definition, such as by providing that only entities that make a two-sided market in swaps are makers of markets in swaps, then it is possible that entities could change their behavior in response to that aspect of the rule. For example, entities that previously made a two-sided market in swaps may decide to make only a one-sided market in swaps, potentially leading to the types of costs that commenters said would arise if entities reduce their swap activities.

Last, several commenters raised questions and offered suggestions about the timeline for implementation of swap dealer requirements [1345] and the sequencing of the CFTC's rulemaking.[1346] While we understand that appropriate timing of rulemaking and the implementation of the requirements applicable to swap dealers will play a significant role in mitigating inappropriate or avoidable costs flowing from those requirements, this rulemaking is limited to the interpretation of the statutory definition of the term ''swap dealer,'' and so these

[1337] *See* letters from AIMA I, API I, Dominion Resources, FSR III, NRG Energy, Peabody and Utility Group.

[1338] *See* letters from API I, Dominion Resources, FERC Staff, NextEra I and WGCEF VIII.

[1339] *See* letters from API I, FSR III, M&T I, Utility Group and Vitol.

[1340] One area cited by commenters as a potential source of such costs is the application for limited designation as a swap dealer. Commenters were concerned that if the parameters of the limited designation were uncertain, entities may incur opportunity costs from avoiding activities that may be incompatible with a limited designation, planning and operational costs from changing corporate structure in ways that are not actually necessary to obtain a limited designation, and other costs from modifying swap activities in response to uncertainty about the steps necessary for a limited designation. *See* letters from API I, BG LNG I, Dominion Resources, NextEra I, Vitol and WGCEF VII.

[1341] *See* letters from BG LNG I, FSR III, NCGA/NGSA I, and WGCEF I, II and VIII.

[1342] *See* letters from API I, Atmos Energy, BG LNG I, Dominion Resources, Hess, NCGA/NGSA Iand Vitol, and WGCEF VIII.

[1343] For example, an entity using swaps to hedge price risks may choose not to hedge or to use a different instrument to hedge similar positions. If it chooses not to hedge, its risk management objectives may be compromised. If it chooses to hedge using futures or some other instrument, that instrument may be less suitable for various reasons (*e.g.,* basis risk, rollover risk, liquidity risk, less customizability, different fee structure, etc.). However, it is not possible to quantify the costs and benefits resulting from these choices without knowing the terms of the individual swaps the entities would have used and the available alternatives for each of those swaps.

[1344] On the other hand, entities may find that they can achieve their risk management goals using forward contracts, futures and other financial instruments, or they may determine that their financial risks can be reduced in other ways.

[1345] *See* letters from API I, Capital One, COPE dated March 14, 2011 (''COPE II''), FSR III,Société Générale, and Vitol and WGCEF dated March 22, 2011 (''WGCEF III'').

[1346] *See* letters from ABA Securities Association, BlackRock dated June 3, 2011 (''BlackRock III''), CDEU, Hess and WGCEF dated March 23, 2011 (''WGCEF IV'').

comments are beyond the scope of this rulemaking.

In sum, we are cognizant that both direct and indirect costs would arise if the rule further defining the term ''swap dealer'' did not appropriately reflect the statutory definition of the term. Such costs, which would arise as the rule is either more or less inclusive, are detailed above. The Adopting Release provides benefits by interpreting the term ''swap dealer'' in a manner that is as close as possible to the statutory definition of the term, thereby mitigating the potential costs of both over-inclusiveness and under-inclusiveness.

m. Costs of Applying the Rules Further Defining the Term ''Swap Dealer''

In order to apply the rules further defining the term ''swap dealer'' and determine whether or not it is covered by the definition, an entity will incur direct costs in the form of personnel hours devoted to analyzing the entity's activities with respect to swaps and determining whether the entity is covered by the definition. These costs will depend on the nature of the entity's swap activities in the relevant situation. For some entities, it will be relatively clear that they are covered by the definition and they will incur relatively few costs in confirming that. It is expected that for many entities it will be relatively clear that they are not covered by the definition and they will incur little or no cost in confirming that determination. However, for some entities, especially those that enter into swaps in a variety of different ways and circumstances, the determination will be more complex and will require that personnel with financial and legal expertise review the circumstances of the entity's swap activities to make the determination of whether the entity is covered by the definition.

It is important to recognize that this would be the case in the absence of any rule further defining the term ''swap dealer,'' or regardless of the terms of the rule, because entities would have to interpret the statutory definition to determine whether they are covered. Thus, at a minimum, a significant portion of the costs discussed below is attributable to the inclusion in the Dodd-Frank Act of a definition of the term ''swap dealer'' and not from any aspect of the final rules further defining that term. Indeed, the final rule provides benefits by minimizing these costs by providing guidance about the application of the statutory definitions in various situations.

The amount of time and resources that must be expended by an entity in order to determine whether it qualifies as a dealer will vary considerably depending on the complexity of the entity's operations. In addition, the direct costs will vary depending on the determinations the entity must make—reviewing whether or not it is covered by the definition of the term ''swap dealer,'' whether it qualifies for the *de minimis* exception, or whether it seeks to obtain a limited purpose registration as a swap dealer. Depending on an entity's situation, it may incur some or all of these costs. We did not receive any comments quantifying the costs that an entity may incur in applying any aspect of the definition of ''swap dealer,'' nor are we aware of any studies or surveys regarding this particular issue. Therefore, the CFTC staff has estimated the amount of time that entities may require to apply the definition in various situations. These estimations are for informational purposes and require the CFTC to consider the aforementioned highly uncertain criteria.

Regarding the determination of whether an entity is covered by the definition of the term ''swap dealer,'' an entity with a relatively low degree of complexity in its organizational structure (*i.e.,* one legal entity) and in its swap activities (*i.e.,* little variation in the types of swaps they use and the purposes for which they use them) might expect the direct cost of such a determination to be approximately $13,000.[1347] We estimate that approximately 250 entities of this type would be engaged in swap activities that create sufficient uncertainty regarding the application of the definition that they would have to incur these costs. An entity with a moderate degree of complexity in its organizational structure (*i.e.,* a few legal entities) and its swap activities (*i.e.,* some variation in the types of swaps they use and the purposes for which they use them) might expect the cost of such a determination to be approximately $54,000.[1348] We estimate that approximately 150 entities of this type would be sufficiently uncertain regarding the application of the definition that they would have to incur these costs. An entity with a high degree of complexity in its organizational structure (*i.e.,* multiple affiliates in the corporate group) and its swap activities (*i.e.,* using diverse types of swaps for various purposes) could spend approximately $170,000 when making a determination as to whether it is covered by the definition of swap dealer.[1349] We estimate that approximately 50 entities of this type would be sufficiently uncertain regarding the application of the definition that they would have to incur these costs. Thus, the total direct cost for all entities to determine the coverage of the definition of the term ''swap dealer'' would be approximately $20,000,000.

As noted above, we estimate that approximately 450 entities (*i.e.,* 250 with relatively low complexity, 150 with moderate complexity and 50 with high complexity) would be sufficiently uncertain about the application of the definition of the term ''swap dealer'' that they would incur costs in applying the definition. This estimate includes IDIs that apply the loan origination exclusion. It is important to emphasize that since there is no definitive publicly available information about how many entities are engaged in swap activities and how they use swaps in particular situations, it is impossible to be sure how many entities may be uncertain about whether the definition covers

[1347] This estimate is based on the following staff requirements for this determination: 20 hours for a financial analyst at $161/hour, 5 hours of a financial manager at $325/hour, 2 hours of a controller or chief financial officer at $722/hour, 10 hours of a compliance attorney at $355/hour, 2 hours of a senior attorney at $992/hour, and 2 hours of a chief compliance officer at $664/hour. We round to two significant digits. The multiplier of 5.35, which was used in the Proposing Release, is higher than the multiplier that the CFTC has used for similar purposes in other final rules adopted under the Dodd-Frank Act. *See, e.g.,* CFTC, Swap Data Recordkeeping and Reporting Requirements; Final Rule, 77 FR 2135, 2173 (Jan. 13, 2012) (adjustment factor of 1.3 for overhead and other benefits). The CFTC believes that use of a higher multiplier here is appropriate because some persons may retain outside advisors to assist in making the determinations under the rules.

The estimates of the hourly cost for these personnel are from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified by CFTC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for firm size, employee benefits, and overhead. These estimates are intended to reflect averages for compiling and analyzing the information necessary to apply the definition of the term ''swap dealer.'' We recognize that particular entities within each range of complexity may, based on their circumstances, incur costs substantially greater or less than the estimated averages.

[1348] This estimate is based on the following staff requirements for this determination: 40 hours for a financial analyst at $161/hour, 10 hours of a financial manager at $325/hour, 5 hours of a controller or chief financial officer at $722/hour, 30 hours of a compliance attorney at $355/hour, 20 hours of a mid-level attorney at $608/hour, 15 hours of a senior attorney at $992/hour, and 5 hours of a chief compliance officer at $664/hour.

[1349] This estimate is based on the following staff requirements for this determination: 120 hours for a financial analyst at $161/hour, 40 hours of a financial manager at $325/hour, 20 hours of a controller or chief financial officer at $722/hour, 80 hours of a compliance attorney at $355/hour, 60 hours of a mid-level attorney at $608/hour, 50 hours of a senior attorney at $992/hour, and 20 hours of a chief compliance officer at $664/hour.

them to the point that they would incur such costs. However, we believe that the number of such entities may be estimated based on certain assumptions as discussed below.

In meetings with commenters since publication of the Proposing Release, the CFTC has discussed extensively the universe of potential entities that may be covered by the definition of the term ''swap dealer'' and gathered information on the swap market and its participants. In its FY 2012 budget drafted in February 2011, the CFTC estimated that 140 entities may be covered by the definition of ''swap dealer,'' [1350] and after receiving additional information the CFTC estimates that approximately 125 entities will be covered by the definitions of the terms ''swap dealer'' and ''major swap participant.'' [1351] With these assumptions in mind, we believe it is reasonable to estimate that for every entity covered by the definitions, there will be about four entities (*i.e.,* approximately four times 120, or about 450) that are sufficiently uncertain about the coverage of the definitions that they would incur costs in applying the definitions.

Our estimate that there would be about 450 such entities is also in line with the number of entities that were sufficiently interested in the Proposing Release that they submitted substantive comments to the CFTC. As noted above, we received about 300 substantive comment letters in response to the proposal. Of these, some reflected more than one letter from a single commenter, comments from persons who did not expect to be swap dealers, or comments from persons who were not uncertain about their status under the definition. On the other hand, several letters were from multiple commenters that submitted their comments jointly. Thus, we estimate that about 225 entities were sufficiently interested in the proposed rule further defining the term ''swap dealer'' that they submitted a substantive comment, and for each such entity there was another entity that would also be similarly uncertain about the definition, which supports our estimate that 450 entities in total would incur costs in applying the definition.

Regarding the determination of whether an entity is eligible for the *de minimis* exception from the definition of the term ''swap dealer,'' we note that only an entity that is engaged in some swap dealing activity would be required to make this determination, but it would be required to make the determination regardless of whether it is uncertain about whether its swap activities constitute dealing (*e.g.,* it would incur costs even if there were no doubt that it is engaged in swap dealing). We also note that the number of entities that will apply the *de minimis* exception is expected to be significantly greater than the number of entities that are required to register as swap dealers. Again, we believe that the entities making this determination would have situations that are highly complex (we believe approximately 25 entities would fall in this category), moderately complex (approximately 200 entities) and of low complexity (approximately 400 entities).[1352] The direct cost of making the determination for these entities would be approximately $42,000 in highly complex situations,[1353] $15,000 in moderately complex situations [1354] and $8,000 in situations of low complexity.[1355] The total direct costs for all entities would be approximately $7,300,000.

Third, regarding the determination of whether an entity should apply for a limited purpose swap dealer registration, we believe that relatively few entities would make such an application but that the situation of each of these entities would be highly complex. We believe approximately 20 entities would fall in this category, and the direct cost of making the determination for each would be approximately $250,000,[1356] resulting in a total direct cost of approximately $5,000,000.

Thus, the total initial direct cost of applying the rules further defining the term ''swap dealer'' (including the *de minimis* exception and the possibility of limited purpose registration) for all entities would be approximately $32,000,000.

In addition to these initial costs, we believe that entities would incur recurring costs in applying the definition. Regarding the application of the term ''swap dealer,'' we estimate that approximately 10 percent of the entities noted above would, each year, experience significant changes in their usage of swaps (such as beginning or ending a new line of business) that would require reconsideration of the application of the definition, which would result in costs amounting to one-half of the direct cost of making the initial determination. Applying these factors to the costs noted above, the total recurring direct costs for all entities associated with the application of the term ''swap dealer'' are estimated to be approximately $1,000,000 per year. Regarding the *de minimis* exception, we estimate that entities would have to incur ongoing costs of review to determine whether the exception applies on a yearly basis, and that the annual cost of this review would amount to one-half of the direct cost of making the initial determination. That is, the total recurring direct costs for all entities associated with the *de minimis* exception are estimated to be approximately $3,700,000. Last, we estimate that entities that qualify for a limited purpose swap dealer registration would incur ongoing review costs amounting to one-quarter of the direct

[1350] CFTC, President's Budget and Performance Plan Fiscal Year 2012, p. 13–14 (Feb. 2011), *available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf.* The estimated 140 swap dealers includes ''[a]pproximately 80 global and regional banks currently known to offer swaps in the United States;'' ''[a]pproximately 40 non-bank swap dealers currently offering commodity and other swaps;'' and ''[a]pproximately 20 new potential market makers that wish to become swap dealers.'' *Id.*

[1351] *See* CFTC, Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2622 (Jan. 19, 2012). The number of persons covered by the definition of ''major swap participant'' is estimated to be quite small, at six or fewer.

[1352] The estimate of approximately 625 entities that will apply the *de minimis* exception is based on our assumption that significantly more (*i.e.,* five times as many) entities will apply the exception as compared to the number of entities registered as swap dealers (which we assume to be approximately 120). This estimate is also in line with information provided by commenters that approximately 100 community and regional banks would potentially apply the *de minimis* exception (*i.e.,* the estimate reflects 100 such banks along with 525 other entities that are involved in the swap markets to a similar extent).

[1353] This estimate is based on the following staff requirements for this determination: 80 hours for a financial analyst at $161/hour, 20 hours of a financial manager at $325/hour, 10 hours of a controller or chief financial officer at $722/hour, 20 hours of a compliance attorney at $355/hour, 5 hours of a senior attorney at $992/hour, and 5 hours of a chief compliance officer at $664/hour.

[1354] This estimate is based on the following staff requirements for this determination: 20 hours for a financial analyst at $161/hour, 5 hours of a financial manager at $325/hour, 5 hours of a controller or chief financial officer at $722/hour, 10 hours of a compliance attorney at $355/hour, 2 hours of a senior attorney at $992/hour, and 2 hours of a chief compliance officer at $664/hour.

[1355] This estimate is based on the following staff requirements for this determination: 10 hours for a financial analyst at $161/hour, 5 hours of a financial manager at $325/hour, 2 hours of a controller or chief financial officer at $722/hour, 5 hours of a compliance attorney at $355/hour, 1 hour of a senior attorney at $992/hour, and 1 hour of a chief compliance officer at $664/hour.

[1356] This estimate is based on the following staff requirements for this determination: 200 hours for a financial analyst at $161/hour, 120 hours of a financial manager at $325/hour, 40 hours of a controller or chief financial officer at $722/hour, 100 hours of a compliance attorney at $355/hour, 60 hours of a mid-level attorney at $608/hour, 50 hours of a senior attorney at $992/hour, and 40 hours of a chief compliance officer at $664/hour. The estimate of approximately 20 entities applying the limited designation reflects an estimate that about one in six swap dealers would apply the designation.

cost of making the initial determination, or approximately $1,300,000 per year. Thus, the total recurring direct cost of applying the swap dealer definition (including the *de minimis* exception and the possibility of limited purpose registration) would be approximately $6,000,000.

5. Costs and Benefits of the Rules Further Defining ''Major Swap Participant''

This Adopting Release further defines a ''major swap participant'' by setting out quantitative thresholds against which a market participant can compare its swaps activities to determine whether it is encompassed by the definition. The rule requires potential major swap participants to analyze their swaps in detail to determine, for example, which of their swaps are subject to netting agreements or mark-to-market collateralization, and the amount of collateral posted with respect to the swaps. The rule includes a general, qualitative definition of the swaps that may be excluded from the calculation because they are used to ''hedge or mitigate commercial risk.'' Like the swap dealer definition, there is a voluntary process by which a person may request that the CFTC limit the major swap participant designation to certain categories of swaps.

a. Background

The definition set forth in CEA section 1a(33) provides that the term ''major swap participant'' means any person who is not a swap dealer and (i) maintains a substantial position in swaps for any of the major swap categories as determined by the CFTC; (ii) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or (iii) is a financial entity that is highly leveraged relative to the amount of capital it holds, is not subject to capital requirements established by an appropriate Federal banking agency, and maintains a substantial position in outstanding swaps in any major swap category as determined by the CFTC. In connection with the calculation of ''substantial position'' noted above, the statutory definition specifically excludes positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan as defined in sections 3(3) and (32) of ERISA for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan. The statutory definition also provides that major swap participant designations may be limited in scope so that a person may be designated as a major swap participant in certain, but not all, swap categories.

CEA section 1a(33)(D) excludes from the definition of the term ''major swap participant'' certain entities whose primary business is providing financing and who use derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company. There is no analogous statutory provision applicable to major security-based swap participants.

As detailed in this Adopting Release, the definition of the term ''major swap participant'' focuses on the market impacts and risks associated with a person's swap positions. This contrasts to the definition of the term ''swap dealer,'' which focuses on a person's activities and accounts for the amount or significance of those activities only in the context of the *de minimis* exception. Persons that meet the major swap participant definition would, in large part, follow the same statutory requirements applicable to swap dealers.[1357] In this manner, the Dodd-Frank Act regulates entities whose swap activities do not cause them to be swap dealers, but nonetheless could pose a high degree of risk to the U.S. financial system. This regulation of major swap participants is intended to facilitate financial stability by reducing risk, increasing transparency, and promoting market integrity.

b. Costs of Applying the Rules Further Defining the Term ''Major Swap Participant''

The actual cost of applying the rule further defining the term ''major swap participant'' to determine if a person is covered by the definition will depend, in large part, on the nature of the person's swap activities as well as the infrastructure such person already has in place for the analysis and reporting of its swap activities. Many persons will be clearly outside the definition (and a few persons may be clearly covered by the definition) and will incur little cost to confirm that status. However, it is reasonable to expect that a few persons that are not swap dealers but nonetheless engage in significant swap activity will be required to incur costs to determine whether they are covered by the definition. The direct costs such a person would incur would result from the incremental expense of personnel with financial and accounting expertise who would be required to devote time to the review of the size and nature of the person's swap positions to determine whether the person is covered by the definition. Moreover, there will also be technology and legal review costs related to the determination of whether a person is a major swap participant. As is the case for the definition of the term ''swap dealer,'' it is important to recognize that even in the absence of any rule further defining the term ''major swap participant,'' or regardless of the terms of the rule, entities would incur costs in interpreting the statutory definition to determine whether they are covered. Thus, at a minimum, a significant portion of the costs discussed below is attributable to the inclusion in the Dodd-Frank Act of a definition of the term ''major swap participant'' and not from any aspect of the final rules further defining that term. Indeed, the final rules provide benefits by mitigating these costs by providing guidance about the application of the statutory definitions in different situations.

The amount of time and resources that must be expended by a person in order to determine whether it qualifies as a major swap participant may vary considerably depending on the complexity of such person's operations. In addition, direct costs will vary depending on the determinations the person must make relating to the definition, including, but not limited to, whether it engages in swap activity near the thresholds for ''substantial position'' and ''substantial counterparty exposure,'' and whether it is subject to a ''safe harbor'' provision as set forth in the definition. The CFTC did not receive any comments quantifying the costs that a person may incur in applying any aspect of the definition of the term ''major swap participant,'' nor are we aware of any studies or surveys regarding this particular issue. Therefore, the CFTC staff has estimated, based on its experience, the amount of time that a person may require to determine whether it meets the definition. These estimations are for informational purposes and require the CFTC to consider the aforementioned highly uncertain criteria.

The CFTC estimates that approximately 20 persons that are not swap dealers will initially be engaged in swap activity to such an extent that they

[1357] The Dodd-Frank Act provides for the registration and regulation of major swap participants under CEA section 4s. The particular requirements applicable to major swap participants will be established in separate rulemakings. *See* notes 1240 and 425, *supra.*

would be required to apply the calculations in the final rule in determining whether they are covered by the definition.[1358] The direct cost of making such determination for each such person is estimated to be approximately $260,000,[1359] resulting in an initial aggregate direct cost of approximately $5,200,000. We note that the relatively low estimate of only 20 persons that would be required to incur costs at this level, as compared to the many thousands of swap market participants, reflects the relatively high thresholds for major swap participant status. As noted above, the large majority of market participants will be able to readily conclude that they are not covered by the definition.

In addition to these initial costs, we believe that approximately 20 entities would incur recurring direct costs in applying the definition of major swap participant on a daily basis, and such costs would amount to one-third of the direct cost of making the initial determination. Thus, the total recurring direct costs for all entities associated with the application of the term ''major swap participant'' are estimated to be approximately $1,700,000 per year or approximately $83,000 per year for each person.

Although the CFTC believes there will only be a limited number of persons that potentially may be major participants, we recognize the concerns raised by several commenters that major swap participant calculations will be conducted as part of the person's overall compliance function even when there is not a significant likelihood that such person would be a major swap participant. As a result of the potential expense and effort that a person would be required to incur in connection with determining whether it meets the definition of major swap participant, the final rule includes three alternative ''safe harbor'' provisions.[1360] These safe harbor provisions relieve persons that are clearly not major swap participants from incurring the expense of the calculations otherwise required under the final rule.

To apply the safe harbor provisions of the rule, the CFTC estimates that a person would have to incur initial direct costs of approximately $2,900 to determine whether its swap positions are within the safe harbor.[1361] In addition, a person would incur costs of reviewing its swap positions on a monthly basis to monitor whether the safe harbor continues to apply, at an annual cost equal to one-third of the direct cost of making the initial determination, or $960. Our assumption that approximately 1,200 entities would apply the safe harbor provisions of the rule yields an aggregate direct initial cost of approximately $3,500,000 and aggregate annual costs of approximately $1,200,000.[1362]

c. Major Swap Participant Thresholds

The final rule adopts the general approach in the proposed rule of determining whether a person is a major swap participant by comparing the exposure resulting from a person's swap positions to specific, quantitative thresholds. The proposed thresholds for substantial position were $3 billion in current uncollateralized exposure or $6 billion in current uncollateralized exposure plus potential future exposure for rate swaps, and $1 billion in current uncollateralized exposure or $2 billion in current uncollateralized exposure plus potential future exposure for each of the other categories of swaps. The proposed thresholds for substantial counterparty exposure are $5 billion in current uncollateralized exposure across all categories or $8 billion in current uncollateralized exposure plus potential future exposure across all categories.[1363] However, there is a change for the weight in the PFE calculations from the proposal to the final rule of 0.2 to 0.1 for cleared swaps.

Commenters generally did not oppose the proposed thresholds although several thought the thresholds should be raised.[1364] Two commenters supported the adoption of the thresholds as proposed.[1365] In addition, a few other commenters thought that the thresholds were set too high.[1366] Other commenters suggested that the thresholds be raised to a level that reflects systemic risk without suggesting a specific numerical threshold.[1367] One commenter, however, suggested that the threshold be increased to $10 billion.[1368] Several commenters also said that the thresholds should be adjusted for inflation and other changes over time in the swap market.[1369]

As discussed in part IV.B.3.d., the CFTC is adopting the thresholds as proposed. We recognize that the level of the thresholds will have a significant effect on whether the rules further defining the term ''major swap

[1358] As is the case with respect to the definition of the term ''swap dealer,'' we believe that the number of persons that may incur costs in reviewing their activities and the rules will be significantly greater than the number of entities that actually are covered by the definition and will be required to register as major swap participants. Similarly, since there is no definitive publicly available information about how many entities are engaged in swap activities and how they use swaps in particular situations, it is impossible to be sure how many entities may be uncertain about whether the definition covers them to the point that they would incur such costs. Our estimate that approximately 20 entities would be sufficiently uncertain about the application of the definition of the term ''major swap participant'' that they would incur costs in applying the definition is based on our assumption that about six entities would be covered by the definition, and that for each such entity there will be about four entities that will be uncertain about the coverage of the definition. *See* note 1351, *supra.*

[1359] This estimate is based on the following staff requirements for this determination: 200 hours for a financial analyst at $161/hour, 80 hours for a programmer analyst at $196/hour; 120 hours of a financial manager at $325/hour, 40 hours of a controller or chief financial officer at $722/hour, 100 hours of a compliance attorney at $355/hour, 60 hours of a mid-level attorney at $608/hour, 50 hours of a senior attorney at $992/hour, and 40 hours of a chief compliance officer at $664/hour.

The estimates of the hourly cost for these personnel are from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified by CFTC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for firm size, employee benefits, and overhead. As is the case for the application of the definition of the term ''swap dealer,'' we believe that that use of a higher multiplier here is appropriate because some persons may retain outside advisors to assist in making the determinations under the rules. These estimates are intended to reflect averages for compiling and analyzing the information necessary to apply the definition of the term ''major swap participant.'' We recognize that particular entities within each range of complexity may, based on their circumstances, incur costs substantially greater or less than the estimated averages. We round to two significant digits.

[1360] *See* part IV.M, *supra.*

[1361] This estimate is based on the following staff requirements for this determination: 5 hours for a financial analyst at $161/hour, 2 hours for a financial manager at $325/hour, 1 hour for a comptroller or chief financial officer at $722/hour, 2 hours for a compliance attorney at $355/hour.

[1362] Our estimate of the number of entities that will make the safe harbor calculation includes the following: one-half of the approximately 700 investment company sponsors that are active in the U.S. (*see* the 2011 Investment Company Factbook published by the ICI, page 14, available at *http://www.ici.org/pdf/2011_factbook.pdf*), a similar number of entities (*i.e.,* 350) that have large positions in swaps as part of other investment management activities, one half of the corporate entities in the ''Fortune 500'' (representing corporate entities that have large positions in swaps) and an additional 250 entities representing other holders of large positions in swaps.

[1363] *See* parts IV.B.3.d. and IV.E.3.

[1364] *See, e.g.,* letters cited in notes 796 and 798, *supra.*

[1365] *See* letters from Dominion Resources and Fidelity.

[1366] *See* letters from AFR and Greenberger.

[1367] *See* letters from BlackRock I, ISDA I, MFA I and WGCEF II.

[1368] *See* letter from CCMR I. In addition, ACLI commented that thresholds for rate swaps should be increased to $4 billion for current uncollateralized exposure and $8 billion for current uncollateralized exposure plus potential future exposure, with corresponding increases to substantial counterparty exposure thresholds to $7 billion for current uncollateralized exposure and $14 billion for current uncollateralized exposure plus potential future exposure. *See* letter from ACLI.

[1369] *See* letters from CDEU, COPE I, Fidelity, ISDA I, and MFA I.

participant'' are applied in a manner that is more or less inclusive, and that in setting the thresholds it is possible that we may err on the side of over- or under-inclusion. As noted above in part V.C.2., if the rule were more inclusive, costs could arise when the persons that are classified as major swap participants incur compliance costs, while if the rule is less inclusive the benefits of regulating major swap participants (in terms of reduced risk, increased transparency and market integrity) could be reduced. We also recognize that a more inclusive rule could lead to costs if it causes persons to make changes to their use of swaps in order to avoid being covered by the rule.

One commenter said that the CFTC should conduct an empirical analysis of the proposed thresholds and whether they are suitable for identifying persons whose swap positions entail the risks enumerated in the statutory definition of the term ''major swap participant.'' [1370] However, the CFTC believes it is not feasible to perform such an analysis because the comprehensive and detailed information about how very active swap market participants use swaps that it would require is not available.

The CFTC believes that the threshold levels in the final rule are appropriate to effectively monitor and oversee entities that are systemically important or could significantly impact the U.S. financial system. The CFTC and SEC are consistent in their approach to thresholds. As more data regarding the use of swaps and the importance of very large swap positions in the swap markets become available, the CFTC may consider adjusting the thresholds.

The final rules also provide for the measure of potential future exposure to be adjusted in the case of swap and security-based swap positions that are centrally cleared or that are subject to daily mark-to market margining. This is consistent with the purpose of the potential future exposure test, which is to account for the extent to which the current outward exposure of positions (though possibly low or even zero at the time of measurement) might grow to levels that can lead to high counterparty risk to counterparties or to the markets generally. The practice of the periodic exchange of mark-to-market margin between counterparties helps to mitigate the potential for large future increases in current exposure.

Consistent with the proposal, the final rules reflect this ability to mitigate risk by providing that the potential future exposure associated with positions that are subject to daily mark-to-market margining will equal 0.2 times the amount that otherwise would be calculated. However, in response to commenters assertions about the risk-mitigating effects of central clearing, and the additional level of rigor that clearing agencies may have with regards to the process and procedures for collecting daily margin, the final rules further provide that the potential future exposure associated with positions that are subject to central clearing will equal 0.1 (rather than the proposed 0.2) times the potential future exposure that would otherwise be calculated.[1371]

Although some commenters supported the complete exclusion of cleared positions from the potential future exposure analysis,[1372] the CFTC recognizes that central clearing cannot reasonably be expected to entirely eliminate counterparty risk.[1373] Accordingly, the CFTC concluded that the use of a 0.1 factor (in lieu of the proposed 0.2) is appropriate for cleared positions, reflecting the strong risk mitigation features associated with central clearing, particularly the procedures regarding the collection of daily margin and the use of counterparty risk limits, while recognizing the presence of some remaining counterparty risk.

Moreover, although some commenters opposed any deduction from the measure of potential future exposure for uncleared positions that are margined on a daily basis,[1374] the CFTC believes that the risk-mitigating attributes of daily margining warrant an adjustment given that the goal of the potential future exposure test is to account for price movements over the remaining life of the contract.[1375] The use of a 0.2 factor also reflects the CFTC's expectation that the risk mitigation associated with uncleared but margined positions would be less than the risk mitigation associated with cleared positions.

While higher or lower alternatives to the 0.1 and 0.2 factors may also be reasonable for positions that are cleared or margined on a daily basis, the CFTC believes that the factors of the final rules reasonably reflects the risk mitigating (but not risk eliminating) features of those practices. The final rules also retain and clarify provisions addressing when daily mark-to-market margining occurs for purposes of this discount.[1376]

d. Difficulty in Applying the Major Swap Participant Calculations

While commenters generally acknowledged that the proposed quantitative threshold tests are objective, some said that the proposed tests are difficult to understand and

[1370] *See* letter from WGCEF II.

[1371] *See* CFTC Regulation § 1.3(jjj)(3)(iii)(A); Exchange Act rule 3a67–3(c)(3)(i). The final rules further have been revised to clarify that the 0.1 factor applies to positions cleared by a registered clearing agency or by a clearing agency that has been exempted from registration.

[1372] *See, e.g.,* letters from MFA I and SIFMA AMG II.

[1373] Central clearing helps to mitigate counterparty credit risk by improving risk management and, among other things, mutualizing the risk of counterparty failure. If multiple members of a central counterparty fail beyond the level to which such risk is managed, however, the central counterparty would also be at risk of failure. *Cf.* Basel Committee on Banking Supervision, Consultative Document, ''Capitalisation of bank exposures to central counterparties,'' Nov. 25, 2011 (available at: *http://www.bis.org/publ/bcbs206.pdf*) (proposing that the capital charge for trade exposures to a qualifying central counterparty should carry a low risk weight, reflecting the relatively low risk of default of the qualifying central counterparty). In addition, as the CFTC and SEC discussed in the Proposing Release, *see* 75 FR at 80192 n. 115, for example, central counterparties that clear credit default swaps do not necessarily become the counterparties of their members' customers (although even absent direct privity those central counterparties benefit customers by providing for protection of collateral they post as margin, and by providing procedures for the portability of customer positions in the event of a member's default). As a result, central clearing may not eliminate the counterparty risk that the customer poses to the member, although required mark-to-market margining should help control that risk, and central clearing would be expected to reduce the likelihood that an entity's default would lead to broader market impacts.

[1374] *See* letter from Better Markets I; *see also* letter from AFR.

[1375] The CFTC does not believe that it is appropriate to have this type of discount when mark-to-market margining is done less than daily, however.

[1376] The CFTC recognizes that at times, market participants whose agreements provide for the daily exchange of variation margin in connection with swaps in practice may not exchange collateral daily, if the amounts at issue are relatively small (such through the use of collateral thresholds and minimum transfer amounts). We do not believe that such practices would be inconsistent with providing a discount for daily margining practices. The proposed rules sought to accommodate those practices by providing that positions would be considered to be subject to daily mark-to-market margining for purposes of the ''uncollateralized outward exposure'' plus ''potential outward exposure'' analysis, so long as the total of such thresholds, and the total of such minimum transfer amounts above $1 million are deemed to be ''uncollateralized outward exposure'' for those purposes.

In light of commenter concerns, which indicated that the proposal was not fully clear about the mechanics and purpose of this approach, the relevant rule language has been revised to clarify that this attribution of thresholds and minimum transfer amounts is solely for the purpose of determining whether certain positions are subject to daily mark-to-market margining for purposes of the analysis. In addition, the final rules have been revised from the proposal to provide that the attribution of thresholds as ''uncollateralized outward exposure'' for these purposes will be reduced by initial margin posted, up to the amount of the threshold. *See* CFTC Regulation § 1.3(jjj)(iii)(B); Exchange Act rule 3a67–3(c)(3)(ii).

hard to apply.[1377] Another commenter submitted that ''[the CFTC] should solicit feedback from market participants prior to final rule given the complexity of tests and likely interpretive issues; proposed tests are highly technical, and more challenging to use than may appear at first glance; could also request volunteers to walk-through the tests to ensure they actually function in practice.''[1378] Several commenters suggested means of reducing the costs of applying the proposed tests. Some commenters requested that the CFTC adopt a ''safe harbor'' provision in the final rules for swap users with positions that are substantially below the thresholds.[1379] Another commenter opined that the rule should allow persons to rely on third-party service providers to conduct the required calculations.[1380] In addition, a commenter said the rule should allow swap users to apply standard industry practices in valuing their positions.[1381]

We believe that the guidance in this Adopting Release reduces the costs of determining if a person is covered by the definition. For example, in response to commenters' concerns we clarify that a person may determine the value of its exposure using industry standard practices.[1382] Also, we believe that the daily calculation burdens associated with the proposed thresholds will be addressed by safe harbors that are available if a simplified calculation shows that a person's exposure from its swap position is far below any threshold for any particular month. The final rule includes safe harbors to reduce unnecessary costs for entities that, because of compliance concerns, would engage in major swap participant calculations even though it would be very unlikely that the major swap participant thresholds would be met.[1383] Also, the CFTC will permit third-party service providers to perform major swap participant calculations, although a person that may be a major swap participant is not relieved of potential liability for violations of the CEA if there is a calculation or other error by the third-party.[1384]

e. Exclusions for Particular Types of Entities

Commenters said that exclusions from the major swap participant definition should be available for certain entities including insurance companies, registered investment companies, entities that maintain legacy portfolios of swaps, ERISA plans, and sovereign wealth funds.[1385] Some commenters cited, as the underlying basis for excluding these entities, the existing regulatory regime to which these entities are subject and the potential for dual regulation if they were covered by the definition of the term ''major swap participant.''[1386] One commenter asserted that a lack of clarity with respect to proposed exemptive relief will impose additional costs on market participants due to the uncertainty in determining major swap participant status.[1387]

Several commenters said that sovereign wealth funds should be excluded from the definition of major swap participant based on international principles of comity and sovereign immunity.[1388] These commenters asserted that sovereign wealth funds are regulated in their home country and do not represent the type of counterparty risk contemplated by the Dodd-Frank Act. A commenter asserted that special purpose vehicles for structured finance or securitization should be exempted from the definition of major swap participant so as to not harm liquidity in asset securitizations.[1389] That commenter based its recommendation on the understanding that special purpose vehicles have limited functionality and resources and would accordingly be unable to comply with the burden of regulation as a major swap participant.[1390]

The final rule does not have specific exclusions for certain types of entities. The CFTC believes that a more level playing field is desirable to ensure no particular type of entity gains an unfair competitive advantage in the market.

The appropriate treatment of ''legacy portfolios'' (*e.g.,* the monoline insurers or their special purpose vehicles) will be determined on a case-by-case basis by the CFTC. Legacy portfolio operators specifically commented that they are in ''run-off''/wind down mode, thereby undertaking no new swaps that would increase their risk, with an expectation to shut down or cease operations once their portfolio expires.[1391] As a result, these commenters maintain that margin or capital requirements would likely lead to their insolvency because they do not have the assets to satisfy the proposed requirements. The CFTC notes that many of the compliance obligations imposed by the Dodd-Frank Act and/or the business conduct rules promulgated thereunder will not apply to operators of legacy portfolios because such obligations will not be applicable to swaps executed prior to the enactment of the Dodd-Frank Act such as the swaps in legacy portfolios.[1392] Consequently, the CFTC expects legacy portfolio operators' primary compliance obligation to be related to reporting and risk management.

f. CEA Section 15(a) Discussion

The costs and benefits of the rule further defining the term ''major swap participant'' are evaluated in light of the section 15(a) five broad areas of market and public concern.

Protection of market participants and the public. The rule helps parties to identify when they have substantial positions or substantial counterparty exposures in swap markets that would cause them to be covered by the definition of major swap participant. Under the Dodd-Frank Act, major swap participants are subject to regulations enacted to protect market participants and the public. The costs and benefits of the statutory and regulatory requirements for major swap participants are addressed in the various rulemakings in which they are promulgated.[1393]

[1377] *See, e.g.,* letters from Fidelity, Freddie Mac, ISDA I and SIFMA AMG II.

[1378] *See* letter from WGCEF II at 11.

[1379] *See* letters from AII, Vanguard and SIFMA AMG II. Another commenter submitted that swap dealers will require counterparties to run the major swap participant calculations in order to certify that they are not major swap participants, even in cases where it is readily evident that they are not major swap participants. *See* meeting with CalSTRS on April 15, 2011.

[1380] *See* letter from ISDA I.

[1381] *See id.*

[1382] *See* part IV.B.3.b, *supra.*

[1383] *See* part IV.M.2, *supra.*

[1384] *See* part IV.B.3.e, *supra.*

[1385] *See* part IV.J.2, *supra.*

[1386] *See id.* For example, commenters said that registered investment companies and corresponding registered investment advisers should be excluded from the definition of major swap participant because they are highly regulated by the SEC pursuant to the ICA and the Investment Advisers Act of 1940, and therefore major swap participant regulation would be duplicative. *See* joint letter from ICI and SIFMA AMG.

[1387] *See* letter from MetLife.

[1388] *See* letters from CIC and GIC and meeting with Weil.

[1389] *See* letter from ISDA I.

[1390] *See id.*

[1391] *See* letters from Athilon, Berkshire Hathaway, ISDA I, MBIA and Newedge. As noted in part IV.J.3.a, *supra,* the CFTC understands that legacy portfolios are no longer entering into new transactions other than to novate, amend and hedge their existing positions. In connection with any potential exclusion, however, legacy portfolios would still be required to report to SDRs information about their swap transactions and positions. *See* letters from BlackRock I and Canadian MAVs.

[1392] *See* CFTC, Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps; Final Rule, 77 FR 2136 (Jan. 13, 2012).

[1393] *See* part VII.C.2, *supra.*

Efficiency, competitiveness, and financial integrity of markets. To date, potential major swap participants have engaged in swaps in an off-exchange marketplace that has been largely unregulated. Once the regulations required under the Dodd-Frank Act are adopted and effective, major swap participants will be subject to CFTC oversight and comprehensive regulation. The CFTC believes these regulations will improve the financial integrity of swap markets and the U.S. financial system generally. Since the number of persons that are expected to be major swap participants is small, the CFTC believes that these regulations will not have a significant effect on the efficiency or competitiveness of the markets.

Price discovery. The CFTC does not perceive any direct effect on price discovery from the rule further defining the term ''major swap participant.''

Sound risk management practices. The level of the major swap participant thresholds may discourage persons from engaging in swap activities that might cause them to exceed the major swap participant thresholds. This reduction in the use of swaps could be costly if other alternatives are not as suitable for the underlying risks (*e.g.,* futures might have different contract sizes or expiration, and forward contracts introduce physical risks not present in cash settled transactions). The CFTC notes that this concern is mitigated by the relatively high threshold levels for major swap participant status.

Other public interest considerations. The specific quantitative thresholds in the rule set forth definitive tests for determining if a person is covered by the definition of the term ''major swap participant.'' This specific, quantitative threshold serves the public interest by promoting efficient application of the rule. Also, as noted above, major swap participants will be subject to CFTC oversight and comprehensive regulation, which we believe will improve the financial integrity of swap markets and the U.S. financial system generally.

6. Costs and Benefits of the Rules Relating to the Definition of ''Eligible Contract Participant''

a. Background

The ECP regulations and interpretation fall within the following six categories:

- CFTC Regulation § 1.3(m)(5)(i) prevents a commodity pool (i) in which any of the pool's direct participants is not an ECP in its own right and (ii) that directly enters into retail forex transactions from being an ECP under CEA section 1a(18)(A)(iv) or (v), for purposes of retail forex transactions only. CFTC Regulation § 1.3(m)(5)(ii) provides that the CFTC would look through a commodity pool participant that directly participates in a transaction-level commodity pool only if such direct commodity pool participant, any entity holding an interest in such direct commodity pool participant, or any entity in which such direct commodity pool participant holds an interest were structured to evade subtitle A of Title VII of the Dodd-Frank Act by permitting persons that are not ECPs to participate in retail forex transactions. The look-through in CFTC Regulation § 1.3(m)(5)(ii) does not apply to a non-commodity pool participant in a commodity pool.
- CFTC Regulation § 1.3(m)(6) excludes a commodity pool from ECP status if it does not have total assets exceeding $5,000,000 or is not operated by a person described in CEA section 1a(18)(A)(iv)(II).[1394]
- CFTC Regulations § 1.3(m)(1)–(4) define major swap participants, swap dealers, major security-based swap participants and security-based swap dealers, respectively, as ECPs.
- CFTC Regulation § 1.3(m)(7) permits an otherwise non-ECP to qualify as an ECP, with respect to certain swaps, based on the collective net worth of its owners, subject to several conditions, including that the owners are ECPs.
- CFTC Regulation § 1.3(m)(8) permits a Forex Pool to qualify as an ECP notwithstanding that it has one or more direct participants that are not ECPs if the Forex Pool (a) is not formed for the purpose of evading regulation under CEA sections 2(c)(2)(B) or (C) or related rules, regulations or orders, (b) has total assets exceeding $10 million and (c) is formed and operated by a registered CPO or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3).
- Finally, the Commissions have provided an interpretation to address an incorrect statutory cross-reference preventing certain government entities from qualifying as ECPs under CEA section 1a(18)(A)(vii).[1395]

b. Summary of Comments

Commenters stated that commodity pools will incur costs to comply with statutory and regulatory requirements made applicable as a result of the Commissions' narrowing of the ECP definition.[1396] Commenters argued that to apply the look-through at any investment level would be unnecessarily burdensome and disruptive to how commodity pools are structured, with resulting costs.[1397] One commenter advised that, if a trading advisor cannot be sure that all pool participants are ECPs, then it must be cautious and either register as a CPO or decide not to engage in Retail Forex Transactions on behalf of its advised pools.[1398] Another commenter stated that while many existing commodity pools have already obtained accredited investor and QEP representations from participants, virtually none currently obtain ECP representations from their investors.[1399] This commenter argued that obtaining such a representation would impose an operational burden and additional costs, as well as require commodity pools to redeem non-ECPs. The commenter further points out that, given the estimated $1.9 trillion of assets invested in hedge funds, the portion of those assets that use OTC forex is likely to be substantial, and therefore substantial time and expense would be expended in determining eligibility requirements for the thousands of investors in funds that use OTC forex.[1400]

Commenters explained that there are costs to losing ECP status and that the enumerated counterparty list is unclear and subject to uncertainty because it relies on other regulators.[1401] One commenter argues that funds would incur compliance and transaction costs if categorized as non-ECPs because they would have to enter into forex transactions through a DCM and their operators would have to register as CPOs.[1402] That commenter also states that the markets for exchange-traded futures are less liquid than OTC forex markets, and that posting initial margin on a DCM is costly, since it cannot be used to invest in riskier assets and a FOF would have to invest in liquid and low risk (and, commensurately, lower yielding) assets necessary to post variation margin. As another commenter points out, the resulting increased expenses from the requirement to trade on a DCM and comply with retail forex rules may result in higher expenses for hedge and private equity funds, which

[1394] 7 U.S.C. 1a(18)(A)(iv)(II).

[1395] 7 U.S.C. 1a(18)(A)(vii).

[1396] *See* letters from AIMA I, Akin Gump, Sidley, and Willkie Farr.

[1397] *See id.*

[1398] *See* letter from AIMA I.

[1399] *See* letter from Sidley.

[1400] *See id.*

[1401] *See* letters from AIMA I, Akin Gump, and Sidley.

[1402] *See* letter from Sidley.

they would likely pass along to their investors.[1403]

A commenter asserted that the characteristics necessary to avoid non-ECP status may prevent free investment and could reduce liquidity and create volatility in these markets.[1404]

With respect to CFTC Regulation § 1.3(m)(6), a commenter expressed concerns with the expected costs associated with the proposal that commodity pools that do not qualify as ECPs under clause (A)(iv) should not be able to qualify under clause (A)(v), stating that the proposal would be difficult to comply with and would adversely impact investment.[1405]

Two commenters agreed that the proposed addition of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants to the ECP definition provided a benefit with little or no costs.[1406] No commenter objected.

With respect to CFTC Regulation § 1.3(m)(7), commenters said that non-ECPs have entered into swaps in reliance on the Swap Policy Statement.[1407] Commenters emphasized the importance of the Swap Policy Statement to pass-through entities used by farmers,[1408] operating companies [1409] and commercial property developers,[1410] noting that such entities may not meet the ECP criteria. According to these commenters, these pass-through entities often are small and medium-sized businesses that enter into interest rate swaps with lending financial institutions in reliance on the Swap Policy Statement.[1411] The commenters explained that the loans usually are guaranteed by the principals of the entity entering into the swap, and that the borrower would qualify as an ECP if structured as a single-level corporate entity or sole proprietorship.[1412] Commenters said that if these non-ECP entities were limited to swaps that are available on or subject to the rules of a DCM, many regional bank borrowers would lose the ability to use swaps, real estate companies would have less flexibility in risk management, and smaller lenders would be at a competitive disadvantage.[1413] Another commenter said that Dodd-Frank Act provisions such as the end-user clearing exception indicate that Congress intended to preserve the availability of swaps used for managing risks rather than for investment or speculation.[1414]

To mitigate the impact of restricting non-ECPs to swaps that are available on or subject to the rules of DCMs, some commenters said that an entity should be able to qualify as an ECP based on the financial qualifications of related entities, so long as various conditions proposed by the commenters are satisfied. Some commenters said that an entity should be eligible to be an ECP if its swap obligations are guaranteed by an ECP,[1415] or if its controlling entity qualifies as an ECP under clause (A)(v) of the statutory definition.[1416] Another commenter suggested revisions to the ECP definition that included looking to the ECP status or sophistication of the majority owner of an entity in determining if the entity itself is an ECP.[1417] Other commenters suggested other provisions to allow non-ECPs to enter into swaps other than on or subject to the rules of a DCM, so long as the non-ECP meets various conditions indicating that the swap is used in connection with its line of business.[1418]

With respect to CFTC Regulation § 1.3(m)(8), several commenters asserted that many Forex Pools are operated by sophisticated, professional managers that do not need the protections of a retail forex regime designed to protect non-ECPs that are engaging in retail forex transactions.[1419] More specifically, some commenters, based on CFTC enforcement actions involving Forex Pools, suggested that commodity pools of a sufficient size, and/or operated by a registered or exempt CPO, do not pose the risks of fraud and abuse of non-ECP customers that the statutory look-through provision is intended to address.[1420]

As a result, commenters suggested that the look-through provision should not apply in determining ECP status of commodity pools that meet certain conditions. For example, commenters suggested that the look-through not be applied to a commodity pool with $10 million in total assets if other factors were present—*e.g.,* not structured to evade,[1421] subject to regulation under the CEA [1422] and/or operation by a registered CPO.[1423] Another commenter suggested requiring the total assets or minimum initial investment of a Forex Pool to be sufficiently large that, in general, only legitimate pools would exceed such thresholds.[1424] This commenter suggested a total asset threshold of $50 million.[1425]

Separately, one commenter also claimed that the statutory look-through, if strictly implemented, might inappropriately preclude Forex Pools and their CPOs, many of whom are registered, from engaging in retail forex transactions with swap dealers because swap dealers are not Enumerated Counterparties (and some swap dealers also may not be Enumerated Counterparties in a different capacity, such as being a U.S. financial institution).[1426] This commenter stated that such a result could reduce close out netting opportunities in the event of the insolvency of a counterparty.

Finally, to reduce the adverse effects on government entities that may need to qualify as ECPs based on their swap

[1403] *See* letter for Akin Gump. This commenter also said that these increased expenses could cause funds to terminate their foreign currency hedging, which would increase their investors' currency risk, causing higher volatility in the investment industry.

[1404] *See* letter from AIMA I. *See generally* part III.B.3, *supra.*

[1405] *See* letter from AIMA I.

[1406] *See* letters from Greenberger and Sidley.

[1407] *See* letters from B&F I, CDEU and Capstar. One element of the Swap Policy Statement required that the swap be entered into in connection with each swap counterparty's line of business. *See* Swap Policy Statement at 30697. The CFTC stated when issuing the Swap Policy Statement that it ''reflects the [CFTC]'s view that at this time most swap transactions, although possessing elements of futures or options contracts, are not appropriately regulated as such under the [CEA] and [CFTC] regulations.'' Swap Policy Statement at 30694.

[1408] *See, e.g.,* letter from Rabobank, New York Branch (relating that ''[f]or a variety of estate planning and regulatory purposes, farmers commonly hold their ownership interests in land, buildings and farm equipment indirectly, through a network of legal entities'').

[1409] *See, e.g.,* letter from Fifth Third Bank and Union Bank, N.A. (advising that ''[i]t is common for an operating business to organize a separate limited liability company (for tax and legal reasons) to acquire * * * assets * * * and to lease these assets to the operating company[, which] becomes the borrow[er] * * * for the loan used to acquire those assets'' and that ''[t]he limited liability company often does not maintain sufficient capital to qualify as an ECP'').

[1410] *See, e.g.,* letters from BB&T I, B&F I and Midsize Banks.

[1411] *See* letters from BB&T I and B&F I. Commenters said that these businesses may intentionally maintain less than $1 million in equity primarily for tax and legal reasons. *See* letters from Capital One and Columbia State Bank (stating that over 65% of its borrowers are structured as limited liability companies or S corporations and intentionally maintain less than $1 million in equity at the entity entering into the swap).

[1412] *See* letter from Columbia State Bank. *See also* letter from BB&T I.

[1413] *See* letters from BB&T I, Capital One, Capstar, Columbia State Bank, Midsize Banks, NAREIT and Wells Fargo II.

[1414] *See* letter from FSR I.

[1415] *See* letters from BB&T I, Midsize Banks and Wells Fargo II.

[1416] *See* letters from CDEU and Regional Banks.

[1417] *See* letter from NAREIT.

[1418] *See* letters from APGA, Capital One and Gavilon dated October 28, 2010.

[1419] *See* letters from Millburn and Sidley.

[1420] *See* letters from GXFD I and Sidley.

[1421] *See* letter from GFXD II.

[1422] *See* letters from GFXD II and Skadden.

[1423] *See* meeting with SIFMA on January 20, 2012.

[1424] *See* letter from Sidley.

[1425] *See id.*

[1426] *See* letter from GFXD I.

counterparties but that would be foreclosed from doing so due to an erroneous reference in the definition of ECP, a commenter requested the correction of that erroneous reference.[1427]

c. Response to Comments and Consideration of Costs and Benefits in the Final Rule

CFTC Regulation § 1.3(m)(5)(i) reduces the number of pools that need to determine the ECP status of their natural person participants, and thus reduces related costs, because it limits, absent evasion, the pools the CFTC considers for look-through purposes to transaction-level retail forex pools. The guidance the Commissions provide in the preamble also reduces the scope of the potential look-through, with attendant cost-reductions, by stating expressly that a Retail Forex Pool using retail forex transactions solely to hedge or mitigate currency risk would not be considered structured to evade. Thus, such hedging or mitigation would not be the basis of a look-through. In particular, because, according to a commenter, the typical FOF uses retail forex transactions solely to hedge currency risk related to fluctuations in the exchange rate between non-U.S. dollar subscription currencies and the U.S. dollar, most, if not all, FOFs would not be covered by the look-through. To the extent other commodity pools use retail forex transactions solely to hedge or mitigate their currency risk, such pools also would not be subject to the CFTC Regulation § 1.3(m)(5)(ii) look-through provision. Because Regulation § 1.3(m)(5)(ii) provides a look through only in cases of evasion and the Commissions' guidance narrows considerably the scope of what might otherwise be considered evasion, the CFTC expects the CPO of the typical pool to be able to determine at little or no cost the ECP status of their direct participant commodity pools; such status will be based on CEA section 1a(18)(iv), an analysis with which such CPOs are familiar.[1428]

While the CFTC has provided guidance to reduce the costs of applying the rule, it estimates that each affected CPO may have to spend between 5 and 20 hours of legal time, representing a cost between $1,800 and $7,100,[1429] initially to determine the ECP status of the pools that they operate, and up to 5 hours ($1,800) of additional legal time to determine such status upon each change to the fund's structure, operating guidelines, etc. that might implicate ECP status. Commenters noted that drafting ECP representations and contacting existing participants are part of the costs of determining ECP status. While the CFTC acknowledges such costs, CFTC Regulation § 1.3(m)(5) also provides investor protection benefits to non-ECP participants in pools that are not ECPs by requiring such pools to enter into retail forex transactions with an Enumerated Counterparty. This provides non-ECP participants in such pools the protections of the retail forex regime imposed by such counterparty's federal regulator.

The CFTC also notes that the number of categories of enumerated counterparties available as counterparties to non-ECP commodity pools has increased since the Commissions proposed the regulations, because other regulators have finalized their retail forex regimes, as discussed in greater detail above. While trading with Enumerated Counterparties will entail doing so pursuant to the retail forex regulations of the relevant federal regulator, such regulations will apply to the counterparties, not the CPO. While CPOs of Retail Forex Pools generally must register as such with the CFTC, to the extent an exemption from registration is available under the CFTC's rules, such CPOs need not register as a result of their retail forex transactions, further reducing the potential costs of Regulations §§ 1.3(m)(5)(i) and (ii). Further, commodity pools will not incur any costs to change counterparties (with the accompanying costs of, for example, putting in place new trading documentation) to the extent they already trade with Enumerated Counterparties. Commenters noted that non-ECP pools would incur costs to negotiate new trading documentation with Enumerated Counterparties to the extent that such pools do not currently enter into retail forex transactions with Enumerated Counterparties and wish to continue to engage in retail forex transactions other than on or subject to the rules of a DCM. However, Regulation § 1.3(m)(5) also provides investor protection benefits to non-ECP participants in pools that enter into retail forex transactions by requiring such pools to trade with Enumerated Counterparties and to be operated by registered CPOs, absent an applicable exemption.

To the extent that a commodity pool is precluded by CFTC Regulation § 1.3(m)(6) from achieving ECP status based on prong (A)(v) of the ECP definition, the pool will be limited to trading swaps, if at all, on or subject to the rules of a DCM. This could result in costs to affected commodity pools, including margin, the costs of establishing relationships with future commission merchants (*e.g.,* reviewing new account opening documentation) and opportunity costs from losing the ability to trade swaps customized to pools' needs. Preventing commodity pools that do not qualify under clause (A)(iv) from qualifying pursuant to clause (v), however, closes a loophole that would allow smaller commodity pools that are not able to satisfy the requirements of clause (A)(iv) of the ECP definition to qualify as ECPs. Moreover, by providing additional clarification in the preamble regarding the meaning of CEA section 1a(18)(A)(iv)(II), the Commissions substantially reduced the potential number of commodity pools affected by CFTC Regulation § 1.3(m)(6).

CFTC Regulations §§ 1.3(m)(1)–(4) define major swap participants, swap dealers, major security-based swap participants and security-based swap dealers, respectively, as ECPs. Stating explicitly in regulations that these entities are ECPs avoids the potentially anomalous result of such entities, which are some of the largest and/or most active swap market participants, not being ECPs and is in line with expectations in the market that these entities may engage in a full range of swap and security-based swap activities. The CFTC believes that these regulations will not result in any significant economic costs or benefits.

The CFTC is persuaded by commenters that allowing participants to continue to rely on the line of business element of the Swaps Policy Statement will mitigate unnecessary costs from the regulation but is adding various conditions to retain adequate protection for market participants and the public. As noted above, CFTC Regulation § 1.3(m)(7) permits an entity,

[1427] *See* letter from Wells Fargo I.

[1428] While the Commissions are adding additional detail explaining the scope of CEA section 1a(18)(A)(iv)(II), the Commissions also provide guidance on that explanation. As a result, the CFTC does not believe that the upfront costs of determining ECP status under CEA section 1a(18)(A)(iv) will significantly increase.

[1429] The CFTC computed these totals by assuming from 5 to 20 hours of legal review by a compliance attorney at $355/hour based on the 2010 SIFMA survey. *See* SIFMA, Report on Management and Professional Earnings in the Securities Industry—2010. If we assume that 5,000 potential commodity pools need to make this determination and round to two significant digits, this results in a total approximate cost of $8.9 million to $36 million. As is the case for the application of the definitions of the terms ''swap dealer'' and ''major swap participant,'' these costs reflect a higher multiplier because some persons may retain outside advisors to assist in making the determinations under the rules.

in determining its net worth for purposes of subclause (A)(v)(III) of the ECP definition,[1430] to include the net worth of its owners, solely for purposes of determining its ECP status for swaps used to hedge or mitigate commercial risk, provided that all of its owners are themselves ECPs (disregarding shell companies, as defined above). Under CFTC Regulation § 1.3(m)(7) as adopted, an entity seeking to qualify under subclause (A)(v)(III) of the ECP definition in order to enter into a swap used to hedge or mitigate commercial risk is permitted to count the net worth of its owners in determining its own net worth, so long as all its owners are ECPs. Accordingly, CFTC Regulation § 1.3(m)(7) will allow qualified participants the flexibility to enter into customized swaps.

By limiting the line of business ECP prong to entities owned solely by ECPs, the CFTC is preserving the intent behind the ECP requirement, which is to limit the availability of customized swaps to market participants of sufficient financial sophistication and with sufficient assets or net worth to assess, appreciate and bear the implications and risks of swap transactions. Although commenters proposed various solutions to address the loss of the Swap Policy Statement, the CFTC believes the approach adopted is the best approach; it substantively preserves the ECP requirement and protects the real parties in interest (*i.e.,* the owners). Although banks and non-ECP borrowers might be able to restructure or more highly capitalize borrowing entities or borrow at a higher level in the ownership structure, this regulation will allow banks and qualified businesses to continue to conduct their loan arrangements as usual without incurring the costs, which could include undesirable tax treatment, of such operational changes. Further, because commenters focused on swap related risks, the Commissions limited this regulation's application narrowly, *i.e.,* it does not apply for purposes of determining ECP status for: swaps not meeting the conditions set forth in Regulation § 1.3(m)(7); security-based swaps; security-based swap agreements; mixed swaps; or agreements, contracts or transactions that are not swaps (regardless of the purpose for which they are used).

CFTC Regulation § 1.3(m)(8) permits a Forex Pool to qualify as an ECP notwithstanding that it has one or more direct participants that are not ECPs if the Forex Pool (a) is not formed for the purpose of evading regulation under CEA sections 2(c)(2)(B) or (C) or related rules, regulations or orders, (b) has total assets exceeding $10 million and (c) is formed and operated by a registered CPO or by a CPO who is exempt from registration as such pursuant to CFTC Regulation § 4.13(a)(3). The data presented by commenters, discussed above, demonstrate that registered CPOs [1431] of commodity pools over a certain size ($10 million in total assets) historically have engaged in retail forex misconduct to a much less significant degree than other CPOs. Only one of the 45 unique cases presented by commenters involved a pool with more than $10 million in total assets and a registered CPO. Only two of those cases involved a pool operated by CPOs exempt from registration: in both of those cases, however, the CPO raised less than $10 million.[1432] The CFTC also recognizes that subjecting such commodity pools to the statutory look-through provision to protect non-ECP customers from fraud and abuse would cause them to incur higher costs (*e.g.,* CPO compliance costs for those CPOs required to register as such, and redocumenting trading relationships with new counterparties who are Enumerated Counterparties), for intangible pool participant protections. To further protect pool participants, the Commissions added a requirement that, to be an ECP under the line of business prong, the Forex Pool must not be formed for the purpose of evading CFTC regulation of Retail Forex Pools and retail forex transactions under CEA Section 2(c)(2)(B) or (C). Accordingly, the Commissions have tailored CFTC Regulation § 1.3(m)(8) in a manner they believe preserves its ability to effectively protect market participants and the public, while avoiding significant costs.

As noted above, CEA section 1a(18)(A)(vii)(cc) contains a statutory cross-reference rendered incorrect due to a legislative drafting oversight. Failing to address such error would inappropriately deprive such entities of ECP status, imposing undue costs (*e.g.,* the opportunity costs of being unable to execute a desired hedge or trading strategy using standardized exchange-traded swaps) on such entities. Allowing a government entity the ability to qualify as an ECP based on its counterparty's status will provide, at little or no cost, the benefit of effectuating Congressional intent that government entities satisfying the conditions of CEA section 1a(18)(A)(vii)(cc) be ECPs. Therefore, the CFTC included in the preamble an interpretation treating as an ECP government entities satisfying the conditions of CEA section 1a(18)(A)(vii)(cc) as if such section incorporated the correct cross-reference. The CFTC believes that correcting this incorrect cross-reference will not result in any significant economic costs or benefits.

d. CEA Section 15(a) Discussion

Protection of market participants and the public. Congress determined to protect retail foreign exchange investors from fraudsters by amending the ECP definition to require a pool's participants to qualify as ECPs for the pool to be an ECP under subsection (A)(iv).[1433] As discussed above, this protection, as implemented by CFTC Regulation § 1.3(m)(5) may raise the costs of legitimate foreign exchange transactions. To mitigate these potential increased costs, CFTC Regulations § 1.3(m)(5)(i) limits the look-through to the level of the commodity pool structure that engages in retail forex transactions, subject to CFTC Regulation § 1.3(m)(5)(ii). This limitation provides that, if any level of the pool has been structured to evade, the CFTC would look through the transaction-level commodity pool's direct commodity pool participants indefinitely until reaching non-commodity pool participants. CFTC Regulation § 1.3(m)(5), therefore, protects non-ECP members of the public in appropriate instances.

By limiting the line of business ECP prong to entities owned solely by ECPs, the CFTC is preserving the intent behind the ECP requirement, which is to limit the availability of customized swaps to market participants of sufficient financial sophistication to assess and appreciate the risk and implications of the transactions. Although commenters proposed various solutions to address the loss of the Swap Policy Statement, the CFTC believes the

[1430] CEA section 1a(18)(A)(v)(III) provides that ''a corporation, partnership, proprietorship, organization, trust, or other entity * * * that (aa) has a net worth exceeding $1,000,000; and (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business'' is an ECP. 7 U.S.C. 1a(18)(A)(v)(III).

[1431] CFTC Regulation § 1.3(m)(8) as adopted requires that the CPO of the Forex Pool be registered as a CPO with the CFTC. The Commissions believe that this condition is appropriate because it will ensure that the NFA oversees compliance by those CPOs relying on this new regulation.

[1432] In addition, one of those CPOs relied on the CFTC Regulation § 4.13(a)(4) CPO registration exemption. As discussed above, the CFTC has withdrawn that exemption.

[1433] *Accord* letter from AIMA I.

approach adopted is the best approach because it preserves the substance of the ECP requirement and protects the real parties in interest (*i.e.,* the owners).

Because registered CPOs,[1434] and CPOs exempt from registration, who operate commodity pools over a certain size ($10 million in total assets) historically have engaged in retail forex misconduct to a much less significant degree than CPOs of commodity pools below that threshold, the CFTC believes that imposing this size threshold requirement as a condition of ECP status pursuant to Regulation § 1.3(m)(8) provides some protection to pool participants. The additional requirement that to be an ECP under the line of business prong the Forex Pool must not be formed for the purpose of evading CFTC regulation of Retail Forex Pools and retail forex transactions under CEA Section 2(c)(2)(B) or (C) will further protect pool participants.

Efficiency, competitiveness, and the financial integrity of the market. With respect to CFTC Regulation §§ 1.3(m)(5) and (6), commodity pools that do not qualify as ECPs may have to use products listed on or subject to the rules of a DCM that might not precisely (or at all) match such parties' needs. This may reduce or eliminate a commodity pool's ability to engage in some transactions, but these regulations also seek to prevent unsophisticated parties from entering into certain transactions to prevent repeated abuses and protect members of the public. We believe CFTC Regulations §§ 1.3(m)(1)–(8) do not significantly impact competitiveness or the financial integrity of markets.

Price discovery. CFTC Regulations §§ 1.3(m)(1)–(8) only clarify the status of entities. They do not affect price discovery.

Sound risk management practices. CFTC Regulations §§ 1.3(m)(5) and (6) may restrict investment opportunities for certain non-ECPs that might have otherwise qualified as ECPs.[1435] This may discourage the use of some sound risk management practices and/or investment strategies. For instance, it may become more expensive for CPOs operating non-ECP pools to use such practices and/or strategies if such pools must enter into swaps on or subject to the rules of a DCM or come into compliance with a retail forex regime or choose to redeem non-ECPs to avoid such results. On the other hand, CPOs may not incur the increased expense of such sound risk management practices and/or investment strategies if they are able to pass such costs on to the participants in the pools. Also, with respect to swaps, pools that are not ECPs due to CFTC Regulation § 1.3(m)(6) can enter swaps on or subject to the rules of a DCM to the extent an appropriate swap is listed by such DCM.

In contrast, CFTC Regulations §§ 1.3(m)(7) and (8) allow qualified participants to engage in swaps that are not on a DCM. This gives qualified participants more choices for their hedges, and may provide an opportunity for better risk management.

Other public interest considerations. CFTC Regulations §§ 1.3(m)(1)–(4) state that major swap participants, swap dealers, major security-based swap participants, and security-based swap dealers, respectively, are ECPs. The interpretive guidance regarding certain governmental ECPs remedies an incorrect statutory cross-reference with respect to the ability of a subset of governmental entities to qualify as ECPs under CEA section 1a(18)(A)(vii).[1436]

VIII. Administrative Law Matters—Exchange Act Revisions (Definitions of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'')

A. Economic Analysis

1. Overview

The SEC is sensitive to the costs and benefits of our rules. Some of these costs and benefits stem from statutory mandates, while others are affected by the discretion we exercise in implementing the mandates. We have requested comment on all aspects of the costs and benefits of the proposal, including any effect our proposed rules may have on efficiency, competition, and capital formation. In considering the economic consequences of these final rules, moreover, we have been mindful of the link between the scope of the persons who are deemed to be dealers or major participants pursuant to these rules and the costs and benefits associated with the regulatory requirements that are applicable to dealers and major participants, as well as the direct assessment costs (as defined below) these rules will impose on certain market participants.

As the SEC noted in the Proposing Release, the definitions of ''security-based swap dealer'' and ''major security-based swap participant'' implicate two categories of potential costs. First, there are costs that arise from the regulatory requirements that will apply to those types of entities (*e.g.,* the registration, margin, capital and business conduct requirements that would apply to dealers and major participants).[1437] The Proposing Release also noted that there are costs that entities will incur in determining whether they fall within the definitions of ''security-based swap dealer'' and ''major security-based swap participant.'' [1438] Commenters that addressed these issues discussed both types of costs.[1439] Our consideration of these issues has been informed by the comments we received.

In adopting these final rules, we have sought to take into account the broader costs and benefits associated with the regulation of security-based swap dealers and major security-based swap participants, which we refer to in this section as ''programmatic'' costs and benefits. We have also considered the direct costs that persons would incur to assess whether they fall within the dealer or major participant definitions or to assess the potential availability of limited registration as a dealer or major participant. We refer to these costs as ''assessment'' costs.[1440] The programmatic costs and benefits and the assessment costs raise distinct analytic issues.

We discuss below certain of the costs and benefits—both programmatic and assessment-related—that we have considered in adopting these rules. These costs and benefits have informed the policy choices described above.

[1434] CFTC Regulation § 1.3(m)(8) as adopted requires that the CPO of the Forex Pool be registered as a CPO with the CFTC. This condition is appropriate because it will ensure that the NFA oversees compliance by those CPOs relying on this new regulation.

[1435] CFTC Regulations § 1.3(m)(1)–(4) and the interpretive guidance regarding certain governmental ECPs have the opposite effect, making investment opportunities available to certain ECPs that might otherwise not have qualified as ECPs.

[1436] 7 U.S.C. 1a(18)(A)(vii).

[1437] *See* Proposing Release, 75 FR at 80206.

[1438] *See* Proposing Release, 75 FR at 80206–07.

[1439] *See, e.g.,* letters from Representatives Bachus and Lucas (''Casting an overly-broad net in defining these terms could force some smaller participants to leave the marketplace as a result of increased costs, or eliminate certain types of contracts used for hedging. If either occurs, businesses will be left exposed to market volatility and the consequences will ultimately be felt by Americans in the forms of increased consumer costs.''); ISDA (suggesting that imposing dealer regulation beyond persons whose business is to make markets would be inconsistent with the Dodd-Frank Act's intent to preserve growth and innovation in the swap markets); ABC/CIEBA (stating that major participant thresholds will cause persons who pose no systemic risk to incur substantial costs associated with major participant registration and regulation); SIFMA–AMG (addressing complexity and burden of analyzing potential status as a major participant, and urging implementation of a calculation safe harbor).

[1440] We expect that the benefits resulting from the identification and registration of dealers and major security-based participants will likely accrue primarily at the programmatic level. To the extent appropriate given the purposes of Title VII, we have sought to mitigate the costs entities will incur in connection with such identification and registration.

Accordingly, the analysis below includes references throughout to the earlier discussions of the policy decisions taken by the Commissions.

In considering the costs and benefits of these rules, we are mindful of the various considerations that must be taken into account in establishing the baseline against which those costs and benefits may be evaluated. A key consideration is that the definitions, while integral to the regulatory requirements that will be imposed on dealers and major participants pursuant to Title VII, do not themselves establish the scope or nature of those substantive requirements or their related costs and benefits. In light of this consideration associated with definitional rulemaking, the baseline we are using to consider the costs and benefits associated with the definitions presumes that the other Title VII rules that implement the statutory requirements applicable to security-based swap dealers and major security-based swap participants will be adopted (and will be the subject of their own economic analysis), but as yet there are no dealers or major participants subject to any of these requirements. The costs and benefits described below are therefore those that may arise in connection with (1) identifying a subset of current and future market participants as either security-based swap dealers or major security-based swap participants (*i.e.,* the assessment costs) and (2) subjecting that subset, through the definitional lines we are drawing, to a complete, fully effective complement of Title VII statutory and regulatory requirements (*i.e.,* the programmatic costs and benefits).

Accordingly, in determining the appropriate scope of the definitions being adopted in these rules, we considered what type of persons should be regulated as dealers and major participants under Title VII, in light of the purposes of the statute, the overall regulatory framework, and the data currently available to us. We thus have sought to adopt regulations that would include entities within the scope of the dealer and major participant definitions to the extent that encompassing persons with their level of security-based swap activities or positions would be necessary and appropriate given the purposes of the statute (for example, because the institution may pose market or other risks of the type addressed by Title VII). Conversely, to the extent that we expect that the regulation of certain types of market participants would not serve the statutory purposes, we have sought to exclude them from the scope of the definitions, thereby reducing unnecessary burdens on entities whose regulation may not be necessary or appropriate to further the purposes of the statute.

We recognize that the costs and benefits arising from these rules will affect competition, efficiency, and capital formation in the security-based swap market broadly, with the impact not being limited to the specific entities that fall within the meaning of the terms ''security-based swap dealer'' and ''major security-based swap participant.'' In the sections that follow we begin with a consideration of the costs and benefits of the rule that affect the regulated market participants that fall within the meaning of these terms, and conclude with a consideration of the potential effects of this rule on competition, efficiency, and capital formation.

2. Programmatic Costs and Benefits Associated With These Definitions' Scope

a. Programmatic Costs

The scope of these definitions will directly affect the number of market participants subject to Title VII and the rules thereunder and thus will directly affect the overall costs associated with the regulation of dealers and major participants pursuant to Title VII. Persons who fall within the statutory definitions of security-based swap dealer and major security-based swap participant, as further defined by these rules, will incur a number of upfront costs and ongoing costs in connection with their status as dealers or major participants. Those include, but are not limited to, costs of complying with requirements related to: registration; reporting, recordkeeping, confirmation and documentation; sales practices; margin, capital and segregation of customer collateral; and maintaining a chief compliance officer.[1441] We expect that the significance of those programmatic costs will outstrip the more discrete and entity-specific assessment costs (discussed in more detail below) that individual entities will incur in determining whether they fall within the dealer and major participant definitions.

The programmatic costs linked to compliance by regulated entities with specific requirements are not the only overall costs associated with the regulation of dealers and major participants. Other potential costs associated with the establishment of a new regulatory structure over dealers and major participants, such as costs related to the potential reduction of competition in the market, the deterrence of new entrants, or reductions in capital formation, are discussed more fully below.[1442]

b. Programmatic Benefits

The regulation of dealers and major participants also will provide a number of programmatic benefits to the security-based swap market and to market participants. As discussed above,[1443] registered security-based swap dealers and major participants will be subject to a number of entity-level and transaction-level requirements that we expect to produce a broad array of benefits consistent with the purposes of Title VII.[1444]

For example, section 15F(e) of the Exchange Act and related rules impose capital and margin requirements on dealers and major participants,[1445] which will reduce the financial risks of these institutions and contribute to the stability of the security-based swap market in particular and the U.S. financial system more generally. Section 3E of the Exchange Act, among other things, requires security-based swap dealers that collect margin from counterparties to cleared security-based swap transactions to maintain that collateral in segregated accounts, as well as providing counterparties to uncleared security-based swap transactions with security-based swap dealers and major

[1441] For example, dealers and major participants will be subject to business conduct requirements of section 15F of the Exchange Act, and thus will be required, among other things, to determine that their counterparty meets certain eligibility standards before entering into security-based swaps with them and to disclose information about material risks and characteristics, material incentives, conflicts of interest, the daily mark, and clearing rights. *See* Securities Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396, 42406, 42410 (July 18, 2011). Also, for example, in connection with registration requirements we expect security-based swap dealers and major security-based swap participants to incur costs in connection with completing and filing forms, providing related certifications, addressing additional requirements in connection with associated persons, as well as certain additional costs. *See* Securities Exchange Act Release No. 65543 (Oct. 12, 2011), 76 FR 65784, 65813–18 (Oct. 24, 2011). The costs associated with these and other substantive rules applicable to dealers and major participants are being addressed in more detail in connection with the applicable rulemakings.

[1442] *See* part VIII.A.4, *infra.*

[1443] *See* part II.D.3.a, *supra.*

[1444] In application, the programmatic requirements applicable to security-based swap dealers may differ from the programmatic requirements applicable to major security-based swap participants. For example, the proposed business conduct rules applicable to dealers include ''know your customer,'' suitability and ''pay to play'' requirements that would not also apply to major participants. *See* Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396, 42399–401 (July 18, 2011).

[1445] *See* Exchange Act section 15F(e).

security-based swap participants with the right to require the segregation of assets held as collateral with an independent third-party custodian. These protections provide market participants who enter into transactions with these entities confidence that their collateral accounts will remain separate from the dealer or major participant's assets in the event of bankruptcy.[1446] Title VII also requires registered entities to implement risk management policies and procedures that should allow them to avoid taking on excessive risk and to better deal with market fluctuations that might otherwise endanger the financial health of the entity.[1447]

Title VII further imposes a range of business conduct requirements upon these registered entities, which should deter fraudulent or deceptive conduct and increase information transparency for customers and counterparties seeking to access the security-based swap market. For example, section 15F(h)(3)(B) of the Exchange Act and related rules establish certain disclosure requirements for dealers and major participants,[1448] while section 15F(h)(3)(C) of the Act and related rules require that communications by these entities meet certain standards of fairness and balance.[1449] Section 15F(j)(5) of the Act and related rules introduce requirements intended to address potential conflicts of interest that may arise in transactions between a dealer or major participant and its counterparty.[1450] Title VII also establishes higher levels of protection for special entities entering into transactions with dealers or major participants.[1451] As we discuss in more detail in our analysis of the competitive effects of these rules, these protections, and the related increase in transparency in dealings with registered entities may be expected to improve the competitiveness and efficiency of the market.

Finally, Title VII also imposes requirements that are designed to promote effective market operation and transparency. Sections 15F(f), (g), and (j)(3) of the Exchange Act and related rules impose certain reporting, recordkeeping, and regulatory disclosure requirements upon registered entities, which should enhance the volume and quality of information available in the market and facilitate effective oversight by the Commission.[1452] Section 15F(i) establishes regulatory standards related to the confirmation, processing, netting, documentation and valuation of security-based swaps, which should enhance the efficiency of the procedures surrounding the execution of security-based swap transactions.[1453]

We expect that the regulation of security-based swap dealers and major participants through these provisions will advance the transparency, risk reduction and counterparty protection purposes of Title VII.[1454] While these benefits will be significant, they will not be entirely measurable, as it is not possible to quantify the benefits of mitigating or avoiding a future financial crisis, or the benefits of avoiding an unsuitable security-based swap transaction.[1455] Those benefits, moreover, can be expected to manifest themselves over the long-term and be distributed over the market as a whole.

c. The Relation Between These Rules and the Programmatic Costs and Benefits

In adopting these final rules, we recognize that: (a) The choices reflected by these rules will affect how many persons and which persons ultimately will be deemed to be dealers or major participants; and (b) those results, combined with the substantive requirements that are to be adopted in connection with the dealer and major participant regulatory regime, ultimately will determine the programmatic costs and benefits that will be associated with the substantive regulation of dealers and major participants.

This is not to say that there would be a one-to-one correlation between the regulation (or non-regulation) of any particular entity as a dealer or major participant and the additional (or reduced) programmatic costs and benefits that would be associated with the regulation (or non-regulation) of that entity. Some of the costs of regulating a particular person as a dealer or major participant, such as costs of registration, may largely be fixed. At the same time, other costs associated with regulating that person as a dealer or major participant (*e.g.,* costs associated with margin and capital requirements) may be variable, reflecting the level of the person's security-based swap activity. Similarly, the regulatory benefits that would arise from deeming that person to be a dealer or major participant (*e.g.,* benefits associated with increased transparency and efficiency, and reduced risks faced by customers and counterparties), although not quantifiable, may be expected to be variable in a way that reflects the person's security-based swap activity. In addition, it is reasonable to believe that the implementation of Title VII itself will change the security-based swap market, and, with the full implementation of Title VII—which in part is conditioned on these definitions—more information will be available for this analysis.[1456]

Given these limitations on our ability to conduct a quantitative assessment of the programmatic costs and benefits associated with these definitional terms, we have considered these costs and benefits primarily in qualitative terms. In that framework it is possible to identify a subset of such entities that, because of the volume of their dealing activity or the size of their security-based swap exposure, appear to be the types of entities for which the other statutory requirements of Title VII were created. We have therefore sought to adopt definitions that would capture these entities, as the statute requires us to do, without imposing the costs of Title VII on those entities for which regulation currently may not be justified in light of those purposes. We believe that this approach will maximize the benefits provided by Title VII while minimizing costs to the extent

[1446] *See* Exchange Act section 3E.

[1447] *See* Exchange Act section 15F(j)(2).

[1448] *See* Exchange Act section 15F(h)(3)(B).

[1449] *See* Exchange Act section 15F(h)(3)(C).

[1450] *See* Exchange Act section 15F(j)(5).

[1451] *See* Exchange Act sections 15F(h)(2), (h)(4), (h)(5).

[1452] *See* Exchange Act section 15F(f) (reporting and recordkeeping requirements); Exchange Act section 15F(g) (daily trading records requirements); and Exchange Act section 15F(j)(3) (requirements related to the disclosure of information to regulators).

[1453] *See* Exchange Act section 15F(i).

[1454] Prior to the enactment of the Dodd-Frank Act, a Treasury Department blueprint for financial reform articulated benefits of comprehensive regulation of derivatives: ''OTC derivatives markets, including CDS markets, should be subject to comprehensive regulation that addresses relevant public policy objectives: (1) preventing activities in those markets from posing risk to the financial system; (2) promoting the efficiency and transparency of those markets; (3) preventing market manipulation, fraud, and other market abuses; and (4) ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties.'' Department of the Treasury, *Financial Regulatory Reform—A New Foundation* 46–47 (2009).

[1455] *See* note 421, *supra.* The significance of these potential benefits is suggested by the 2008 financial crisis. Better Markets cited estimates that the worldwide cost of the 2008 financial crisis in terms of lost output was between $60 trillion and $200 trillion, depending primarily on the long-term persistence of the effects. *See* letter from Better Markets. We recognize, however, that this estimate addresses the aggregate cost of the financial crisis, and that Title VII is directed to only one aspect of the factors that contributed to the crisis.

[1456] The lack of market data is particularly significant in the context of total return swaps on equity and debt. We do not have the same amount of information regarding those products as we have in connection with the present market for single-name credit default swaps.

consistent with the purposes of the statute.

Moreover, as discussed above, the SEC has directed the staff to report to the Commission on all aspects of the dealer and major participant definitions no later than three years following the later of: (i) the last compliance date for the registration and regulatory requirements for security-based swap dealers and major security-based swap participants under Section 15F of the Exchange Act; and (ii) the first date on which compliance with the trade-by-trade reporting rules for credit-related and equity-related security-based swaps to a registered security-based swap data repository is required. This report will provide the SEC and market participants with more information about the security-based swap market following the implementation of Title VII—including information regarding the business of dealers and major participants, the characteristics of positions they and other market participants hold, the structure of the market, and how Title VII has affected those aspects of the market. This report, which will take into account the additional data from our observations of the security-based swap market and the functioning of the associated regulatory requirements, is intended to help the SEC assess whether to make changes to the scope of the dealer and major participant definitions (as well as to assess future actions related to the extended compliance period in connection to the *de minimis* exception to the security-based swap dealer definition).

d. Analysis of the Effect of Specific Rules on Programmatic Costs and Benefits

We have sought to establish definitions that capture the types of entities whose security-based swap activity or whose security-based swap positions warrant regulation under Title VII as dealers or major participants, and to exclude the types of entities whose activity or positions may not warrant such regulation. The relationship between a given rule and the scope of the persons that ultimately will fall within the dealer or major participant definitions—along with the related costs and benefits—manifests itself in different ways depending on the rule at issue. Some of these rules may be expected to have a close link to the overall programmatic costs and benefits associated with dealer and major participant regulation because they play a significant role in determining the overall scope of the definitions (for example, because they are relevant to the status of relatively more entities). Other rules may be expected to affect the status of relatively fewer entities and thus have a smaller effect on those programmatic costs and benefits.

We anticipate that the report that the SEC staff will make to the Commission following the full implementation of Title VII with regard to these definitions will help us more fully evaluate the programmatic impact of all of these rules, both in terms of the number of potential major participants and dealers that would result from the definition we are adopting as well as potential alternatives, and in terms of the associated programmatic costs and benefits.

i. Core Rules That Implicate Programmatic Costs and Benefits

The core definitional terms with respect to establishing the scope of the dealer and major participant definitions are those relating to: (i) the core dealer definition, (ii) the dealer *de minimis* exception, and (iii) the definitions of ''substantial position'' and ''substantial counterparty exposure'' within the major participant definition.

A. Dealer Definition

Exchange Act rule 3a71–1 defines ''security-based swap dealer'' and thus plays a central role in determining the scope of the Title VII regulatory regime going forward. Based on the available data regarding activity in the market for single-name credit default swaps, including the application of various criteria that may be indicative of dealing activity in that market, and taking into account the availability of the *de minimis* exception to the dealer definition, we estimate that 50 or fewer entities ultimately may have to register with the SEC as security-based swap dealers.[1457] This is consistent with the estimate that accompanied the proposal.[1458]

[1457] This estimate—which potentially overstates the number of potential dealers—is consistent with the data considered in the CDS Data Analysis. That analysis implied a range of alternative estimates—from 16 possible dealers to 93 possible dealers—based on currently available data and reflecting a $3 billion *de minimis* level. *Compare* CDS Data Analysis at table 2a (identifying 16 potential dealers above the $3 billion level based on the criterion of having 20 or more unique counterparties) *with* CDS Data Analysis at table 2c (identifying 93 potential dealers above that level based on the criterion of having 10 or more unique counterparties). However, most of the criteria applied by the CDS Data Analysis as potentially indicative of dealer activity suggested estimates of fewer than 50 possible dealers after accounting for the $3 billion *de minimis* level. *See id.* at table 2b (identifying 32 possible dealers based on the criterion of having 15 or more unique counterparties); *id.* at table 3 (identifying 16, 19, or 25 possible dealers based on the criterion of having a certain number of counterparties not identified as dealers by ISDA); *id.* at table 4 (identifying 32 possible dealers based on the criterion of having a ''flat notional book''); *id.* at table 5 (identifying 33 possible dealers based on the criterion of having ''flat transaction volume''); *id.* at table 7 (identifying 40 possible dealers that meet two or more of the other criteria cited in the analysis); *id.* at table 8 (identifying 27 possible dealers that meet three or more of the other criteria cited in the analysis). Only two criteria suggested estimates in excess of 50 possible dealers above the $3 billion level. *See id.* at table 2c (identifying 93 possible dealers based on the criterion of having 10 or more unique counterparties, which may also be explained by the fact that non-dealers may maintain trading relations with multiple dealers); *id.* at table 6 (identifying 52 possible dealers based on the criterion of posting initial margin with low frequency, which may also be explained by underreporting of margin due to the fact that such reporting was voluntary with respect to the data underlying the CDS Data Analysis).

While recognizing that alternative criteria for identifying possible dealing activity produced varied results, we believe that the results largely are consistent with the estimate of 50 or fewer security-based swap dealer registrants. We further believe that it is appropriate to place particular weight on one criterion that identified possible dealing activity based on whether an entity engaged in security-based swap transactions with three or more counterparties that themselves were not identified as dealers by ISDA. That analysis identified 28 entities possibly engaged in dealing activity (with 25 of those with trailing notional transactions that exceed the $3 billion *de minimis* threshold we are adopting). *See* CDS Data Analysis at table 3c. We believe that this metric serves as a useful proxy for the application of the dealer-trader distinction, given that persons with the business model of seeking to profit by providing liquidity in general may reasonably be expected to engage in transactions with persons who are not themselves recognized as dealers.

In estimating that 50 or fewer entities ultimately may have to register as dealers, we are seeking to take a conservative approach that recognizes both the limitations on the conclusions that may be drawn from available data and the potential for changes in the security-based swap market. We recognize that the criteria applied in the CDS Data Analysis are imperfect in that they do not directly apply the dealer-trader distinction, and that some alternative criteria may prove to be superior predictors of actual dealing activity. We also recognize that the estimate may overstate the number of possible registered dealers insofar as not all of the activity of persons identified as potential dealers based on the CDS Data Analysis necessarily reflects dealing activity, meaning that in practice a greater number of entities may be able to take advantage of the *de minimis* exception, and fewer entities would have to register as dealers, than estimates implied by that analysis may suggest. This estimate of 50 potential dealers further seeks to reflect the potential for growth in the size of the security-based swap market, as well as growth in the number of registered dealers as a result of competition promoted by the policies contemplated by the Dodd-Frank Act, and the possibility that some business groups that are identified as a single entity for purposes of this data ultimately may register multiple legal entities as security-based swap dealers.

[1458] The proposal estimated approximately 50 entities would be required to register as security-based swap dealers, based on discussions with industry. *See* Proposing Release, 75 FR at 80209, n.188. Commenters did not contradict this estimate. To the extent that the actual number of registrants differs from this estimate, it is reasonable to assume that the actual number will be lower than the

Continued

Alternative approaches to identifying dealer activity, including those suggested by commenters, may have led to a lower or higher number of potential dealers out of the over 1,000 total participants in the security-based swap market. For example, commenters variously suggested, among other approaches, that the dealer definition should be interpreted to be coextensive with the concept of market making activity, that dealer status should be limited to persons available to take either side of the market at any time, or that dealer status should be limited to transactions arising from a ''customer'' relationship.[1459] Following those alternative approaches potentially would reduce the ultimate number of persons required to register as dealers.

In adopting the final rules and providing interpretive guidance that adapts our traditional dealer-trader analysis for the security-based swap market, we have sought to capture those entities whose security-based swap activity is warranted due to the nature of their interactions with counterparties, or is warranted to promote market stability and transparency. In this respect, we have sought to limit the costs imposed by regulation under Title VII to those entities whose regulation would serve the transparency, customer protection, and market stability purposes of the statute while not imposing those costs on entities whose regulation may not produce sufficient benefit in terms of those purposes. The core dealer analysis that we have adopted here focuses on activity that characterizes dealers, as the statutory text requires, and does so while drawing on a well-established approach used in an analogous securities dealer context by a wide range of financial intermediaries.[1460]

B. De Minimis Exception to the Dealer Definition

Exchange Act rule 3a71–2 implements the *de minimis* exception to the dealer definition. This rule will directly affect the scope of the dealer definition by excepting certain entities that otherwise would be encompassed by the dealer definition but whose security-based swap dealing activities fall below a specified notional threshold. As above, we believe that the application of the final rule implementing the *de minimis* exception, in combination with application of the dealer-trader distinction, reasonably may be expected to result in 50 or fewer entities ultimately registering with the SEC as security-based swap dealers.[1461]

As discussed above, the final rule implementing the *de minimis* exception reflects our attempt to focus the application of dealer regulation onto those entities for which that regulation would be appropriate, taking into account the comparative costs and benefits of dealer regulation, and the high degree of concentration of dealing activity in the security-based swap market.[1462] The final rule particularly provides that a dealer may take advantage of the exception if the notional amount of its dealing activity involving security-based swaps that are credit default swaps over the trailing 12 months is no more than $3 billion. For other types of swaps, a dealer may take advantage of the exception if the notional amount of its dealing activity is no more than $150 million. The threshold for dealing activity with counterparties that are ''special entities,'' regardless of the type of security-based swap, is $25 million. The final rule also eliminates proposed tests based on the number of an entity's dealing counterparties and on the number of its dealing security-based swaps. This approach also mitigates concerns raised by some commenters about the exception being overly narrow.[1463]

We have concluded that a $3 billion threshold for security-based swaps that are credit default swaps would appropriately apply dealer regulatory requirements to entities that comprise the vast majority of domestic dealing activities in these products, while not imposing the fixed costs of dealer regulation upon those entities responsible for only a small portion of total dealing activity, and avoiding the threat of leaving an excessive amount of dealing activity outside the ambit of dealer regulation.[1464] We believe that this approach strikes a balance that appropriately maximizes the benefits of dealer regulation while avoiding the application of the fixed costs of dealer regulation onto those entities for which dealer regulation may not significantly contribute to those benefits and avoiding the threat of allowing an excessive volume of unregulated dealing activity.[1465]

Similar considerations influenced our determination that a $3 billion *de minimis* threshold would be inappropriate for persons engaged in dealing activity involving other types of security-based swaps, given the comparatively smaller size of that market.[1466] We instead have set the threshold at a level that reflects the relative volume in the security-based swap market of security-based swaps that are not credit default swaps.[1467]

The final rule implementing the *de minimis* exception also sets forth a lower notional threshold for dealing activities involving ''special entities,'' consistent with the special protections that Title VII affords those entities. While we recognize that this lower threshold may deter certain entities that are not registered as dealers from

estimate in the proposal because the *de minimis* level established by the final rules for credit default swaps that are security-based swaps—as described above, by far the overwhelming majority of the security-based swap market—is higher than the level that was proposed (*i.e.,* $3 billion vs. $100 million).

[1459] *See* part II.A.2, *supra.*

[1460] *See* part II.A.5, *supra* (discussing the application of the dealer-trader distinction to the security-based swap market).

[1461] *See* note 1457, *supra.*

[1462] *See* parts II.D, *supra.* Regardless of the criterion used for identifying entities engaged in dealing activity, analysis of 2011 transaction data for single-name credit default swaps indicates that possible dealers with $3 billion or more in trailing notional activity account for over 98 percent of all the trailing notional activity by such entities. *See* CDS Data Analysis at 8–17.

[1463] *See* part II.D.2, *supra.* Conversely, some commenters suggested lower thresholds than those provided in the final rule, an approach that reasonably would be expected to lead more entities to have to register as security-based swap dealers. We did not adopt these lower thresholds because we determined that, given our understanding of the current structure of the market, it was unnecessary to do so to achieve the purposes of Title VII. Under any of the metrics used in the CDS Data Analysis (with the exception of the metrics relying on the posting of margin, which are, for reasons provided in the analysis, particularly unreliable), for example, retaining the proposed *de minimis* threshold of $100 million would have captured at most an additional 0.75 percent of transaction activity engaged in by entities captured by the respective analysis. *See* CDS Data Analysis at 8–17.

In adopting this rule we also considered alternative approaches and thresholds suggested by some commenters that potentially may lead fewer entities to have to register as security-based swap dealers. For example, while some commenters supported the use of an exposure-based threshold rather than a notional threshold, we declined to adopt this approach because the use of an exposure threshold could permit a virtually unlimited amount of dealing activity within the *de minimis* exception so long as exposures are collateralized (or offset, as generally occurs with dealing activity), a result inconsistent with the purposes of Title VII.

[1464] As noted above, a sufficiently high *de minimis* threshold could allow a significant amount of unregulated security-based swap dealing activity to develop among entities whose dealing activity does not exceed the *de minimis* threshold. *See* part II.D.5.b, *supra.*

[1465] As noted above, an extended compliance period will be available to entities that engage in $8 billion or less in annual notional dealing activity in security-based swaps that are credit default swaps (or $400 million in dealing activity in other types of security-based swaps), to help facilitate the orderly implementation of Title VII and to afford the SEC additional time to study the security-based swap market as it evolves in the new regulatory framework. *See* part II.D.5.c.ii, *supra.*

[1466] *See* part II.D.5.d, *supra.*

[1467] *See id.* (discussing rationale for use of $150 million threshold and $400 million phase-in level in connection with those types of security-based swaps).

entering into security-based swap transactions with special entities, and hence may have the effect of reducing the availability of security-based swaps to those entities or increasing their costs,[1468] we believe that this lower threshold is appropriate to avoid undermining those separate Title VII protections.[1469]

The final rule implementing the *de minimis* exception further provides that security-based swap activities of affiliates under common control with an entity should be considered when determining whether the entity can avail itself of the *de minimis* exception. That is intended to avoid evasion of the dealer registration requirement; thus, while a contrary approach might be expected to reduce the number of registered dealers, such an approach would not be consistent with the purposes of Title VII.[1470]

C. ''Substantial Position'' and ''Substantial Counterparty Exposure'' Definitions

Exchange Act rules 3a67–3 and 3a67–5 define ''substantial position'' and ''substantial counterparty exposure,'' which constitute key terms within the major participant definition. The rules defining these thresholds—including the use of current exposure and potential future exposure tests, the specific features of those tests, and the thresholds associated with those tests[1471]—can be expected to directly influence the overall number of persons who may fall with the major participant definition.

These tests seek to capture persons whose security-based swap positions pose sufficient risk to counterparties and the markets generally that regulation as a major participant is warranted.[1472] Based on available data regarding the single-name credit default swap market—which we believe will comprise the majority of security-based swaps—we estimate that the number of major security-based swap participants likely will be fewer than five and, in actuality, may be zero. As discussed above, an entity that posts daily variation margin in connection with those positions generally would need to have security-based swap positions approaching $100 billion to reach the levels of potential future exposure required to meet the substantial position threshold, even before accounting for the impact of netting, while an entity that clears its security-based swaps generally would need to have positions approaching $200 billion.[1473] The available data shows that as of December 2011 a single entity had aggregate gross notional positions (*i.e.,* aggregate buy and sell notional positions) in single-name credit default swaps exceeding $100 billion, and three others had aggregate gross notional positions between $50 and $100 billion.[1474] However, as discussed above, the purchase of credit protection is weighed less heavily than the sale of credit protection for purposes of the analysis,[1475] meaning that an entity's positions reflecting single-name credit protection sold to its counterparties may be expected to be more of a key determinant of the entity's potential future exposure level under the rules we are adopting. The data shows that no entities have more than $100 billion in positions arising from selling single-name credit protection and that only two have between $50 and $100 billion in positions arising from such transactions.[1476]

While a ''substantial position'' or ''substantial counterparty exposure'' also can be established by a sufficiently high amount of current uncollateralized exposure, the available data does not provide information about individual entities' uncollateralized exposure in connection with security-based swap positions. We note, however, our understanding that certain of the financial entities that may have large security-based swap positions, such as hedge funds, tend to collateralize their security-based swap exposures as a matter of course, which would reduce the potential impact of this aspect of the test.

As noted above, commenters suggested both higher and lower thresholds, as well as different discounts or risk multipliers for certain positions.[1477] If the final rules defining ''substantial position'' and ''substantial counterparty exposure'' incorporated higher major participant thresholds, potentially fewer entities may be major participants. Conversely, lower thresholds may have led to a higher number of major participants, with the upper bound being represented by the over 1,000 non-dealer entities that participate in the security-based swap market.[1478]

By potentially capturing more or fewer major participants, such alternatives would have correspondingly increased or decreased the programmatic costs and benefits associated with Title VII regulation of major participants. As discussed above, however, the tests incorporated into the final rules, and the thresholds associated with those tests, are in our view tailored to capture only those entities that pose the risks that major participant regulation in Title VII seeks to address; in other words, these thresholds and related calculations

[1468] We expect any such effect will likely be minimal. An analysis of 2011 transaction data regarding single-name credit default swap transactions involving special entities shows that 16 counterparties account for all transactions with special entities. Although all but one of these entities engaged in more than $25 million in transactions with such entities in 2011, all of these entities engaged in total single-name credit default swap activity well in excess of the $3 billion *de minimis* threshold that applies to dealers generally. *See* CDS Data Analysis, Table 9 and note 8. Consequently, it is possible that all 16 entities would have been required to register as dealers under the standard *de minimis* threshold of $3 billion, regardless of the lower *de minimis* threshold for special entities.

[1469] *See* note 179, *supra* (discussing business conduct requirements applicable to dealing activities involving special entities).

[1470] *See* note 437, *supra* (discussing use of common control standard in this anti-evasion context, rather than the majority ownership standard used in connection with the inter-affiliate exclusions from the dealer and major participant definitions).

[1471] As detailed above in part IV.B.3, an entity will generally be required to register as a major security-based swap participant if its current security-based swap exposure exceeds $1 billion in a single major category of security-based swaps or to a single counterparty or if its current security-based swap exposure plus its potential future exposure exceeds $2 billion in a single major category of security-based swaps or to a single counterparty. The current exposure test looks to an entity's current uncollateralized exposure posed by its security-based swap positions in a given category; the potential future exposure test looks to the effective notional exposure represented by an entity's security-based swap positions, with certain adjustments for cleared or margined positions and netting.

[1472] *See* parts IV.C.3 and IV.E.3, *supra.*

[1473] *See* note 914, *supra.* Although it is possible that a notional position of $20 billion could cause an entity to be a major participant in the absence of central clearing or mark-to-market margining (and assuming that there is no risk reduction associated with netting or with certain positions that pose lower credit risk), we expect that those entities (such as hedge funds) that may be expected to have large positions would, as a matter of course, post mark-to-market margin in connection with positions that are not cleared. *See* Proposing Release, 75 FR 80207–08 n.181 (stating our understanding that banks, securities firms, and hedge funds typically collateralize most or all of their mark-to-market exposure to U.S. banks as a matter of practice). Accordingly, we believe that $100 billion provides a reasonable focus for the analysis.

[1474] *See* CDS Data Analysis at table 10.

[1475] *See* part IV.B.3.c.iii, *supra.*

[1476] *See id.* Although this data describes aggregate notional positions only for single-name credit default swaps and does not include analysis of positions in other types of security-based swaps, as noted above, credit default swaps appear to account for approximately 95 percent of the security-based swap market. That fact reduces the likelihood that positions involving security-based swaps that are not credit-related would cause a person to be a major security-based swap participant, or lead any entity to find it necessary to perform the major participant analysis in connection with those instruments.

[1477] *See* part IV.B.2, *supra.*

[1478] *See* CDS Analysis at tables 10 through 12.

incorporate the risk criteria embedded in the major participant definition.[1479] For example, we have declined to exclude centrally cleared positions from the potential future exposure test, instead permitting entities to discount those positions for purposes of the analysis, because central clearing cannot reasonably be expected to fully eliminate all counterparty risk that may affect the broader markets. Based on this fact, we conclude that it would be inappropriate, given the purposes of Title VII, to exclude an entity from the major participant definition simply because all of its security-based swap positions arise from cleared transactions.[1480] Similar considerations informed our approach to other aspects of the substantial position and substantial counterparty position tests, as discussed more fully above.[1481]

ii. Rules That May Be Expected To Have a Lesser Effect on Programmatic Costs and Benefits

Several of the final rules may be expected to have relatively smaller effects on the scope of the major participant and dealer definitions because they are likely to affect relatively fewer entities. By extension, they will also have a smaller effect on the programmatic costs and benefits arising from these definitions.

A. Limited Purpose Dealer and Major Participant Designations

Exchange Act rules 3a67–1 and 3a71–1 retain the presumption that a person that is encompassed within the major participant or dealer definitions will be deemed to be a dealer or major participant with respect to all of its security-based swap activities or positions, unless the SEC exercises its authority to limit the person's designation as a dealer to specified categories of swaps or security-based swaps, or to specified activities. This presumption may affect programmatic costs in at least two ways.

First, by not providing for registration as a limited purpose major participant or dealer as a matter of course, the final rules may be expected to increase the costs associated with the registration of those entities that seek designation as dealers or major participants or dealers. Aside from the costs of registration described in the SEC's proposal related to the registration of dealers and major participants,[1482] we expect that entities seeking to register as a limited purpose major participant or dealer would incur some additional marginal costs associated with making applications for limited designation.[1483]

In addition, the presumption against limited purpose designation may be expected to reduce the number of limited purpose major participants and dealers below the number that would otherwise register as limited purpose entities absent the presumption. In concept, broader availability of limited purpose registration of major participants or dealers may be expected to reduce the programmatic costs associated with regulation under Title VII, without necessarily reducing certain programmatic benefits if appropriately crafted. In particular, any programmatic effects of an appropriately scoped limited designation likely would affect only the transaction-level requirements applicable to dealers and major participants (*e.g.,* certain business conduct standards and requirements related to trading records, documentation and confirmations), potentially reducing costs and benefits that would otherwise arise from such requirements with respect to transactions that occur outside the limited designation. At the same time, certain of the entity-level regulatory requirements applicable to dealers and major participants as a whole (such as requirements related to capital) would continue to apply in the context of limited designation, ensuring that a limited purpose designation would not undermine the counterparty protection and systemic risk concerns of Title VII.

Notwithstanding these effects, we believe that the presumption against limited purpose designations is appropriate. This conclusion reflects the statutory language, the difficulty of separating a dealer's activities from its non-dealing activities (or a major participant's security-based swap positions taken under its limited purpose designation from other of its security-based swap positions) for compliance purposes, and the challenges of applying dealer or major participant regulatory requirements to only a portion of the entity's security-based swap business. Instead, we will consider limited purpose applications on an individual basis through analysis of the unique circumstances of each applicant.[1484]

We note that the available data does not indicate how many, or which, entities may have business models that conceivably could make limited purposed designations appropriate (*e.g.,* large positions in one major category of security-based swaps accompanied by minor positions in the other).[1485]

B. Inter-Affiliate Exclusions From Dealer and Major Participant Definitions

Exchange Act rules 3a67–3 and 3a71–1 respectively exclude inter-affiliate security-based swaps from the calculation of substantial position and substantial counterparty position thresholds under the major participant

[1479] *See* part IV.B.3, *supra* (discussing the decisions made regarding the substantial position definition and the reasoning behind the adopted approach). For example, we have concluded that the proposed thresholds are set prudently in a manner that takes into account the financial system's ability to absorb losses of a particular size, the need for major participant regulation not to encompass entities only after they pose significant risks to the market, and the need to account for the possibility that multiple market participants may fail close in time. In addition, as discussed above, we believe that this threshold is tailored to address the types of events associated with the failure of AIG FP. *See* part IV.B.3.d, *supra.*

[1480] Central clearing helps to mitigate counterparty credit risk by improving risk management and, among other things, mutualizing the risk of counterparty failure. If multiple members of a central counterparty fail beyond the level to which such risk is managed, however, the central counterparty would also be at risk of failure. *Cf.* Basel Committee on Banking Supervision, Consultative Document, ''Capitalisation of bank exposures to central counterparties,'' Nov. 25, 2011 (available at: *http://www.bis.org/publ/bcbs206.pdf*) (proposing that the capital charge for trade exposures to a qualifying central counterparty should carry a low risk weight, reflecting the relatively low risk of default of the qualifying central counterparty).

[1481] *See* part IV.B.3, *supra.*

[1482] *See* ''Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,'' Exchange Act Rel. No. 34–65543 (''Registration Proposing Release''), 76 FR 65784, 65814–65818 (describing various costs associated with registration, including $11,800 per entity to complete and file form SBSE and between approximately $94,000 and $610,000 per entity to certify to the capabilities of the entity seeking registration).

[1483] These costs may include the costs of identifying how the entity would be able, as a limited designation entity, to comply with the various entity-level requirements of Title VII.

[1484] We will consider applications for limited purpose designation in the context of the registration requirements for major participants and dealers. In that context, we could consider applications on a case-by-case basis, pursuant to requests by specific major participants or dealers. This could help to ensure that any person that is designated as a limited purpose major participant or dealer is able to comply with the regulatory requirements applicable to major participants or dealers. Accordingly, we intend to further consider issues regarding limited designations, including associated costs, in a release relating to the specific registration requirements (for example, the form used for registration) for major participants and dealers. Furthermore, as noted above, the SEC is directing the staff to prepare a report on all aspects of the dealer and major participant definitions. Upon completion of this report, the SEC may further assess whether changes to the presumption against limited designation are warranted in light of the then-current state of the security-based swap market and the types of business in which security-based swap dealers are engaged.

[1485] The study that will be conducted in connection with the dealer and major participant definitions may also provide relevant information regarding limited designations of dealers and major participants.

definition, and from the *de minimis* calculation under the dealer definition. The inter-affiliate exclusion from the major participant and dealer definitions has the potential to affect the scope of these definitions for those entities that engage in inter-affiliate transactions by leading some entities not to meet the major participant or dealer *de minimis* thresholds when they otherwise would have met those thresholds (or by allowing certain centralized hedging facilities to look only at their market-facing activities in conducting the dealer-trader analysis). The exclusion or inclusion of certain inter-affiliate transactions thus may have some impact on the programmatic costs and benefits associated with dealer and major participant regulation.

We are adopting a majority-ownership standard for determining whether transactions between affiliates can be excluded from these threshold calculations because such transactions between entities whose economic interests are aligned to a degree represented by majority ownership do not appear to pose the kinds of counterparty and market risks that Title VII addresses.[1486] Some commenters suggested lower levels of control (such as common control) that may be expected to lead to fewer entities being registered as dealers or major participants, with associated impacts on programmatic costs and benefits. In our view, however, such alternative standards would not be consistent with the scope of the interactions to which dealer regulation is intended to apply, or with an alignment of economic interests consistent with an exclusion from the major participant definitions.

We also note that the data upon which the staff assessment of credit default swap transactions and positions is based excludes certain inter-affiliate credit default swap transactions. As a result, estimates of market concentration and the distribution of dealing activity or credit default swap positions derived from this data should reflect to some extent the effect of the inter-affiliate exclusions we are adopting in this rule.

C. Commercial Risk Hedging Exclusion

Exchange Act rule 3a67–4 defines ''hedging or mitigating commercial risk'' as that term is used in the major participant definition. The scope of this definition has the potential to determine whether certain market participants will be major participants by virtue of the first statutory major participant test, and will therefore affect the scope of the programmatic costs and benefits associated with major participant regulation. In application, this effect may be limited in light of the fact that we estimate that, as discussed above, only five or fewer entities—perhaps as few as zero—may have to register as major security-based swap participants.

The final rule adopts an ''economically appropriate'' standard for determining whether a security-based swap position hedges or mitigates commercial risk, and sets forth exclusions for security-based swap positions that have a speculative or trading purpose. As we discuss above, we carefully considered the alternative approaches suggested by some commenters, including the suggestion that the definition should encompass positions that hedge speculative or trading positions and the suggestion that the definition should incorporate a ''congruence'' standard. We concluded, however, that these approaches are inconsistent with the focus of the statutory text, which is on ''commercial risk.'' [1487] We also concluded that broadening the exclusion as some commenters suggested could largely exclude security-based swap positions from the first major participant test. This would produce a result that we believe to be contrary to the purposes of that part of the statutory definition, which envisions that entities might be required to register as major participants by virtue of their security-based swap positions.

D. ''Financial Entity'' Definition

Exchange Act rule 3a67–6 defines ''financial entity'' for purposes of the third test of the major participant definition, which applies to certain highly leveraged non-bank financial entities and does not prevent them from excluding commercial risk hedging positions when conducting the substantial position analysis (in contrast to the first test within the major participant definition, which permits exclusion of those hedging positions).

Although the scope of the financial entity definition has the potential to affect the number of persons who are captured by the third test of the statutory major participant definition (and thus, by extension, the programmatic costs and benefits associated with major participant regulation), we believe that as a practical matter such an effect would be minimal. This is based on our view that persons that have security-based swap positions large enough and risky enough to potentially lead to major participant status to be financial in nature and thus would likely fall within any reasonable interpretation of the term ''financial entity,'' [1488] thus making such entities potentially subject to the third major participant test (to the extent that such entities are subject to bank capital requirements).

E. ''Highly Leveraged'' Definition

Exchange Act rule 3a67–7 defines ''highly leveraged'' for purposes of the third prong of the major participant definition, which applies to certain non-banks as described above. In adopting the final rule, we have considered alternative approaches suggested by commenters. For example, a number of commenters favored the use of a 15 to 1 leverage ratio, which may be expected to reduce the number of persons who are deemed to be ''highly leveraged'' and thus subject to the third test. Conversely, some commenters favored a ratio that is lower than the one found in the final rule, which may be expected to increase the number of entities deemed to be highly leveraged.[1489]

The final rule defines ''highly leveraged'' as a leverage ratio of 12 to 1 or higher. In our view, this ratio reasonably sets forth objective criteria for identifying entities that pose a heightened risk of being unable to meet their obligations through their use of leverage. This 12 to 1 ratio reflects a number of factors, including the use of a 12 to 1 ratio in connection with certain broker-dealer capital rules, as well as reasons to distinguish the use of a 15 to 1 ratio in Title I of the Dodd-Frank Act.[1490]

As with the financial entity definition in rule 3a67–6, as a practical matter we do not believe that expanding or narrowing the leverage ratio within any reasonable definition of ''highly leveraged'' for purposes of the third major participant test will have a significant impact on the programmatic costs and benefits of major participant regulation. In part, this is because we believe that in many circumstances the

[1486] *See* parts II.C.2.b and IV.G.2, *supra* (discussing nature of inter-affiliate security-based swap transactions).

[1487] *See* parts IV.C.5.a and IV.C.5.b, *supra* (discussing rationale for excluding hedges of speculative and trading positions from the definition).

[1488] *See* Federal Reserve Bank of New York staff reports, ''An Analysis of CDS Transactions: Implications for Public Reporting'' (2011) at table 3 (''NY Fed analysis'') (available at *http://www.newyorkfed.org/research/staff_reports/sr517.pdf*) (discussing credit default swap trade frequency by market type, and indicating that most activity is done by entities of a financial nature).

[1489] *See* part IV.F.2.b, *supra.*

[1490] *See* part IV.F.3.b, *supra* (discussing the rationale for using a 12 to 1 ratio for purposes of defining the term ''highly leveraged'' in the context of the major participant definitions).

sales of credit protection cannot reasonably be interpreted to constitute the hedging of commercial risk,[1491] meaning that such positions in any event may be expected to be considered as part of the analysis of the first major participant test. The programmatic impact of this definition further is mitigated by the fact that we believe that there will be relatively few entities whose security-based swap positions would cause them to be major participants.

F. ''Major'' Categories of Security-Based Swaps

Exchange Act rule 3a67–2 defines ''major'' categories of security-based swaps, a term that plays a role in the two statutory major participant tests that turn upon the presence of a substantial position in a ''major'' category of security-based swaps. The final rule retains the proposal's division of those instruments into debt-based and other categories. As discussed above, these major categories are broadly consistent with market usage and statistics, and we believe that it is reasonable for entities undertaking this analysis to use these categories in calculating whether they have a substantial position.[1492]

In theory, it is possible that the categorization of security-based swaps for these purposes could result in a particular entity exceeding the applicable thresholds in a major category, causing it to be a major security-based swap participant and triggering the Title VII registration and regulatory requirements.[1493] The relationship between the major security-based swap categories as we have defined them in this rule and the programmatic costs and benefits associated with major participant regulation will depend largely on how the security-based swap positions of entities with security-based swap exposures approaching these thresholds are distributed between these categories.

The available data suggests that the debt-based major category (*i.e.,* credit default swaps) accounts for the vast majority of security-based swap positions.[1494] Absent an approach that breaks single-name credit default swaps in to multiple ''major'' categories—which itself would not appear to be justified based on current information—this suggests that this categorization as a practical matter will not have a significant effect on the programmatic costs and benefits of major participant regulation.[1495]

G. Registration Period

Exchange Act rules 3a67–8 and 3a71–2 establish periods for registration as a dealer and major participant, as well as periods for revaluating or terminating one's status as a registered entity. As such, these provisions may affect the length of time that particular entities may be deemed to be major participants or dealers, and hence subject to the requirements applicable to those entities. However, any effect of delaying or accelerating dealer or major participant status on the programmatic costs and benefits associated with major participant or dealer status likely will be negligible compared to the overall programmatic costs and benefits associated with major participant or dealer regulation.

H. Calculation Safe Harbor

Exchange Act rule 3a67–9 establishes a calculation safe harbor for the major participant threshold tests. We do not believe that this safe harbor changes the scope of the major participant definition, as it should not exclude from the major participant definition any entity that would otherwise fall within the definition if that entity performed the substantial position calculations.[1496] Accordingly, we do not believe that the safe harbor would have a material effect on the programmatic costs and benefits associated with major participant regulation.

I. Interpretation Related to Guarantees

In adopting these final rules, we also have finalized an interpretation regarding when a person will have security-based swap positions attributed to it by virtue of having guaranteed the positions of another party. In general, we have clarified that an entity's security-based swap positions need not be attributed to its parent unless the counterparty has recourse to the parent. We also clarified that, even in the presence of a guarantee, positions of certain regulated entities—including swap dealers, security-based swap dealers, major participants, broker-dealers, FCMs and certain entities subject to U.S. bank capital requirements—will not be attributed to the guarantor.[1497]

We recognize that attributing security-based swap positions to the entity guaranteeing another entity's security-based swap transactions may increase the number of major participants. At the same time, excluding certain regulated entities from the attribution requirement even in the presence of a guarantee may help prevent a guarantor, such as a holding company, from being deemed to be a major participant when the risks associated with those positions already are subject to regulation.

We do not currently possess data relating to the existence of guarantees of the security-based swap positions of other parties and thus cannot reasonably estimate the number of additional entities that may be brought within the ambit of major participant regulation by virtue of this interpretation. However, we note that, to the extent that guarantees of another entity's security-based swap positions creates the level of exposure—and corresponding risk to the market and to counterparties—that warrants regulation under Title VII, it would appear inconsistent with the purposes of the statute not to subject that entity to major participant regulation.

J. Other Interpretations

Finally, in this release we also have provided a number of additional interpretations and discussions in connection with the dealer and major participant definitions. These include, among others: the rejection of requests for entity-specific exclusions from the dealer and major participant definitions;[1498] interpretations regarding the application of the ERISA exclusion from the first major

[1491] *See* note 1019, *supra.*

[1492] *See* part IV.A.3 (discussing rationale for final ''major'' categories).

[1493] In other words, the dividing line that the rule sets between the major category of debt-based security-based swaps and the major category for other security-based swaps (or other dividing lines based on different or additional major categories) could determine whether an entity's security-based swap positions exceed or fall below the major participant thresholds for a particular major category, and hence whether the entity will be deemed to be a major participant.

[1494] *See* note 476, *supra.*

[1495] For example, an alternative approach might divide narrow-based index CDS and single-name CDS into separate major categories. We believe, however, that single-name CDS account for the large majority of debt-based security-based swaps, *see id.,* suggesting that most entities' status as major participants would turn on their single-name CDS exposures under any reasonable approach to defining major categories and that the subtraction of narrow-based index CDS exposures in the calculation of substantial exposure would, given their relatively small market volume, have little effect on whether most entities meet the substantial exposure threshold. Thus, we believe that the decision to classify all debt-based security-based swaps in a single category will likely have minimal effect, if any, on any entity's status as a major participant, as compared to dividing debt-based security-based swaps into two categories.

[1496] *See* part IV.M.2, *supra.*

[1497] *See* part IV.H.3, *supra.*

[1498] *See* parts II.A.6 and IV.J, *supra* (stating that such exclusions from the dealer definition would have no basis in the statutory text and would be inconsistent with the activity focus of the dealer definition, and not providing entity exclusions from the major participant definition because entities that meet the thresholds of the rules may pose high risk to the U.S. financial system regardless of how they are organized).

participant test,[1499] and interpretations regarding the application of the major participant analysis to managed accounts.[1500] In theory, each of these interpretations potentially has a programmatic impact.[1501] For the reasons discussed above, we believe that these interpretations reflect reasonable choices.

3. Analysis of Assessment Costs

Certain persons engaged in security-based swap activity are likely to incur costs in connection with evaluating whether they fall within the dealer or major participant definitions.[1502] As detailed below, we have considered these assessment costs in adopting definitional rules and interpretations that seek to capture entities whose security-based swap activity or whose security-based swap positions warrant regulation under Title VII as dealers or major participants, while excluding entities whose activity or positions do not warrant such regulation.

a. Assessment Costs Associated With the ''Security-Based Swap Dealer'' Definition

i. Core Dealer Analysis and *De Minimis* Exception

A. Overview

Exchange Act rule 3a71–1 in part restates the statutory definition of ''security-based swap dealer'' to consolidate the definition and related interpretations for market participants' ease of reference. In conjunction with these final rules the SEC has set forth interpretations to provide additional guidance to implement the statutory approach of capturing persons that engage in certain security-based swap activities while excluding persons that do not engage in those activities as part of a ''regular business.'' [1503] We believe that this guidance—including its reliance on the distinction between dealing activity and non-dealing activity such as hedging or trading—will allow a number of market participants to readily conclude that their security-based swap activities will not cause them to be security-based swap dealers. In adopting this approach, we have considered alternative views, expressed by some commenters, that would have had the effect of narrowing the statutory definition's scope.[1504]

Exchange Act rule 3a71–2 specifies when a person that otherwise would be a security-based swap dealer can take advantage of the *de minimis* exception. In adopting the rule's tests and thresholds—including the use of a $3 billion notional threshold in connection with dealing activity involving credit default swaps that are security-based swaps, a $150 million notional threshold in connection with other types of security-based swaps, higher phase-in levels in connection with those thresholds, and a separate $25 million threshold in connection with dealing activity involving ''special entities''—we have considered a range of alternative approaches and thresholds suggested by commenters.[1505]

In application, the assessment costs associated with the core dealer test and *de minimis* exception are linked.

B. Assessment Costs Associated With the Final Rules and Interpretations

We recognize that certain participants in the security-based swap market may incur costs in connection with the facts-and-circumstances analysis of whether they are security-based swap dealers as defined in the statute and in the final rules, particularly with regard to the application of the dealer-trader distinction and the *de minimis* exception.

As noted above, analysis of market data indicates that the overwhelming number of participants in the single-name credit default swap market in 2011 had total activities (dealing or non-dealing) of significantly less than $3 billion notional amount over the prior 12 months.[1506] In general—aside from potential dealing activity involving other types of security-based swaps and dealing activity involving ''special entities''—such persons likely would not be deemed to be security-based swap dealers regardless of whether their current level of security-based swap activities constitutes dealing (apart from those entities that increase their dealing activity following the implementation of Title VII).

On the other hand, some market participants whose security-based swap activities exceed, or are not materially below, the $3 billion *de minimis* threshold may be expected to incur costs in connection with the dealer analysis. Those entities reasonably may conclude that they need to incur costs to analyze their security-based swap activities to determine whether those activities are non-dealing in nature (*e.g.,* hedging or trading), or whether those activities instead are dealing in nature (*e.g.,* part of a business purpose of providing liquidity in connection with security-based swaps), consistent with the statute and the rules and guidance provided in this release.[1507]

There are over 1,000 entities (U.S. and non-U.S.) that from time to time may engage in single-name credit default swap transactions.[1508] Of this number,

[1499] *See* part IV.D, *supra* (interpreting the provision to exclude security-based swap positions entered into for the primary purpose of hedging or mitigating risks associated with operation of the plan, consistent with the statutory language that does not limit the hedging exclusion for ERISA plans to commercial risk; also clarifying that such positions may be eligible for exclusion even if they are held by a non-plan entity that holds plan assets).

[1500] *See* part IV.I, *supra* (clarifying that the position will be attributed to the client account rather than to the investment advisers or asset managers and that a beneficial owner should be required to treat the positions of such an account as its own only if the security-based swap counterparty has recourse to the beneficial owner).

[1501] For example, attributing security-based swap positions to investment advisors would have increased the likelihood of advisers being deemed to be major participants. Our interpretations do not take that approach, however, as we believe that it would be inconsistent with the focus of the statutory definition.

[1502] These costs are distinguishable from the costs associated with registration as a dealer or major participant (which for purposes of this analysis we treat programmatic costs) and the other programmatic costs discussed above.

[1503] *See* part II.A.5, *supra.*

[1504] These include suggestions that: the dealer definition should be interpreted to be coextensive with the concept of market making activity; the dealer definition requires that a person be available to take either side of the market at any time; the dealer definition should not extend to persons solely engaged in security-based swap activity on swap execution facilities; the dealer definition should exclude persons whose security-based swap dealing activity is relatively small compared to its other activities; and dealing activity requires the presence of a ''customer'' relationship. *See id.* (discussing interpretive approach to ''security-based swap dealer'' definition). Conversely, a few commenters suggested rejection of the dealer-trader distinction, and implied that the dealer definition should be applied more broadly. *See id.*

These also include suggestions that the dealer analysis incorporate particular *per se* exclusions. Although we recognize that such approaches may be simpler for market participants to implement, we nonetheless do not believe that such *per se* exclusions would be consistent with the statutory definition, which identifies dealers based on their security-based swap activities. *See* part II.A.6, *supra* (discussing reasons not to include *per se* exclusions from the dealer definitions).

[1505] *See* parts II.D.3 and II.D.5, *supra.*

[1506] Of 1,084 entities with single-name credit default swap transaction activity over the 12 months ending in December 2011, 961 entities, or 88.7 percent, engaged in less than $3 billion notional in such activity. These 961 entities were responsible for approximately 3.2 percent of the notional value of all single-name credit default swap transactions during that period. *See* CDS Data Analysis, table 1.

[1507] The use of the $8 billion phase-in level in connection with these activities may also be expected to temporarily mitigate such costs.

[1508] *See* CDS Data Analysis, table 1. The Federal Reserve Bank of New York has published data that is consistent with this analysis. *See* NY Fed analysis at 10 (noting that for a three month period spanning from May through July of 2010, there were 933 unique market participants in the credit default swap market).

As noted above, *see* note 148, *supra,* in relying on the available data we are not indicating our views as to the application of Title VII to non-U.S.

Continued

however, only 123 entities engaged in more than $3 billion in single-name credit default swap transactions over the previous 12 months. For purposes of analyzing the assessment costs of this rule, we have assumed that all of these entities would perform the dealer analysis.[1509] We also recognize that some entities whose activities fall below the *de minimis* threshold may opt to engage in this analysis out of an abundance of caution or to meet internal compliance requirements, and for purposes of this analysis have assumed that the 43 entities whose activity during the trailing 12 month period fell between $2 and $3 billion also would engage in the dealer analysis, leading to a total of 166.[1510]

This estimate of 166 entities, although derived from data about total (dealing and non-dealing) transactions,[1511] illustrates a potential upper bound for the total costs arising from security-based swap dealer determinations, to the extent that all market participants whose security-based swap activity approaches or exceeds the $3 billion *de minimis* threshold identify a need to retain outside counsel to analyze their status under the security-based swap dealer definition. In that context, this estimate suggests that the costs of analysis may approach $4.2 million.[1512]

In accounting for the *de minimis* exception in estimating these costs, we note our expectation that market participants generally would be aware of the notional amount of their activity involving security-based swaps as a matter of good business practice. Consequently, we would not expect market participants to incur costs in determining the availability of the *de minimis* exception significantly in excess of the costs associated with the general dealer determination.[1513]

We recognize that additional market participants may be expected to incur these types of assessment costs to the extent that they engage in activity involving other types of security-based swaps in an amount close to, or in excess of, $150 million annually. Because the market for these other types of security-based swaps appears to be highly concentrated (like the single-name credit default swap market) and to involve many of the same entities,[1514] we expect the number of entities that will incur assessment costs solely by virtue of this lower threshold also to be small.

In addition, we recognize that some market participants potentially may incur these types of assessment costs to the extent they engage in security-based swap activities in an amount close to, or in excess of, $25 million annually.[1515]

For the reasons discussed above we believe that the approach we are adopting in the final rules is necessary and appropriate given the goals of Title VII and the statute's express requirement that we implement a *de minimis* exception to the dealer definition.

ii. Additional Issues Related to the Dealer Analysis

A. Limited Designation of Dealers

Exchange Act rule 3a71–1(c) implements the portion of the ''security-based swap dealer'' definition that provides for limited purpose registration of dealers. The rule provides for a presumption that a person that acts as a security-based swap dealer is a dealer with regard to all of its security-based swaps or security-based swap activities, unless the SEC limits its designation. While we recognize that permitting persons to more broadly take advantage of limited dealer designations potentially would lower the cumulative costs that individual dealers otherwise would incur to determine whether to

persons. Issues regarding the extraterritorial application of Title VII instead will be addressed in a separate release.

[1509] *See* CDS Data Analysis, table 1. This approach potentially overstates the number of entities that would need to engage in the analysis. Of entities with more than $3 billion in activity over the trailing 12 month period, some number can be expected to determine, given the nature of their business, that they are (or are not) dealers under the definition without having to engage in this analysis. For example, the NY Fed analysis discussed above found that so-called G14 dealers were responsible for roughly 78 percent of CDS transactions as buyer and 85 percent of CDS transactions as sellers, and that so-called ''other dealers'' were responsible for approximately an additional seven percent of CDS transactions as sellers and six percent as buyers. *See* NY Fed analysis at 9, table 3. Many of these entities would likely determine that performing this analysis was unnecessary.

[1510] For the reasons stated above, we also believe that this number potentially overstates the number of entities with less than $3 billion in activity over the trailing 12 month period that would be likely to engage in this analysis. Because it appears that all entities engaged in security-based swap transactions with special entities engaged in more than $8 billion in security-based swap transactions in 2011, *see* CDS Data Analysis at 21 n.8, we do not expect that the *de minimis* threshold for dealing activity involving special entities to cause market participants to incur costs independent of those associated with the general *de minimis* threshold.

[1511] The CDS Data Analysis uses criteria that screen for likely characteristics of entities engaged in dealing activity. *See* CDS Data Analysis at 2. However, the available data does not permit identification of which of these entities' transactions arise from dealing activity and which arise from non-dealing activity (such as proprietary trading or hedging). It is therefore likely that the notional amounts provided in each table of the data analysis include both dealing and non-dealing activity. For purposes of the economic analysis of our rules further defining ''security-based swap dealer,'' we have assumed that the entire notional amount for each entity appearing in Tables 2–9 represents dealing activity. Although this potentially results in an overestimate of dealing activity for these entities—and thus in an overestimate of the costs associated with conducting the dealer analysis—we believe that this represents a conservative approach to evaluating the assessment costs of these rules.

[1512] This total is based on the assumption that 166 market participants would seek outside legal counsel to determine their status under the security-based swap dealer definition, with such analysis costing an average of $25,000 per entity.

The average cost incurred by such entities in connection with outside counsel is based on staff experience in undertaking legal analysis of status under federal securities laws, and assumes that the legal analysis for a complex entity on average may cost $30,000, and that the legal analysis for a less complex entity on average may cost $20,000. The use of inside counsel in lieu of outside counsel would reduce this upper bound.

We recognize that the complexity of market participants may vary greatly, and that we do not have insight into market participants such that we could reasonably determine how many entities may be considered more or less complex for these purposes. Thus, based on our understanding of the market we believe that an average of the costs associated with more complex and less complex entities equaling $25,000 would reasonably approximate the average costs for entities across the credit default swap market, assuming that all such participants perceive a need to retain outside counsel for purposes of the analysis.

[1513] We note that different cost estimates have been used for purposes of the ''swap dealer'' definition under the CEA. We do not believe that the estimate of the number of persons who would have to engage in a dealer analysis under the CEA would be germane to the analysis of the costs associated with the Exchange Act's ''security-based swap dealer'' definition, given the wide range of markets that are exclusive to the ''swap'' definition. We also do not believe that the basis that underpins the CFTC's estimate of the cost of performing the dealer analysis under the definition of swap as set forth in the CEA would be relevant to the Exchange Act definition. In part, this is because we believe that the entities whose security-based swap activities may cause them to be dealers likely would have businesses that are financial in nature. We thus expect that those entities would be particularly sensitive to the link between the business purpose of their activities and the dealer definition. In many cases those entities also should be familiar with the use of the dealer-trader distinction in connection with their activities involving other types of securities.

We also note that different cost estimates have been used for purposes of the *de minimis* exception under the CEA. We expect, however, that entities whose security-based swap activities may cause them to be dealers likely would have businesses that are financial in nature. We thus expect that those entities would: (a) be well placed to distinguish their security-based swap dealing activities from their non-dealing activities under the dealer-trader distinction; and (b) would be familiar with the notional amount of their security-based swap activities over the prior year.

[1514] *See, e.g.,* OCC Quarterly Report at tables 1 and 10 (listing notional credit and equity derivatives for largest U.S. banks and trust companies). *See also* note 429, *supra.*

[1515] We believe that any such costs would be modest, in light of data indicating that persons who are counterparties to special entities in the single-name credit default swap market may otherwise have to register as dealers notwithstanding the lower threshold connected with special entities. *See* note 1510, *supra.*

seek a limited designation,[1516] after careful consideration of commenter concerns we have determined that it is appropriate to adopt a presumption against limited designation.[1517]

Certain persons who satisfy the dealer definition may incur costs in determining whether to seek a limited designation. We believe that such costs would affect no more than the 166 entities that potentially may be expected to engage in the dealer analysis,[1518] and expect these costs to be included in the estimated costs of seeking outside legal counsel described above.

B. Exclusion of Inter-Affiliate Security-Based Swaps

Exchange Act rule 3a71–1 also provides that security-based swaps between majority-owned affiliates will be excluded for purposes of the dealer analysis. After consideration of commenter views, we are adopting this standard, rather than potential alternatives such as a common control test, because we believe that it is appropriate, in light of the goals of Title VII, that the dealer definition not capture entities by virtue of security-based swap transactions with affiliated entities that have a sufficient alignment of economic interests to avoid raising systemic risk, customer protection, and other concerns that dealer regulation is intended to address.[1519] Moreover, we note that a majority-ownership test should, given its objective nature, impose fewer assessment costs on market participants than a more subjective common control test.

Some market entities may need to incur costs in connection with determining whether particular security-based swap positions may be excluded from the dealer analysis by virtue of the inter-affiliate exclusion. Such costs potentially could be incurred by any of the approximately 166 entities that we believe may engage in the dealer analysis. The costs specifically associated with that assessment may vary depending on factors including the extent to which those entities engage in inter-affiliate security-based swaps, but we expect these costs to be included in the estimated costs of seeking outside legal counsel described above.

C. Timing Issues Connected to the De Minimis Exception

In response to commenter concerns, Exchange Act rule 3a71–2 specifies that an entity that no longer may rely on the *de minimis* exception, because its dealing activity has exceeded the exception's thresholds, has two months to submit a completed application to register as a dealer.[1520] The final rule also specifies that a person who has been registered as a dealer for at least 12 months may withdraw from registration while continuing to engage in a limited amount of dealing activity under the exception.

In adopting these rules we have carefully considered alternatives that would lead to slower entry and faster exit from dealer status, and we recognize that providing particular entities with additional time to register as a dealer may have the potential to reduce the costs associated with the registration process.[1521] We believe, however, that a two-month period for registration should provide entities with sufficient time to register without incurring additional expenses—both for large firms with security-based swap businesses well above the $3 billion threshold, and for mid-sized firms that fluctuate near the $3 billion threshold amount. We also conclude that this approach will appropriately help to avoid applying dealer requirements to entities that no longer meet the dealer criteria, and will avoid the prospect of persons moving in and out of dealer status overly frequently.

b. Assessment Costs Associated With the ''Major Security-Based Swap Participant'' Definition

i. ''Substantial Position'' and ''Substantial Counterparty Exposure'' Definitions

A. Overview of ''Substantial Position'' and ''Substantial Counterparty Exposure'' Definitions

Exchange Act rule 3a67–3 defines the term ''substantial position'' for purposes of the first and third tests of the statutory major participant definition (which address whether a person has a ''substantial position'' in a major category of security-based swaps). The final rule sets forth two tests for identifying the presence of a substantial position—one test based on a $1 billion daily average measure of uncollateralized mark-to-market exposure, and one based on a $2 billion daily average measure of combined uncollateralized mark-to-market exposure and potential future exposure. Both of those daily measures would be calculated and averaged over a calendar quarter. In developing the ''substantial position'' tests and their associated thresholds, we have sought to capture those entities whose security-based swap positions have the potential to pose significant risks to financial markets, while not capturing other entities for which major participant regulation and its associated costs would be unwarranted.[1522]

Exchange Act rule 3a67–5 defines ''substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets,'' a phrase that comprises part of the second test of the ''major security-based swap participant'' definition. The analysis set forth in this rule parallels the ''substantial position'' analysis, but: (i) Contains higher thresholds; (ii) examines an entity's security-based swap positions as a whole (rather than focusing on a particular ''major'' category); and (iii) would not exclude certain hedging positions.[1523]

In adopting these definitions, we carefully considered alternative

[1516] A default presumption in favor of the availability of limited designations may be expected to reduce the costs associated with an entity determining whether it qualifies for such relief, such as the costs of hiring outside legal counsel to undertake this analysis to determine that they could take advantage a limited designation relief.

[1517] In this regard we note the relative lack of data about the types of security-based swap positions held by particular entities that will fall within the dealer definition. Our decision takes into account the difficulty of separating a dealer's activities from its non-dealing activities for compliance purposes, and the challenges of applying dealer requirements to only a portion of the entity's security-based swap activities. In reaching our decision, we have especially been influenced by the statutory definition's discretionary language in connection with the potential for limited designations, and by the need for persons subject to limited designations to be able to comply with the statutory and regulatory requirements applicable to major participants. *See* part II.E.3, *supra* (discussing limited designation principles applicable to dealers).

We note that the discussion of limited designation of ''swap dealers'' under the CEA generally seeks to quantify the costs associated with applications for limited designations. However, we believe that the costs of applying for a limited designation are dependent upon the application process for this type of registration category. As noted previously, the SEC expects to address the limited designation application process for security-based swap dealers in separate rulemakings. *See id.* As such, we believe that the costs associated with security-based swap dealer limited designation applications under the Exchange Act are more appropriately addressed in the context of those separate rulemakings.

[1518] As discussed above, *see* note 1457, *supra,* we have estimated that 50 or fewer entities ultimately may have to register as security-based swap dealers.

[1519] *See* part II.C.2, *supra.*

[1520] *See* part II.D.6, *supra* (discussing rational for final rule addressing registration period for entities that exceed the *de minimis* threshold).

[1521] For example, a shorter period for registration might be expected to cause some entities to incur over-time costs arising from the need to complete the registration process within a short time frame, whereas a longer time period could have enabled such an entity to avoid those costs.

[1522] *See* part IV.B.3, *supra* (discussing basis for the substantial position analysis we are adopting).

[1523] *See* part IV.E.3, *supra* (discussing basis for the substantial counterparty exposure analysis we are adopting).

approaches suggested by commenters, including suggestions that the thresholds should be raised or lowered, and that certain positions should be excluded from the potential future exposure test, or that the test should discount certain positions differently.[1524] We have retained the tests largely as proposed, however, as we believe that the tests appropriately address the risk criteria embedded in the major participant definition.[1525] We also believe that the tests minimize the assessment costs to these entities in a manner consistent with the statutory definition. For example, the decision to base the potential future exposure analysis on tests used by bank regulators for purposes of setting prudential capital reflects our view that it would be appropriate to implement the analysis by building upon an existing regulatory approach that is less subjective—and thus less costly—for market participants to utilize (as compared to, for example, a VaR approach [1526]) and would lead to reproducible results, rather than seeking to develop a brand new approach.[1527]

B. Assessment Costs Associated With the Final Rules Defining ''Substantial Position'' and ''Substantial Counterparty Exposure''

Certain market participants may be expected to incur costs in connection with the determination of whether they have a ''substantial position'' in security-based swaps or pose ''substantial counterparty exposure'' in connection with security-based swaps.

Based on a review of notional positions maintained in 2011 by entities with single-name credit default swap positions, we estimate that approximately 12 entities have security-based swap positions of such an amount that, as a matter of prudence, they may reasonably find it necessary to engage in the requisite calculations, particularly given the additional availability of the calculation safe harbor.[1528] In our view, the data indicates that other than approximately 12 entities, the non-dealer market participants in the security-based swap market use these products in such limited amounts that they reasonably would conclude that they do not need to undertake the calculations used to determine whether they have a ''substantial position.'' [1529]

Although some commenters noted concerns about the complexity of the major participant calculation,[1530] commenters did not appear to directly question the Proposing Release's per-entity cost estimates.[1531] After further

[1524] *See* parts IV.B.2 and IV.E.2, *supra.*

[1525] *See* part IV.B.3, *supra* (discussing the decisions made regarding the substantial position definition and the reasoning behind the adopted approach). For example, we have concluded that the proposed thresholds are set prudently in a manner that takes into account the financial system's ability to absorb losses of a particular size, the need for major participant regulation not to encompass entities only after they pose significant risks to the market, and the need to account for the possibility that multiple market participants may fail close in time. In addition, as discussed above, we believe that this threshold is tailored to address the types of events associated with the failure of AIG FP. *See* part IV.B.3.d, *supra.*

As discussed above, for an entity with no current uncollateralized exposure—and before accounting for netting—it would take a $100 billion notional portfolio of marked-to-market security-based swaps that reflect written protection on credit to meet the $2 billion potential future exposure threshold for security-based credit derivatives, and it would take a $200 billion notional portfolio of cleared positions to meet that threshold. Even in the absence of clearing or daily mark-to-market margining, it would take a minimum $20 billion notional portfolio of written protection on credit (reflecting the 0.10 multiplier in the risk adjustment tables) to meet the $2 billion potential future exposure threshold. Accounting for netting (which can reduce potential future exposure measures by up to 60 percent) could materially increase that required amount. *See* note 914, *supra.*

[1526] For example, because value-at-risk measures typically account only for market risk and not for other types of risk, an approach based on such measures would likely require separate calculations for these other risks, as well as calculations to account for possible losses in the event of a severe market downturn; such an approach would also require the selection of appropriate parameters for the test. *See* Concept Release: Net Capital, Exchange Act Rel. No. 39456, at 13–19 (comparing value-at-risk and haircut approaches to net capital calculations).

[1527] *See* part IV.B.3.c, *supra.*

[1528] In the Proposing Release, we stated that based on our understanding of the market, we concluded that only 10 entities had security-based swap positions of a size to necessitate performing the calculations to determine whether they meet those thresholds. *See* Proposing Release, 75 FR at 80207–08. Some commenters challenged the assumption that only approximately 10 entities would engage in the requisite calculations. Those commenters took the view that certain entities with smaller security-based swap positions would perceive a need to conduct the relevant calculations on a daily basis even if they are not reasonably likely to be major participants, and, to address that concern, requested a safe harbor from having to perform the major participant calculations. *See* letters from SIFMA AMG I and Vanguard.

[1529] As discussed above, an entity that margins its positions daily generally would need to have security-based swap positions approaching $100 billion notional to meet the substantial position threshold, assuming no current uncollateralized exposure, while an entity that clears those positions generally would need positions approaching $200 billion notional to meet the threshold. *See* note 914, *supra.* We believe that it is reasonable to assume that most entities that will have security-based swap positions large enough to potentially cause them to be major participants in practice will post variation margin in connection with those positions that they do not clear, making $100 billion the relevant measure. The available data shows that as of December 2011 a single entity had aggregate gross notional positions from bought and sold credit protection exceeding $100 billion, four had aggregate gross notional single-name credit default swap positions exceeding $50 billion, and 12 had aggregate gross notional single-name credit default swap positions exceeding $25 billion. *See* CDS Data Analysis at table 10. Making allowances for certain entities that may determine, due to internal policies or other reasons, that they need to conduct this analysis and cannot rely on the calculation safe harbor we also are adopting, we believe that it is reasonable to assume that entities with aggregate gross notional single-name credit default swap positions exceeding $25 billion may identify a need to perform the major participant analysis. (In the Proposing Release, we stated that based on our understanding of the market, we thought that fewer than ten entities had security-based swap positions of a size to necessitate performing the calculations to determine whether they meet those thresholds. *See* Proposing Release, 75 FR at 80207–08.)

We believe, moreover, that the estimate that 12 entities will perceive a need to perform this analysis in practice may overstate the number of entities that reasonably will find it necessary to perform the major participant analysis, given that only four entities had $25 billion or more of aggregate gross notional single-name credit default swap positions arising from the selling of credit protection. *See id.* As discussed above, moreover, we believe that fewer than five entities ultimately may be required to register as major security-based swap participants. *See* part VIII.A.2.d.i.*C, supra.*

Finally, we note that this estimate may also overstate the size of positions held by individual legal entities, thus further overstating the number of legal entities that have security-based swap positions of such a size as to potentially trigger major participant status. This is because the data in the analysis at times aggregates multiple affiliated accounts—which may reflect the legal entities that are counterparties to the security-based swap—at the parent level. While such aggregation is appropriate for these purposes given that parents may be deemed to be major participants by virtue of security-based swap positions that they guarantee, the aggregation in fact may tend to overstate the extent to which a legal entity bears credit risk in connection with security-based swaps.

To the extent that an entity's security-based swap transactions are not cleared or associated with the posting of variation margin, security-based swap positions of $20 billion may lead to sufficient potential future exposure to cause the entity to be a major participant. As we have noted, we believe that few if any entities with significant security-based swap positions will have a significant number of such transactions. Even then, the data indicates that only a total of 32 entities have notional credit default swap positions in excess of $10 billion. *See* CDS Data Analysis at table 10 (showing that 32 entities have aggregate gross single-name credit default swap positions of $10 billion or greater).

[1530] *E.g.,* letter from WGCEF II (addressing technical complexity of the proposed major participant calculations).

[1531] Based on industry discussions, in the Proposing Release we estimated that those 10 entities would incur one-time programming costs of approximately $13,444 per entity, or $134,440 in total, and that these entities would incur annual ongoing costs of $7,260 per entity, or $72,600 in total. *See* Proposing Release, 75 FR at 80207–08, nn.183–86 and accompanying text (providing a summary of the methodology used to estimate these costs). The hourly cost figures in the Proposing Release for the positions of Compliance Attorney, Compliance Manager, Programmer Analyst, and Senior Internal Auditor were based on data from SIFMA's Management & Professional Earnings in the Securities Industry 2009. For purposes of the cost estimates in this release, we have updated these figures with more recent data as follows: the figure for a Compliance Attorney is $322/hour, the figure for a Compliance Manager is $279/hour, the figure for a Programmer Analyst is $196/hour, and the figure for a Senior Internal Auditor is $198/

consideration, however, we are modifying that estimate, in that we believe that the annual per-entity costs associated with the assessment will amount to $15,268, and the annual one-time per-entity costs associated with the assessment will amount to approximately $13,692.[1532] The total industry-wide assessment costs associated with the major participant definition, given our expectation that 12 entities will need to engage in this analysis, is $183,216 for annual costs and $164,304 for annual one-time costs.[1533]

We believe that these estimates also address the assessment costs under the ''substantial counterparty exposure'' test. Because credit default swaps may be expected to constitute the bulk of the likely security-based swap market, it is possible that participants in the market may be more likely to have a ''substantial position'' in debt-related security-based swaps than they would be to meet this second test. Nonetheless, we conservatively estimate that the same approximately 12 entities would engage in the ''substantial counterparty exposure'' calculation as would undertake the ''substantial position'' calculation.[1534] Given the link between this rule and the ''substantial position'' calculations, however, we do not anticipate that the ''substantial counterparty exposure'' test would create incremental costs additional to those associated with the definition of ''substantial position.''[1535] We thus believe that the estimate of assessment costs in connection with the ''substantial position'' analysis (consisting of one-time programming costs of approximately $13,692 per entity, and annual costs of $15,268 per entity) also adequately addresses the costs of assessment under this statutory test.[1536]

At the same time, upon further consideration we believe these rules also may impose certain interpretive costs, including those related to obtaining legal counsel, on market participants. Given the size and complexity of the entities that may find it necessary to analyze their status under the major participant definition, we believe that it is reasonable to conclude that at least some entities with security-based swap positions that approach the major participant thresholds are likely to seek legal counsel for interpretation of various aspects of the rules pertaining to the major participant definition. The costs associated with obtaining such legal services would vary depending on the relevant facts and circumstances, including the size and complexity of the person's security-based swap positions, and the extent to which these interpretations may be germane to whether the entity ultimately is deemed to be a major participant. We believe, however, that $30,000 represents a reasonable estimate of the upper end of the range of the costs of obtaining the services of outside counsel in undertaking the legal analysis of the entity's status as a major participant.[1537]

hour, each from SIFMA's Management & Professional Earnings in the Securities Industry 2011, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. We have also updated the Proposing Release's $450/hour figure for a Chief Financial Officer, which was based on data from 2010. Using the consumer price index to make an inflation adjustment to this figure, we have multiplied the 2010 estimate by 1.03 and arrived at a figure of $464/hour for a Chief Financial Officer in 2011. Incorporating these new cost figures, the updated one-time programming costs based upon our assumptions regarding the number of hours required in the proposing release would be $13,692 per entity, or $136,920 in total, and the annual ongoing costs would be $7,428 per entity, or $74,280 in total.

[1532] This revision in part is based on the addition of an ongoing cost of a Programmer Analyst who we estimate would spend an additional 40 hours annually on software maintenance attributable to the modifications made to an automated system to undertake these tests. We further estimate that the hourly wage of a Programmer Analyst would be approximately $196. The $196/hour figure for a Programmer Analyst is from SIFMA's Management & Professional Earnings in the Securities Industry 2011, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. Based on these assumptions, we estimate these additional costs as $7,840 per year per entity and $94,080 per year for all entities as follows: (Programmer Analyst at $196 per hour for 40 hours) × (12 entities) = $94,080.

[1533] These adjustments do not materially change the estimated costs associated with performing these calculations.

To the extent that additional entities perceive a need to perform the major participant calculations provided by the rules, notwithstanding a relatively low position in security-based swaps, these costs would differ. For example, if we assume that 32 entities will perceive the need to conduct the major participant analysis, *see* note 1529, *supra,* initial legal costs will total approximately $960,000 (based on the per-entity cost estimate of $30,000); one-time industry-wide costs would total approximately $440,000 (based on the per-entity cost estimate of $13,692); and annual industry-wide costs would total approximately $490,000 (based on the per-entity cost estimate of $15,268 addressed below).

At the extreme, available data indicates that 1,188 participants have single-name credit default swap positions in the security-based swap market (excluding ISDA-recognized dealers and ICE Trust). *See* CDS Data Analysis at table 10, To the extent that none of these 1,188 entities avail themselves of the calculation safe harbor we are adopting, and that all of them engage in the full major participant analysis, then there potentially will be initial legal costs of approximately $35.6 million (based on the per-entity cost estimate of $30,000), one-time industry-wide costs of approximately $16.3 million (based on the per-entity cost estimate of $13,692), and annual industry-wide costs of approximately $18.1 million (based on the per-entity cost estimate of $15,268 addressed below).

In practice, however, we think that the estimates for 12 entities more fairly assesses the relevant costs for the reasons discussed above. *See* note 1529, *supra.* In our view, a large number of participants in the market have notional security-based swap positions low enough to permit them to conclude that they do not have to engage in the relevant calculations. *See id.*

[1534] *See* part VIII.A.3.b.i.*A, supra.* These costs would differ if additional entities perceive a need to perform the major participant calculations provided by the rules, notwithstanding a relatively low position in security-based swaps. Commenters have taken the view that more than 10 entities may identify a need to perform the requisite calculations. As already noted, based on the analysis of 2011 transaction data, we have revised this estimate upward to 12 entities, though we believe that the actual number is likely to be smaller. In any event, these concerns should be addressed by the calculation safe harbor that we are adopting as part of these final rules.

[1535] *See* Proposing Release, 75 FR at 80209.

[1536] We note that higher cost estimates have been used for purposes of the ''major swap participant'' definition under the CEA. We expect, however, that the entities that may have security-based swap positions of a size that could lead them to be major participants likely would have businesses that are financial in nature (rather than being non-financial entities that use security-based swaps as part of their commercial activities). As such, we would expect those entities to generally be cognizant of, or in a good position to obtain information about: their uncollateralized exposure with counterparties (to the extent that those financial entities have any material amount of uncollateralized exposure); the total notional amount of their security-based swap positions; the notional amount of those positions that are subject to central clearing or daily mark-to-market margining; and the extent to which those positions are in-the-money or out-of-the-money (for purposes of calculating the netting discount to the potential future exposure calculation). We also expect that security-based swaps will be used less frequently for hedging purposes than swaps. *See, e.g.,* Bernadette A. Minton, René Stulz & Rohan Williamson, ''How Much Do Banks Use Credit Derivatives to Hedge Loans?,'' 35 J. Fin. Serv. Res. 1 (2008) (noting that the ''net notional amount of credit derivatives used for hedging of loans in 2005 represents less than 2% of the total notional amount of credit derivatives held by banks''). Accordingly, there is reason to believe that the costs of calculation associated with the ''major security-based swap participant'' assessment will be lower than the costs associated with the ''major swap participant'' assessment.

[1537] The average cost incurred by such entities in connection with outside counsel is based on staff experience in undertaking legal analysis of status under federal securities laws. The staff believes that costs associated with obtaining outside legal counsel relating to such determinations range from $20,000 to $30,000 depending on the complexity of the entity. We believe that an entity that maintains security-based swap exposures of the size that would necessitate undergoing this analysis will generally be large, complex financial organizations. We also recognize that, while the major participant test may be more objective and quantitative than the dealer test (and therefore require a less involved legal analysis), the test is novel (unlike the core dealer test, which draws on the dealer-trader distinction familiar to many market participants) and, as such, may cause entities to incur additional costs in interpreting and applying the test. Together, these factors lead us to estimate that entities undertaking this analysis will incur legal costs at the upper end of our estimated range. The use of inside counsel in lieu of outside counsel would reduce this upper bound.

Continued

Based on the conclusion that no more than 12 entities have security-based swap positions that they would face enough of a possibility of being a major participant that they would need to engage in such analysis,[1538] we estimate that the total legal costs associated with evaluating the various elements of this definition may approach $360,000.[1539]

ii. Calculation Safe Harbor

We also are adopting Exchange Act rule 3a67–9, which provides a safe harbor from the definition of ''major security-based swap participant'' for market participants whose security-based swap positions fall below certain thresholds. This safe harbor responds to concerns raised by commenters that—based on internal compliance policies and procedures, out of an abundance of caution, or for other reasons—certain entities may feel compelled to perform the full major participant calculations even if their security-based swap positions did not rise to a level near the thresholds in the ''substantial position'' or ''substantial counterparty exposure'' definitions.[1540]

The safe harbor makes use of three alternative tests. The first of these is based on the maximum possible uncollateralized exposure under the applicable credit support arrangements, and on the notional amount of a participant's security-based swap positions. The two other alternatives entail monthly calculations, with the second alternative using calculations based on the maximum possible uncollateralized exposure under the applicable credit support arrangements and monthly adaptations of the substantial position and substantial counterparty exposure calculations, and the third alternative using calculations based on uncollateralized exposure and a modified version of the potential future exposure calculation.

Although the provisions of the safe harbor we are adopting do not mirror the safe harbors suggested by commenters,[1541] the inclusion of this safe harbor should help address commenter concerns regarding entities with small positions that would nonetheless feel compelled (due to their own internal compliance programs, or otherwise) to undertake the major participant calculations. While recognizing that more liberal standards for this safe harbor[1542] could further mitigate costs of assessing major participant status, the safe harbor may be expected to help some entities avoid the costs associated with assessing if they are major participants.

It is not clear how many firms may ultimately seek to rely on the calculation safe harbor.[1543] Participants in the security-based swap market vary greatly in the size of their positions, and may be expected to vary greatly in the complexity of their operations, and in the requirements of their internal compliance and risk management policies. As a result, it is possible that some firms with relatively small positions may choose to undertake the safe harbor analysis while significantly larger firms may determine that such analysis is unnecessary.

The first of the three alternatives within the safe harbor would be based on the maximum possible uncollateralized exposure under the applicable credit support arrangements, and on the notional amount of a participant's security-based swap positions. We believe that as a matter of good business practice large participants in the security-based swap market already would be aware of that information, making the test relatively simple to implement. We also note that available data indicates that 1,073 of the 1,188 entities with single-name credit default swap positions (other than ISDA-recognized dealers and ICE Trust), have notional positions less than $2 billion, potentially making the first test of the safe harbor available to them.[1544]

The other alternatives within the safe harbor would also entail monthly calculations, with such calculations for the second alternative based on the maximum possible uncollateralized exposure under the applicable credit support arrangements and monthly adaptations of the substantial position and substantial counterparty exposure calculations, while the monthly calculation for the third alternative is based on uncollateralized exposure and a modified version of the potential future exposure calculation. Both of these would entail additional analysis beyond current industry practices, causing entities to incur higher costs than the first alternative, but no more than would be required to complete the full major participant test.[1545]

The legal costs associated with the major participant analysis may include, among other things, legal advice with respect to whether an affiliate with which the entity enters into security-based swap transactions qualifies as an ''affiliate'' under rule 3a67–3, whether particular transactions fall within the definition of security-based swap, whether certain types of security-based swap transactions fall within the debt-based security-based swap or other security-based swap category, whether the entity falls within the definition of ''financial entity,'' and whether certain types of security-based swap transactions qualify for the hedging exclusion under the substantial exposure tests. We recognize that the complexity of the analysis required for any of these issues may vary considerably across entities, depending on each entity's individual business model.

The major participant test is based on daily average exposures over the course of the previous quarter, and, as discussed further below, some number of entities may decide to establish a system that will monitor their exposure on an ongoing basis. To the extent that the entity does so, we expect that any initial legal analysis should permit the entity to make determinations about these calculations on an ongoing basis. As such, we assume that any additional costs associated with outside counsel with respect to ongoing monitoring of positions would be negligible.

[1538] *See* note 1529, *supra.*

[1539] If 32 entities were to perform this analysis, as discussed above, the market-wide legal costs associated with the analysis would total $960,000.

[1540] In particular, some commenters challenged the assumption in the Proposing Release that only approximately 10 entities had security-based swap positions large enough to lead them to engage in the major participant calculations. Those commenters took the view that certain entities with smaller security-based swap positions would perceive a need to conduct the relevant calculations on a daily basis even if they are not reasonably likely to be major participants, and, to address that concern, requested a safe harbor from having to perform the major participant calculations. *See* letters from SIFMA AMG I and Vanguard.

[1541] *See* part IV.M, *supra* (discussing rationale for safe harbor).

[1542] *See* part IV.M.2, *supra* (discussing rationale for final rule implementing safe harbor).

[1543] As noted previously in part VIII.A.3.b.i.*B, supra,* we expect that approximately 12 entities may have security-based swap positions in an amount such that it may be reasonably necessary for them to undertake the major participant calculations. To the extent, however, that entities with smaller positions nonetheless identify a reason to perform a major participant analysis, the safe harbor would permit those entities to conclude that they are not major participants without the need to engage in the full set of calculations otherwise anticipated by the rules.

[1544] *See* CDS Data Analysis at table 10.

[1545] We expect that the outer bounds of the assessment costs associated with this safe harbor will be no higher than the one-time costs associated with conducting the major participant analysis, given that, to the extent that an entity determines that performing the safe harbor analysis is more expensive, it would likely choose to perform the less-costly major participant analysis. As such, the upper bound of costs associated with the safe harbor is not likely to exceed our estimates of the costs associated with the full major participant analysis, and should in fact be considerably lower.

We estimate that one-time costs associated with establishing a system to identify and monitor security-based swap positions, as may be necessary to perform the monthly assessments anticipated by two of the three alternative tests that comprise the safe harbor, would be similar to the one-time costs associated with the major participant analysis, and that, therefore, up to 1,188 entities may incur one-time industry-wide costs of approximately $16.3 million. *See* note 1533 and accompanying text, *supra.* The annual costs associated with monthly assessment would be expected to be less than the costs of daily assessment, and $9.1 million—approximately half of the estimated $18.1 million estimated annual costs if all 1,188 entities found it necessary to perform the daily assessment required by the substantial position test (*see id.*)—may be a reasonable estimate of that amount, given the relative simplicity of the test and the less frequent assessments that it requires. In practice, however, we believe that the costs associated with this safe harbor will be less because we expect that far fewer entities would perceive a need to rely on these aspects of the safe harbor, particular given that, as

iii. Additional Issues Related to the Major Participant Analysis

A. ''Major'' Categories of Security-Based Swaps

Exchange Act rule 3a67–2 sets forth two ''major'' categories of security-based swaps for purposes of the first and third tests of the major participant definitions—one consisting of debt-based security-based swaps and the other consisting of other security-based swaps (including equity swaps). These categories are consistent with our understanding of the ways in which those products are used, as well as market statistics and current market infrastructures,[1546] and we believe it is appropriate that those market categories be reflected in the major participant definition.

The consistency of the rule with current market practices should help mitigate any assessment costs incurred by market participants. Moreover, we do not expect that market participants will be required to incur costs to determine the major category with respect to a large majority of their security-based swap positions, given that the vast majority of security-based swaps likely fall within the debt-based security-based swap major category. Also, in adopting the final rules we also have provided additional guidance related to the categorization of certain types of instruments in response to commenter concerns. Nonetheless, given the fact-specific nature of any such assessment, we recognize that some entities may seek the opinion of legal counsel as to how specific security-based swap transactions should be categorized for purposes of this rule (such as legal costs associated with having counsel analyze a particular security-based swap to determine its status under these rules, to the extent that certain types of security-based swaps with complex, novel or bespoke structures are not readily categorized within one of the two identified major categories). We expect that these costs would be included in the estimated costs of seeking outside legal counsel in connection with the major participant analysis, as described above.[1547]

B. Definition of ''Hedging or Mitigating Commercial Risk''

Exchange Act rule 3a67–4 defines the term ''hedging or mitigating commercial risk'' for purposes of the exclusion from the first major participant test. Among other aspects, this rule makes use of an ''economically appropriate'' standard, and sets forth exclusions for security-based swap positions that have a speculative or trading purpose.

As discussed above, we carefully consider alternative approaches suggested by some commenters, including the suggestion that the definition should encompass positions that hedge speculative or trading positions and the suggestion that the definition should incorporate a ''congruence'' standard.[1548] We concluded, however, that these approaches are inconsistent with the focus of the statutory text, which is on ''commercial risk,'' and in adopting this definition we have sought to set forth criteria that reasonably distinguish hedging positions from other positions. We believe that the approach we are adopting, which seeks to exclude positions that hedge commercial risk without also excluding other types of positions, is necessary and appropriate in light of the statute.[1549]

Some market participants may be expected to incur costs in connection with determining whether certain security-based swap positions fall within this hedging exclusion.[1550] Any such costs of analyzing the status of particular security-based swaps as a hedge of commercial risk would reflect the unique character of individual positions and the business purpose associated with the position. Such costs may be particularly relevant for security-based swaps of a more complex nature, or for security-based swaps that introduce some degree of basis risk in connection with the hedge. Because of the facts-and-circumstances nature of this analysis,[1551] we believe that some entities may seek the opinion of legal counsel as to whether certain transactions qualify for the commercial hedging exclusion at the time they conduct their initial analysis, and these costs would likely be encompassed within the estimated costs of legal services related to the major participant definition.[1552]

C. Definitions of ''Financial Entity'' and ''Highly Leveraged''

Exchange Act rule 3a67–6 defines the term ''financial entity'' for purposes of the third major participant test. This definition is largely consistent with the statutory ''financial entity'' definition used in Title VII's exception from mandatory clearing for commercial end-users.[1553] However, in response to commenter concerns, the final rules exclude centralized hedging facilities from the ''financial entity'' definition (in a way that itself is consistent with that Title VII hedging exception).[1554]

noted above, approximately 1,073 entities have aggregate gross notional single-name credit default swap positions under $2 billion. *See* note 1544 and accompanying discussion, *supra.*

We note that our analysis of the safe harbor in connection with the ''major security-based swap participant'' definition differs from that of the CFTC with regard to the ''major swap participant'' safe harbor. This, in part, reflects the differences between the markets for swaps and security-based swaps. We also note our expectation that many of the entities that may opt to avail themselves of the safe harbor likely would have businesses that are financial in nature (rather than being non-financial entities that use security-based swaps as part of their commercial activities). As such, we would expect those entities to generally be cognizant of, or in a good position to obtain information about: Their maximum potential uncollateralized exposure with security-based swap counterparties; the total notional amount of their security-based swap positions; the notional amount of those positions that are subject to central clearing or daily mark-to-market margining; and the extent to which those positions are in-the-money or out-of-the-money (for purposes of calculating the netting discount to the potential future exposure calculation). Other non-financial entities seeking to take advantage of the safe harbor may minimize their costs by utilizing whichever safe harbor option may be expected to most closely align with the security-based swap information that readily is available to such entities.

[1546] In particular, the major categories of security-based swaps adopted in these final rules are consistent with how bank derivatives data is presented by the Office of the Comptroller of the Currency, as well as with categories used by derivatives market infrastructure such as The Depository Trust & Clearing Corporation. *See* part IV.A.3, *supra.*

[1547] Entities may also incur programming and other costs related to recording the classification of their security-based swap transactions in systems designed to monitor current exposure and potential future exposure, but we expect these costs to be one component of entities' overall system costs relating to its substantial position calculations, which we discuss in further detail above. *See* part VIII.A.3.b.i.*B, supra.*

[1548] *See* parts IV.C.5.a and IV.C.5.b, *supra* (discussing rationale for excluding positions hedging speculative and trading positions from the definition).

[1549] *See* parts IV.C.3 and IV.C.5, *supra.*

[1550] We have incorporated provisions into the final rule designed to provide guidance to market participants as to which types of security-based swap positions could be expected to fall within this exclusion. This release also provides further guidance as to the scope of the exclusion.

[1551] The transaction-related costs of making a hedging determination would apply only to entities with security-based swap positions that are near to or exceed the substantial position threshold prior to taking advantage of the hedging exclusion. This may be expected to mitigate costs associated with making this determination.

[1552] Separately, the proposed rule defining this term would have included certain documentation and assessment conditions that commenters stated could lead to significant costs. Commenters expressed concerns regarding the application of these conditions and the associated costs. As discussed previously in this release, we have determined not to include these conditions in the final rule. *See* part IV.C.5.d, *supra.*

[1553] *See* Exchange Act section 3C(g).

[1554] In addition, we considered, but do not incorporate, some commenters' suggestion that ''financial entity'' be defined more narrowly, such as by excluding employee benefit plans. *See* part IV.F.3.a, *supra,* (discussing rationale for final rule defining ''financial entity'').

Although particular market participants may incur costs in connection with determining whether they fall within the ''financial entity'' definition, we believe that such costs would be minimal in light of the objective nature of the definition, and its consistency with the use of the term elsewhere in Title VII. We also recognize that entities may seek the opinion of legal counsel as to whether the entity falls within the scope of this ''financial entity'' definition, but believe that these costs would likely be encompassed within the estimated costs of legal services related to the major participant definition.

Exchange Act rule 3a67–7 defines the term ''highly leveraged,'' also for purposes of the third statutory major participant test. After considering commenters' views, the final rule defines that term based on a 12 to 1 leverage ratio, as discussed in greater detail above. In adopting this leverage ratio, we also modify the proposed method of calculating leverage in certain respects,[1555] but conclude that it would not be appropriate to provide special methodologies for insurers to measure leverage.[1556] It is possible that certain market participants will incur costs in connection with determining whether they are ''highly leveraged'' for purposes of the major participant definitions. In part, we believe that those costs are mitigated by the fact that the final rules identify ''highly leveraged'' entities based on a ratio of liabilities to equity, which we expect are simpler for entities to implement than alternative methods for measuring leverage, such as risk-adjusted methods.

We recognize that the unavailability of an alternative method of calculation for insurers may have the effect of increasing certain insurers' cost of calculating leverage for purposes of determining whether they fall within the major participant definition, to the extent that insurers have security-based swap positions that are close enough to the relevant thresholds that they have to perform the required calculations.[1557] We believe, however, that a uniform approach to defining ''highly leveraged'' is appropriate here given that the large insurance firms that are most likely to meet the major participant definition would be expected already to use GAAP in preparing their financial statements. This should mitigate any additional costs arising from the absence of an alternative calculation method for insurers.

D. Limited Designations of Major Participants

Exchange Act rule 3a67–1 in part implements the portion of the ''major security-based swap participant'' definition that provides for limited purpose registration of major participants. The rule sets forth a presumption that a person that acts as a major security-based swap participant in general will be deemed to be a major participant with regard to all of its security-based swaps, unless the SEC limits its designation.

In adopting this rule we have considered the alternative, suggested by some commenters, of permitting persons to more broadly take advantage of limited major participant designations.[1558] Our decision to use this presumption takes into account the difficulty of separating a major participant's positions taken under its limited purpose designation from other of its positions for purposes of compliance, and the challenges of applying major participant regulatory requirements to only a portion of the entity's security-based swap activities. The presumption further reflects the statutory definition's discretionary language in connection with the potential for limited designations, and the need for persons subject to limited designations to be able to comply with the statutory and regulatory requirements applicable to major participants.[1559]

Certain persons who satisfy the major participant definition may incur costs in determining whether to seek a limited designation. Consistent with the discussion above, in general we believe that such costs would affect no more than 12 entities.[1560] These costs could, however, vary significantly depending on the structure or other characteristics of an entity's business.

E. Exclusion of Inter-Affiliate Security-Based Swaps

Exchange Act rule 3a67–3 provides that security-based swap transactions between majority-owned affiliates will be excluded for purposes of the substantial position test.[1561] We have concluded that majority ownership represents an alignment of interests appropriate to justify an inter-affiliate exclusion.[1562] Moreover, we note that a majority-ownership test should, given its objective nature, impose fewer assessment costs on market participants than a more subjective common control test.

Some market entities may incur costs in connection with determining whether

[1555] *See* part IV.F.3.b, *supra* (addressing leverage ratio calculation for certain employee benefit plans).

[1556] *See* note 1107, *supra* (providing special rules related to the calculation of leverage for certain employee benefit plans).

[1557] We note that many large insurers of the type that maintain security-based swap positions in an amount that would require them to perform the major participant calculations may be publicly traded companies, in which case they would already calculate their financial statements according to GAAP for purposes of public disclosure, and thus would not incur additional costs due to our decision not provide special methodologies for insurers to calculate their leverage. We also expect that the concerns of many smaller insurers that are not publicly traded and thus may not use GAAP will be addressed by our inclusion of the safe harbor for major participant calculations.

In addition, publicly available information regarding insurer use of derivatives suggests that the potential costs to insurers arising from the definition of ''major security-based swap participant'' may be negligible. As of the end of 2010, U.S. insurers as a whole had enter into roughly $33.5 billion in notional amount of credit default swaps (not distinguishing between credit default swaps that fall within the ''security-based swap'' definition and those that are ''swaps''). *See* National Association of Insurance Commissioners, ''Insights into the Insurance Industry's Derivatives Exposure'' (available at *http://www.naic.org/capital_markets_archive/110610.htm*) (stating that life insurers had entered into roughly $27.1 billion of that amount, and that property and casualty insurers had entered into roughly $6.4 billion of that amount). Even if those positions were concentrated within single entity, they would not necessarily lead that entity to exceed the thresholds that could cause it to be a major participant, *see* note 914, *supra,* suggesting that, given the likely distribution of these positions across a significant number of insurers, few or no insurers may have exposures that approach the thresholds.

[1558] Such an approach may be expected to lower the cumulative costs that major participants would incur in determining whether to seek a limited designation. For example, a default presumption in favor of the availability of limited designations may be expected to reduce the costs that certain entities would incur to determine that they could take advantage of limited designation relief, and thus reduce the costs associated with an entity determining whether it qualifies for such relief, such as the costs of hiring outside legal counsel to undertake this analysis to determine that they could take advantage a limited designation relief. A default presumption in favor of limited designations also would be expected to reduce costs in connection with the registration process for entities seeking limited designation status, as discussed above. *See* part VIII.A.2.d.ii.*A, supra.*

[1559] *See* part IV.N.3, *supra* (discussing limited designation principles applicable to major participants). We note that the discussion of limited designation of ''swap dealers'' under the CEA generally seeks to quantify the costs associated with applications for limited designations. However, we believe that the costs of applying for a limited designation are dependent upon the application process for this type of registration category. As noted previously, the SEC expects to address the limited designation application process for major security-based swap participants in separate rulemakings. *See id.* As such, we believe that the costs associated with major security-based swap participant limited designation applications under the Exchange Act are more appropriately addressed in the context of that separate rulemaking.

[1560] *See* note 1529, *supra.*

[1561] This exclusion also applies to the ''substantial counterparty exposure'' analysis.

[1562] *See* part IV.G.2, *supra* (discussing rationale for the approach we are adopting, and considering alternative approaches).

particular security-based swap positions may be excluded from the major participant analysis by virtue of the inter-affiliate exclusion. It is possible that such costs could be incurred by any of the approximately 12 entities that we believe reasonably may have to engage in the major participant calculations.[1563] We believe that any costs arising out of such an analysis would be encompassed within the $30,000 estimated for legal services related to the major participant definition as a whole.

F. Timing Requirements, Reevaluation Period and Termination of Status

Exchange Act rule 3a67–8 specifies the time at which an entity that satisfies the major participant tests would be deemed to be a ''major security-based swap participant,'' and also addresses the time at which an entity's status as a major security-based swap participant would be terminated. In adopting this rule we have considered alternatives that would lead to slower entry and faster exit from major participant status, and we believe that the approach that we are adopting provides a reasonable amount of time for registration based on the proposed registration process, will appropriately help to avoid applying major participant requirements to entities that meet the major participant criteria for only a short time due to unusual activity, and will avoid the prospect of persons moving in and out of major participant status overly frequently.[1564]

Persons falling within the major participant definitions will incur costs in connection with the registration process,[1565] and it is possible that alternative timing approaches could allow such persons to register at a more deliberate pace, potentially reducing the associated costs.[1566] Such cost differences may affect the up-to-twelve entities that we believe reasonably may have to engage in the major participant calculations. Moreover, altering the timing requirements may not significantly decrease costs associated with registration because in all cases we would expect the same preparatory actions to be taken, and we believe that the final rules provide sufficient time for entities to perform the activities necessary for compliance.[1567]

4. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the SEC, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[1568] In addition, section 23(a)(2) of the Exchange Act [1569] requires the SEC, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the SEC from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We are adopting these rules and interpretive guidance pursuant to authority under section 712(d) of the Dodd-Frank Act, which requires the Commissions to further define several terms, including ''security-based swap dealer'' and ''major security-based swap participant.'' [1570] In the Proposing Release, we stated that we preliminarily believed that the proposed Exchange Act rules would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, that they would not significantly affect capital formation, and that they would improve efficiency. We requested comment on each of these issues, and certain commenters raised concerns that overbroad definitions would lead to undue competitive impacts.[1571]

In adopting these final rules, we recognize that the most significant impact of the dealer and major participant definitions will derive from those definitions' role in implementing Title VII, particularly given the significant impacts that Title VII will have on the security-based swap market. Many of these impacts may be expected to be positive, because Title VII imposes, among other measures, requirements that may be expected to promote safety and soundness, transparency, and competition within the security-based swap market. We recognize, however, that regulation also can pose costs that have negative impacts on the markets.

In adopting these definitional rules and interpretations, moreover, we have sought to fairly reflect the statutory definitions and their underlying intent. Given the link between these definitional rules and interpretations and the Title VII framework, the scope of the definitions will affect the ultimate regulatory benefits and costs that will accompany the full implementation of Title VII. Definitions that capture more entities will tend to promote the Title VII benefits, but will also risk increasing the accompanying costs. Definitions that capture fewer entities may be expected to lead to the converse result.

a. Competitive Impacts

As noted above, the SEC is required to consider the effect of these rules and interpretations on competition. The SEC also is prohibited from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. Because these definitional rules and interpretations will help determine which entities within the market are subject to the Title VII requirements that govern dealers and major participants, they may also affect competition within the security-based swap market.

In enacting Title VII, Congress set forth a regulatory framework for OTC derivatives; security-based swaps represent one segment of the overall OTC derivatives market. Within the security-based swap market, dealers compete for business from counterparties, while non-dealers that participate in the market use security-based swaps for purposes that can

[1563] The data underlying this assessment already excludes certain inter-affiliate credit default swaps.

[1564] *See* part IV.L.3, *supra* (discussing rationale for the final rules addressing timing, reevaluation and termination).

[1565] Registration Proposing Release, 76 FR at 65814–65818.

[1566] For example, it is possible that an entity may perceive the steps associated with the registration process as requiring it to take additional steps to complete the registration process within the time frame we are adopting, whereas a longer time period could have enabled such an entity to avoid those costs.

[1567] Specific costs associated with the registration process will be addressed by the SEC in final rules related to the registration of major security-based swap participants that have not yet been adopted. However, we expect any additional costs arising from the timing provisions of this rule to be insignificant.

[1568] 15 U.S.C. 78c(f).

[1569] 15 U.S.C. 78w(a)(2).

[1570] The SEC is also acting pursuant to its rulemaking authority provided by Exchange Act sections 3 and 23(a).

[1571] *See, e.g.,* letters from Representatives Bachus and Lucas (''Casting an overly-broad net in defining these terms could force some smaller participants to leave the marketplace as a result of increased costs, or eliminate certain types of contracts used for hedging.''), SIFMA—Regional Dealers (stating that the proposed *de minimis* exception ''is unnecessarily narrow, will discourage smaller dealers from competing in the market and will limit the availability of efficient and cost-effective intermediation services to small- and medium-sized organizations'') and Midsize Banks (stating that a reduction in small dealers due to an overly narrow *de minimis* exception would ''curtail economic development going forward and would leave end-users less options for hedging risks with community and smaller regional dealers'').

include speculation and hedging. To date, security-based swaps primarily have traded in the over-the-counter market, and have not been subject to comprehensive regulation in the U.S. We understand that entities engaged in dealing activity within this market facilitate the vast majority of security-based swap transactions.[1572] Dealing activity within the market also is highly concentrated.[1573] This concentration in large part appears to reflect the fact that larger entities possess competitive advantages in engaging in over-the-counter security-based swap dealing activities, particularly with regard to having sufficient financial resources to provide potential counterparties with adequate assurances of financial performance.[1574] As such, it is reasonable to conclude that there are high barriers to entry in connection with security-based swap dealing activity.[1575]

At the same time, commenters have noted that some entities engage in smaller volumes of security-based swap dealing activity. Some small and mid-size banks, for example, routinely provide such services involving relatively small notional amounts to their customers.[1576] Although these relatively smaller dealers in general may not compete directly with the largest dealers (because they service a different segment of the market), they may be expected to play a role in helping certain types of customers (such as customers with a relatively smaller need for security-based swaps) enter into security-based swaps, thus promoting the availability of these products.

Fundamentally, in considering the competitive impacts associated with Title VII regulation of dealers and major participants—and hence the competitive impacts associated with the dealer and major participant definitions—we recognize that one consequence of the current concentrated market structure [1577] is the potential for risk spillovers and systemic risk, which can occur when the financial sector as a whole (or certain key segments) becomes undercapitalized. Risk spillovers emerge when losses and financial distress at one firm lead to losses and financial distress for the financial sector as a whole, either through direct counterparty relationships or the deterioration of asset values. As financial distress spreads, the aggregate financial system may become undercapitalized, hindering its ability to provide financial intermediation services. If firms do not internalize this aggregate cost, the financial system may end up holding more risk than its aggregate capital can manage.

In enacting Title VII, Congress set forth a framework that will impose new costs and regulatory burdens, including capital, margin, and registration requirements, on persons who act as security-based swap dealers, and on persons whose security-based swap positions are large enough to cause them to be major security-based swap participants. While the substantive rules associated with capital, margin, and registration requirements have yet to be finalized, we have sought to set the dealer and major participant definitions in such a way as to impose the substantive rules on those entities most likely to contribute to an aggregate capital shortfall without imposing unnecessary burdens on those who do not pose similar risks to the market.[1578] It is reasonable to expect that it is the largest security-based swap entities that are more likely to contribute to an aggregate capital shortfall than smaller participants, as more risk is likely to be concentrated within these entities.[1579]

As discussed above, persons who fall within the statutory definitions of security-based swap dealer and major security-based swap participant will incur a range of one-time costs and ongoing costs by virtue of that status.[1580] Also, as discussed above, market participants may incur costs in connection with determining whether their security-based swap activities or positions will cause them to be dealers or major participants.[1581] To the extent the costs associated with these statutorily mandated requirements are relatively fixed or large enough, they may negatively affect competition within the market. This may, for example, lead smaller dealers or entities for whom dealing is not a core business to exit the market, which could cause smaller customers to have less access to the market or to incur higher costs in accessing the market. Such costs might also deter the entry of new firms into the market. If sufficiently high, these costs of compliance may increase concentration among dealers. We also recognize that some market participants may be expected to incur costs in connection with determining their status as a dealer or major participant, but such costs can be expected to be significantly less than the costs associated with the various rules applicable to dealers or major participants.

Conversely, certain aspects of Title VII may enhance competition in the market. For example, the business conduct and other requirements of Title VII may enhance the availability of information to market participants. Measures designed to equalize access to information through disclosure requirements should promote participation, which may intensify price competition among dealers, and thus

[1572] Data from the credit default swap trade information warehouse operated by DTCC indicates that as of the week ending October 7, 2011, single-name credit default swaps involving two counterparties that are not dealers (as identified by DTCC) constitutes roughly 0.2 percent of the notional amount of all open positions involving single-name credit default swaps (amounting to $24.6 billion gross notional out of a total of $15.2 trillion gross notional). Conversely, single-name credit default swaps involving two dealers (as identified by DTCC) constitute roughly 74.2 percent of the total notional amount (amounting to $11.3 trillion gross notional out of the $15.2 trillion total). *See http://www.dtcc.com/products/derivserv/data/index.php* (as of October 7, 2011). We have no reason to believe that the market for other types of security-based swaps exhibits different amounts of concentration with regard to dealer activity.

[1573] As discussed above in the context of the *de minimis* exception to the security-based swap dealer definition, analysis of available data shows that, under any metric used to screen for dealers in our CDS Data Analysis, over 90 percent of activity in single-name credit default swaps among entities identified as dealers is attributable to the fourteen or fifteen largest of those entities. We have no reason to believe that the concentration of dealing activity involving other types of security-based swaps significantly differs from the concentration of dealers in the single-name credit default swap market.

[1574] *See* Pirrong, note 487, *supra,* at 17–18 (noting that counterparties seek to reduce risk of default by engaging in credit derivative transactions with well capitalized firms).

[1575] *See id.,* at 18–19 (noting lack of success among new entrants into derivatives dealing market due to perception that AAA rating for subsidiary is less desirable than a slightly lower rating for a larger entity, and suggesting that there are ''economies of scale in bearing default risk'' that may induce ''substantial concentration in dealer activities'').

[1576] *See* letter from FSR I.

[1577] *See, e.g.,* notes 478 and 485, *supra,* and accompanying text.

[1578] We expect that implementation of Title VII will provide both the SEC and market participants with more information about the business of dealers and major participants, the characteristics of positions they and other market participants hold, the structure of the market, and how each of these have changed under the Title VII framework. For that reason the SEC has directed the staff to report to the Commission on all aspects of the dealer and major participant definitions. *See* part V, *supra.*

[1579] *See* Acharya, Pedersen, Philippon, and Richardson, Measuring Systemic Risk (May 2010) (available at *http://vlab.stern.nyu.edu/public/static/SR-v3.pdf*) (working paper that derives an empirical measure of a financial entity's expected contribution to an aggregate capital shortfall that scales with the size of the institution, and that shows using historical data that their measure predicted the risks that emerged during the recent financial crisis).

[1580] As discussed above, for example, security-based swap dealers and major security-based swap participants will have to meet minimum capital and margin requirements, maintain specified business and transaction records and adhere to certain standards of business conduct, along with other obligations. *See, e.g.,* notes 178 to 180, *supra.*

[1581] *See* part VIII.A.3, *supra.*

may increase participation in the security-based swap market. Other aspects of Title VII, such as rules promoting access of dealers to central clearing facilities, also may be expected to enhance competition in the market.

i. Security-Based Swap Dealer Definition

Persons who are deemed to be dealers may be expected to incur costs in connection with the substantive rules applicable to dealers, and to incur comparatively smaller costs in connection with determining whether they fall within the dealer definition. We cannot rule out the possibility that the prospects of these aggregate costs might deter new entrants from engaging in security-based swap activity that potentially could lead them to be dealers.[1582] We also cannot rule out the possibility that the imposition of those costs could lead some persons who currently engage in dealing activity involving security-based swaps to lessen or cease that activity. Those effects—if they were to occur—would be expected to reduce competition in the market. Conversely, the application of the Title VII requirements applicable to dealers, such as, for example, the business conduct requirements related to disclosures to counterparties, may be expected to enhance the availability of information to market participants. The resulting reduction in information asymmetries may be expected to promote participation, and therefore competition, in the market. Accordingly, the scope of the rules and interpretations defining security-based swap dealer, including the scope of the *de minimis* exception to the dealer definition, can be expected to affect competition in the market in a variety of ways.[1583]

As discussed above, in rule 3a71–1 we have codified the statutory definition of security-based swap dealer and provided guidance to interpret the contours of this definition in the context of the dealer-trader distinction. After considering commenters' views, we believe that this guidance interprets the statute to give effect to the four dealer tests and the ''regular business'' exclusion in a way that reflects the features of the security-based swap market. This use of the dealer-trader distinction—which parallels the analysis that securities market participants currently use in the context of the Exchange Act's ''dealer'' definition—also should help reduce the potential competitive effects associated with the costs that market participants incur to analyze their possible status as a dealer by imposing fewer costs than a more novel approach.[1584]

Moreover, as discussed above, in rule 3a71–2 we have adopted a *de minimis* test and thresholds that will impose the costs associated with dealer regulation upon entities that engage in the bulk of dealing activity in the market, without imposing those costs upon persons who account for a small portion of dealing activity (and for which dealer regulation may be accompanied by comparatively modest benefits). We believe this will mitigate some of the potential competitive burdens associated with dealer status that could fall on entities engaged in a smaller amount of dealing activity, without leaving an undue amount of dealing activity outside of the ambit of dealer regulation. As discussed in detail above, we believe we have set the threshold in a way that appropriately considers this risk along with the benefits afforded to smaller entities by a higher threshold. Furthermore, after considering commenters' views, we believe that this approach strikes a balance that appropriately will implement the transparency, risk, and customer and counterparty protection goals of Title VII. This approach, including the general use of a $3 billion threshold, also can facilitate the initial entrance of dealers into the market, and permit persons to engage in limited dealing activity that helps smaller entities participate in the market. While we recognize that the lower threshold associated with dealing activity involving ''special entities'' has the potential to reduce competition to provide dealing services to those entities, we believe that this lower threshold is appropriate to preserve the protections that Title VII affords to those entities.

In rule 3a71–1, we also have set forth a presumption that a person that acts as a dealer in the security-based swap market will be a dealer with regard to all of its security-based swaps. We recognize that this presumption may have competitive impacts: on the one hand, by imposing regulatory costs on a wider range of activities, certain entities concentrated in discrete security-based swap segments may face higher costs than they might without the presumption; on the other hand, the presumption suggests a single, uniform baseline for competition across dealers. While these impacts may bear out in a number of ways, we believe that the presumption is appropriate in light of the statutory language and the need to help ensure that security-based swap dealers comply with all applicable legal requirements.

In rule 3a71–1, we also have provided an exclusion from dealer status in connection with security-based swaps involving majority-owned affiliated counterparties. To the extent that the scope of this exclusion may have competitive impacts—such as in connection with dealing activity involving affiliates that are not majority-owned, and that hence cannot take advantage of the exclusion—we believe that the exclusion appropriately applies the Title VII dealer requirements in a way that reflects the economic reality of swaps among affiliates, which generally does not raise the customer protection or market risk concerns addressed by Title VII.

In sum, to the extent that the application of Title VII dealer requirements to certain persons were to pose a net burden on competition in the security-based swap market, we believe those effects would be a necessary or appropriate consequence of implementing the statutory definitions consistent with the purposes of the Title VII amendments to the Exchange Act.

ii. Major Security-Based Swap Participant Definition

As we discuss above, we have estimated that entities approaching the level of exposure required to be a major participant may incur certain costs in connection with analyzing their

[1582] We do think it unlikely that the costs associated with determining an entity's status, considered on their own, would have any measurable effect on competition. As noted above, we estimate that the cost of making this determination to be $30,000 at most, and likely significantly less for most entities. *See* note 1537, *supra.* In other words, the costs would amount to, at most, 0.1 percent of the *de minimis* threshold, and it is likely that few firms would feel compelled to conduct this analysis until their dealing volume approached the *de minimis* threshold.

[1583] At the same time, it is possible that these additional costs associated with dealer regulation will be comparatively small compared to the existing barriers to entry in the market (particularly the need for resources to provide counterparties with sufficient assurance of performance). *Cf.* Pirrong, note 487, *supra,* at 18–19 (noting that firms with smaller balance sheets, relative to largest dealers, ''have largely failed to make major inroads as derivatives dealers despite concerted efforts to do so''). It thus is possible the incremental costs associated with dealer regulation may not be of the magnitude to cause persons who currently engage in security-based swap dealing activity to exit the market.

[1584] As noted above, we have declined to adopt *per se* exclusions or overly simple tests, even though they might impose fewer assessment costs on market participants conducting the dealer analysis because we do not believe that such exclusions or tests would capture the full range of entities that should be regulated as dealers under Title VII. Moreover, the nature of the tests being adopted are straightforward to implement and rely on information that already should be readily available to market participants.

status.[1585] Given the size of the exposures and notional amounts required to trigger the major participant test (*e.g.,* $1 billion in daily average current uncollateralized exposure in a major category), we do not believe that these costs of assessment would materially impact the competitive role played in the security-based swap market by persons who have positions large enough that they potentially may be major participants.

We expect that the programmatic costs associated with the rules applicable to major participants will be more significant. Presumably, a market participant will weigh the costs of complying with the rules against the benefit it expects from maintaining security-based swap positions of a magnitude that would require registration as a major participant, in deciding whether to continue to maintain such positions. We cannot rule out the possibility that the prospect of those costs could deter persons from maintaining security-based swap positions of such a magnitude, and that this may reduce competition in the market.[1586]

As discussed above, Exchange Act rules 3a67–1 through 3a67–9 and the accompanying interpretations reflect choices that we believe are reasonably designed to satisfy the risk criteria set forth in the major participant definition.[1587] In reaching these conclusions we considered commenters' views on a variety of issues, including suggested alternative approaches that would lessen the likelihood of particular entities being deemed to be major participants (*e.g.,* alternative tests, higher thresholds, a broader hedging exclusion, and a higher leverage test). We believe that the choices reflected in the final rules and interpretations are necessary or appropriate in furtherance of the purposes of the Exchange Act and reasonably reflect the criteria set forth by the statutory definition.

b. Efficiency and Capital Formation

As noted above, in adopting these final rules and interpretations we also are required to consider whether these actions would promote efficiency and capital formation.

In significant part, the effect of these rules on efficiency and capital formation are linked to the effect of these rules on competition. For example, markets that are competitive, with fair and transparent pricing and equal access to security-based swaps, may be expected to promote the efficient allocation of capital. Similarly, definitional rules that promote, or do not unduly restrict, competition can be accompanied by regulatory benefits that minimize the risk of market failure and thus promote efficiency within the market. Such competitive markets would increase the efficiency by which market participants could transact in security-based swaps for speculative, trading, hedging and other purposes.

Definitional rules and interpretations of an appropriate scope also can be expected to promote capital formation by facilitating the appropriate use of security-based swaps for hedging purposes, and thus by contributing to liquidity and reducing costs in connection with the issuance of equity and debt securities. In the context of credit default swaps based on loans, moreover, definitional rules and interpretations of an appropriate scope can be expected to promote capital formation by facilitating loans to businesses that may not otherwise be made absent such a swap. Since credit risk is correlated, lenders may find it desirable to hedge credit risks on their loan portfolios by purchasing protection through single-name or index credit default swaps. Even though there is basis risk in this type of trade, it should be particularly effective at reducing exposure to systemic credit events. More generally, security-based swaps can be expected to promote risk transfer to persons better positioned and more willing to bear certain risks (*e.g.,* the transfer of risks from hedgers to speculators).

Conversely, definitional rules that are accompanied by too many competitive burdens pose the risk of imposing excessive costs of regulation that could deter the efficient allocation of capital to security-based swaps. Such rules also may be expected to reduce the capital formation benefits that otherwise would be associated with security-based swaps. Definitional rules of an inappropriate scope further may reduce the availability of security-based swaps and thus direct market participants not to seek to address certain business needs, or to use less effective financial instruments to meet their business needs. For example, major participant thresholds that broadly capture much of the security-based swap market would discourage certain entities from participating in the market, particularly if the regulatory costs for major participants are high. This could make it difficult for hedgers to find a counterparty, which would make it more expensive to hedge risks and hinder efficient risk-sharing in the broader economy. In addition, definitional rules that pose the risk of creating a market that contains an undue amount of unregulated dealing activity—as may be the result of a *de minimis* threshold that is too high—would lead to disparate treatment of dealers and could undermine the benefits of Title VII.

The rules and interpretations that we are adopting in connection with the dealer and major participant definitions are designed to apply the statutory definitions in a way that reasonably effects the goals of Title VII. For example, the rule implementing the *de minimis* exception to the dealer definition is designed to focus the application of the dealer definition in a way that implements the benefits associated with the regulation of security-based swap dealers under Title VII, without imposing the costs associated with those regulations on those entities responsible for only a small portion of total dealing activity. In addition, the rules and interpretations in connection with the major participant definition are geared to focus major participant regulation on entities whose security-based swap positions pose a particularly high degree of credit risk to the market, without applying those regulations on persons who pose a lesser degree of risk.

In conclusion, we believe that the rules and interpretations may be expected to promote efficiency in the allocation of capital to security-based swaps, and to promote the capital formation benefits of security-based swaps, by helping to focus the costs and burdens of the regulation of dealers and major participants under Title VII upon those persons for whom the imposition of those costs are most appropriate given their overall activity and positions in the security-based swap market. The rules and interpretations similarly may be expected to apply certain Title VII requirements (*e.g.,* counterparty disclosure requirements that can be expected to reduce information asymmetries) to those entities that engage in activities or maintain positions in the security-based swap market such that their compliance with these requirements may promote the efficiency and capital allocation benefits associated with such regulation.

B. Paperwork Reduction Act Analysis

The Proposing Release addressed a potential new ''collection of information'' requirement, within the

[1585] *See* text accompanying note 1532, *supra* (estimating assessment costs as roughly $44,000 in the first year, and $15,268 in subsequent years).

[1586] The extent of such possible deterrence is mitigated by the fact that major participant status is a prospect only for those persons with very large security-based swap positions.

[1587] *See* part VIII.A.2, *supra.*

meaning of the Paperwork Reduction Act of 1995,[1588] because the proposed definition of the term ''hedging or mitigating commercial risk'' included documentation and assessment conditions.

As discussed above, final rule defining ''hedging or mitigating commercial risk'' does not contain those proposed documentation and assessment conditions. Accordingly, the Paperwork Reduction Act does not apply to these definitions.[1589]

C. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [1590] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) [1591] of the Administrative Procedure Act,[1592] as amended by the RFA, generally requires the SEC to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.'' [1593] Section 605(b) of the RFA provides that this requirement shall not apply to any proposed rule or proposed rule amendment, which if adopted, would not have a significant economic impact on a substantial number of small entities.[1594]

For purposes of SEC rulemaking in connection with the RFA, a small entity includes: (i) When used with reference to an ''issuer'' or a ''person,'' other than an investment company, an ''issuer'' or ''person'' that, on the last day of its most recent fiscal year, had total assets of $5 million or less,[1595] or (ii) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[1596] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1597] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) For entities engaged in credit intermediation and related activities, entities with $175 million or less in assets; [1598] (ii) for entities engaged in non-depository credit intermediation and certain other activities, entities with $7 million or less in annual receipts; [1599] (iii) for entities engaged in financial investments and related activities, entities with $7 million or less in annual receipts; [1600] (iv) for insurance carriers and entities engaged in related activities, entities with $7 million or less in annual receipts; [1601] and (v) for funds, trusts, and other financial vehicles, entities with $7 million or less in annual receipts.[1602]

The Proposing Release stated that based on feedback from industry participants about the security-based swap markets, the SEC preliminarily believes that any entities that would qualify as security-based swap dealers and major security-based swap market participants would exceed the thresholds defining ''small entities,'' and that the SEC believes it is unlikely that the proposed rules would have a significant economic impact on any small entity. As a result, the SEC certified that the proposed rules would not have a significant economic impact on a substantial number of small entities for purposes of the RFA, and requested written comments regarding this certification.[1603]

While we received comment letters that addressed cost issues in connection with the proposed rules, we did not receive any comments that specifically addressed whether the rules defining ''security-based swap dealer'' or ''major security-based swap participant'' would have a significant economic impact on small entities.

The SEC continues to believe that the types of entities that would engage in more than a *de minimis* amount of dealing activity involving security-based swaps—which generally would be major banks—would not be ''small entities'' for purposes of the RFA. Similarly, the SEC continues to believe that the types of entities that may have security-based swap positions above the level required to be a ''major security-based swap participant'' would not be a ''small entity'' for purposes of the RFA. Accordingly, the SEC certifies that the final rules defining ''security-based swap dealer'' or ''major security-based swap participant'' would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Statutory Basis and Text of the Amendments

List of Subjects in 17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

Commodity Futures Trading Commission

For the reasons stated in the preamble, the CFTC is adopting the following amendments to 17 CFR part 1.

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Amend § 1.3 by revising paragraph (m) and adding paragraphs (ggg) through (mmm) to read as follows:

§ 1.3 Definitions.

* * * * *

(m) *Eligible contract participant.* This term has the meaning set forth in Section 1a(18) of the Act, except that:

(1) A major swap participant, as defined in Section 1a(33) of the Act and paragraph (hhh) of this section, is an eligible contract participant;

(2) A swap dealer, as defined in Section 1a(49) of the Act and paragraph (ggg) of this section, is an eligible contract participant;

(3) A major security-based swap participant, as defined in Section 3(a)(67) of the Securities Exchange Act

[1588] 44 U.S.C. 3501.

[1589] Consistent with the discussion above, we recognize that the substantive rules applicable to dealers and major participants may contain collections of information, and that these definitions will affect which entities are subject to those collections of information. We believe that these Paperwork Reduction Act issues are more appropriately addressed in connection with the substantive rules applicable to dealers and major participants.

[1590] 5 U.S.C. 601 *et seq.*

[1591] 5 U.S.C. 603(a).

[1592] 5 U.S.C. 551 *et seq.*

[1593] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits the Commissions to formulate their own definitions. The SEC has adopted definitions for the term small entity for the purposes of SEC rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982) (File No. AS–305).

[1594] *See* 5 U.S.C. 605(b).

[1595] *See* 17 CFR 240.0–10(a).

[1596] *See* 17 CFR 240.17a–5(d).

[1597] *See* 17 CFR 240.0–10(c).

[1598] *See* 13 CFR 121.201 (Subsector 522).

[1599] *See id.* at Subsector 522.

[1600] *See id.* at Subsector 523.

[1601] *See id.* at Subsector 524.

[1602] *See id.* at Subsector 525.

[1603] *See* Proposing Release, 75 FR at 80211.

of 1934 and § 240.3a67–1 of this title, is an eligible contract participant;

(4) A security-based swap dealer, as defined in Section 3(a)(71) of the Securities Exchange Act of 1934 and § 240.3a71–1 of this title, is an eligible contract participant;

(5)(i) A transaction-level commodity pool with one or more direct participants that is not an eligible contract participant is not itself an eligible contract participant under either Section 1a(18)(A)(iv) or Section 1a(18)(A)(v) of the Act for purposes of entering into transactions described in Sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii) of the Act; and

(ii) In determining whether a commodity pool that is a direct participant in a transaction-level commodity pool is an eligible contract participant for purposes of paragraph (m)(5)(i) of this section, the participants in the commodity pool that is a direct participant in the transaction-level commodity pool shall not be considered unless the transaction-level commodity pool, any commodity pool holding a direct or indirect interest in such transaction-level commodity pool, or any commodity pool in which such transaction-level commodity pool holds a direct or indirect interest, has been structured to evade subtitle A of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act by permitting persons that are not eligible contract participants to participate in agreements, contracts, or transactions described in Section 2(c)(2)(B)(i) or Section 2(c)(2)(C)(i) of the Act;

(6) A commodity pool that does not have total assets exceeding $5,000,000 or that is not operated by a person described in subclause (A)(iv)(II) of Section 1a(18) of the Act is not an eligible contract participant pursuant to clause (A)(v) of such Section;

(7)(i) For purposes of a swap (but not a security-based swap, security-based swap agreement or mixed swap) used to hedge or mitigate commercial risk, an entity may, in determining its net worth for purposes of Section 1a(18)(A)(v)(III) of the Act, include the net worth of any owner of such entity, provided that all the owners of such entity are eligible contract participants;

(ii)(A) For purposes of identifying the owners of an entity under paragraph (m)(7)(i) of this section, any person holding a direct ownership interest in such entity shall be considered to be an owner of such entity; provided, however, that any shell company shall be disregarded, and the owners of such shell company shall be considered to be the owners of any entity owned by such shell company;

(B) For purposes of paragraph (m)(7)(ii)(A) of this section, the term *shell company* means any entity that limits its holdings to direct or indirect interests in entities that are relying on this paragraph (m)(7); and

(C) In determining whether an owner of an entity is an eligible contract participant for purposes of paragraph (m)(7)(i) of this section, an individual may be considered to be a proprietorship eligible contract participant only if the individual—

(*1*) Has an active role in operating a business other than an entity;

(*2*) Directly owns all of the assets of the business;

(*3*) Directly is responsible for all of the liabilities of the business; and

(*4*) Acquires its interest in the entity seeking to qualify as an eligible contract participant under paragraph (m)(7)(i) of this section in connection with the operation of the individual's proprietorship or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the individual in the operation of the individual's proprietorship; and

(iii) For purposes of paragraph (m)(7)(i) of this section, a swap is used to hedge or mitigate commercial risk if the swap complies with the conditions in paragraph (kkk) of this section; and

(8) Notwithstanding Section 1a(18)(A)(iv) of the Act and paragraph (m)(5) of this section, a commodity pool that enters into an agreement, contract, or transaction described in Section 2(c)(2)(B)(i) or Section 2(c)(2)(C)(i)(I) of the Act is an eligible contract participant with respect to such agreement, contract, or transaction, regardless of whether each participant in such commodity pool is an eligible contract participant, if all of the following conditions are satisfied:

(i) The commodity pool is not formed for the purpose of evading regulation under Section 2(c)(2)(B) or Section 2(c)(2)(C) of the Act or related Commission rules, regulations or orders;

(ii) The commodity pool has total assets exceeding $10,000,000; and

(iii) The commodity pool is formed and operated by a registered commodity pool operator or by a commodity pool operator who is exempt from registration as such pursuant to § 4.13(a)(3) of this chapter.

* * * * *

(ggg) *Swap Dealer.* (1) In general. The term *swap dealer* means 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 it to be commonly known in the trade as a dealer or market maker in swaps.

(2) *Exception.* The term *swap dealer* does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(3) *Scope of designation.* A person who is a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into, regardless of the category of the swap or the person's activities in connection with the swap. However, if a person makes an application to limit its designation as a swap dealer to specified categories of swaps or specified activities of the person in connection with swaps, the Commission shall determine whether the person's designation as a swap dealer shall be so limited. If the Commission grants such limited designation, such limited designation swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into in the swap category or categories for which it is so designated, regardless of the person's activities in connection with such category or categories of swaps. A person may make such application to limit the categories of swaps or activities of the person that are subject to its swap dealer designation at the same time as, or after, the person's initial registration as a swap dealer.

(4) *De minimis exception.* (i) Except as provided in paragraph (ggg)(4)(vi) of this section, a person that is not currently registered as a swap dealer shall be deemed not to be a swap dealer as a result of its swap dealing activity involving counterparties, so long as the swap positions connected with those dealing activities into which the person—or any other entity controlling, controlled by or under common control with the person—enters over the course of the immediately preceding 12 months (or following the effective date of final rules implementing Section 1a(47) of the Act, 7 U.S.C. 1a(47), if that period is less than 12 months) have an aggregate gross notional amount of no more than $3 billion, subject to a phase in level of an aggregate gross notional amount of no more than $8 billion applied in accordance with paragraph (ggg)(4)(ii) of this section, and an aggregate gross notional amount of no more than $25 million with regard to swaps in which the counterparty is a ''special entity'' (as that term is defined in Section 4s(h)(2)(C) of the Act, 7

U.S.C. 6s(h)(2)(C), and § 23.401(c) of this chapter). For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

(ii) *Phase-in procedure and staff report.* (A) *Phase-in period.* For purposes of paragraph (ggg)(4)(i) of this section, except as provided in paragraph (ggg)(4)(vi) of this section, a person that engages in swap dealing activity that does not exceed the phase-in level set forth in paragraph (ggg)(4)(i) shall be deemed not to be a swap dealer as a result of its swap dealing activity until the ''*phase-in termination date*'' established as provided in paragraph (ggg)(4)(ii)(C) or (D) of this section. The Commission shall announce the phase-in termination date on the Commission Web site and publish such date in the **Federal Register**.

(B) *Staff report.* No later than 30 months following the date that a swap data repository first receives swap data in accordance with part 45 of this chapter, the staff of the Commission shall complete and publish for public comment a report on topics relating to the definition of the term ''swap dealer'' and the *de minimis* threshold. The report should address the following topics, as appropriate, based on the availability of data and information: the potential impact of modifying the *de minimis* threshold, and whether the *de minimis* threshold should be increased or decreased; the factors that are useful for identifying swap dealing activity, including the application of the dealer-trader distinction for that purpose, and the potential use of objective tests or safe harbors as part of the analysis; the impact of provisions in paragraphs (ggg)(5) and (6) of this section excluding certain swaps from the dealer analysis, and potential alternative approaches for such exclusions; and any other analysis of swap data and information relating to swaps that the Commission or staff deem relevant to this rule.

(C) Nine months after publication of the report required by paragraph (ggg)(4)(ii)(B) of this section, and after giving due consideration to that report and any associated public comment, the Commission may either:

(*1*) Terminate the phase-in period set forth in paragraph (ggg)(4)(ii)(A) of this section, in which case the phase-in termination date shall be established by the Commission by order published in the **Federal Register**; or

(*2*) Determine that it is necessary or appropriate in the public interest to propose through rulemaking an alternative to the $3 billion amount set forth in paragraph (ggg)(4)(i) of this section that would constitute a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of customers within the meaning of section 1(a)(47)(D) of the Act, 7 U.S.C. 1(a)(47)(D), in which case the Commission shall by order published in the **Federal Register** provide notice of such determination, which order shall also establish the phase-in termination date.

(D) If the phase-in termination date has not been previously established pursuant to paragraph (ggg)(4)(ii)(C) of this section, then in any event the phase-in termination date shall occur five years after the date that a swap repository first receives swap data in accordance with part 45 of this chapter.

(iii) *Registration period for persons that can no longer take advantage of the exception.* A person that has not registered as a swap dealer by virtue of satisfying the requirements of this paragraph (ggg)(4), but that no longer can take advantage of that *de minimis* exception, will be deemed not to be a swap dealer until the earlier of the date on which it submits a complete application for registration pursuant to Section 4s(b) of the Act, 7 U.S.C. 6s(b), or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

(iv) *Applicability to registered swap dealers.* A person who currently is registered as a swap dealer may apply to withdraw that registration, while continuing to engage in swap dealing activity in reliance on this section, so long as that person has been registered as a swap dealer for at least 12 months and satisfies the conditions of paragraph (ggg)(4)(i) of this section.

(v) *Future adjustments to scope of the de minimis exception.* The Commission may by rule or regulation change the requirements of the *de minimis* exception described in paragraphs (ggg)(4)(i) through (iv) of this section.

(vi) *Voluntary registration.* Notwithstanding paragraph (ggg)(4)(i) of this section, a person that chooses to register with the Commission as a swap dealer shall be deemed to be a swap dealer.

(5) *Insured depository institution swaps in connection with originating loans to customers.* Swaps entered into by an insured depository institution with a customer in connection with originating a loan with that customer shall not be considered in determining whether the insured depository institution is a swap dealer.

(i) An insured depository institution shall be considered to have entered into a swap with a customer in connection with originating a loan, as defined in paragraphs (ggg)(5)(ii) and (iii) of this section, with that customer only if:

(A) The insured depository institution enters into the swap with the customer no earlier than 90 days before and no later than 180 days after the date of execution of the applicable loan agreement, or no earlier than 90 days before and no later than 180 days after any transfer of principal to the customer by the insured depository institution pursuant to the loan;

(B)(*1*) The rate, asset, liability or other notional item underlying such swap is, or is directly related to, a financial term of such loan, which includes, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made and its principal amount;

(*2*) Such swap is required, as a condition of the loan under the insured depository institution's loan underwriting criteria, to be in place in order to hedge price risks incidental to the borrower's business and arising from potential changes in the price of a commodity (other than an excluded commodity);

(C) The duration of the swap does not extend beyond termination of the loan;

(D) The insured depository institution is:

(*1*) The sole source of funds to the customer under the loan;

(*2*) Committed to be, under the terms of the agreements related to the loan, the source of at least 10 percent of the maximum principal amount under the loan; or

(*3*) Committed to be, under the terms of the agreements related to the loan, the source of a principal amount that is greater than or equal to the aggregate notional amount of all swaps entered into by the insured depository institution with the customer in connection with the financial terms of the loan;

(E) The aggregate notional amount of all swaps entered into by the customer in connection with the financial terms of the loan is, at any time, not more than the aggregate principal amount outstanding under the loan at that time; and

(F) If the swap is not accepted for clearing by a derivatives clearing organization, the insured depository institution reports the swap as required by section 4r of the Act, 7 U.S.C. 6r (except as otherwise provided in section 4r(a)(3)(A), 7 U.S.C. 6r(a)(3)(A), or section 4r(a)(3)(B), 7 U.S.C. 6r(a)(3)(B) of the Act).

(ii) An insured depository institution shall be considered to have originated a loan with a customer if the insured depository institution:

(A) Directly transfers the loan amount to the customer;

(B) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(C) Purchases or receives a participation in the loan; or

(D) Otherwise is the source of funds that are transferred to the customer pursuant to the loan or any refinancing of the loan.

(iii) The term loan shall not include:

(A) Any transaction that is a sham, whether or not intended to qualify for the exclusion from the definition of the term *swap dealer* in this rule; or

(B) Any synthetic loan, including, without limitation, a loan credit default swap or loan total return swap.

(6) *Swaps that are not considered in determining whether a person is a swap dealer.* (i) *Inter-affiliate activities.* In determining whether a person is a swap dealer, that person's swaps with majority-owned affiliates shall not be considered. For these purposes the counterparties to a swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the swap, where ''majority interest'' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

(ii) *Activities of a cooperative.* (A) Any swap that is entered into by a cooperative with a member of such cooperative shall not be considered in determining whether the cooperative is a swap dealer, provided that:

(*1*) The swap is subject to policies and procedures of the cooperative requiring that the cooperative monitors and manages the risk of such swap;

(*2*) The cooperative reports the swap as required by Section 4r of the Act, 7 U.S.C. 6r (except as otherwise provided in Section 4r(a)(3)(A) of the Act, 7 U.S.C. 6r(a)(3)(A) or Section 4r(a)(3)(B) of the Act, 7 U.S.C. 6r(a)(3)(B)); and

(*3*) if the cooperative is a cooperative association of producers, the swap is primarily based on a commodity that is not an excluded commodity.

(B) For purposes of this paragraph (ggg)(6)(ii), the term *cooperative* shall mean:

(*1*) A cooperative association of producers as defined in section 1a(14) of the Act, 7 U.S.C. 1a(14), or

(*2*) A person chartered under Federal law as a cooperative and predominantly engaged in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k).

(C) For purposes of this paragraph (ggg)(6)(ii), a swap shall be deemed to be entered into by a cooperative association of producers with a member of such cooperative association of producers when the swap is between a cooperative association of producers and a person that is a member of a cooperative association of producers that is itself a member of the first cooperative association of producers.

(iii) *Swaps entered into for the purpose of hedging physical positions.* In determining whether a person is a swap dealer, a swap that the person enters into shall not be considered, if:

(A) The person enters into the swap for the purpose of offsetting or mitigating the person's price risks that arise from the potential change in the value of one or several—

(*1*) Assets that the person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(*2*) Liabilities that the person owns or anticipates incurring; or

(*3*) Services that the person provides, purchases, or anticipates providing or purchasing;

(B) The swap represents a substitute for transactions made or to be made or positions taken or to be taken by the person at a later time in a physical marketing channel;

(C) The swap is economically appropriate to the reduction of the person's risks in the conduct and management of a commercial enterprise;

(D) The swap is entered into in accordance with sound commercial practices; and

(E) The person does not enter into the swap in connection with activity structured to evade designation as a swap dealer.

(iv) *Swaps entered into by floor traders.* In determining whether a person is a swap dealer, each swap that the person enters into in its capacity as a floor trader as defined by section 1a(23) of the Act or on or subject to the rules of a swap execution facility shall not be considered for the purpose of determining whether the person is a swap dealer if the person:

(A) Is registered with the Commission as a floor trader pursuant to § 3.11 of this chapter;

(B) Enters into swaps with proprietary funds for that trader's own account solely on or subject to the rules of a designated contract market or swap execution facility and submits each such swap for clearing to a derivatives clearing organization;

(C) Is not an affiliated person of a registered swap dealer;

(D) Does not directly, or through an affiliated person, negotiate the terms of swap agreements, other than price and quantity or to participate in a request for quote process subject to the rules of a designated contract market or a swap execution facility;

(E) Does not directly or through an affiliated person offer or provide swap clearing services to third parties;

(F) Does not directly or through an affiliated person enter into swaps that would qualify as hedging physical positions pursuant to paragraph (ggg)(6)(iii) of this section or hedging or mitigating commercial risk pursuant to paragraph (kkk) of this section (except for any such swap executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction);

(G) Does not participate in any market making program offered by a designated contract market or swap execution facility; and

(H) Notwithstanding the fact such person is not registered as a swap dealer, such person complies with §§ 23.201, 23.202, 23.203, and 23.600 of this chapter with respect to each such swap as if it were a swap dealer.

(hhh) *Major Swap Participant.* (1) *In general.* The term *major swap participant* means any person:

(i) That is not a swap dealer; and

(ii)(A) That maintains a substantial position in swaps for any of the major swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002, for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(B) Whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(C) That is a financial entity that:

(*1*) Is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an

appropriate Federal banking agency (as defined in Section 1a(2) of the Act, 7 U.S.C. 1a(2)); and

(*2*) Maintains a substantial position in outstanding swaps in any major swap category.

(2) *Scope of designation.* A person that is a major swap participant shall be deemed to be a major swap participant with respect to each swap it enters into, regardless of the category of the swap or the person's activities in connection with the swap. However, if a person makes an application to limit its designation as a major swap participant to specified categories of swaps, the Commission shall determine whether the person's designation as a major swap participant shall be so limited. If the Commission grants such limited designation, such limited designation major swap participant shall be deemed to be a major swap participant with respect to each swap it enters into in the swap category or categories for which it is so designated, regardless of the person's activities in connection with such category or categories of swaps. A person may make such application to limit its designation at the same time as, or after, the person's initial registration as a major swap participant.

(3) *Timing requirements.* A person that is not registered as a major swap participant, but that meets the criteria in this rule to be a major swap participant as a result of its swap activities in a fiscal quarter, will not be deemed to be a major swap participant until the earlier of the date on which it submits a complete application for registration as a major swap participant pursuant to Section 4s(a)(2) of the Act, 7 U.S.C. 6s(a)(2), or two months after the end of that quarter.

(4) *Reevaluation period.* Notwithstanding paragraph (hhh)(3) of this section, if a person that is not registered as a major swap participant meets the criteria in this rule to be a major swap participant in a fiscal quarter, but does not exceed any applicable threshold by more than twenty percent in that quarter:

(i) That person will not be deemed a major swap participant pursuant to the timing requirements specified in paragraph (hhh)(3) of this section; but

(ii) That person will be deemed a major swap participant pursuant to the timing requirements specified in paragraph (hhh)(3) of this section at the end of the next fiscal quarter if the person exceeds any of the applicable daily average thresholds in that next fiscal quarter.

(5) *Termination of status.* A person that is deemed to be a major swap participant shall continue to be deemed a major swap participant until such time that its swap activities do not exceed any of the daily average thresholds set forth within this rule for four consecutive fiscal quarters after the date on which the person becomes registered as a major swap participant.

(6) *Calculation of status.* A person shall not be deemed to be a ''major swap participant,'' regardless of whether the criteria paragraph (hhh)(1) of this section otherwise would cause the person to be a major swap participant, provided the person meets the conditions set forth in paragraphs (hhh)(6)(i), (ii) or (iii) of this section.

(i) Caps on uncollateralized exposure and notional positions.

(A) *Maximum potential uncollateralized exposure.* The express terms of the person's agreements or arrangements relating to swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $100 million to all such counterparties, including any exposure that may result from thresholds or minimum transfer amounts established by credit support annexes or similar arrangements; and

(B) Maximum notional amount of swap positions. The person does not maintain swap positions in a notional amount of more than $2 billion in any major category of swaps, or more than $4 billion in the aggregate across all major categories; or

(ii) Caps on uncollateralized exposure plus monthly calculation.

(A) *Maximum potential uncollateralized exposure.* The express terms of the person's agreements or arrangements relating to swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $200 million to all such counterparties (with regard to swaps and any other instruments by which the person may have exposure to those counterparties), including any exposure that may result from thresholds or minimum transfer amounts established by credit support annexes or similar arrangements; and

(B) *Calculation of positions.* (*1*) At the end of each month, the person performs the calculations prescribed by paragraph (jjj) of this section with regard to whether the aggregate uncollateralized outward exposure plus aggregate potential outward exposure as of that day constitute a ''substantial position'' in a major category of swaps, or pose ''substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets''; these calculations shall disregard provisions of those rules that provide for the analyses to be determined based on a daily average over a calendar quarter; and

(*2*) Each such analysis produces thresholds of no more than:

(*i*) $1 billion in aggregate uncollateralized outward exposure plus aggregate potential outward exposure in any major category of swaps; if the person is subject to paragraph (jjj) of this section, by virtue of being a highly leveraged financial entity that is not subject to capital requirements established by an appropriate Federal banking agency, this analysis shall account for all of the person's swap positions in that major category (without excluding hedging positions), otherwise this analysis shall exclude the same hedging and related positions that are excluded from consideration pursuant to paragraph (jjj)(1)(i) of this section; or

(*ii*) $2 billion in aggregate uncollateralized outward exposure plus aggregate potential outward exposure (without any positions excluded from the analysis) with regard to all of the person's swap positions.

(iii) *Calculations based on certain information.* (A)(*1*) At the end of each month, the person's aggregate uncollateralized outward exposure with respect to its swap positions in each major swap category is less than $1.5 billion with respect to the rate swap category and less than $500 million with respect to each of the other major swap categories; and

(*2*) At the end of each month, the sum of the amount calculated under paragraph (hhh)(6)(iii)(A)(*1*) of this section with respect to each major swap category and the total notional principal amount of the person's swap positions in each such major swap category, adjusted by the multipliers set forth in paragraph (jjj)(3)(ii)(*1*) of this section on a position-by-position basis reflecting the type of swap, is less than $3 billion with respect to the rate swap category and less than $1 billion with respect to each of the other major swap categories; or

(B)(*1*) At the end of each month, the person's aggregate uncollateralized outward exposure with respect to its swap positions across all major swap categories is less than $500 million; and

(*2*) The sum of the amount calculated under paragraph (hhh)(6)(iii)(B)(*1*) of this section and the product of the total effective notional principal amount of the person's swap positions in all major security-based swap categories multiplied by 0.15 is less than $1 billion.

(C) For purposes of the calculations set forth in this paragraph (hhh)(6)(iii):

(*1*) The person's aggregate uncollateralized outward exposure for positions held with swap dealers shall be equal to such exposure reported on the most recent reports of such exposure received from such swap dealers; and

(*2*) The person's aggregate uncollateralized outward exposure for positions that are not reflected in any report of exposure from a swap dealer (including all swap positions it holds with persons other than swap dealers) shall be calculated in accordance with paragraph (jjj)(2) of this section.

(iv) For purposes of the calculations set forth in this paragraph (hhh)(6), the person shall use the effective notional amount of a position rather than the stated notional amount of the position if the stated notional amount is leveraged or enhanced by the structure of the position.

(v) No presumption shall arise that a person is required to perform the calculations needed to determine if it is a major swap participant, solely by reason that the person does not meet the conditions specified in paragraph (hhh)(6)(i), (ii) or (iii) of this section.

(7) *Exclusions.* A person who is registered as a derivatives clearing organization with the Commission pursuant to section 5b of the Act and regulations thereunder, shall not be deemed to be a major swap participant, regardless of whether the criteria in this paragraph (hhh) otherwise would cause the person to be a major swap participant.

(iii) *Category of swaps; major swap category.* For purposes of Section 1a(33) the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the terms *major swap category, category of swaps* and any similar terms mean any of the categories of swaps listed below. For the avoidance of doubt, the term *swap* as it is used in this paragraph (iii) has the meaning set forth in Section 1a(47) of the Act, 7 U.S.C. 1a(47), and the rules thereunder.

(1) *Rate swaps.* Any swap which is primarily based on one or more reference rates, including but not limited to any swap of payments determined by fixed and floating interest rates, currency exchange rates, inflation rates or other monetary rates, any foreign exchange swap, as defined in Section 1a(25) of the Act, 7 U.S.C. 1a(25), and any foreign exchange option other than an option to deliver currency.

(2) *Credit swaps.* Any swap that is primarily based on instruments of indebtedness, including but not limited to any swap primarily based on one or more broad-based indices related to debt instruments or loans, and any swap that is an index credit default swap or total return swap on one or more indices of debt instruments.

(3) *Equity swaps.* Any swap that is primarily based on equity securities, including but not limited to any swap based on one or more broad-based indices of equity securities and any total return swap on one or more equity indices.

(4) *Other commodity swaps.* Any swap that is not included in the rate swap, credit swap or equity swap categories.

(jjj) *Substantial position.* (1) In general. For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the term ''substantial position'' means swap positions that equal or exceed any of the following thresholds in the specified major category of swaps:

(i) For rate swaps:

(A) $3 billion in daily average aggregate uncollateralized outward exposure; or

(B) $6 billion in:

(*1*) Daily average aggregate uncollateralized outward exposure plus

(*2*) Daily average aggregate potential outward exposure.

(ii) For credit swaps:

(A) $1 billion in daily average aggregate uncollateralized outward exposure; or

(B) $2 billion in:

(*1*) Daily average aggregate uncollateralized outward exposure plus

(*2*) Daily average aggregate potential outward exposure.

(iii) For equity swaps:

(A) $1 billion in daily average aggregate uncollateralized outward exposure; or

(B) $2 billion in:

(*1*) Daily average aggregate uncollateralized outward exposure plus

(*2*) Daily average aggregate potential outward exposure.

(iv) For other commodity swaps:

(A) $1 billion in daily average aggregate uncollateralized outward exposure; or

(B) $2 billion in:

(*1*) Daily average aggregate uncollateralized outward exposure plus

(*2*) Daily average aggregate potential outward exposure.

(2) *Aggregate uncollateralized outward exposure.* (i) *In general. Aggregate uncollateralized outward exposure* in general means the sum of the current exposure, obtained by marking-to-market using industry standard practices, of each of the person's swap positions with negative value in a major swap category, less the value of the collateral the person has posted in connection with those positions.

(ii) *Calculation of aggregate uncollateralized outward exposure.* In calculating this amount the person shall, with respect to each of its swap counterparties in a given major swap category, determine the dollar value of the aggregate current exposure arising from each of its swap positions with negative value (subject to the netting provisions described below) in that major category by marking-to-market using industry standard practices; and deduct from that dollar amount the aggregate value of the collateral the person has posted with respect to the swap positions. The aggregate uncollateralized outward exposure shall be the sum of those uncollateralized amounts across all of the person's swap counterparties in the applicable major category.

(iii) *Relevance of netting agreements.* (A) If the person has one or more master netting agreement in effect with a particular counterparty, the person may measure the current exposure arising from its swaps in any major category on a net basis, applying the terms of those agreements. Calculation of net current exposure may take into account offsetting positions entered into with that particular counterparty involving swaps (in any swap category) as well as security-based swaps and securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements), and other financial instruments that are subject to netting offsets for purposes of applicable bankruptcy law, to the extent these are consistent with the offsets permitted by the master netting agreements.

(B) Such adjustments may not take into account any offset associated with positions that the person has with separate counterparties.

(iv) *Allocation of uncollateralized outward exposure.* If a person calculates current exposure with a particular counterparty on a net basis, as provided by paragraph (jjj)(2)(iii) of this section, the portion of that current exposure that should be attributed to each ''major'' category of swaps for purposes of the substantial position analysis should be calculated according to the formula:

$$ES(MC)_{\square} = Enet\ total_{\square} \cdot \frac{OTM_{S(MC)}}{OTM_{S(MC)} + OTM_{S(O)} + OTM_{non-S}}$$

Where: $E_{S(MC)}$ equals the amount of aggregate current exposure attributable to the entity's swap positions in the ''major'' swap category at issue; $E_{net\ total}$ equals the entity's aggregate current exposure to the counterparty at issue, after accounting for the netting of positions and the posting of collateral; $OTM_{S(MC)}$ equals the exposure associated with the entity's out-of-the-money positions in swaps in the ''major'' category at issue, subject to those netting arrangements; and $OTM_{S(O)}$ equals the exposure associated with the entity's out-of-the-money positions in the other ''major'' categories of swaps, subject to those netting arrangements; and $OTM_{non\text{-}S}$ equals the exposure associated with the entity's out-of-the-money positions associated with instruments, other than swaps, that are subject to those netting arrangements.

(3) *Aggregate potential outward exposure.* (i) *In general.* Aggregate potential outward exposure in any major swap category means the sum of:

(A) The aggregate potential outward exposure for each of the person's swap positions in a major swap category that are not subject to daily mark-to-market margining and are not cleared by a registered or exempt clearing agency or derivatives clearing organization, as calculated in accordance with paragraph (jjj)(3)(ii) of this section; and

(B) The aggregate potential outward exposure for each of the person's swap positions in such major swap category that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization, as calculated in accordance with paragraph (jjj)(3)(iii) of this section.

(ii) *Calculation of potential outward exposure for swaps that are not subject to daily mark-to-market margining and are not cleared by a registered or exempt clearing agency or derivatives clearing organization.* (A) *In general.* (*1*) For positions in swaps that are not subject to daily mark-to-market margining and are not cleared by a registered or exempt clearing agency or a derivatives clearing organization, potential outward exposure equals the total notional principal amount of those positions, multiplied by the following factors on a position-by-position basis reflecting the type of swap. For any swap that does not appropriately fall within any of the specified categories, the ''other commodities'' conversion factors set forth in the following Table 1 are to be used. If a swap is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the swap is zero, the remaining maturity equals the time until the next reset date.

TABLE 1—CONVERSION FACTOR MATRIX FOR SWAPS

Residual maturity	Interest rate	Foreign exchange rate and gold	Precious metals (except gold)	Other commodities
One year or less	0.00	0.01	0.07	0.10
Over one to five years	0.005	0.05	0.07	0.12
Over five years	0.015	0.075	0.08	0.15

Residual maturity	Credit	Equity
One year or less	0.10	0.06
Over one to five years	0.10	0.08
Over five years	0.10	0.10

(*2*) *Use of effective notional amounts.* If the stated notional amount on a position is leveraged or enhanced by the structure of the position, the calculation in paragraph (jjj)(3)(ii)(A)(*1*) of this section shall be based on the effective notional amount of the position rather than on the stated notional amount.

(*3*) *Exclusion of certain positions.* The calculation in paragraph (jjj)(3)(ii)(A)(*1*) of this section shall exclude:

(*i*) Positions that constitute the purchase of an option, if the purchaser has no additional payment obligations under the position;

(*ii*) Other positions for which the person has prepaid or otherwise satisfied all of its payment obligations; and

(*iii*) Positions for which, pursuant to law or a regulatory requirement, the person has assigned an amount of cash or U.S. Treasury securities that is sufficient at all times to pay the person's maximum possible liability under the position, and the person may not use that cash or those Treasury securities for other purposes.

(*4*) *Adjustment for certain positions.* Notwithstanding paragraph (jjj)(3)(ii)(A)(1) of this section, the potential outward exposure associated with a position by which a person buys credit protection using a credit default swap or index credit default swap, or associated with a position by which a person purchases an option for which the person retains additional payment obligations under the position, is capped at the net present value of the unpaid premiums.

(B) *Adjustment for netting agreements.* Notwithstanding paragraph (jjj)(3)(ii)(A) of this section, for positions subject to master netting agreements the potential outward exposure associated with the person's swaps with each counterparty equals a weighted average of the potential outward exposure for the person's swaps with that counterparty as calculated under paragraph (jjj)(3)(ii)(A) of this section, and that amount reduced by the ratio of net current exposure to gross current exposure, consistent with the following equation as calculated on a counterparty-by-counterparty basis:

$$P_{Net} = 0.4 * P_{Gross} + 0.6 * NGR * P_{Gross}$$

Where: P_{Net} is the potential outward exposure, adjusted for bilateral netting, of the person's swaps with a particular counterparty; P_{Gross} is the potential outward exposure without adjustment for bilateral netting as calculated pursuant to paragraph (jjj)(3)(ii)(A) of this section; and *NGR* is the ratio of the current exposure arising from its swaps in the major category as calculated on a net basis according to paragraphs (jjj)(2)(iii) and (iv) of this section, divided by the current exposure arising from its swaps in the major category as calculated in the absence of those netting procedures.

(iii) *Calculation of potential outward exposure for swaps that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization.* For positions in swaps that are subject to daily mark-to-market margining or that are cleared by a registered or exempt clearing agency or derivatives clearing organization:

(A) Potential outward exposure equals the potential exposure that would be attributed to such positions using the procedures in paragraph (jjj)(3)(ii) of this section multiplied by:

(*1*) 0.1, in the case of positions cleared by a registered or exempt clearing agency; or

(*2*) 0.2, in the case of positions that are subject to daily mark-to-market margining but that are not cleared by a registered or exempt clearing agency.

(B) Solely for purposes of calculating potential outward exposure:

(*1*) A swap shall be considered to be subject to daily mark-to-market margining if, and for so long as, the counterparties follow the daily practice of exchanging collateral to reflect changes in the current exposure arising from the swap (after taking into account any other financial positions addressed by a netting agreement between the counterparties).

(*2*) If the person is permitted by agreement to maintain a threshold for which it is not required to post collateral, the position still will be considered to be subject to daily mark-to-market margining for purposes of calculating potential outward exposure, but the total amount of that threshold (regardless of the actual exposure at any time), less any initial margin posted up to the amount of that threshold, shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (jjj)(1)(i)(B), (ii)(B), (iii)(B) or (iv)(B) of this section, as applicable.

(*3*) If the minimum transfer amount under the agreement is in excess of $1 million, the position still will be considered to be subject to daily mark-to-market margining for purposes of calculating potential outward exposure, but the entirety of the minimum transfer amount shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (jjj)(1)(i)(B), (ii)(B), (iii)(B) or (iv)(B) of this section, as applicable.

(*4*) A person may, at its discretion, calculate the potential outward exposure of positions in swaps that are subject to daily mark-to-market margining in accordance with paragraph (jjj)(3)(ii) of this section in lieu of calculating the potential outward exposure of such swap positions in accordance with this paragraph (jjj)(3)(iii).

(4) *Calculation of daily average.* Measures of daily average aggregate uncollateralized outward exposure and daily average aggregate potential outward exposure shall equal the arithmetic mean of the applicable measure of exposure at the close of each business day, beginning the first business day of each calendar quarter and continuing through the last business day of that quarter.

(5) *Inter-affiliate activities.* In calculating its aggregate uncollateralized outward exposure and its aggregate potential outward exposure, the person shall not consider its swap positions with counterparties that are majority-owned affiliates. For these purposes the counterparties to a swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the swap, where ''majority interest'' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

(kkk) *Hedging or mitigating commercial risk.* For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33) and paragraph (hhh) of this section, a swap position is held for the purpose of hedging or mitigating commercial risk when:

(1) Such position:

(i) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (or of a majority-owned affiliate of the enterprise), where the risks arise from:

(A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or

(C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise;

(D) The potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise;

(E) Any potential change in value related to any of the foregoing arising from interest, currency, or foreign exchange rate movements associated with such assets, liabilities, services, inputs, products, or commodities; or

(F) Any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person's current or anticipated assets or liabilities; or

(ii) Qualifies as bona fide hedging for purposes of an exemption from position limits under the Act; or

(iii) Qualifies for hedging treatment under:

(A) Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133); or

(B) Governmental Accounting Standards Board Statement 53, Accounting and Financial Reporting for Derivative Instruments; and

(2) Such position is:

(i) Not held for a purpose that is in the nature of speculation, investing or trading; and

(ii) Not held to hedge or mitigate the risk of another swap or security-based swap position, unless that other position itself is held for the purpose of hedging or mitigating commercial risk as defined by this rule or § 240.3a67–4 of this title.

(lll) *Substantial counterparty exposure.* (1) *In general.* For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the term *substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets* means a swap position that satisfies either of the following thresholds:

(i) $5 billion in daily average aggregate uncollateralized outward exposure; or

(ii) $8 billion in:

(A) Daily average aggregate uncollateralized outward exposure plus

(B) Daily average aggregate potential outward exposure.

(2) *Calculation methodology.* For these purposes, the terms *daily average aggregate uncollateralized outward exposure* and *daily average aggregate potential outward exposure* shall be calculated the same way as is prescribed in paragraph (jjj) of this section, except that these amounts shall be calculated by reference to all of the person's swap positions, rather than by reference to a specific major swap category.

(mmm) *Financial entity; highly leveraged.* (1) For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the term *financial entity* means:

(i) A security-based swap dealer;

(ii) A major security-based swap participant;

(iii) A commodity pool as defined in Section 1a(10) of the Act, 7 U.S.C. 1a(10);

(iv) A private fund as defined in Section 202(a) of the Investment

Advisers Act of 1940, 15 U.S.C. 80b–2(a);

(v) An employee benefit plan as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; and

(vi) A person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k).

(2) For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the term *highly leveraged* means the existence of a ratio of an entity's total liabilities to equity in excess of 12 to 1 as measured at the close of business on the last business day of the applicable fiscal quarter. For this purpose, liabilities and equity should each be determined in accordance with U.S. generally accepted accounting principles; provided, however, that a person that is an employee benefit plan, as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002, may exclude obligations to pay benefits to plan participants from the calculation of liabilities and substitute the total value of plan assets for equity.

Securities and Exchange Commission

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, Sections 3 and 23 thereof, and Sections 712 and 761(b) of the Dodd-Frank Act, the SEC is adopting Rules 3a67–1, 3a67–2, 3a67–3, 3a67–4, 3a67–5, 3a67–6, 3a67–7, 3a71–1, and 3a71–2 under the Exchange Act.

For the reasons stated in the preamble, the SEC is amending Title 17, Chapter II, of the Code of the Federal Regulations, as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for part 240 is amended by adding the following citation in numerical order:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77jjj, 77kkk, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., 18 U.S.C. 1350; 12 U.S.C. 5221(e)(3), and Pub. L. 111–203, § 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

Sections 3a67–1 through 3a67–9 and 3a71–1 and 3a71–2 are also issued under Pub. L. 111–203, §§ 712, 761(b), 124 Stat. 1841 (2010).

* * * * *

■ 4. Add an undesignated center heading and §§ 240.3a67–1 through 240.3a67–9 and §§ 240.3a71–1 and 240.3a71–2 to read as follows:

Security-Based Swap Dealer and Participant Definitions

Sec.

* * * * *

§ 240.3a67–1 Definition of ''major security-based swap participant.''

(a) *General. Major security-based swap participant* means any person:

(1) That is not a security-based swap dealer; and

(2)(i) That maintains a substantial position in security-based swaps for any of the major security-based swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(ii) Whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(iii) That is a financial entity that:

(A) Is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency (as defined in 15 U.S.C. 78c(a)(72)); and

(B) Maintains a substantial position in outstanding security-based swaps in any major security-based swap category.

(b) *Scope of designation.* A person that is a major security-based swap participant in general shall be deemed to be a major security-based swap participant with respect to each security-based swap it enters into, regardless of the category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's designation as a major security-based swap participant to specified categories of security-based swaps.

§ 240.3a67–2 Categories of security-based swaps.

For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and the rules thereunder, the terms *major security-based swap category, category of security-based swaps* and any similar terms mean either of the following categories of security-based swaps:

(a) *Debt security-based swaps.* Any security-based swap that is based, in whole or in part, on one or more instruments of indebtedness (including loans), or on a credit event relating to one or more issuers or securities, including but not limited to any security-based swap that is a credit default swap, total return swap on one or more debt instruments, debt swap, debt index swap, or credit spread.

(b) *Other security-based swaps.* Any security-based swap not described in paragraph (a) of this section.

§ 240.3a67–3 Definition of ''substantial position.''

(a) *General.* For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67–1, the term *substantial position* means security-based swap positions that equal or exceed either of the following thresholds in any major category of security-based swaps:

(1) $1 billion in daily average aggregate uncollateralized outward exposure; or

(2) $2 billion in:

(i) Daily average aggregate uncollateralized outward exposure; plus

(ii) Daily average aggregate potential outward exposure.

(b) *Aggregate uncollateralized outward exposure.* (1) *General. Aggregate uncollateralized outward exposure* in general means the sum of the current exposure, obtained by marking-to-market using industry standard practices, of each of the person's security-based swap positions

with negative value in a major security-based swap category, less the value of the collateral the person has posted in connection with those positions.

(2) *Calculation of aggregate uncollateralized outward exposure.* In calculating this amount the person shall, with respect to each of its security-based swap counterparties in a given major security-based swap category:

(i) Determine the dollar value of the aggregate current exposure arising from each of its security-based swap positions with negative value (subject to the netting provisions described below) in that major category by marking-to-market using industry standard practices; and

(ii) Deduct from that dollar amount the aggregate value of the collateral the person has posted with respect to the security-based swap positions.

(iii) The aggregate uncollateralized outward exposure shall be the sum of those uncollateralized amounts across all of the person's security-based swap counterparties in the applicable major category.

(3) *Relevance of netting agreements.* (i) If a person has one or more master netting agreements with a counterparty, the person may measure the current exposure arising from its security-based swaps in any major category on a net basis, applying the terms of those agreements. Calculation of current exposure may take into account offsetting positions entered into with that particular counterparty involving security-based swaps (in any security-based swap category) as well as swaps and securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements), and other financial instruments that are subject to netting offsets for purposes of applicable bankruptcy law, to the extent these are consistent with the offsets permitted by the master netting agreements.

(ii) Such adjustments may not take into account any offset associated with positions that the person has with separate counterparties.

(4) *Allocation of uncollateralized outward exposure.* If a person calculates current exposure with a particular counterparty on a net basis, as provided by paragraph (b)(3) of this section, the amount of current uncollateralized exposure attributable to each ''major'' category of security-based swaps should be calculated according to the following formula:

$$E_{SBS(MC)} = E_{net\ total} \cdot \frac{OTM_{SBS(MC)}}{OTM_{SBS(MC)} + OTM_{SBS(O)} + OTM_{non-SBS}}$$

Note to paragraph (b)(4). *Where:* $E_{SBS(MC)}$ equals the amount of aggregate current exposure attributable to the entity's security-based swap positions in the ''major'' category at issue (either security-based credit derivatives or other security-based swaps); $E_{net\ total}$ equals the entity's aggregate current exposure to the counterparty at issue, after accounting for the netting of positions and the posting of collateral; $OTM_{SBS(MC)}$ equals the current exposure associated with the entity's out-of-the-money positions in security-based swaps in the ''major'' category at issue, subject to those netting arrangements; and $OTM_{SBS(O)}$ equals the current exposure associated with the entity's out-of-the-money positions in the other ''major'' category of security-based swaps, subject to those netting arrangements; and $OTM_{non\text{-}SBS}$ equals the current exposure associated with the entity's out-of-the-money positions associated with instruments, other than security-based swaps, that are subject to those netting arrangements.

(c) *Aggregate potential outward exposure.* (1) *General. Aggregate potential outward exposure* means the sum of:

(i) The aggregate potential outward exposure for each of the person's security-based swap positions in a major security-based swap category that are neither cleared by a registered or exempt clearing agency nor subject to daily mark-to-market margining, as calculated in accordance with paragraph (c)(2) of this section; and

(ii) The aggregate potential outward exposure for each of the person's security-based swap positions in a major security-based swap category that are either cleared by a registered or exempt clearing agency or subject to daily mark-to-market margining, as calculated in accordance with paragraph (c)(3) of this section.

(2) *Calculation of potential outward exposure for security-based swaps that are not cleared by a registered or exempt clearing agency or subject to daily mark-to-market margining.* (i) *General.* (A)(*1*) For positions in security-based swaps that are not cleared by a registered or exempt clearing agency or subject to daily mark-to-market margining, potential outward exposure equals the total notional principal amount of those positions, multiplied by the following factors on a position-by-position basis reflecting the type of security-based swap. For any security-based swap that is not of the ''debt'' type, the ''equity and other'' conversion factors are to be used:

Residual maturity	Debt	Equity and other
One year or less	0.10	0.06
Over one to five years	0.10	0.08
Over five years	0.10	0.10

(*2*) If a security-based swap is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the security-based swap is zero, the remaining maturity equals the time until the next reset date.

(B) *Use of effective notional amounts.* If the stated notional amount on a position is leveraged or enhanced by the structure of the position, the calculation in paragraph (c)(2)(i)(A) of this section shall be based on the effective notional amount of the position rather than on the stated notional amount.

(C) *Exclusion of certain positions.* The calculation in paragraph (c)(2)(i)(A) of this section shall exclude:

(*1*) Positions that constitute the purchase of an option, such that the person has no additional payment obligations under the position;

(*2*) Other positions for which the person has prepaid or otherwise satisfied all of its payment obligations; and

(*3*) Positions for which, pursuant to regulatory requirement, the person has assigned an amount of cash or U.S. Treasury securities that is sufficient to pay the person's maximum possible liability under the position, and the person may not use that cash or those Treasury securities for other purposes.

(D) *Adjustment for certain positions.* Notwithstanding paragraph (c)(2)(i)(A) of this section, the potential outward exposure associated with a position by which a person buys credit protection using a credit default swap, or associated with a position by which a person purchases an option for which the person retains additional payment obligations under the position, is capped at the net present value of the unpaid premiums.

(ii) *Adjustment for netting agreements.* Notwithstanding paragraph (c)(2)(i) of this section, for positions subject to master netting agreements the

potential outward exposure associated with the person's security-based swaps with each counterparty equals a weighted average of the potential outward exposure for the person's security-based swaps with that counterparty as calculated under paragraph (c)(2)(i) of this section, and that amount reduced by the ratio of net current exposure to gross current exposure, consistent with the following equation as calculated on a counterparty-by-counterparty basis:

$$P_{Net} = 0.4 \times P_{Gross} + 0.6 \times NGR \times P_{Gross}$$

Note to paragraph (c)(2)(ii): *Where:* P_{Net} is the potential outward exposure, adjusted for bilateral netting, of the person's security-based swaps with a particular counterparty; P_{Gross} is the potential outward exposure without adjustment for bilateral netting, as calculated pursuant to paragraph (c)(2)(i) of this section; and *NGR* is the ratio of:

1. The current exposure arising from its security-based swaps in the major category as calculated on a net basis according to paragraphs (b)(3) and (4) of this section, divided by

2. The current exposure arising from its security-based swaps in the major category as calculated in the absence of those netting procedures.

(3) *Calculation of potential outward exposure for security-based swaps that are either cleared by a registered or exempt clearing agency or subject to daily mark-to-market margining.* For positions in security-based swaps that are cleared by a registered or exempt clearing agency or subject to daily mark-to-market margining:

(i) Potential outward exposure equals the potential outward exposure that would be attributed to such positions using the procedures in paragraph (c)(2) of this section, multiplied by:

(A) 0.1, in the case of positions cleared by a registered or exempt clearing agency; or

(B) 0.2, in the case of positions that are subject to daily mark-to-market margining but that are not cleared by a registered or exempt clearing agency.

(ii) Solely for purposes of calculating potential outward exposure:

(A) A security-based swap shall be considered to be subject to daily mark-to-market margining if, and for as long as, the counterparties follow the daily practice of exchanging collateral to reflect changes in the current exposure arising from the security-based swap (after taking into account any other financial positions addressed by a netting agreement between the counterparties).

(B) If the person is permitted by agreement to maintain a threshold for which it is not required to post collateral, the position still will be considered to be subject to daily mark-to-market margining for purposes of calculating potential outward exposure, but the total amount of that threshold (regardless of the actual exposure at any time) less any initial margin posted up to the amount of that threshold, shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (a)(2) of this section.

(C) If the minimum transfer amount under the agreement is in excess of $1 million, the position still will be considered to be subject to daily mark-to-market margining for purposes of calculating potential outward exposure, but the entirety of the minimum transfer amount shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (a)(2) of this section.

(D) A person may, at its discretion, calculate the potential outward exposure of positions in security-based swaps that are subject to daily mark-to-market margining in accordance with paragraph (c)(2) of this section in lieu of calculating the potential outward exposure of such positions in accordance with this paragraph (c)(3).

(d) *Calculation of daily average.* Measures of daily average aggregate uncollateralized outward exposure and daily average aggregate potential outward exposure shall equal the arithmetic mean of the applicable measure of exposure at the close of each business day, beginning the first business day of each calendar quarter and continuing through the last business day of that quarter.

(e) *Inter-affiliate activities.* In calculating its aggregate uncollateralized outward exposure and its aggregate potential outward exposure, a person shall not consider its security-based swap positions with counterparties that are majority-owned affiliates. For these purposes the parties are majority-owned affiliates if one party directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the security-based swap, where ''majority interest'' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

§ 240.3a67–4 Definition of ''hedging or mitigating commercial risk.''

For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67–1, a security-based swap position shall be deemed to be held for the purpose of hedging or mitigating commercial risk when:

(a)(1) Such position is economically appropriate to the reduction of risks that are associated with the present conduct and management of a commercial enterprise (or of a majority owned affiliate of the enterprise), or are reasonably expected to arise in the future conduct and management of the commercial enterprise, where such risks arise from:

(i) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise (or of an affiliate under common control with the enterprise);

(ii) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise (or of an affiliate under common control with the enterprise); or

(iii) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise (or of an affiliate under common control with the enterprise);

(2) Depending on the applicable facts and circumstances, the security-based swap positions described in paragraph (a)(1) of this section may be expected to encompass, among other positions:

(i) Positions established to manage the risk posed by a customer's, supplier's or counterparty's potential default in connection with: Financing provided to a customer in connection with the sale of real property or a good, product or service; a customer's lease of real property or a good, product or service; a customer's agreement to purchase real property or a good, product or service in the future; or a supplier's commitment to provide or sell a good, product or service in the future;

(ii) Positions established to manage the default risk posed by a financial counterparty (different from the counterparty to the hedging position at issue) in connection with a separate transaction (including a position involving a credit derivative, equity swap, other security-based swap, interest rate swap, commodity swap, foreign exchange swap or other swap, option, or future that itself is for the purpose of hedging or mitigating commercial risk pursuant to this section or 17 CFR 1.3(kkk));

(iii) Positions established to manage equity or market risk associated with certain employee compensation plans, including the risk associated with market price variations in connection with stock-based compensation plans, such as deferred compensation plans and stock appreciation rights;

(iv) Positions established to manage equity market price risks connected with certain business combinations, such as a corporate merger or consolidation or similar plan or acquisition in which securities of a person are exchanged for securities of any other person (unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States), or a transfer of assets of a person to another person in consideration of the issuance of securities of such other person or any of its affiliates;

(v) Positions established by a bank to manage counterparty risks in connection with loans the bank has made; and

(vi) Positions to close out or reduce any of the positions described in paragraphs (a)(2)(i) through (a)(2)(v) of this section; and

(b) Such position is:

(1) Not held for a purpose that is in the nature of speculation or trading; and

(2) Not held to hedge or mitigate the risk of another security-based swap position or swap position, unless that other position itself is held for the purpose of hedging or mitigating commercial risk as defined by this section or 17 CFR 1.3(kkk).

§ 240.3a67–5 Definition of ''substantial counterparty exposure.''

(a) *General.* For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67–1, the term *substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets* means a security-based swap position that satisfies either of the following thresholds:

(1) $2 billion in daily average aggregate uncollateralized outward exposure; or

(2) $4 billion in:

(i) Daily average aggregate uncollateralized outward exposure; plus

(ii) Daily average aggregate potential outward exposure.

(b) *Calculation.* For these purposes, daily average *aggregate uncollateralized outward exposure* and daily average *aggregate potential outward exposure* shall be calculated the same way as is prescribed in § 240.3a67–3, except that these amounts shall be calculated by reference to all of the person's security-based swap positions, rather than by reference to a specific major security-based swap category.

§ 240.3a67–6 Definition of ''financial entity.''

(a) *General.* For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67–1, the term *financial entity* means:

(1) A swap dealer;

(2) A major swap participant;

(3) A commodity pool as defined in section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10));

(4) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a));

(5) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); and

(6) A person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843k).

(b) *Exclusion for centralized hedging facilities.* (1) *General.* Notwithstanding paragraph (a) of this section, for purposes of this section the term *financial entity* shall not encompass a person that would be a financial entity solely as a result of the person's activities that facilitate hedging and/or treasury functions on behalf of one or more majority-owned affiliates that themselves do not constitute a financial entity.

(2) *Meaning of majority-owned.* For these purposes the counterparties to a security-based swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the security-based swap, where ''majority interest'' includes, but is not limited to, the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

§ 240.3a67–7 Definition of ''highly leveraged.''

(a) *General.* For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67–1, the term *highly leveraged* means the existence of a ratio of an entity's total liabilities to equity in excess of 12 to 1 as measured at the close of business on the last business day of the applicable fiscal quarter.

(b) *Measurement of liabilities and equity.* For purposes of this section, liabilities and equity generally should each be determined in accordance with U.S. generally accepted accounting principles; provided, however, that a person that is an employee benefit plan, as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), may, for purposes of this paragraph (b):

(1) Exclude obligations to pay benefits to plan participants from the calculation of liabilities; and

(2) Substitute the total value of plan assets for equity.

§ 240.3a67–8 Timing requirements, reevaluation period, and termination of status.

(a) *Timing requirements.* A person that is not registered as a major security-based swap participant, but that meets the criteria in § 240.3a67–1 to be a major security-based swap participant as a result of its security-based swap activities in a fiscal quarter, will not be deemed to be a major security-based swap participant until the earlier of the date on which it submits a complete application for registration pursuant to section 15F of the Act (15 U.S.C. 78o–10) or two months after the end of that quarter.

(b) *Reevaluation period.* Notwithstanding paragraph (a) of this section, if a person that is not registered as a major security-based swap participant meets the criteria in § 240.3a67–1 to be a major security-based swap participant in a fiscal quarter, but does not exceed any applicable threshold by more than twenty percent in that quarter:

(1) That person will not immediately be deemed a major security-based swap participant pursuant to the timing requirements specified in paragraph (a) of this section; but

(2) That person will be deemed a major security-based swap participant pursuant to the timing requirements specified in paragraph (a) of this section at the end of the next fiscal quarter if the person exceeds any of the applicable daily average thresholds in that next fiscal quarter.

(c) *Termination of status.* A person that is deemed to be a major security-based swap participant shall continue to be deemed a major security-based swap participant until such time that its security-based swap activities do not exceed any of the daily average thresholds set forth within § 240.3a67–

1 for four consecutive fiscal quarters after the date on which the person becomes registered as a major security-based swap participant.

§ 240.3a67–9 Calculation of major participant status by certain persons.

A person shall not be deemed to be a major security-based swap participant, regardless of whether the criteria in § 240.3a67–1 otherwise would cause the person to be a major security-based swap participant, provided the person meets the conditions set forth in paragraph (a) of this section.

(a) *Conditions.* (1) *Caps on uncollateralized exposure and notional positions.* (i) *Maximum potential uncollateralized exposure.* The express terms of the person's agreements or arrangements relating to security-based swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $100 million to all such counterparties, including any exposure that may result from thresholds or minimum transfer amounts established by credit support annexes or similar arrangements; and

(ii) *Maximum notional amount of security-based swap positions.* The person does not maintain security-based swap positions in an effective notional amount of more than $2 billion in any major category of security-based swaps, or more than $4 billion in aggregate; or

(2) *Caps on uncollateralized exposure plus monthly calculation.* (i) *Maximum potential uncollateralized exposure.* The express terms of the person's agreements or arrangements relating to security-based swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $200 million to all such counterparties (with regard to security-based swaps and any other instruments by which the person may have exposure to those counterparties), including any exposure that may result from thresholds or minimum transfer amounts established by credit support annexes or similar arrangements; and

(ii) *Calculation of positions.* (A) At the end of each month, the person performs the calculations prescribed by §§ 240.3a67–3 and 240.3a67–5 with regard to whether the aggregate uncollateralized outward exposure plus aggregate potential outward exposure as of that day constitute a substantial position in a major category of security-based swaps, or pose substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; these calculations shall disregard provisions of those rules that provide for the analyses to be determined based on a daily average over a calendar quarter; and

(B) Each such analysis produces thresholds of no more than:

(*1*) $1 billion in aggregate uncollateralized outward exposure plus aggregate potential outward exposure in any major category of security-based swaps; if the person is subject to § 240.3a67–3(a)(2)(iii), by virtue of being a highly leveraged financial entity that is not subject to capital requirements established by an appropriate Federal banking agency, this analysis shall account for all of the person's security-based swap positions in that major category (without excluding hedging positions), otherwise this analysis shall exclude the same hedging and related positions that are excluded from consideration pursuant to § 240.3a67–3(a)(2)(i); or

(*2*) $2 billion in aggregate uncollateralized outward exposure plus aggregate potential outward exposure (without any positions excluded from the analysis) with regard to all of the person's security-based swap positions.

(3) *Calculations based on certain information.* (i) At the end of each month:

(A)(*1*) The person's aggregate uncollateralized outward exposure with respect to its security-based swap positions is less than $500 million with respect to each of the major security-based swap categories; and

(*2*) The sum of the amount calculated under paragraph (a)(3)(i)(A)(*1*) of this section with respect to each major security-based swap category and the total notional principal amount of the person's security-based swap positions in each such major security-based swap category, adjusted by the multipliers set forth in § 240.3a67–3(c)(2)(i)(A) on a position-by-position basis reflecting the type of security-based swap, is less than $1 billion with respect to each of the major security-based swap categories; or

(B)(*1*) The person's aggregate uncollateralized outward exposure with respect to its security-based swap positions across all major security-based swap categories is less than $500 million; and

(*2*) The sum of the amount calculated under paragraph (a)(3)(i)(B)(*1*) of this section and the product of the total effective notional principal amount of the person's security-based swap positions in all major security-based swap categories multiplied by 0.10 is less than $1 billion.

(ii) For purposes of the calculations set forth in paragraph (a)(3)(i) of this section:

(A) The person's aggregate uncollateralized outward exposure for positions held with security-based swap dealers shall be equal to such exposure reported on the most recent reports of such exposure received from such security-based swap dealers; and

(B) The person's aggregate uncollateralized outward exposure for positions that are not reflected in any report of exposure from a security-based swap dealer (including all security-based swap positions it holds with persons other than security-based swap dealers) shall be calculated in accordance with § 240.3a67–3(b)(2).

(b) For purposes of the calculations set forth by this section, the person shall use the effective notional amount of a position rather than the stated notional amount of the position if the stated notional amount is leveraged or enhanced by the structure of the position.

(c) No presumption shall arise that a person is required to perform the calculations needed to determine if it is a major security-based swap participant, solely by reason that the person does not meet the conditions specified in paragraph (a) of this section.

§ 240.3a71–1 Definition of "security-based swap dealer."

(a) *General.* The term *security-based swap dealer* in general means any person who:

(1) Holds itself out as a dealer in security-based swaps;

(2) Makes a market in security-based swaps;

(3) Regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(4) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(b) *Exception.* The term *security-based swap dealer* does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(c) *Scope of designation.* A person that is a security-based swap dealer in general shall be deemed to be a security-based swap dealer with respect to each security-based swap it enters into, regardless of the type, class, or category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's

designation as a security-based swap dealer to specified types, classes, or categories of security-based swaps or specified activities of the person in connection with security-based swaps.

(d) *Inter-affiliate activities.* (1) *General.* In determining whether a person is a security-based swap dealer, that person's security-based swaps with majority-owned affiliates shall not be considered.

(2) *Meaning of majority-owned.* For these purposes the counterparties to a security-based swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the security-based swap, where ''majority interest'' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

§ 240.3a71–2 De minimis exception.

(a) *Requirements.* For purposes of section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)) and § 240.3a71–1, a person that is not currently registered as a security-based swap dealer shall be deemed not to be a security-based swap dealer, and, therefore, shall not be subject to section 15F of the Act (15 U.S.C. 78o–10) and the rules, regulations and interpretations issued thereunder, as a result of security-based swap dealing activity that meets the following conditions:

(1) *Notional thresholds.* The security-based swap positions connected with the dealing activity in which the person—or any other entity controlling, controlled by or under common control with the person—engages over the course of the immediately preceding 12 months (or following the effective date of final rules implementing section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) if that period is less than 12 months) have:

(i) An aggregate gross notional amount of no more than $3 billion, subject to a phase-in level of an aggregate gross notional amount of no more than $8 billion applied in accordance with paragraph (a)(2)(i) of this section, with regard to credit default swaps that constitute security-based swaps;

(ii) An aggregate gross notional amount of no more than $150 million, subject to a phase-in level of an aggregate gross notional amount of no more than $400 million applied in accordance with paragraph (a)(2)(i) of this section, with regard to security-based swaps not described in paragraph (a)(1)(i) of this section; and

(iii) An aggregate gross notional amount of no more than $25 million with regard to all security-based swaps in which the counterparty is a special entity (as that term is defined in section 15F(h)(2)(C) of the Act (15 U.S.C. 78o–10(h)(2)(C)).

(2) *Phase-in procedure.* (i) *Phase-in period.* For purposes of paragraphs (a)(1)(i) and (ii) of this section, a person that engages in security-based swap dealing activity that does not exceed either of the phase-in levels set forth in paragraphs (a)(1)(i) and (ii) of this section, as applicable, shall be deemed not to be a security-based swap dealer, and, therefore, shall not be subject to Section 15F of the Act (15 U.S.C. 78o–10) and the rules, regulations and interpretations issued thereunder, as a result of its security-based swap dealing activity, until the ''phase-in termination date'' established as provided in paragraph (a)(2)(ii) of this section; provided, however, that this phase-in period shall not be available to the extent that a person engages in security-based swap dealing activity with counterparties that are natural persons, other than natural persons who qualify as eligible contract participants by virtue of section 1a(18)(A)(xi)(II) of the Commodity Exchange Act, (7 U.S.C. 1a(18)(A)(xi)(II)). The Commission shall announce the phase-in termination date on the Commission Web site and publish such date in the **Federal Register**.

(ii) *Establishment of phase-in termination date.* (A) Nine months after the publication of the staff report described in Appendix A of this section, and after giving due consideration to that report and any associated public comment, the Commission may either:

(*1*) Terminate the phase-in period set forth in paragraph (a)(2)(i) of this section, in which case the phase-in termination date shall be established by the Commission by order published in the **Federal Register**; or

(*2*) Determine that it is necessary or appropriate in the public interest to propose through rulemaking an alternative to the $3 billion and $150 million amounts set forth in paragraphs (a)(1)(i) and (ii) of this section, as applicable, that would constitute a *de minimis* quantity of security-based swap dealing in connection with transactions with or on behalf of customers within the meaning of section 3(a)(71)(D) of the Act, (15 U.S.C. 78c(a)(71)(D)), in which case the Commission shall by order published in the **Federal Register** provide notice of such determination to propose through rulemaking an alternative, which order shall also establish the phase-in termination date.

(B) If the phase-in termination date has not been previously established pursuant to paragraph (a)(2)(ii)(A) of this section, then in any event the phase-in termination date shall occur five years after the data collection initiation date defined in paragraph (a)(2)(iii) of this section.

(iii) *Data collection initiation date.* The term ''*data collection initiation date*'' shall mean the date that is the later of: the last compliance date for the registration and regulatory requirements for security-based swap dealers and major security-based swap participants under Section 15F of the Act (15 U.S.C. 78o–10); or the first date on which compliance with the trade-by-trade reporting rules for credit-related and equity-related security-based swaps to a registered security-based swap data repository is required. The Commission shall announce the data collection initiation date on the Commission Web site and publish such date in the **Federal Register**.

(3) *Use of effective notional amounts.* For purposes of paragraph (a)(1) of this section, if the stated notional amount of a security-based swap is leveraged or enhanced by the structure of the security-based swap, the calculation shall be based on the effective notional amount of the security-based swap rather than on the stated notional amount.

(b) *Registration period for persons that no longer can take advantage of the exception.* A person that has not registered as a security-based swap dealer by virtue of satisfying the requirements of paragraph (a) of this section, but that no longer can take advantage of the *de minimis* exception provided for in paragraph (a) of this section, will be deemed not to be a security-based swap dealer under section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)) and subject to the requirements of section 15F of the Act (15 U.S.C. 78o–10) and the rules, regulations and interpretations issued thereunder until the earlier of the date on which it submits a complete application for registration pursuant to section 15F(b) (15 U.S.C. 78o–10(b)) or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

(c) *Applicability to registered security-based swap dealers.* A person who currently is registered as a security-based swap dealer may apply to withdraw that registration, while continuing to engage in security-based swap dealing activity in reliance on this

section, so long as that person has been registered as a security-based swap dealer for at least 12 months and satisfies the conditions of paragraph (a) of this section.

(d) *Future adjustments to scope of the de minimis exception.* The Commission may by rule or regulation change the requirements of the *de minimis* exception described in paragraphs (a) through (c) of this section.

(e) *Voluntary registration.* Notwithstanding paragraph (a) of this section, a person that chooses to register with the Commission as a security-based swap dealer shall be deemed to be a security-based swap dealer, and, therefore, shall be subject to Section 15F of the Act (15 U.S.C 78o–10) and the rules, regulations and interpretations issued thereunder.

§ 240.3a71–2A Report regarding the ''security-based swap dealer'' and ''major security-based swap participant'' definitions (Appendix A to 17 CFR 240.3a71–2).

Appendix A to § 240.3a71–2 sets forth guidelines applicable to a report that the Commission has directed its staff to make in connection with the rules and interpretations further defining the Act's definitions of the terms ''security-based swap dealer'' (including the *de minimis* exception to that definition) and ''major security-based swap participant.'' The Commission intends to consider this report in reviewing the effect and application of these rules based on the evolution of the security-based swap market following the implementation of the registration and regulatory requirements of Section 15F of the Act (15 U.S.C. 78o–10). The report may also be informative as to potential changes to the rules further defining those terms. In producing this report, the staff shall consider security-based swap data collected by the Commission pursuant to other Title VII rules, as well as any other applicable information as the staff may determine to be appropriate for its analysis.

(a) *Report topics.* As appropriate, based on the availability of data and information, the report should address the following topics:

(1) *De minimis exception.* In connection with the *de minimis* exception to the definition of ''security-based swap dealer,'' the report generally should assess whether any of the *de minimis* thresholds set forth in paragraph (a)(1) of § 240.3a71–2 should be increased or decreased;

(2) *General security-based swap dealer analysis.* In connection with the definition of ''security-based swap dealer,'' the report generally should consider the factors that are useful for identifying security-based swap dealing activity, including the application of the dealer-trader distinction for that purpose, and the potential use of more objective tests or safe harbors as part of the analysis;

(3) *General major security-based swap participant analysis.* In connection with the definition of ''major security-based swap participant,'' the report generally should consider the tests used to identify the presence of a ''substantial position'' in a major category of security-based swaps, and the tests used to identify persons whose security-based swap positions create ''substantial counterparty exposure,'' including the potential use of alternative tests or thresholds;

(4) *Commercial risk hedging exclusion.* In connection with the definition of ''major security-based swap participant,'' the report generally should consider the definition of ''hedging or mitigating commercial risk,'' including whether that latter definition inappropriately permits certain positions to be excluded from the ''substantial position'' analysis, and whether the continued availability of the exclusion for such hedging positions should be conditioned on a person assessing and documenting the hedging effectiveness of those positions;

(5) *Highly leveraged financial entities.* In connection with the definition of ''major security-based swap participant,'' the report generally should consider the definition of ''highly leveraged,'' including whether alternative approaches should be used to identify highly leveraged financial entities;

(6) *Inter-affiliate exclusions.* In connection with the definitions of ''security-based swap dealer'' and ''major security-based swap participant,'' the report generally should consider the impact of rule provisions excluding inter-affiliate transactions from the relevant analyses, and should assess potential alternative approaches for such exclusions; and

(7) *Other topics.* Any other analysis of security-based swap data and information the Commission or the staff deem relevant to this rule.

(b) *Timing of report.* The report shall be completed no later than three years following the data collection initiation date, established pursuant to § 240.3a71–2(a)(2)(iii).

(c) *Public comment on the report.* Following completion of the report, the report shall be published in the **Federal Register** for public comment.

Dated: April 27, 2012.

By the Commodity Futures Trading Commission.

David A. Stawick,

Secretary.

Dated: April 27, 2012.

By the Securities and Exchange Commission.

Elizabeth M. Murphy,

Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations:

Appendices by the Commodity Futures Trading Commission to Joint Final Rule Entitled ''Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant.' ''—Commission Voting Summary and Statements of Commissioners

Appendix 1—Commodity Futures Trading Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton and Wetjen voted in the affirmative; Commissioner O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gensler

I support the final rule to further define entities, which is pivotal to lowering risk that swap dealers may pose to the rest of the economy. The entities rule fulfills Congress' direction to further define the terms ''swap dealer,'' ''major swap participant'' and ''eligible contract participant'' and appropriately addresses the many comments we received. It will provide essential direction to market participants on whether they will be required to register.

Regulating banks and other firms that deal in derivatives as swap dealers is central to financial reform. Leading up to the financial crisis, it was assumed by many that swap dealers were largely regulated. The 2008 crisis revealed the inadequacy of this approach: While banks were regulated for safety and soundness, including their lending activities, there was no comprehensive regulation of their swap dealing activity. Similarly, bank affiliates dealing in swaps, and subsidiaries of insurance and investment bank holding companies dealing in swaps, were not subject to specific regulation of their swap dealing activities under U.S. law, and thus often had ineffective or no oversight.

A prime example of this fact was AIG. AIG was a holding company with a number of regulated insurance companies, but its unregulated swaps subsidiary brought down the company and helped to nearly topple the U.S. economy.

The final rule gives market participants guidance on the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) definition of swap dealer:

- First, it does so by allowing market participants to draw on useful precedents developed by the SEC in the traditional

securities market to help distinguish between dealing and trading.

• Second, it does so by providing further clarity on the Dodd-Frank Act's term ''makes a market in swaps'' by focusing on entities that routinely seek to profit by accommodating other market participants' demand for swaps.

• Third, it does so by clarifying another key term ''regular business,'' focusing on whether a person has an identifiable swap dealing business.

• Fourth, it does so by fulfilling Congress' mandate that swaps entered into by an insured depository institution in connection with originating a loan are not to be considered dealing activity.

• Fifth, it does so by providing direction on the distinction between hedging and dealing and within this provides a specific rule for swaps that hedge price risk associated with a physical commodity.

• Sixth, it does so by clarifying that a swap between an agricultural cooperative or a cooperative financial institution and its members does not constitute dealing.

• Seventh, it does so by setting a de minimis threshold for swap dealing, as directed by Congress. The threshold is $3 billion total, across all asset classes, subject to a phase in level of $8 billion. As we proposed, the final rule would define as a swap dealer any entity with more than $25 million of dealing activity with pension funds and municipals—so-called ''special entities.''

True to congressional intent, end-users other than those genuinely making markets in swaps won't be required to register as swap dealers. The swap dealer definition benefited from the many comments from end-users who use swaps to hedge their risk.

As the swap dealing market is dominated by large entities, though, I believe that the final swap dealer definition will encompass the vast majority of swap dealing activity, as Congress had intended. For those who question the level of the de minimis, we considered the threshold in the context of an overall $300 trillion notional amount U.S. swaps market. Further, the statute defines swap dealing by referencing ''making a market in swaps'' and conducting a ''regular business'' in swaps. The $3 billion threshold in the rule represents, on average, $12 million a trading day, with the phase-in of $8 billion representing, on average, $32 million notional amount per trading day. Putting this in perspective, the interest rate swap market, transacts, on average, over $500 billion notional amount per day. As further reference, the futures markets for crude oil traded this year, on average, $65 billion of notional amount per day.

During this phase-in period the Commissions will collect and analyze data to evaluate the appropriate de minimis threshold.

Another question that has been raised is whether the swap dealer definition should appropriately be activities-based or relate to how an entity is classified. The final rule is consistent with Congressional intent that we take an activities-based approach.

Though many of these large swap dealers are financial entities, Congress anticipated that some non-banks would be registered as swap dealers. Congress provided in Dodd-Frank that capital and margin for bank swap dealers would be set by the bank regulators, but for non-bank swap dealers, by the CFTC. Instructive in this regard is the list of primary dealers on the International Swaps and Derivatives Association's (ISDA) Web site, which includes a number of non-bank dealers. The Association describes as meeting that designation an entity ''that deals in derivatives as part of its business.'' Congress closed the so-called ''Enron loophole,'' which let traders evade oversight by using electronic trading platforms. But it is important to recall that Enron was also a swap dealer. Congress did not intend to create a new type of loophole in its place.

Congress drafted the swap dealer definition recognizing the fact that some entities are involved in swap dealing activities, as well as other lines of business. Section 1a(49)(C) provides that an entity is a swap dealer only if it engages in swap dealing as ''a regular business.'' But it does not say that swap dealing must be its only regular business. Further, section 1a(49)(B) specifically provides for the regulation of a single entity as a swap dealer for one part of its business and not for the other part of its business. Given the business realities reflected in the statutory language, there is no compelling reason to think that an entities-based approach would better interpret the statute or that it would, in practice, be simpler than an approach based on what a business actually does.

The rule also further defines the term ''major swap participant.'' Relying on Congress' three-prong test, this category is clearly limited to only those entities with swaps positions that pose a risk large enough to threaten the U.S. financial system.

The further definition of the term ''eligible contract participant'' provides guidance regarding who is eligible to transact swaps off of an exchange. Based upon the many comments received, we incorporated further guidance to ensure that small businesses and real estate developers can continue to have access to swaps to hedge commercial risks. The final rule also clarifies how the eligible contract participant definition applies to certain foreign exchange transactions conducted by commodity pools.

Appendix 3—Statement of Commissioner O'Malia

In General

I respectfully dissent from the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') approval today of the Entities Rule,[1] which is a joint final and interim final rule with the Securities and Exchange Commission (''SEC'') under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'').[2] I have a number of concerns with each definition in the CFTC Entities Rule. However, this dissent focuses on the ''swap dealer'' definition.

Preliminarily, in its proposal,[3] the Commission ignored basic canons of statutory construction[4] in defining ''swap dealer.''[5] Specifically, the statutory definition has four clauses, lettered (A) through (D). As discussed below, the Commission defined ''swap dealer'' as encompassed only within CEA section 1a(49)(A). Thus, the Commission advanced a definition focusing on *activities,* rather than

[1] Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant,'' and ''Eligible Contract Participant;'' Final Rule, (to be codified at 17 CFR part 1), available at [_____]. As stated below, this final rule and interim final rule is joint between the Commission and the SEC. Therefore, within this dissent, (i) the term ''Entities Rule'' refers to the entire rule, (ii) the term ''CFTC Entities Rule'' refers to only the CFTC portion of such rule, and (iii) the term ''SEC Entities Rule'' refers to the SEC portion of such rule.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[3] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant,'' and ''Eligible Contract Participant;'' Proposed Rule, 75 FR 80174 (Dec. 21, 2010) (the ''Proposal'').

[4] The canons of statutory construction are ''important rules and conventions'' that the judiciary applies to determine the meaning of statutory provisions. Congressional Research Service, Report for Congress, *Statutory Interpretation: General Principles and Recent Trends,* updated August 31, 2008 (the ''CRS Report'') (Summary). In general, it behooves agencies (such as the Commission) to adhere to such canons so that its regulations, if subject to legal challenge, would be more likely to survive judicial scrutiny. In the CFTC Entities Rule, the Commission acknowledges the importance of canons of statutory construction, since it cites to certain canons in determining the application of its ''eligible contract participant'' definition. *See* Section III(B)(4) of the CFTC Entities Rule.

[5] The statutory definition of ''swap dealer'' can be found in section 1a(49) of the Commodity Exchange Act (the ''CEA''), 7 U.S.C. 1a(49). For purposes of reference, the text of CEA section 1a(49) is as follows:

''(49) SWAP DEALER.—

''(A) IN GENERAL.—The term 'swap dealer' means 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, provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.

''(B) INCLUSION.—A person may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or activities.

''(C) EXCEPTION.—The term 'swap dealer' does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

''(D) DE MINIMIS EXCEPTION.—The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers.

The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.''

the *entities* conducting these activities.[6] The Commission then minimized the other clauses of the definition. Specifically, the Commission characterized CEA section 1a(49)(C) as an ''exception'' for certain activities. The Commission also characterized CEA section 1a(49)(B) as only authorizing ''limited designation.'' [7]

I have always disagreed with the Proposal. By focusing on the activities in CEA section 1a(49)(A), the Commission essentially used the ''swap dealer'' definition to capture commercial end-users.[8] Congress clearly precluded this result. As described below, CEA section 1a(49)(C) provides a mandatory exclusion for commercial end-users.[9] Alternatively, CEA section 1a(49)(B) permits the Commission to exercise its discretion to exclude commercial end-users, so long as the Commission articulates a rational basis for such differential treatment.[10] The Commission has many reasons for exercising its discretion, including certain statutory reasons.

Today, the Commission has erected the CFTC Entities Rule on the infirm scaffold of the Proposal. To be sure, the Commission has performed astonishing contortions to afford greater certainty to commercial end-users.[11] However, the Commission could have provided equivalent or superior certainty by properly construing CEA sections 1a(49)(C) and (B), either initially or in a re-proposal. By preserving and furthering the statutory misconstructions in the Proposal, the CFTC Entities Rule may ultimately provide illusory comfort. Therefore, I cannot support the CFTC Entities Rule.

The ''Swap Dealer'' Definition: Fundamental Misconstruction

• *CEA section 1a(49)(A): Not the Entire ''Swap Dealer'' Definition*

A statute should be read as a ''harmonious whole.'' [12] This statement is a basic canon of statutory construction.[13] The Commission has failed to follow such canon in defining ''swap dealer.''

As mentioned above, in the CFTC Entities Rule (as in the Proposal), the Commission insists that CEA section 1a(49)(A) *is* the entirety of the ''swap dealer'' definition. According to the Commission, any entity engaged in any *activity* enumerated in CEA section 1a(49)(A) is a ''swap dealer'' [14] (unless otherwise ''excepted'').[15] Specifically, the Commission states: ''The Dodd-Frank Act definitions of the term 'swap dealer' * * * focus on whether a person engages in particular types of activities involving swaps * * *.'' [16] Also, the Commission states: ''The CEA * * * [definition] in general encompass persons that engage in any of the [activities in CEA section 1a(49)(A)].'' [17] Finally, the Commission characterizes the activities in CEA section 1a(49)(A) as ''dealer activities.'' [18]

• *CEA section 1a(49)(C): Mandatory Exclusion for Entities*

CEA section 1a(49) contradicts in both its language and structure the Commission's focus on the *activities* of CEA section 1a(49)(A). Specifically, CEA section 1a(49)(C), when properly construed, sets forth a mandatory exclusion that focuses on the characteristics of an *entity,* and not exclusively on its *activities.* CEA section 1a(49)(C) states: ''The term 'swap dealer' does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as part of a regular business.''

First, CEA section 1a(49)(C) is as central to the ''swap dealer'' definition as CEA section 1a(49)(A). CEA section 1a(49)(C) begins with ''The term 'swap dealer' does not include * * *''. In comparison, CEA section 1a(49)(A) begins with ''The term 'swap dealer' means * * *''. Therefore, according to their plain language, CEA section 1a(49)(C) and CEA section 1a(49)(A) are equal and opposite of each other. In essence, CEA section 1a(49)(C) sets forth the *exclusion* criteria for the ''swap dealer'' definition, whereas CEA section 1a(49)(A) sets forth the *inclusion* criteria.

Second, CEA section 1a(49)(C) focuses on the characteristics of entities, and not solely on their activities. CEA section 1a(49)(C) states that ''[t]he term 'swap dealer' does not include a person that enters into swaps * * * not as part of a regular business.'' In contrast, CEA section 1a(49)(A)(iii) states that the ''swap dealer'' definition encompasses any person that ''regularly enters into swaps with counterparties as an ordinary course of business for its own account.'' If the Commission is correct in presuming that CEA section 1a(49)(A) focuses on *activities,* then the phrase ''regularly enters into swaps * * * as an ordinary course of business'' must refer to an activity. However, Congress used different words in CEA section 1a(49)(C). According to a basic canon of statutory construction, when Congress uses different words, it intends different meanings. In other words, a court should strive to give effect to every word of a statute.[19]

The Commission could have easily given effect to every word of CEA section 1a(49)(C), while according the same respect to CEA section 1a(49)(A)(iii). Juxtaposing CEA section 1a(49)(C) and CEA section 1a(49)(A)(iii), the following construction emerges: a ''person'' (*i.e.,* an entity) is not a ''swap dealer'' if it enters into swaps for ''its own account'' (*i.e.,* as principal) in the ''ordinary course of business'' (*i.e.,* normally while conducting business), provided that entering into these swaps is not its ''regular business'' (*i.e.,* entering into swaps is ancillary to its core business).[20]

[6] *See* Proposed Rule; 75 FR at 80175, 80179 (stating that ''The Dodd-Frank Act defines the terms 'swap dealer' * * * in terms of whether a person engages in certain types of activities involving swaps or security-based swaps * * * Based on the plain meaning of the statutory definition, so long as a person engages in dealing activity that is not *de minimis,* as discussed below, the person is a swap dealer * * *'').

[7] The following example illustrates the difference between (i) an ''exception'' and (ii) an ''exclusion.'' Imagine a circle entitled ''swap dealer.'' ''Exceptions'' are circles within the ''swap dealer'' circle. In essence, entities within those circles are subcategories of ''swap dealer'' permitted special treatment. ''Exclusions'' are circles entirely separate from the ''swap dealer'' circle. In essence, entities within those circles are not ''swap dealers'' in the first instance. As described below, CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C), provides a mandatory ''exclusion'' from the ''swap dealer'' definition for—at a minimum—non-financial entities that do not have ''a regular business'' of entering into swap transactions. To be clear, this ''exclusion'' applies to *entities,* and not solely to their *activities.* Similarly, CEA section 1a(49)(B), 7 U.S.C. 1a(49)(B), provides a discretionary ''exclusion'' from the ''swap dealer'' definition (rather than just ''limited designation,'' as the Commission contends).

[8] *See, e.g.,* Opening Statement, Sixth Series of Proposed Rulemakings under the Dodd-Frank Act, Dec. 1, 2010, available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement120110*; and Jobs on Main Street vs. Wall Street: The Choice Should be Clear, 2011 Futures Industry Association Energy Forum, New York, Keynote Address, Sept. 14, 2011, available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-8.*

[9] *See supra* note 5 for the exact text of CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C). *See also supra* note 7 for an explanation of the difference between (i) an ''exception'' and (ii) an ''exclusion.'' The collapse of CEA section 1a(49)(C) (referencing ''a regular business'') into CEA section 1a(49)(A)(iii), 7 U.S.C. 1a(49)(A)(iii) (referencing ''an ordinary course of business''), illustrates that the Commission still considers entities within CEA section 1a(49)(C) as subcategories of ''swap dealers,'' absent Commission largesse.

[10] *Id.* for the exact text of CEA section 1a(49)(B), 7 U.S.C. 1a(49)(B).

[11] In the CFTC Entities Rule, the Commission departs from the Proposal in the following ways, among others: (i) acknowledging that there is a difference between dealing, trading, and hedging; (ii) setting forth an explicit exception for swaps that an entity enters into in its capacity as a floor trader (as defined in CEA section 1a(23), 7 U.S.C. 1a(23)); (iii) providing another explicit exception for certain hedging activities; (iv) providing an exception for swaps between majority-owned affiliates; and (iv) setting forth a phase-in period with a higher *de minimis* threshold.

[12] *See, e.g.,* the CRS Report, p. CRS–2.

[13] *Id.*

[14] As mentioned above, CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A), states that the term ''swap dealer'' means ''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.''

[15] *See supra* note 9.

[16] Section II of the CFTC Entities Rule.

[17] *Id.*

[18] *Id.*

[19] The CRS Report, p. CRS–14 (stating that ''A basic principle of statutory construction is that courts should 'give effect, if possible to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.'' (quoting *Montclair* v. *Ramsdell,* 107 U.S. 147, 152 (1883)). *See also* the CRS Report, CRS–12, footnote 62 (discussing the ''modern variant'' of this canon).

[20] As mentioned below, certain financial entities may also satisfy these criteria, such as ''special entities'' (as defined in CEA section 4s(h)(2)(C), 7 U.S.C. 6s(h)(2)(C) (*e.g.,* certain employee benefit plans covered by the Employee Retirement Income Security Act of 1974 (''ERISA'')). If the Commission wanted to prevent other financial entities from abusing CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C), the Commission could have preliminarily limited

Continued

If the Commission had adopted this construction, the Commission would have *per se* excluded commercial end-users. Such exclusion would have permitted these entities to freely hedge their business risks, whether financial or physical, without fear of becoming a ''swap dealer.'' Just to provide some context, commercial end-users include Caterpillar, John Deere, and ConAgra Foods. These entities have ''a regular business'' of supplying energy, food, and other tangible products to America. To these entities, swaps are ancillary tools that they can use to manage risk. These entities suffered from—rather than perpetrated—the 2008 financial crisis. Yet, these entities (either individually or through trade associations) took the time to draft and submit comment letters to the Commission—sometimes multiple letters—because they were afraid of being defined as ''swap dealers.''

If the Commission had any doubt regarding the above construction, the Commission could have referred to various letters from members of Congress. Such letters explicitly state that Congress intended to exclude commercial end-users. For example, former Chairman Christopher Dodd and Chairwoman Blanche Lincoln circulated a joint letter stating: ''Congress does not intend to regulate end-users as Major Swap Participants or Swap Dealers just because they use swaps to hedge or manage the commercial risks associated with their business.'' [21] Both senators Dodd and Lincoln were instrumental in shaping the legislation that became the Dodd-Frank Act.

Recently, Chairwoman Debbie Stabenow and Chairman Frank Lucas reiterated this point: [I]t is important for the Commission to finalize the swap dealer definition in a manner that is not overly broad, and that will not impose significant new regulations on entities that Congress did not intend to be regulated as swap dealers. The Commission's final rulemaking further defining 'swap dealing' should clearly distinguish swap activities that end-users engage in to hedge or mitigate the commercial risks associated with their businesses, including swaps entered into by end-users to hedge physical commodity price risk, from swap dealing.[22]

It is important to note that Chairwoman Stabenow and Chairman Lucas lead the Congressional committees charged with overseeing the Commission.

○ *CEA section 1a(49)(B): Discretionary Exclusion for Entities*

In the alternative (assuming that the Commission rejects the above construction), CEA section 1a(49)(B) also contradicts the Commission's focus on the activities in CEA section 1a(49)(A). Specifically, CEA section 1a(49)(B), when properly construed, sets forth a permissive exclusion focused on *entities,* with respect to either their *activities* or their *swaps.* CEA section 1a(49)(B) states: ''A person may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or activities.''

First, CEA section 1a(49)(B) references ''[a] person.'' CEA section 1a(38) [23] defines ''person'' as ''import[ing] the plural or singular.'' Read together, the sections indicate that CEA section 1a(49)(B) focuses on either (i) an entity or (ii) multiple entities.

Second, CEA section 1a(49)(B) states that ''[a] person'' (or ''persons'') could be ''considered not to be'' a ''swap dealer'' for ''types, classes, or categories of swaps.'' So, an *entity* could be excluded from the ''swap dealer'' definition with respect to, *e.g.,* physical commodity swaps, regardless of its *activity* with respect to such swaps. That indicates that the ''swap dealer'' definition does not solely focus on activity, as the Commission maintains. Instead, the characteristics of the entity and the underlying swaps are also relevant.

Third, CEA section 1a(49)(B) states that ''[a] person'' (or ''persons'') could be ''considered not to be'' a ''swap dealer'' for certain ''activities.'' So, even if an entity engages in ''activities'' in CEA section 1a(49)(A), that entity may nevertheless not be a ''swap dealer.'' That indicates that the ''swap dealer'' definition may not even predominantly focus on activity.

Finally, CEA section 1a(49)(B) permits the Commission to include one ''person'' (or a group of ''persons'') engaging in certain activities in the ''swap dealer'' definition, but to exclude another ''person'' (or group of ''persons'') engaging in the same activities. Of course, the Commission has to articulate a rational basis for differential treatment. As discussed below, there may be certain statutory bases for differentiation (including the reference to ''financial entity'' in the end-user exception). Nothing in CEA section 1a(49)(B) prevents the Commission from so differentiating through rulemaking (rather than individual determinations).

○ *Unnecessary Statutory Contortions*

Instead of following the canons of statutory construction and properly interpreting CEA section 1a(49)(C) and CEA section 1a(49)(B), the Commission engages in a series of contortions with seemingly opposing purposes. Upon review, these contortions appear to stem from a desire of the Commission to provide a measure of certainty to commercial end-users in the CFTC Entities Rule, without explicitly contradicting the Proposal.

Preliminarily, the Commission appears to broadly define ''swap dealer'' to capture commercial end-users. For example, both the Proposal and the CFTC Entities Rule obfuscate the application of CEA section 1a(49)(C) to *entities* (rather than solely to *activities*) by collapsing CEA section 1a(49)(C) into CEA section 1a(49)(A)(iii).[24] In

the exclusion to commercial end-users (or other entities that the Commission determines could be excluded based on a holistic reading of the Dodd-Frank Act and the CEA, including small financial institutions as delineated in CEA section 2(h)(7)(C), 7 U.S.C. 2(h)(7)(C)). Additionally, if the Commission wanted to prevent commercial end-users (or such other entities) from abusing CEA section 1a(49)(C) (by, *e.g.,* entering into non-ancillary transactions in swaps), the Commission has anti-evasion authority under section 721(c) of the Dodd-Frank Act.

The regulations that the Commission promulgates under the Dodd-Frank Act will irrevocably change the structure of the swap markets. Such changes have benefits and costs. To properly weigh the benefits and costs of its regulations under CEA section 15(a), 7 U.S.C. 19(a), it would have behooved the Commission to have discussed (i) categorically excluding certain entities from the ''swap dealer'' definition within the phase-in period, and (ii) exercising anti-evasion authority, if the Commission found it necessary based on its surveillance of the swaps market.

[21] Letter from Chairman Christopher Dodd, Committee on Banking, Housing, and Urban Affairs, United States Senate, and Chairman Blanche Lincoln, Committee on Agriculture, Nutrition, and Forestry, United States Senate, to Chairman Barney Frank, Financial Services Committee, United States House of Representatives, and Chairman Collin Peterson, Committee on Agriculture, United States House of Representatives (June 30, 2010) (the ''Dodd-Lincoln Letter'').

The Dodd-Lincoln Letter (as well as the Stabenow-Lucas Letter (as defined below)) appears to have embraced a broader conception of ''commercial risk'' than the Commission. *See infra* note 42.

[22] Letter from Chairwoman Debbie Stabenow, Committee on Agriculture, Nutrition, and Forestry, United States Senate, and Chairman Frank D. Lucas, Committee on Agriculture, United States House of Representatives to Chairman Gary Gensler, United States Commodity Futures Trading Commission (March 29, 2012) (the ''Stabenow-Lucas Letter'').

[23] 7 U.S.C. 1a(38).

[24] In Section II(A)(4)(d) of CFTC Entities Rule, the Commission states: ''We recognize, as noted by one commenter (*see* letter from ISDA I), that the 'regular business' exclusion is not limited solely to the 'ordinary course of business' test of the swap dealer definition. Our interpretations of the other three tests are, and should be read to be, consistent with the exclusion of activities that are not part of a regular business.''

Preliminarily, I would note that more than one commenter observed the collapse.

Secondarily, as noted above, CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C), applies to *entities* (and not solely to *activities*). Therefore, the Commission does not (and really cannot) argue that the collapse of CEA section 1a(49)(C) into CEA section 1a(49)(A)(iii), 7 U.S.C. 1a(49)(A)(iii), has little to no impact on its construction of CEA sections 1a(49)(A)(i), (ii), and (iv), 7 U.S.C. 1a(49)(A)(i), (ii), and (iv).

Finally, although it is ambiguous in the CFTC Entities Rule (and not contemplated in the Proposal), it seems like the Commission may be indirectly relying on its reference to the dealer-trader distinction to justify its collapse of CEA section 1a(49)(C) and 1a(49)(A)(iii). Interestingly, the SEC does not state that ''regular business'' in Exchange Act section 3(a)(71)(C), 15 U.S.C. 78c(a)(71)(C)) (parallel to CEA section 1a(49)(C)), is ''synonymous'' with ''ordinary course of business'' in Exchange Act section 3(a)(71)(A)(iii), 15 U.S.C. 78c(a)(71)(A) (parallel to CEA section 1a(49)(A)(iii)). Of course, it may have been understood that the SEC would hew more closely to the dealer-trader distinction, as historically applicable to securities, and thus would focus on *activities* and not *entities. See* Section II(A)(3) of the Entities Rule. However, one wonders that of all the distinctions that the Commission makes or attempts to preserve between the swaps and securities-based swaps markets, the Commission does not acknowledge (i) the ''high degree of concentration'' of dealing in the securities-based swaps markets among the largest financial entities and (ii) the lack of similar concentration in the swaps markets (particularly with respect to markets that commercial end-users frequent, such as the physical commodity swaps markets). *Compare generally* Section II(D)(5) of the SEC Entities Rule (which repeatedly references ''high degree of concentration'') with Section II(D)(4) of the CFTC Entities Rule (which does not contain such references). *See also* Section II(A)(2)(e)(iii) of the CFTC Entities Rule (describing comments with respect to electricity swaps). The

performing such collapse, the Commission states that it ''continue[s] to believe, as stated in the [Proposal], that the phrases 'ordinary course of business' and 'a regular business' are, for purposes of the definition of 'swap dealer' essentially synonymous.'' [25] Neither the Proposal nor the CFTC Entities Rule fully supports collapsing CEA section 1a(49)(C)—one of four clauses in the statutory ''swap dealer'' definition—into CEA section 1a(49)(A)(iii)—a subparagraph of one clause. Further, neither the Proposal nor the CFTC Entities Rule fully supports interpreting two separate phrases (*i.e.,* ''ordinary course of business'' and ''regular business'') as meaning the same thing. The Commission similarly minimizes CEA section 1a(49)(B) as providing for ''limited designation'' only, rather than an alternate source of authority for the Commission to exclude certain *entities* from the ''swap dealer'' definition.[26]

However, after appearing to broadly define ''swap dealer'', the Commission then cobbles together various measures that aim—with differing levels of success—to provide a measure of certainty to commercial end-users. The most important (and successful) of these measures is a higher *de minimis* threshold. Two other important measures are: (i) referencing the dealer-trader distinction and (ii) incorporating an explicit hedging exception.

Although these measures reflect positive policy choices, they also reflect various compromises that may ultimately diminish the certainty that they seek to provide. As mentioned above, the Commission could have provided equivalent or superior certainty by properly construing CEA sections 1a(49)(C) and (B), either initially or in a re-proposal.

○ *Reference to the Dealer-Trader Distinction*

In the CFTC Entities Rule, the Commission states that it ''believe[s] that the dealer-trader distinction—which already forms a basis for identifying which persons fall within the longstanding Exchange Act definition of 'dealer'—in general provides an appropriate framework for interpreting the statutory definition of the term 'swap dealer.'' [27] In so recognizing, the Commission departs from the Proposal.[28] I have always argued that differences exist among (i) dealing, (ii) trading, and (iii) hedging. I have also recommended that the Commission provide guidance to clearly distinguish among the three categories. Such guidance would aid market participants in determining whether to register as a ''swap dealer.'' Although the CFTC Entities Rule contains (i) an interim final hedging exception [29] and (ii) a final ''floor trader'' exclusion, [30] both provisions are limited in scope. Therefore, market participants will still need clear guidance on Commission interpretation of the dealer-trader distinction, in order to determine whether their trading or hedging transactions may cause them to be deemed ''swap dealers.''

Unfortunately, the Commission has missed its opportunity in the CFTC Entities Rule. After reading the relevant portions of the rulemaking multiple times, it is still unclear to me exactly how the Commission intends to distinguish among (i) dealing, (ii) trading (outside of the limited ''floor trader'' exclusion), and (iii) hedging (outside of the specific hedging exception, which I discuss below). For example, the Commission states: ''[t]he principles embedded within the 'dealer trader distinction' are also applicable to distinguishing dealers from non-dealers such as hedgers or investors.'' [31] I agree with this statement. The Commission also cites to more support from the SEC Entities Rule—specifically the fact that ''[t]he 'dealer-trader' nomenclature has been used for decades.'' [32] I also agree with this statement. However, the Commission then states: ''These same principles, though instructive, may be inapplicable to swaps in certain circumstances or may be applied differently in the context of dealing activities involving commodity, interest rate, or other types of swaps.'' [33] I do not know whether to agree or disagree with this statement, given its ambiguity. Thus, for all of its girth, the CFTC Entities Rule fails to answer a basic question—namely, under which circumstances would an entity be deemed a dealer (rather than a trader or hedger) with respect to specific swap transactions? [34]

The Commission appears to argue that inherent differences between the swaps markets and securities markets (other than security-based swaps) justify its selective incorporation of dealer-trader elements (which elements, in themselves, apparently vary according to unknown facts and circumstances). For example, the Commission states that an entity need not engage in two-way transactions in order to fall within the ''swap dealer'' definition. One justification that the Commission advances is that ''swaps thus far are not significantly traded on exchanges or other trading systems'' and that this ''[attribute]—along with the lack of 'buying *and* selling' language in the swap dealer definition * * *— suggest that concepts of what it means to make a market need to be construed flexibly in the contexts of the swap market.'' [35] However, in the same section of the CFTC Entities Rule, the Commission states: ''many cash market securities also are not significantly traded on those systems.'' [36] Therefore, the Commission advances a justification for selective incorporation of dealer-trader elements and then contradicts its justification in the same paragraph. Thus, even if market participants wished to understand Commission reasoning to determine whether they need to register as ''swap dealers,'' they may not be able to do so.

Finally, the Commission and the SEC appear to emphasize different dealer-trader elements. For example, the Commission tends to emphasize ''accommodating demand

Commission should have accorded greater consideration to differences in market structure before dismissing a construction of CEA section 1a(49)(C) as focusing on *entities* (and as independent of CEA section 1a(49)(A)(iii)).

[25] Section II(A)(4)(d) of the CFTC Entities Rule.

[26] The Commission characterizes CEA section 1a(49)(B), 7 U.S.C. 1a(49)(B), as ''limited designation'' based on a series of misconstructions. First, as noted above, the Commission insists that CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A), *is* the entirety of the ''swap dealer'' definition. Second, the Commission then interprets CEA section 1a(49)(B) to apply to the *registration* of an entity as a ''swap dealer,'' and not to the ''swap dealer'' *definition.* Third, because CEA section 1a(49)(B) applies to registration, the Commission concludes that it would be appropriate to apply an individualized, facts-and-circumstances analysis.

In actuality, CEA section 1a(49)(B) does more than provide for ''limited designation.'' First, as discussed above, CEA section 1a(49)(A) sets forth general parameters for defining ''swap dealer.'' The entirety of the ''swap dealer'' definition *is* actually CEA sections 1a(49)(A), (B), (C), and (D), 7 U.S.C. 1a(49)(A), (B), (C), and (D). Second, CEA section 1a(49)(B) is in the *definition* of ''swap dealer.'' It is not in CEA section 4s(a), 7 U.S.C. 6s(a), which pertains to *registration* of ''swap dealers.'' Therefore, the Commission should have considered the effect of CEA section 1a(49)(B) in delineating the universe of entities that need to seek registration with the Commission, and not solely the effect of CEA section 1a(49)(B) in determining the scope of registration that the Commission would afford such entities. Third, because CEA section 1a(49)(B) relates to the *definition* and not the *registration* of ''swap dealers,'' the Commission articulates no basis for an individualized, facts-and-circumstances determination.

[27] Section II(A)(4)(a) of the CFTC Entities Rule.

[28] The Commission acknowledges such departure, but attempts to mitigate its legal effect by emphasizing that (i) the dealer-trader framework overlaps with the functional approach in the Proposal, and (ii) the Commission has changed its interpretative approach to the ''swap dealer'' definition in response to comments. *See* Section II(A)(4)(a) of the CFTC Entities Rule.

[29] As described below, this exception only applies to physical commodity swaps. Therefore, commercial end-users would not be able to rely on this exception for swaps to hedge financial risks. Moreover, small financial institutions would not be able to rely on this exception (as they most likely would be hedging financial risk), even if the Commission were to permit them to use the end-user exception. Finally, even financial entities (such as ''special entities'') may engage in ''hedging'' without ''dealing.'' The CFTC Entities Rule does not provide much clarity on how such financial entities could demonstrate that they are not ''dealing'' (other than the amorphous distinction between ''purpose'' and ''consequences'').

[30] The final ''floor trader'' exclusion has many limitations. For example, an entity cannot rely on this exclusion if it participates in a market-making program offered by a designated contract market (''DCM'') or swap execution facility. One wonders what would happen if an entity participates in a DCM market-making program for futures, and then the Commission requires such futures to be converted to swaps in a forthcoming rulemaking. *See, e. g.,* Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (Dec. 22, 2010).

[31] Section II(A)(4)(a) of the CFTC Entities Rule.

[32] Section II(A)(5)(a) of the SEC Entities Rule.

[33] Section II(A)(3) of the Entities Rule.

[34] For example, in Section II(A)(4)(a) of the CFTC Entities Rule, the Commission sets forth a list of indicia that are either ''particularly similar to'' or ''generally consistent with * * * the dealer-trader distinction as it will be applied to determine whether a person is a security-based swap dealer.'' However, the Commission immediately undermines any comfort that such list could provide by stating ''[t]o clarify, the activities listed in the text are indicative of acting as a swap dealer. Engaging in one or more of these activities is not a prerequisite to a person being covered by the swap dealer definition.''

[35] Section II(A)(4)(a) of the CFTC Entities Rule.

[36] *Id.*

or facilitating interest in the instrument.''[37] In contrast, the SEC tends to emphasize ''a business model that seeks to profit by providing liquidity.''[38] The Commission fails to provide a rationale for its difference in focus.[39] On its face, ''accommodating demand or facilitating interest'' seems to capture more traders and hedgers than having ''a business model that seeks to profit by providing liquidity.''

○ *Interim Final Rule on Hedging*

In the CFTC Entities Rule, the Commission has included an interim final rule excepting certain hedging transactions from the ''swap dealer'' definition (*i.e.,* Regulation 1.3(ggg)(6)(iii)).[40] I agree that hedging is not dealing. However, I find the interim final rule excessively narrow. First, the interim final rule only applies to a limited set of physical commodity hedges. I am not sure why the Commission does not wish to allow commercial end-users to hedge financial risks (*e.g.,* through interest rate swaps) without fearing that they could be deemed ''swap dealers.''[41] Permitting such hedging would be consonant with Congressional intent, as expressed in the letters from members of Congress.[42] Conversely, I am not sure why the Commission wants to encourage, *e.g.,* banking entities—like Barclays—to own physical commodities and claim the hedge exception.

Second, there are four other hedging definitions that are either (i) currently effective or (ii) the subject of a Dodd-Frank Act proposal.[43] Given the call by President Obama to simplify regulation,[44] I would have expected the Commission to refrain from proposing a fifth hedging definition, unless strictly necessary. In the CFTC Entities Rule, the Commission does not cogently explain the necessity for a fifth hedging exception. For example, the Commission spends a considerable amount of effort to differentiate the interim final rule from *bona fide hedging* in Regulations 1.3(z) and 151.5(a)(1). The Commission's rationale may be distilled into one circular sentence: the Commission believes that certain *bona fide hedging* transactions may constitute swap dealing, due to reasons that the Commission declines to fully explain.[45] Additionally, the Commission spends one paragraph attempting to differentiate between the interim final rule and the ''major swap participant'' definition (which contains a *hedging or mitigating commercial risk* exception). In that paragraph, the central argument appears to be that the ''swap dealer'' definition determines the parameters of the ''major swap participant'' definition—but not also *vice versa.*[46] Preliminarily, the Commission declines to cite where exactly the Dodd-Frank Act states that the ''swap dealer'' definition is determinative. Secondarily, even assuming that the Commission is correct in characterizing the interconnection, the Commission does not clearly explain why it thinks that those transactions (i) falling outside the interim final rule but (ii) falling within *hedging or mitigating commercial risk* are more likely to constitute swap dealing.

Finally, the Commission is silent on the manner in which the interim final rule interacts with the proposed Regulation 39.6 (detailing *hedging or mitigating commercial risk* for the end-user exception). If an entity is a ''swap dealer,'' then it cannot rely on the end-user exception to clearing.[47] Therefore, if the Commission overreaches in defining ''swap dealer,'' it may narrow the end-user exception in a way not congruent with Congressional intent.[48]

Other Provisions of the Dodd-Frank Act and the CEA: Further Misconstructions

As mentioned above, the Commission fails to properly construe the various clauses of CEA section 1a(49). As detailed in this section, the Commission also fails to consider other provisions of the CEA or the Dodd-Frank Act in determining the parameters of ''swap dealer.'' The Commission appears to assume that the ''swap dealer'' definition is determinative for all such provisions, rather than also *vice versa.* The Commission does not provide much (if any) rationale for this assumption. Removing this assumption, it becomes clear that other provisions of the CEA or the Dodd-Frank Act may suggest further limitations on ''swap dealer.''[49]

• *End-User Exemption: Who can take advantage of it?*

CEA section 2(h)(7) sets forth what is commonly known as the ''end-user clearing exception.'' As mentioned above, the ''swap dealer'' definition is crucial to determining which entities could use the end-user clearing exception. That is because CEA section 2(h)(7) only applies if one counterparty to a swap is not a ''financial entity.''[50] CEA section 2(h)(7)(C) defines

[37] *See generally* Section II(A)(4) of the CFTC Entities Rule.

[38] *See generally* Section II(A)(5) of the SEC Entities Rule.

The CFTC Entities Rule does acknowledge that seeking to profit from providing liquidity is one indicia of dealing. However, the CFTC Entities Rule limits its discussion of this indicia to CEA section 1a(49)(A)(ii), 7 U.S.C. 1a(49)(A)(ii), which emphasizes market-making. The Commission appears to rely more heavily on ''accommodating demand or facilitating interest'' (without necessarily emphasizing a ''business model that seeks to profit from providing liquidity'') in its interpretation of the remainder of CEA section 1a(49)(A), 7 U.S.C. 1a(49)(A). Therefore, a dissonance still exists between the CFTC Entities Rule and the SEC Entities Rule.

[39] *See supra* note 24. The Commission could have focused on differences in market composition. Unfortunately, such focus could have raised other issues with Commission construction of CEA section 1a(49), 7 U.S.C. 1a(49).

[40] *See* Section II(A)(4)(e) of the CFTC Entities Rule.

[41] The Commission relies on its misconstruction of the statutory ''swap dealer'' definition to justify such a narrow exclusion. In Section II(A)(4)(e) of the CFTC Entities Rule, the Commission states: ''In terms of the statutory definition of the term 'swap dealer,' the *CFTC* notes as an initial matter that there is no specific provision addressing hedging activity. Thus, the statutory definition leaves the treatment of hedging swaps to the *CFTC's* discretion; it neither precludes consideration of a swap's hedging purpose, nor does it require an absolute exclusion of all swaps used for hedging.'' As noted above, whereas CEA section 1a(49) does not specifically refer to ''hedging,'' CEA section 1a(49)(C), 7 U.S.C. 1a(49)(C), (as well as CEA section 1a(49)(B), 7 U.S.C. 1a(49)(B))—as properly construed—would have excluded commercial end-users that engage in swaps for purposes of hedging. It is interesting that the SEC did not endorse these specific sentences.

[42] As mentioned above, the Commission contorts itself in the CFTC Entities Rule to provide an interim hedging exception that applies only to physical commodity risks. This approach runs contrary to the Dodd-Lincoln Letter (as well as the Stabenow-Lucas Letter). Both letters emphasize exclusions for *entities*—such as commercial end-users—so that they could freely hedge their risks—whether financial or physical.

The Dodd-Lincoln Letter begins by referencing hedging of interest rate risk. It specifically states: ''Whether swaps are used by an airline hedging its fuel costs or a global manufacturing company hedging interest rate risk, derivatives are an important tool businesses use to manage costs and market volatility. This legislation will preserve that tool.'' Moreover, the Dodd-Lincoln Letter states: ''The end user exemption may also apply to our smaller financial entities—credit unions, community banks, and farm credit institutions.'' If such institutions could be categorized as ''swap dealers,'' then they would be prohibited from relying on the end-user exception. Such institutions would likely seek to hedge financial risk.

As mentioned above, the Stabenow-Lucas Letter states: ''The Commission's final rulemaking further defining 'swap dealing' should clearly distinguish swap activities that end-users engage in to hedge or mitigate the commercial risks associated with their businesses, *including* swaps entered into by end-users to hedge physical commodity price risk, from swap dealing.'' In using the term ''including,'' the Stabenow-Lucas Letter acknowledges that end-users may use swaps to hedge or mitigate risks—such as financial risks—other than those related to physical commodities.

By focusing only physical commodity risks, therefore, the interim hedging exception fails to fully satisfy Congressional intent.

[43] *See* Regulation 1.3(z), 17 CFR 1.3(z); (ii) Regulation 151.5(a)(1) (in Position Limits in Futures and Swaps; Final Rule, 76 FR 71626, 71688 (Nov. 18, 2011) (to be codified at 17 CFR parts 1, 150, and 151)); (iii) Regulation 1.3(hhh) (as set forth in the CFTC Entities Rule); and (iv) Regulation 39.6(c) (in End-User Exception to Mandatory Clearing of Swaps; Proposed Rule, 75 FR 80747, 80757 (Dec. 23, 2010)).

[44] *See* Exec. Order No. 13563, 76 FR 3821, Jan. 21, 2011; *see also* Exec. Order No. 13579, 76 FR 41587, July 14, 2011.

[45] In Section II(A)(4)(e) of the CFTC Entities Rule, the Commission attempts to distinguish between ''purpose'' and ''effect.'' Market participants may find such an attempt to be less than clear.

[46] Section II(A)(4)(e) of the CFTC Entities Rule (stating ''* * *The definition of the term ''major swap participant,'' which applies only to persons who are not swap dealers, is premised on the prior identification, by the swap dealer definition, of persons who accommodate demand for swaps, make a market in swaps, or otherwise engage in swap dealing activity. The major swap participant definition performs the subsequent function of identifying persons that are not swap dealers, but hold swap positions that create an especially high level of risk that could significantly impact the U.S. financial system.'').

[47] *See* CEA section 2(h)(7), 7 U.S.C. 2(h)(7). *See also supra* note 43.

[48] *See supra* note 42.

[49] As mentioned above, the Commission has authority to discretionarily exclude certain *entities* pursuant to CEA section 1a(49)(B), 7 U.S.C. 1a(49)(B).

[50] CEA section 2(h)(7)(A), 7 U.S.C. 2(h)(7)(A), states: ''In General.—The requirements of paragraph (1)(A) shall not apply to a swap if 1 of the

''financial entity'' as including a ''swap dealer.'' [51] Therefore, if the Commission defines ''swap dealer'' expansively, then the Commission will limit the number and types of end-users that may use the clearing exception.

Given the importance of the interconnections between the ''swap dealer'' definition and the end-user clearing exception, I would have expected the Commission to discuss such interconnections in great detail. Surprisingly, in that portion of the CFTC Entities Rule defining ''swap dealer,'' the Commission only discusses end-user clearing in a footnote.[52]

Footnote 213 illustrates in a particularly poignant manner the Commission's failure to properly consider the interaction between the ''swap dealer'' definition and the end-user exception. In that footnote, the Commission attempts to dismiss the argument that the ''swap dealer'' definition should only apply to financial entities. The Commission states:

Similarly, the absence of any limitation in the statutory definition of the term ''swap dealer'' to financial entities, when such limitation is included elsewhere in Title VII, indicates that no such limitation applies to the swap dealer definition. CEA section 2(h)(7), 7 U.S.C. 2(h)(7), specifically limits the application of the clearing mandate, in certain circumstances, to only ''financial entities.'' That section also provides a detailed definition of the term ''financial entity.'' *See* CEA section 2(h)(7)(C), 7 U.S.C. 2(h)(7)(C). That such a limitation is included in this section, but not in the swap dealer definition, does not support the view that the statutory definition of the term ''swap dealer'' should encompass only financial entities.

In actuality, Footnote 213 raises more questions than it answers. In Footnote 213, the Commission presumes that the interaction between the ''swap dealer'' definition and the end-user exception only goes one way—namely, that the ''swap dealer'' definition fixes the scope of the end-user exception, but not also *vice versa.* The Commission provides no basis for this presumption, especially since a basic canon of statutory is that the Commission should construe a statute as a ''harmonious whole.'' From that perspective, it becomes clear that Footnote 213 raises a series of fundamental questions. Why did Congress use the term ''financial entity'' in CEA section 2(h)(7)(C)? Does use of this term imply in any way that Congress presumed that the ''swap dealer'' definition would exclude commercial entities? Why or why not? Surely, Congress need not have specified *financial entity* in CEA section 2(h)(7)(C) if it had intended to permit the Commission to vitiate the reference to *financial* by simply defining ''swap dealers'' to include *commercial entities.* If Congress intended to so permit, then Congress could have simply used the term ''entity'' in CEA section 2(h)(7)(C).

• *Employee Benefit Plans: ''Swap Dealers?''*

In Section II(A)(2)(f) of the CFTC Entities Rule, the Commission describes comments requesting categorical exclusions from the ''swap dealer'' definition. One such comment was from American Benefits Council (''ABC'') and the Committee on the Investment of Employee Benefit Assets (''CIEBA'').[53] In their comments, ABC/CIEBA requested that the Commission exclude (or interpret CEA section 1a(49) to exclude) certain employee benefit plans from the ''swap dealer'' definition. In Section II(A)(6) of the CFTC Entities Rule, the Commission denies this request, mainly on the basis of its misguided construction of CEA section 1a(49).

In so denying, the Commission fails to consider CEA section 4s(h). Specifically, CEA sections 4s(h)(2), (4), and (5) prescribe heightened business conduct standards for ''swap dealers'' interacting with ''special entities.'' In fact, the Commission recently promulgated a final rulemaking on these standards.[54] CEA section 4s(h)(2)(C) defines ''special entity'' as, among other things, ''any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).'' CEA section 4s(h) raises another series of fundamental questions. Did Congress presume that employee benefit plans would not constitute ''swap dealers''? [55] Why or why not? Indeed, how does the Commission reconcile its denial of the ABC/CIEBA request with its own *de minimis* requirement, which seems to recognize a *per se* difference between a ''special entity'' and a ''swap dealer''? [56]

• *Internal Business Conduct Standards: Indication of the Scope of ''Swap Dealer?''*

In addition to failing to account for external business conduct standards, the Commission fails to account for certain internal business conduct standards in defining ''swap dealer.'' For example, CEA section 4s(j)(5) requires ''swap dealers'' to have systems and procedures to mitigate conflicts of interest resulting from interactions between (i)(A) any person engaged in ''research or analysis of the price or market for any commodity or swap'' or (B) any person ''acting in a role of providing clearing activities or making determinations as to accepting clearing customers'' and (ii) certain persons involved in ''pricing, trading, or clearing activities.'' The Commission recently promulgated a final rulemaking on this requirement.[57] CEA section 4s(j)(5) raises another fundamental question. Did Congress presume that ''swap dealers'' generally engage in either ''research or analysis'' or ''providing clearing activities or making determinations'' *and* ''pricing, trading, or clearing activities''? Why or why not?

• *Volcker: How does the CFTC Entities Rule Fit?*

As I have noted previously, the ''Volcker Rule'' [58] sets forth detailed metrics to differentiate between (i) market-making and (ii) proprietary trading. To say that the CFTC Entities Rule does not replicate such detail would be an understatement. Worse, the CFTC Entities Rule does not even attempt to explain why the metrics in the Volcker Rule are inapplicable to the ''swap dealer'' definition. In fact, the Commission addresses the interaction between the Volcker Rule and the CFTC Entities Rule only in one footnote. This footnote states in relevant part:

The Commissions have proposed an approach to the Volcker Rule under which a person could seek to avoid the Volcker Rule in connection with swap activities by asserting the availability of that market making exception * * * Under this approach, such a person would likely also be required to register as a swap dealer (unless the person is excluded from the swap dealer definition, such as by the exclusion of certain swaps entered into in connection with the origination of a loan).[59]

Of course, this footnote provides no useful clarification, since the operative question is whether an entity engaging in activities that would not be ''market-making'' under the Volcker Rule could nonetheless be engaging in ''market-making'' under the CFTC Entities Rule (and, solely by virtue of such characterization, be required to register as a ''swap dealer'').

counterparties to the swap—(i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.''

[51] Notably, CEA section 2(h)(7)(C)(i), 7 U.S.C. 2(h)(7)(C)(i), also lists commodity pools, certain private funds, certain employee benefit plans, and certain banking and financial entities separately from ''swap dealer.'' Does this separate listing imply that those entities are not ''swap dealers''? Why or why not?

[52] The Commission discusses the end-user clearing exception more fully in that portion of the CFTC Entities Rule defining ''major swap participant.''

[53] Comment from ABC/CIEBA, dated February 22, 2011, available at: *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27944&SearchText=American%20Benefits%20Council.*

[54] Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties; Final Rule, 77 FR 9734 (Feb. 17, 2012).

[55] *See supra* note 51.

[56] *See* Section II(D) of the Entities Rule.

[57] Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants; Final Rule, 77 FR 20128 (Apr. 3, 2012).

[58] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Covered Funds; Proposed Rule, 77 FR 8332 (Feb. 14, 2012).

[59] Section II(A)(4)(c) of the CFTC Entities Rule.

Conclusion

In the CFTC Entities Rule, the Commission has made many positive policy changes. To enable these changes, however, the Commission engages in a series of statutory contortions. Moreover, the Commission ignores a number of important questions. Witnessing these statutory gymnastics, I am reminded of the Robert Frost poem, ''The Road Not Taken.'' In its eagerness to adopt the CFTC Entities Rule, the Commission opted for one road. Specifically, the Commission opted for providing more relief to market participants, without contradicting the fundamental premises of the Proposal. However, once market participants have examined the rulemaking, will the Commission have wished that it had properly construed CEA section 1a(49) instead? Given the Proposal and the final CFTC Entities Rule (and their respective differences), the Commission may well conclude that ''* * * it took the one less traveled by * * * And that has made all the difference.'' [60]

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[60] Generally, because the vast body of administrative law provides guideposts to the road more traveled.

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Part III

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 571

Federal Motor Vehicle Safety Standards; Electronic Stability Control Systems for Heavy Vehicles; Proposed Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2012–0065]

RIN 2127–AK97

Federal Motor Vehicle Safety Standards; Electronic Stability Control Systems for Heavy Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to establish a new Federal Motor Vehicle Safety Standard No. 136 to require electronic stability control (ESC) systems on truck tractors and certain buses with a gross vehicle weight rating of greater than 11,793 kilograms (26,000 pounds). ESC systems in truck tractors and large buses are designed to reduce untripped rollovers and mitigate severe understeer or oversteer conditions that lead to loss of control by using automatic computer-controlled braking and reducing engine torque output.

In 2012, we expect that about 26 percent of new truck tractors and 80 percent of new buses affected by this proposed rule will be equipped with ESC systems. We believe that ESC systems could prevent 40 to 56 percent of untripped rollover crashes and 14 percent of loss-of-control crashes. By requiring that ESC systems be installed on truck tractors and large buses, this proposal would prevent 1,807 to 2,329 crashes, 649 to 858 injuries, and 49 to 60 fatalities at less than $3 million per equivalent life saved, while generating positive net benefits.

DATES: *Comments:* Submit comments on or before August 21, 2012.

Public Hearing: NHTSA will hold a public hearing in the summer of 2012. NHTSA will announce the date for the hearing in a supplemental **Federal Register** document. The agency will accept comments to the rulemaking at this hearing.

ADDRESSES: You may submit comments electronically [identified by DOT Docket Number NHTSA–2012–0065] by visiting the following Web site

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Alternatively, you can file comments using the following methods:

- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: For technical issues, you may contact George Soodoo, Office of Crash Avoidance Standards, by telephone at (202) 366–4931, and by fax at (202) 366–7002. For legal issues, you may contact David Jasinski, Office of the Chief Counsel, by telephone at (202) 366–2992, and by fax at (202) 366–3820. You may send mail to both of these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

The agency proposes to reduce rollover and loss of directional control of truck tractors and large buses by establishing a new standard, Federal Motor Vehicle Safety Standard (FMVSS) No. 136, *Electronic Stability Control Systems for Heavy Vehicles.* The standard would require truck tractors and certain buses [1] with a gross vehicle weight rating (GVWR) of greater than 11,793 kilograms (26,000 pounds) to be equipped with an electronic stability control (ESC) system that meets the equipment and performance criteria of the standard. ESC systems use engine torque control and computer-controlled braking of individual wheels to assist the driver in maintaining control of the vehicle and maintaining its heading in situations in which the vehicle is becoming roll unstable (*i.e.,* wheel lift potentially leading to rollover) or experiencing loss of control (*i.e.,* deviation from driver's intended path due to understeer, oversteer, trailer swing or any other yaw motion leading to directional loss of control). In such situations, intervention by the ESC system can assist the driver in maintaining control of the vehicle, thereby preventing fatalities and injuries associated with vehicle rollover or collision. Based on the agency's estimates regarding the effectiveness of ESC systems, we believe that an ESC standard could annually prevent 1,807 to 2,329 crashes, 649 to 858 injuries, and 49 to 60 fatalities, while providing net economic benefits.

There have been two types of stability control systems developed for heavy vehicles. A roll stability control (RSC) system is designed to prevent rollover by decelerating the vehicle using braking and engine torque control. The other type of stability control system is ESC, which includes all of the functions of an RSC system plus the ability to mitigate severe oversteer or understeer by automatically applying brake force at selected wheel-ends to help maintain directional control of a vehicle. To date, ESC and RSC systems for heavy vehicles have been developed for air-braked vehicles. Truck tractors and buses covered by this proposed rule make up a large proportion of air-braked heavy vehicles and a large proportion of the heavy vehicles involved in both rollover crashes and total crashes. Based on information we have received to date, the agency has tentatively determined that ESC and RSC systems are not available for hydraulic-braked medium or heavy vehicles.

Since 2006, the agency has been involved in testing truck tractors and large buses with stability control systems. To evaluate these systems, NHTSA sponsored studies of crash data in order to examine the potential safety benefits of stability control systems. NHTSA and industry representatives separately evaluated data on dynamic test maneuvers. At the same time, the agency launched a three-phase testing program to improve its understanding of how stability control systems in truck tractors and buses work and to develop dynamic test maneuvers to challenge roll propensity and yaw stability. By combining the studies of the crash data with the testing data, the agency is able to evaluate the potential effectiveness of stability control systems for truck tractors and large buses.

As a result of the data analysis research, we have tentatively determined that ESC systems can be 28 to 36 percent effective in reducing first-event untripped rollovers and 14 percent effective in eliminating loss-of-control crashes caused by severe oversteer or understeer conditions.[2] As a result of the agency's testing program and the test data received from industry, the agency was able to develop reliable and repeatable test maneuvers that could demonstrate a stability control system's ability to prevent rollover and loss of directional control among the varied configurations of truck tractors and buses in the fleet.

In order to realize these benefits, the agency is proposing to require new truck tractors and certain buses with a GVWR of greater than 11,793 kilograms (26,000 pounds) to be equipped with an ESC system. This proposal is made pursuant to the authority granted to NHTSA under the National Traffic and Motor Vehicle Safety Act (''Motor Vehicle Safety Act''). Under 49 U.S.C. Chapter 301, Motor Vehicle Safety (49 U.S.C. 30101 et seq.), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms. The responsibility for promulgation of Federal motor vehicle safety standards is delegated to NHTSA.

This proposal requires ESC system must meet both definitional criteria and performance requirements. It is necessary to include definitional criteria in the proposal and require compliance with them because developing separate performance tests to cover the wide array of possible operating ranges, roadways, and environmental conditions would be impractical. The definitional criteria are consistent with those recommended by SAE International and used by the United Nations (UN) Economic Commission for Europe (ECE), and similar to the definition of ESC in FMVSS No. 126, the agency's stability control standard for light vehicles. This definition would describe an ESC system as one that would enhance the roll and yaw stability of a vehicle using a computer-controlled system that can receive inputs such as the vehicle's lateral acceleration and yaw rate, and use the information to apply brakes individually, including trailer brakes, and modulate engine torque.

The proposal requires that the system be able to detect a malfunction and provide a driver with notification of a malfunction by means of a telltale. This requirement would be similar to the malfunction detection and telltale requirements for light vehicles in FMVSS No. 126. An ESC system on/off switch is allowed for light vehicles; however, there is no provision in this proposal for allowing an ESC system to be deactivated. For truck tractors and large buses, we do not believe such controls are necessary.

[1] As explained later in this notice, the applicability of this proposed standard to buses would be similar to the applicability of NHTSA's proposal to require seat belts on certain buses. These buses would have 16 or more designated seating positions (including the driver), at least 2 rows of passenger seats that are rearward of the driver's seating position and forward-facing or can convert to forward-facing without the use of tools. As with the seat belt NPRM, this proposed rule would exclude school buses and urban transit buses sold for operation as a common carrier in urban transportation along a fixed route with frequent stops.

[2] See Wang, Jing-Shiam, ''Effectiveness of Stability Control Systems for Truck Tractors'' (January 2011) (DOT HS 811 437); Docket No. NHTSA–2010–0034–0043.

After considering and evaluating several test maneuvers, the agency is proposing to use two test maneuvers for performance testing: The slowly increasing steer (SIS) maneuver and the sine with dwell (SWD) maneuver. The SIS maneuver is a characterization maneuver used to determine the relationship between a vehicle's steering wheel angle and the lateral acceleration. This test serves both to normalize the severity of the SWD maneuver and to ensure that the system has the ability to reduce engine torque. The SIS maneuver is performed by driving at a constant speed of 48 km/h (30 mph), and then increasing the steering wheel angle at a constant rate of 13.5 degrees per second until ESC system activation occurs. Using linear regression followed by extrapolation, the steering wheel angle that would produce a lateral acceleration of 0.5g is determined.

Using the steering wheel angle derived from the SIS maneuver, the agency would conduct the sine with dwell maneuver. The SWD test maneuver challenges both roll and yaw stability by subjecting the vehicle to a sinusoidal input. To conduct the SWD maneuver, the vehicle is accelerated to 72 km/h (45 mph) and then turned in a clockwise or counterclockwise direction to reach a set steering wheel angle in 0.5 seconds. The steering wheel is then turned in the opposite direction until the same steering wheel angle is reached in the opposite direction in one second. The steering wheel is then held at that steering wheel angle for one second, and then the steering wheel angle returned to zero degrees within 0.5 seconds. This maneuver would be repeated for two series of test runs (first in the counterclockwise direction and then in the clockwise direction) at several target steering wheel angles from 30 to 130 percent of the angle derived in the SIS maneuver.

The lateral acceleration, yaw rate, and engine torque data from the test runs would be measured, recorded, and processed to determine the four performance metrics: Lateral acceleration ratio (LAR), yaw rate ratio (YRR), lateral displacement, and engine torque reduction. The LAR and YRR metrics would be used to ensure that the system reduces lateral acceleration and yaw rate, respectively, after an aggressive steering input, thereby preventing rollover and loss of control, respectively. These two metrics can effectively measure what NHTSA's testing has found to be the threshold of stability. The lateral displacement metric would be used to ensure that the stability control system is not set to intervene solely by making the vehicle nonresponsive to driver input. The engine torque reduction metric would be used to ensure that the system has the capability to automatically reduce engine torque in response to high lateral acceleration and yaw rate conditions. The manner in which the data would be filtered and processed is described in this proposal.

The agency considered several test maneuvers based on its own work and that of industry. In particular, the agency's initial research focused on a ramp steer maneuver (RSM) for evaluating roll stability. In that maneuver, a vehicle is driven at a constant speed and a steering wheel input that is based on the steering wheel angle derived from the SIS maneuver is input. The steering wheel angle is then held for a period of time before it is returned to zero. A stability control system would act to reduce lateral acceleration, and thereby wheel lift and roll instability, by applying selective braking. A vehicle without a stability control system would maintain high levels of lateral acceleration and potentially experience wheel lift or rollover.

The proposed rule also sets forth the test conditions that the agency would use to ensure safety and demonstrate sufficient performance. All vehicles would be tested using outriggers for the safety of the test driver. The agency would use an automated steering controller to ensure reproducible and repeatable test execution performance. Truck tractors would be tested with an unbraked control trailer to eliminate the effect of the trailer's brakes on testing. Because the agency tests new vehicles, the brakes would be conditioned, as they are in determining compliance with the air brake standard. The agency would also test to ensure that system malfunction is detected.

This proposed rule would take effect for most truck tractors and covered buses produced two years after publication of a final rule. We believe that this amount of lead time is necessary to ensure sufficient availability of stability control systems from suppliers of these systems and to complete necessary engineering on all vehicles. For three-axle tractors with one drive axle, tractors with four or more axles, and severe service tractors, we would provide two years additional lead time. We believe this additional time is necessary to develop, test, and equip these vehicles with ESC systems. Although the agency has statutory authority to require retrofitting of in-service truck tractors, trailers, and large buses, the agency is not proposing to do so, given the integrated aspects of a stability control system.

Based on the agency's effectiveness estimates, the adoption of this proposal would prevent 1,807 to 2,329 crashes per year resulting in 649 to 858 injuries and 49 to 60 fatalities. The proposal also would result in significant monetary savings as a result of prevention of property damage and travel delays.

Based on information obtained from manufacturers, the agency estimates that 26.2 percent of truck tractors manufactured in model year 2012 will be equipped with an ESC system and that 80 percent of covered buses manufactured in model year 2012 will be equipped with an ESC system. Information obtained from manufacturers indicates that the average unit cost of an ESC system is approximately $1,160. In addition, 16.5 percent of truck tractors manufactured in model year 2012 will be equipped with an RSC system. The incremental cost of installing an ESC system in place of an RSC system is estimated to be $520 per vehicle. Based upon the agency's estimates that 150,000 truck tractors and 2,200 buses covered by this proposed rule will be manufactured in 2012, the agency estimates that the total cost of this proposal would be approximately $113.6 million.

The agency believes that this proposal is cost effective. The net benefits of this proposal are estimated to range from $228 to $310 million at a 3 percent discount rate and from $155 to $222 million at a 7 percent discount rate. As a result, the net cost per equivalent live saved from this proposal ranges from $1.5 to $2.0 million at a 3 percent discount rate and from $2.0 to $2.6 million at a 7 percent discount rate. The costs and benefits of this proposal are summarized in Table 1.

TABLE 1—ESTIMATED ANNUAL COST, BENEFITS, AND NET BENEFITS OF THE PROPOSAL

[In millions of 2010 dollars]

	Costs	Injury benefits	Property damage and travel delay savings	Cost per equivalent live saved	Net benefits
At 3% Discount	$113.6	$328–405	$13.9–17.8	$1.5–2.0	$228–310
At 7% Discount	113.6	257–322	11.0–14.1	2.0–2.6	155–222

The agency considered two regulatory alternatives. First, the agency considered requiring truck tractors and large buses to be equipped with RSC systems. When compared to this proposal, RSC systems would result in slightly lower cost per equivalent life saved, but would produce net benefits that are lower than the net benefits from this proposal. This is because RSC systems are less effective at preventing rollover crashes and much less effective at preventing loss-of-control crashes. The second alterative considered was requiring trailers to be equipped with RSC systems. However, this alternative would save fewer than 10 lives at a very high cost per equivalent life saved and would provide negative net benefits.

The remainder of this notice will describe in detail the following: (1) The size of the safety problem to be addressed by this proposed rule; (2) how stability control systems work to prevent rollover and loss of control; (3) the research and testing separately conducted by NHTSA and industry to evaluate the potential effectiveness of a stability control requirement and to develop dynamic test maneuvers to challenge system performance; (4) the specifics of the agency's proposal, including equipment and performance criteria, compliance testing, and the implementation schedule; and (5) the benefits and costs of this proposal.

II. Safety Problem

A. Heavy Vehicle Crash Problem

The *Traffic Safety Facts 2009* reports that tractor trailer combination vehicles are involved in about 72 percent of the fatal crashes involving large trucks, annually.[3] According to FMCSA's *Large Truck and Bus Crash Facts 2008,* these vehicles had a fatal crash involvement rate of 1.92 crashes per 100 million vehicle miles traveled during 2007, whereas single unit trucks had a fatal crash involvement rate of 1.26 crashes per 100 million vehicle miles traveled.[4] Combination vehicles represent about 25 percent of large trucks registered but travel 63 percent of the large truck miles, annually. Traffic tie-ups resulting from loss-of-control and rollover crashes also contribute to in millions of dollars of lost productivity and excess energy consumption each year.

According to *Traffic Safety Facts* 2009, the overall crash problem for tractor trailer combination vehicles is approximately 150,000 crashes, 29,000 of which involve injury. The overall crash problem for single-unit trucks is nearly as large—approximately 146,000 crashes, 24,000 of which are injury crashes. However, the fatal crash involvement for truck tractors is much higher. In 2009, there were 2,334 fatal combination truck crashes and 881 fatal single-unit truck crashes.

The rollover crash problem for combination trucks is much greater than for single-unit trucks. In 2009, there were approximately 7,000 crashes involving combination truck rollover and 3,000 crashes involving single-unit truck rollover. As a percentage of all crashes, combination trucks are involved in rollover crashes at twice the rate of single-unit trucks. Approximately 4.4 percent of all combination truck crashes were rollovers, but 2.2 percent of single-unit truck crashes were rollovers. Combination trucks were involved in 3,000 injury crashes and 268 fatal crashes, and single-unit trucks were involved in 2,000 injury crashes and 154 fatal crashes.

According to FMCSA's *Large Truck and Bus Crash Facts 2008,* cross-country intercity buses were involved in 19 of the 247 fatal bus crashes in 2008, which represented about 0.5 percent of the fatal crashes involving large trucks and buses, annually. The bus types presented in the crash data include school buses, intercity buses, cross-country buses, transit buses, and other buses. These buses had a fatal crash involvement rate of 3.47 crashes per 100 million vehicle miles traveled during 2008. From 1998 to 2008, cross-country intercity buses, on average, accounted for 12 percent of all buses involved in fatal crashes, whereas transit buses and school buses accounted for 35 percent and 40 percent, respectively, of all buses involved in fatal crashes. Most of the transit bus and school bus crashes are not rollover or loss-of-control crashes that ESC systems are capable of preventing. The remaining 13 percent of buses involved in fatal crashes were classified as other buses or unknown. Fatal rollover and loss-of-control crashes are a subset of these crashes.

There are many more fatalities in buses with a GVWR greater than 11,793 kg (26,000 lb) compared to buses with a GVWR between 4,536 kg and 11,793 kg (10,000 lb and 26,000 lb).[5] In the 10-year period between 1999 and 2008, there were 34 fatalities on buses with a GVWR between 4,536 kg and 11,793 kg (10,000 lb and 26,000 lb) compared to 254 fatalities on buses with a GVWR greater than 11,793 kg (26,000 lb). Among buses with a GVWR of greater than 11,793 kg (26,000 lb), over 70 percent of the fatalities were cross-country intercity bus occupants.

Furthermore, the size of the rollover crash problem for cross-country intercity buses is greater than in other buses. According to FARS data from 1999 to 2008, there were 97 occupant fatalities as a result of rollover events on cross-country intercity buses with a GVWR of greater than 11,793 kg (26,000 lb), which represents 52 percent of cross-country intercity bus fatalities.[6] In comparison, rollover crashes were responsible for 21 occupant fatalities on other buses with a GVWR of greater than 11,793 kg (26,000 lb) and 9 occupant fatalities on all buses with a GVWR between 4,536 kg and 11,793 kg (10,000 lb and 26,000 lb). That is, 95 percent of bus occupant rollover fatalities on buses over 4,536 kg (10,000 lb) were occupants on buses with a GVWR of over 11,793 kg (26,000 lb).

[3] DOT HS 811 402, *available at http://www-nrd.nhtsa.dot.gov/Pubs/811402.pdf* (last accessed May 9, 2012).

[4] FMCSA–RRA–10–043 (Mar. 2010), *available at http://www.fmcsa.dot.gov/facts-research/ltbcf2008/index-2008largetruckandbuscrashfacts.aspx* (last accessed May 9, 2012).

[5] This data was taken from the FARS database and was presented in the NPRM that would require seat belts on certain buses. See 75 FR 50,958, 50,917 (Aug. 18, 2010).

[6] See U.S. Department of Transportation Motorcoach Safety Action Plan, DOT HS 811 177, at 13 (Nov. 2009), *available at http://www.fmcsa.dot.gov/documents/safety-security/MotorcoachSafetyActionPlan_finalreport-508.pdf* (last accessed May 9, 2012).

B. Contributing Factors in Rollover and Loss-of-Control Crashes

Many factors related to heavy vehicle operation, as well as factors related to roadway design and road surface properties, can cause heavy vehicles to become yaw unstable or to roll. Listed below are several real-world situations in which stability control systems may prevent or lessen the severity of such crashes.

• *Speed too high to negotiate a curve*—The entry speed of vehicle is too high to safely negotiate a curve. When the lateral acceleration of a vehicle during a steering maneuver exceeds the vehicle's roll or yaw stability threshold, a rollover or loss of control is initiated. Curves can present both roll and yaw instability issues to these types of vehicles due to varying heights of loads (low versus high, empty versus full) and road surface friction levels (*e.g.,* wet, dry, icy, snowy).

• *Sudden steering maneuvers to avoid a crash*—The driver makes an abrupt steering maneuver, such as a single- or double-lane-change maneuver, or attempts to perform an off-road recovery maneuver, generating a lateral acceleration that is sufficiently high to cause roll or yaw instability. Maneuvering a vehicle on off-road, unpaved surfaces such as grass or gravel may require a larger steering input (larger wheel slip angle) to achieve a given vehicle response, and this can lead to a large increase in lateral acceleration once the vehicle returns to the paved surface. This increase in lateral acceleration can cause the vehicle to exceed its roll or yaw stability threshold.

• *Loading conditions*—The vehicle yaw due to severe over-steering is more likely to occur when a vehicle is in a lightly loaded condition and has a lower center of gravity height than it would have when fully loaded. Heavy vehicle rollovers are much more likely to occur when the vehicle is in a fully loaded condition, which results in a high center of gravity for the vehicle. Cargo placed off-center in the trailer may result in the vehicle being less stable in one direction than in the other. It is also possible that improperly secured cargo can shift while the vehicle is negotiating a curve, thereby reducing roll or yaw stability. Sloshing can occur in tankers transporting liquid bulk cargoes, which is of particular concern when the tank is partially full because the vehicle may experience significantly reduced roll stability during certain maneuvers.

• *Road surface conditions*—The road surface condition can also play a role in the loss of control a vehicle experiences. On a dry, high-friction asphalt or concrete surface, a tractor trailer combination vehicle executing a severe turning maneuver is likely to experience a high lateral acceleration, which may lead to roll or yaw instability. A similar maneuver performed on a wet or slippery road surface is not as likely to experience the high lateral acceleration because of less available tire traction. Hence, the result is more likely to be vehicle yaw instability than vehicle roll instability.

• *Road design configuration*—Some drivers may misjudge the curvature of ramps and not brake sufficiently to negotiate the curve safely. This includes ramps with decreasing radius curves as well as curves and ramps with improper signage. A decrease in super-elevation (banking) at the end of a ramp where it merges with the roadway causes an increase in vehicle lateral acceleration, which may increase even more if the driver accelerates the vehicle in preparation to merge.

C. NTSB Safety Recommendations

The National Transportation Safety Board (NTSB) has issued several safety recommendations relevant to ESC systems on heavy and other vehicles. One is H–08–15, which addresses ESC systems and collision warning systems with active braking on commercial vehicles. Recommendations H–11–07 and H–11–08 specifically address stability control systems on commercial motor vehicles and buses with a GVWR above 10,000 pounds. Two other safety recommendations, H–01–06 and H–01–07, relate to adaptive cruise control and collision warning systems on commercial vehicles, and are indirectly related to ESC on heavy vehicles because all these technologies require the ability to apply brakes without driver input.

• H–08–15: Determine whether equipping commercial vehicles with collision warning systems with active braking [7] and electronic stability control systems will reduce commercial vehicle accidents. If these technologies are determined to be effective in reducing accidents, require their use on commercial vehicles.

• H–11–07: Develop stability control system performance standards for all commercial motor vehicles and buses with a gross vehicle weight rating greater than 10,000 pounds, regardless of whether the vehicles are equipped with a hydraulic or pneumatic brake system.

• H–11–08: Once the performance standards from Safety Recommendation H–11–07 have been developed, require the installation of stability control systems on all newly manufactured commercial vehicles with a GVWR greater than 10,000 pounds.

D. Motorcoach Safety Plan

In November 2009, the U.S. Department of Transportation Motorcoach Safety Action Plan was issued.[8] Among other things, the Motorcoach Safety Action Plan includes an action item for NHTSA to assess the safety benefits for stability control on large buses and develop objective performance standards for these systems.[9] Consistent with that plan, NHTSA made a decision to pursue a stability control requirement for large buses.

In March 2011, NHTSA issued its latest Vehicle Safety and Fuel Economy Rulemaking and Research Priority Plan (Priority Plan).[10] The Priority Plan describes the agency plans for rulemaking and research for calendar years 2011 to 2013. The Priority Plan includes stability control on truck tractors and large buses, and states that the agency plans to develop test procedures for a Federal motor vehicle safety standard on stability control for truck tractors, with the countermeasures of roll stability control and electronic stability control, which are aimed at addressing rollover and loss-of-control crashes.

E. International Regulation

The United Nations (UN) Economic Commission for Europe (ECE) Regulation 13, Uniform Provisions Concerning the Approval of Vehicles of Categories M, N and O with Regard to *Braking,* has been amended to include Annex 21, *Special Requirements for Vehicles Equipped with a Vehicle Stability Function.* Annex 21's requirements apply to trucks with a GVWR greater than 3,500 kg (7,716 lb), buses with a seating capacity of 10 or more (including the driver), and trailers with a GVWR greater than 3,500 kg (7,716 lb). Trucks and buses are required to be equipped with a stability system that includes rollover control and directional control, while trailers are required to have a stability system that includes only rollover control. The directional control function must be demonstrated in one of eight tests, and the rollover control function must be demonstrated in one of two tests. For

[7] Active braking involves using the vehicle's brakes to maintain a certain, preset distance between vehicles.

[8] See *supra,* note 6.

[9] *Id.* at 28–29.

[10] See Docket No. NHTSA–2009–0108–0032.

compliance purposes, the ECE regulation requires a road test to be performed with the function enabled and disabled, or as an alternative accepts results from a computer simulation. No test procedure or pass/fail criterion is included in the regulation, but it is left to the discretion of the Type Approval Testing Authority in agreement with the vehicle manufacturer to show that the system is functional. The implementation date of Annex 21 is 2012 for most vehicles, with a phase-in based on the vehicle type.

III. Stability Control Technologies

A. Dynamics of a Rollover

Whenever a vehicle is steered, the lateral forces that result from the steering input lead to one of the following results: (1) Vehicle maintains directional control; (2) vehicle loses directional control due to severe understeer or plowing out; (3) vehicle loses directional control due to severe oversteer or spinning out; or (4) vehicle experiences roll instability and rolls over.

A turning maneuver initiated by the driver's steering input results in a vehicle response that can be broken down into two phases. Phase 1 is the yaw response that occurs when the front wheels are turned. As the steering wheel is turned, the displacement of the front wheels generates a slip angle at the front wheels and a lateral force is generated. That lateral force leads to vehicle rotation, and the vehicle starts rotating about its center of gravity.

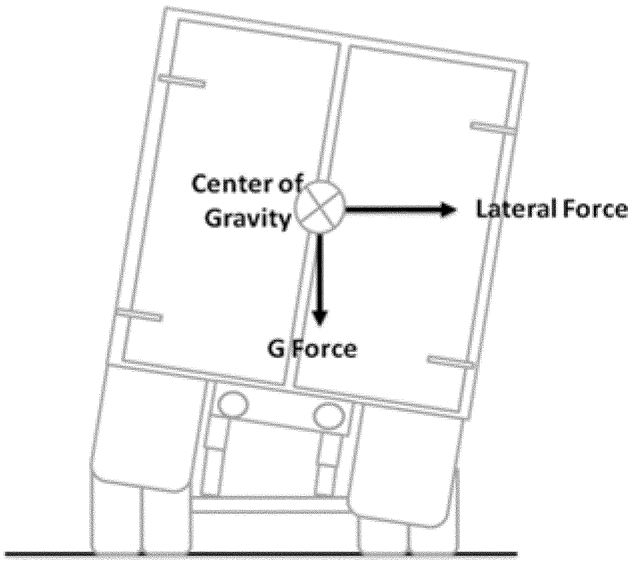
This rotation leads to Phase 2. In Phase 2, the vehicle's yaw causes the rear wheels to experience a slip angle. That causes a lateral force to be generated at the rear tires, which leads to vehicle rotation. All of these actions establish a steady-state turn in which lateral acceleration and yaw rate are constant.

In combination vehicles, which typically consist of a tractor towing a semi-trailer, an additional phase is the turning response of the trailer. Once the tractor begins to achieve a yaw and lateral acceleration response, the trailer begins to yaw as well. This leads to the trailer's tires developing slip angles and producing lateral forces at the trailer tires. Thus, there is a slight delay in the turning response of the trailer when compared to the turning response of the tractor.

If the lateral forces generated at either the front or the rear wheels exceed the friction limits between the road surface and the tires, the result will be a vehicle loss-of-control in the form of severe understeer (loss of traction at the steer tires) or severe oversteer (loss of traction at the rear tires). In a combination vehicle, a loss of traction at the trailer wheels would result in the trailer swinging out of its intended path. However, if the lateral forces generated at the tires result in a vehicle lateral acceleration that exceeds the rollover threshold of the vehicle, then rollover will result.

Lateral acceleration is the primary cause of rollovers. Figure 1 depicts a simplified rollover condition. As shown, when the lateral force (*i.e.,* lateral acceleration) is sufficient large and exceeds the roll stability threshold of the tractor-trailer combination vehicle, the vehicle will roll over. Many factors related to the drivers' maneuvers, heavy vehicle loading conditions, vehicle handling characteristics, roadway design, and road surface properties would result in various lateral accelerations and influences on the rollover propensity of a vehicle. For example, given other factors are equal, a vehicle entering a curve at a higher speed is more likely to roll than a vehicle entering the curve at a lower speed. Also, transporting a high center of gravity (CG) load would increase the rollover probability more than transporting a relatively lower CG load.

Figure 1: Rollover Condition



Stability control technologies help a driver maintain directional control and help to reduce roll instability. Two types of heavy vehicle stability control technologies have been developed. One such technology is roll stability control or RSC, which is designed to help prevent on-road, untripped rollovers by automatically decelerating the vehicle using brakes and engine control. The other technology is electronic stability control, or ESC,[11] which is designed to

[11] In light vehicles, the term ESC generally describes a system that helps the driver maintain directional control and typically does not include the RSC function because these vehicles are much less prone to untripped rollover.

assist the driver in mitigating severe oversteer or understeer conditions by automatically applying selective brakes to help the driver maintain directional control of the vehicle. On heavy vehicles, ESC also includes the RSC function described above.

B. Description of RSC System Functions

Currently, RSC systems are available for air-braked tractors with a GVWR of greater than 11,793 kilograms (26,000 pounds) and for trailers. A tractor-based RSC system consists of an electronic control unit (ECU) that is mounted on a vehicle and continually monitors the vehicle's speed and lateral acceleration based on an accelerometer, and estimates vehicle mass based on engine torque information.[12] The ECU continuously estimates the roll stability threshold of the vehicle, which is the lateral acceleration above which a combination vehicle will roll over. When the vehicle's lateral acceleration approaches the roll stability threshold, the RSC system intervenes. Depending on how quickly the vehicle is approaching the estimated rollover threshold, the RSC system intervenes by one or more of the following actions: Decreasing engine power, using engine braking, applying the tractor's drive-axle brakes, or applying the trailer's brakes. When RSC systems apply the trailer's brakes, they use a pulse modulation protocol to prevent wheel lockup because tractor stability control systems cannot currently detect whether or not the trailer is equipped with ABS. Some RSC systems also use a steering wheel angle sensor, which allows the system to identify potential roll instability events earlier.

An RSC system can reduce rollovers, but is not designed to help to maintain directional control of a truck tractor. Nevertheless, RSC systems may provide some additional ability to maintain directional control in some scenarios, such as in a low-center-of-gravity scenario, where an increase in a lateral acceleration may lead to yaw instability rather than roll instability.

In comparison, a trailer-based RSC system has an ECU mounted on the trailer, which typically monitors the trailer's wheel speeds, the trailer's suspension to estimate the trailer's loading condition, and the trailer's lateral acceleration. When a high lateral acceleration that is likely to cause the trailer to rollover is detected, the ECU commands application of the trailer brakes to slow the combination vehicle. In this case, the trailer brakes on the outside wheels can be applied with full pressure since the ECU can directly monitor the trailer wheels for braking-related lockup. The system modulates the brake pressure as needed to achieve maximum braking force without locking the wheels. However, a trailer-based RSC system can only apply the trailer brakes to slow a combination vehicle, whereas a tractor-based RSC system can apply brakes on both the tractor and trailer.

C. Description of ESC System Functions

Currently, ESC systems are available for heavy vehicles, including truck tractors and buses, equipped with air brakes. An ESC system incorporates all of the inputs of an RSC system. In addition, an ESC system monitors steering wheel angle and yaw rate of the vehicle.[13] These system inputs are monitored by the system's ECU, which estimates when the vehicle's directional response begins to deviate from the driver's steering command, either by oversteer or understeer. An ESC system intervenes to restore directional control by taking one or more of the following actions: Decreasing engine power, using engine braking, selectively applying the brakes on the truck tractor to create a counter-yaw moment to turn the vehicle back to its steered direction, or applying the brakes on the trailer. An ESC system enhances the RSC functions because it has the added information from the steering wheel angle and yaw rate sensors, as well as more braking power because of its additional capability to apply the tractor's steer axle brakes.[14]

D. How ESC Prevents Loss of Control

Like an RSC system, an ESC system has a lateral acceleration sensor. However, it also has two additional sensors to monitor a vehicle for loss of directional control, which may result due to either understeer or oversteer. The first additional sensor is a steering wheel angle sensor, which senses the intended direction of a vehicle. The other is a yaw rate sensor, which measures the actual turning movement of the vehicle. When a discrepancy between the intended and actual headings of the vehicle occurs, it is because the vehicle is in either an understeering (plowing out) or an oversteering (spinning out) condition. The ESC system responds to such a discrepancy by automatically intervening and applying brake torque selectively at individual wheel ends on the tractor, by reducing engine torque output to the drive axle wheels, or by both means. If only the wheel ends at one corner of the vehicle are braked, the uneven brake force will create a correcting yaw moment that causes the vehicle's heading to change. An ESC system also has the capability to reduce the engine torque output to the drive wheels, which effectively reduces the vehicle speed and helps the wheels to regain traction. This means of intervention by the ESC system may occur separate from or simultaneous with the automatic brake application at selective wheel ends. An ESC system is further differentiated from an RSC system in that it has the ability to selectively apply the front steer axle brakes while the RSC system does not incorporate this feature.

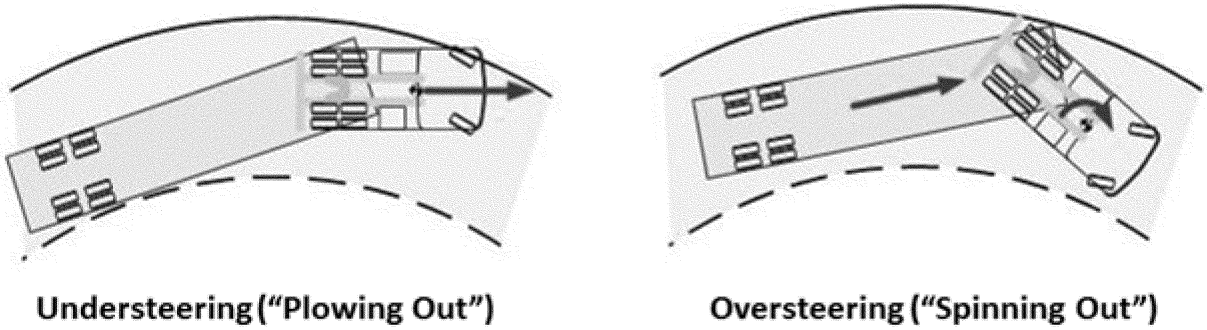
Figure 2 illustrates the oversteering and understeering conditions. While Figure 2 may suggest that a particular vehicle loses control due to either oversteer or understeer, it is quite possible that a vehicle could require both understeering and oversteering interventions during progressive phases of a complex crash avoidance maneuver such as a double lane change.

[12] RSC systems are not presently available for large buses.

[13] Because ESC systems must monitor steering inputs from the tractor, ESC systems are not available for trailers.

[14] This is a design strategy to avoid the unintended consequences of applying the brakes on the steering axle without knowing where the driver is steering the vehicle.

Figure 2: Loss-of-Control Conditions



Oversteering. The right side of Figure 2 shows that the truck tractor whose driver has lost directional control during an attempt to drive around a right curve. The rear wheels of the tractor have exceeded the limits of road traction. As a result, the rear of the tractor is beginning to slide. This would lead a vehicle without an ESC system to spin out. If the tractor is towing a trailer, as the tractor in the figure is, this would result in a jackknife crash. In such a crash, the tractor spins and may make physical contact with the side of the trailer. The oversteering tractor in this figure is considered to be yaw-unstable because the tractor rotation occurs without a corresponding increase in steering wheel angle by the driver. In a vehicle equipped with ESC, the system immediately detects that the vehicle's heading is changing more quickly than appropriate for the driver's intended path (*i.e.,* the yaw rate is too high). To counter the leftward rotation of the vehicle, it momentarily applies the right front brake, thus creating a rightward (clockwise) counter-rotational force and turning the heading of the vehicle back to the correct path. It will also cut engine power to gently slow the vehicle and, if necessary, apply additional brakes (while maintaining the uneven brake force to create the necessary yaw moment). The action happens quickly so that the driver does not perceive the need for steering corrections.

Understeering. The left side of Figure 2 shows a truck tractor whose driver has lost directional control during an attempt to drive around a right curve, except that in this case, it is the front wheels that have exceeded the limits of road traction. As a result, the tractor is sliding at the front (''plowing out''). Such a vehicle is considered to be yaw-stable because no increase in tractor rotation occurs when the driver increases the steering wheel angle. However, the driver has lost directional control of the tractor. In this situation, the ESC system rapidly detects that the vehicle's heading is changing less quickly than appropriate for the driver's intended path (*i.e.,* the yaw rate is too low). In other words, the vehicle is not turning right sufficiently to remain on the right curve and is instead heading off to the left. The ESC system momentarily applies the right rear brake, creating a rightward rotational force, to turn the heading of the vehicle back to the correct path. Again, it will also cut engine power to gently slow the vehicle and, if necessary, apply additional brakes (while maintaining the uneven brake force to create the necessary yaw moment).

E. Situations in Which Stability Control Systems May Not Be Effective

A stability control system will not prevent all rollover and loss-of-control crashes. A stability control system has the capability to prevent many untripped on-road rollovers and first-event loss-of-control events. Nevertheless, there are real-world situations in which stability control systems may not be as effective in avoiding a potential crash. Such situations include:

- Off-road recovery maneuvers in which a vehicle departs the roadway and encounters an incline too steep to effectively maneuver the vehicle or an unpaved surface that significantly reduces the predictability of the vehicle's handling
- Entry speeds that are much too high for a curved roadway or entrance/exit ramp
- Cargo load shifts on the trailer during a steering maneuver
- Vehicle tripped by a curb or other roadside object or barrier
- Truck rollovers that are the result of collisions with other motor vehicles
- Inoperative antilock braking systems—the performance of stability control systems depends on the proper functioning of ABS
- Brakes that are out-of-adjustment or other defects or malfunctions in the ESC, RSC, or brake system.
- Maneuvers during tire tread separation or sudden tire deflation events.

F. Difference in Vehicle Dynamics Between Light Vehicles and Heavy Vehicles

On April 6, 2007, the agency published a final rule that established FMVSS No. 126, *Electronic Stability Control Systems,* which requires all passenger cars, multipurpose passenger vehicles, trucks and buses with a GVWR of 4,536 kg (10,000 lb) or less to be equipped with an electronic stability control system beginning in model year 2012.[15] The rule also requires a phase-in of 55 percent, 75 percent, and 95 percent of vehicles produced by each manufacturer during model years 2009, 2010, and 2011, respectively, to be equipped with a compliant ESC system. The system must be capable of applying brake torques individually at all four wheels, and must comply with the performance criteria established for stability and responsiveness when subjected to the sine with dwell steering maneuver test.

For light vehicles, the focus of the FMVSS No. 126 is on addressing yaw instability, which can assist the driver in preventing the vehicle from leaving the roadway, thereby preventing fatalities and injuries associated with crashes involving tripped rollover, which often occur when light vehicles run off the road. The standard does not include any equipment or performance requirements for roll stability.

The dynamics of light vehicles and heavy vehicles differ in many respects. First, on light vehicles, the yaw stability threshold is typically lower than the roll stability threshold. This means that a light vehicle making a crash avoidance maneuver, such as a lane change on a dry road, is more likely to reach its yaw stability threshold and lose directional control before it reaches its roll stability threshold and rolls over. On a heavy

[15] 72 FR 17236.

vehicle, however, the roll stability threshold is lower than the yaw stability threshold in most operating conditions, primarily because of its higher center of gravity height.[16] As a result, there is a greater propensity for a heavy vehicle, particularly in a loaded condition, to roll during a severe crash avoidance maneuver or when negotiating a curve, than to become yaw unstable, as compared with light vehicles.

Second, a tractor-trailer combination unit is comprised of a power unit and one or more trailing units with one or more articulation points. In contrast, although a light vehicle may occasionally tow a trailer, a light vehicle is usually a single rigid unit. The tractor and the trailer have different center of gravity heights and different lateral acceleration threshold limits for rollover. A combination vehicle rollover frequently begins with the trailer where the rollover is initiated by trailer wheel lift. The trailer roll torque is transmitted to the tractor through the vehicles' articulation point, which subsequently leads to tractor rollover. In addition to the trailer's loading condition, the trailer rollover threshold is also related to the torsional stiffness of the trailer body. A trailer with a low torsional stiffness, such as a flatbed open trailer, would typically experience wheel lift earlier during a severe turning maneuver than a trailer with a high torsional stiffness, such as a van trailer. Hence, compared with a light vehicle, the roll dynamics of a tractor trailer combination vehicle is a more complex interaction of forces acting on the units in the combination, as influenced by the maneuver, the loading condition, and the roadway.

Unlike with light vehicles, there is a large range of loading scenarios possible for a given heavy vehicle, particularly for truck tractors towing trailers. A tractor-trailer combination vehicle can be operated empty, loaded to its maximum weight rating, or loaded anywhere in between the two extremes. The weight of a fully loaded combination vehicle is generally more than double that of the vehicle with an empty trailer. Furthermore, the load's center of gravity height can vary over a large range, which can have substantial effects on the dynamics of a combination vehicle.

Third, due to greater length, mass, and mass moments of inertia of heavy vehicles, they respond more slowly to steering inputs than do light vehicles. The longer wheelbase of a heavy vehicle, compared with a light vehicle, results in a slower response time, which gives the stability control system the opportunity to intervene and prevent rollovers.

Finally, the larger number of wheels on a heavy vehicle, as compared to a light vehicle, results in making heavy vehicles less likely to yaw on dry road surface conditions.

As a result of the differences in vehicle dynamics between light vehicles and heavy vehicles, the requirements in FMVSS No. 126 for light vehicle ESC systems cannot translate directly into requirements for heavy vehicles. Nevertheless, many requirements in FMVSS No. 126 are pertinent to heavy vehicles because they do not relate to any difference in vehicle dynamics between light vehicles and heavy vehicles. For example, the ESC system malfunction detection and telltale requirements already developed for light vehicles can be translated to heavy vehicles.

IV. Research and Testing

NHTSA has been studying ways to prevent untripped heavy vehicle rollovers for many years. In the mid-1990s, the agency sponsored the development of a prototype roll stability advisor (RSA) system that displayed information to the driver regarding the truck's roll stability threshold and the peak lateral acceleration achieved during cornering maneuvers. This was followed by a fleet operational test sponsored by the Federal Highway Administration, under the Department of Transportation's Intelligent Vehicle Initiative. The tractors were equipped with a RSA system using an engine retarder, which was an early configuration of an RSC system. As that test program was concluding, industry developers of stability control systems began to add tractor and trailer foundation braking capabilities to increase the effectiveness these systems.

In 2006, the agency initiated a test program at the Vehicle Research and Test Center (VRTC) to conduct track testing on RSC- and ESC-equipped tractors and semitrailers. The initial testing focused only on roll stability testing and provided comparative data on the performance of the different stability control systems in several test maneuvers. Subsequent testing focused on refining test maneuvers and developing performance metrics suitable for a safety standard. The agency studied a slowly increasing steer maneuver that would characterize a tractor's steering system and verify the ability of a tractor-based system to control engine torque. The agency also developed a ramp steer maneuver to evaluate the roll stability performance of a stability control system, and investigated a sine with dwell maneuver to evaluate both yaw and roll stability performance. In addition to tests conducted on combination unit trucks, the VRTC research program included testing of three large buses equipped with ESC using these test maneuvers. As part of the research at VRTC, the agency also developed data collection and analysis methods to characterize the performance of stability control systems.

NHTSA researchers began updating their vehicle dynamics simulation programs to include a stability control model, and coordinated with researchers at the National Advanced Driving Simulator (NADS) at the University of Iowa to add stability control modeling capability to their tractor trailer simulations. NHTSA sponsored a research program with the NADS to evaluate potential RSC and ESC effectiveness in several tractor-trailer driving scenarios involving potential rollover and loss of control, using sixty professional truck drivers who were recruited as test participants.

NHTSA purchased three tractors equipped with ESC or RSC systems for testing: A Freightliner 6x4 [17] tractor that had ESC as a production option, a Sterling 4x2 tractor that had RSC as a production option, and a Volvo 6x4 tractor that had ESC included as standard equipment. NHTSA also obtained a RSC control unit that could be retrofitted on the Freightliner 6x4 tractor so that it could be comparatively tested with both ESC and RSC. The agency also purchased a Heil 9,200-gallon tanker semitrailer that was equipped with a trailer-based RSC system, and retrofitted a Fruehauf 53-foot van semitrailer with a trailer-based RSC system. NHTSA also obtained three large buses equipped with stability control systems: A 2007 MCI D4500 (MCI #1), a 2009 Prevost H3, and a second 2007 MCI D4500 (MCI #2). The MCI buses were equipped with a Meritor WABCO ESC system and the Prevost was equipped with a Bendix ESC system.

Although the manufacturers of truck tractors and large buses and the suppliers of stability control systems have performed extensive development

[16] One instance where a heavy vehicle's yaw stability threshold might be higher than its roll stability threshold is in an unloaded condition on a low-friction road surface.

[17] The 6x4 description for a tractor represents the total number of wheel positions (six) and the total number of wheel positions that are driven (four), which means that the vehicle has three axles with two of them being drive axles. Similarly, a 4x2 tractor has four wheel positions, two of which are driven, meaning that the vehicle has two axles, one of which is a drive axle.

work to bring these systems to the market, there are few sources of objective evaluations for testing on stability control systems in the public domain beyond the research programs described above. The agency coordinated with truck, bus, and stability control system manufacturers throughout the VRTC test program so that industry organizations had the opportunity to contribute additional test data and other relevant information on test maneuvers that the agency could consider for use during the research program. Potential maneuvers suggested by industry included a decreasing radius test from the Truck & Engine Manufacturers Association (EMA),[18] a sinusoidal steering maneuver and a ramp with dwell maneuver from Bendix, and a lane change maneuver (on a large diameter circle) from Volvo.[19] In late 2009, the EMA provided results from their tests of the ramp steer, sine with dwell, and ramp with dwell maneuvers to NHTSA. The agency evaluated these data from a measures-of-performance perspective. EMA provided data in December 2010 discussing additional testing with the sine with dwell, J-turn, and a wet-Jennite drive through maneuver. Additional details on these research programs are included in the sections below.

A. UMTRI Study

NHTSA sponsored a research program with Meritor WABCO and the University of Michigan Transportation Research Institute (UMTRI) to examine the potential safety effectiveness of stability control systems for five-axle tractor-trailer combination vehicles. The systems investigated included both RSC and ESC.[20] The research results are provided in the report ''Safety Benefits of Stability Control Systems for Tractor-Semitrailers.'' A copy of this report has been included in the docket.[21]

The objectives of the study were: (1) To use the Large Truck Crash Causation Study (LTCCS) to define typical pre-crash scenarios and identify factors associated with loss-of-control and rollover crashes for tractor-trailers; (2) to study the effectiveness of RSC and ESC in a range of realistic scenarios through hardware-in-the-loop simulation testing, and through case reviews by a panel of experts; (3) to apply the results of this research to generate national estimates from the Trucks Involved in Fatal Accidents (TIFA) and General Estimates System (GES) crash databases of the safety benefits of RSC and ESC in preventing tractor-trailer crashes; and (4) to review crash data from 2001 through 2007 from a large trucking fleet that had started purchasing RSC on all of its new tractors starting in 2004, to determine if there was an influence of this system on reducing crashes.

The LTCCS was a joint study undertaken by the Federal Motor Carrier Safety Administration (FMCSA) and NHTSA, based on a sample of 963 crashes between April 2001 and December 2003 with a reported injury or fatality involving 1,123 trucks with a GVWR over 10,000 pounds. The LTCCS crash data formed the backbone for this study because of the high quality and consistent detail contained in the case files. Included in the LTCCS are categorical data, comprehensive narrative descriptions of each crash, scene diagrams, and photographs of the vehicle and roadway from various angles. This information allowed the researchers to achieve a high level of understanding of the crash mechanics for particular cases. The LTCCS was used to help develop the crash scenarios for modeling (hardware-in-the-loop) performed as part of the engineering analyses for this stability control project. In addition, LTCCS cases of interest with respect to stability control systems were also reviewed by a panel of three experts (two from UMTRI and one from industry) to help estimate the safety benefits of RSC and ESC.

One method for assessing the safety benefits of vehicle technologies is to analyze crash datasets containing data on the safety performance of vehicles equipped with the subject technology. However, because the deployment of the stability control technologies for large trucks is still in its early stages, national crash databases do not yet have sufficient cases that can be used to evaluate the safety performance of stability control technology. Given this limitation, this study used an indirect method to estimate the safety performance of stability control technologies based on probable outcome estimates derived from hardware-in-the-loop simulation, field test experience, expert panel assessment, and crash data from trucking fleets.

UMTRI's study made several conclusions. First, identifying relevant loss-of-control and rollover crashes within the national databases proved a difficult task because the databases are developed for general use and this project required very precise definitions of loss-of-control and rollover (*e.g.,* tripped versus untripped). Relying on the general loss-of-control or rollover categories captures a wide range of crashes, many of which cannot be prevented by the stability control technology. Furthermore, many of the crashes involved vehicles that were not equipped with ABS. Because ABS is now mandatory for the target population of vehicles, the researchers had to factor in what effect the presence of ABS on the vehicle may have reduced the likelihood of or prevented the crash.

Second, the LTCCS was highly valuable in providing a greater level of detail concerning rollover and loss-of-control crashes, which was used to construct a number of relevant crash scenarios so that the technical potential of the candidate RSC and ESC technologies could be estimated systematically. However, the inability to determine with confidence if a vehicle lost control and the lack of detailed information on driver input and vehicle state placed limitations on the ability to assess the potential for stability control technologies to alter the outcome of a particular crash scenario. In contrast, for rollover crashes, it was clear that rollover occurred. Tire marks and road alignment provide strong evidence of the vehicle path and the point of instability.

Third, UMTRI concluded that ESC systems would provide more overall safety benefits than RSC systems. The difference between the estimated effectiveness of RSC and ESC varied among crash scenarios. ESC systems were slightly more effective at preventing rollovers than RSC systems and much more effective at preventing loss-of-control crashes.

Finally, the safety benefits estimates derived from this study were limited to five-axle tractor-trailer combination vehicles, which constitute a majority of the national tractor fleet. However, the study did not include benefits estimates for multi-trailer combinations or for tractors not towing a trailer.

B. Simulator Study

NHTSA sponsored a research study with the University of Iowa to study the effectiveness of heavy truck electronic stability control systems in reducing jackknife and rollover incidents using the NADS–1 National Advanced Driving Simulator. The NADS–1 is a high-fidelity, full motion driving simulator with a 360-degree visual display system

[18] EMA was formerly known as the Truck Manufacturers Association (TMA). Many docket materials refer to EMA as TMA.

[19] Presentations from briefings NHTSA had with EMA have been included in the docket. See Docket Nos. NHTSA–2010–0034–0025 through NHTSA–2010–0034–0031; Docket Nos. NHTSA–2010–0034–0041 and NHTSA–2010–0034–0042. Research notes provided by EMA, Bendix, and Volvo Trucks have also been included in the docket. See Docket Nos. NHTSA–2010–0034–0032 through NHTSA–2010–0034–0040.

[20] A similar study has been initiated with respect to straight trucks over 10,000 pounds GVWR.

[21] DOT HS 811 205 (Oct. 2009), Docket No. NHTSA–2010–0034–0006

that is typically used for the study of driver behavior. Sixty professional truck drivers were recruited to participate in the study. The participants drove a typical tractor-semitrailer in five scenarios designed to have a high potential for rollover or jackknife. The study used the NADS heavy truck cab and vehicle dynamics model to simulate a typical 6x4 tractor-trailer combination vehicle in a baseline (ABS-only), RSC-equipped, and ESC-equipped configurations, using twenty truck drivers per configuration. The purpose of the study was to determine the effectiveness of both roll stability control and yaw stability control systems, to demonstrate driver behavior while using stability control systems, and to help NHTSA refine safety benefits estimates for heavy truck stability technologies.[22]

The NADS truck model performance was compared with test track data from VRTC. The test maneuver used was a ramp steer maneuver with a steering wheel angle of 190 degrees and an angular steering rate of 175 degrees per second. The steering angle was held constant for five seconds after reaching 190 degrees, and then returned to zero. Steering inputs on the NADS were performed manually rather than by using an automated steering machine. The RSM was performed in the NADS to both the right and left directions to check for any simulation abnormalities, and was performed for the baseline, RSC, and ESC test conditions. Exact matching of values to the test track data was not possible because the NADS model was developed by simulating the braking properties of a Freightliner tractor while using the inertial properties of a Volvo tractor. Also, the NADS was modeled with rigid body tractor and trailer vehicle models that did not include the torsional chassis compliance that is a variable in actual vehicles. The result of the testing was that the NADS model tractor-semitrailer experienced wheel lift at slightly lower speeds in the RSM in all three conditions (baseline, RSC, and ESC) than in the VRTC track tests. An additional comparison of VRTC track test data and the NADS ESC model was performed for lane change maneuvers at 45 and 50 mph and showed that the NADS ESC system responses closely matched the responses of the actual test vehicle.

The maneuvering events used to assess the influence of ESC systems consisted of lane incursion from the left side on a snow-covered road and from the right side on a dry road surface, with each event necessitating a sudden lane change to avoid collision. These events provided a greater challenge for the stability control systems due to the aggressive steering and braking inputs by the drivers. Neither stability control system showed benefits in preventing rollover on the dry road surface. ESC systems did provide improved vehicle control on the snow-covered surface; however, two jackknife events still occurred with the ESC system. A large number of jackknife events occurred on the snow-covered surface with the RSC system (11 loss-of-control events in 20 runs) which may have been a result of the aggressive RSC braking strategy found in the model interfering with the driver's ability to maintain steering control of the tractor.

The NADS research study indicated that the RSC system showed a statistically significant benefit in preventing rollovers on both curves and exit ramps on dry, high-friction road surfaces. The tractors equipped with RSC and ESC systems showed a benefit over the baseline tractor in assisting drivers to avoid a jackknife on a low-friction road surface and a rollover on a high-friction road surface when encountering a directional change due roadway geometry. However, in several instances the ESC system was found to activate at abnormally high levels of lateral acceleration in a curve with a high-friction road surface. Although the reason for this was not determined, there may have been problems with the mass estimation algorithm or vehicle parameter inaccuracies in the model.

C. NHTSA Track Testing

NHTSA researchers at VRTC in East Liberty, Ohio, initiated a test program in 2006 to evaluate the performance of stability control systems under controlled conditions on a test track, and to develop objective test procedures and measures of performance that could form the basis of a new FMVSS. Researchers tested three truck tractors, all of which were equipped with an RSC or ESC system (one vehicle was tested with both an RSC and ESC system), one trailer equipped with a trailer-based RSC system, and three large buses equipped with an ESC system. Additionally, the agency tested five baseline semi-trailers not equipped with a stability control system, including an unbraked control trailer that is used to conduct tractor braking tests as prescribed by FMVSS No. 121, *Air brake systems.*

The testing was conducted in three phases. Phase I research focused on understanding how stability control systems performed. Phase II research focused on the development of a dynamic test maneuver to evaluate the roll stability of tractor semitrailers and large buses. Phase III research focused on the development of a dynamic test maneuver to evaluate the yaw stability of truck tractors and large buses.

The Phase I and II research results are documented in the report ''Tractor Semi-Trailer Stability Objective Performance Test Research—Roll Stability.''[23] The Phase III research results for truck tractors are documented in the report ''Tractor Semitrailer Stability Objective Performance Test Research—Yaw Stability.''[24] The information provided in sections IV.C.1, IV.C.2, and IV.C.3 below is based on these two reports. The motorcoach research is documented in the report ''Test Track Lateral Stability Performance of Motorcoaches Equipped with Electronic Stability Control Systems.''[25] The information in section IV.C.4 is based on this report.

1. Effects of Stability Control Systems—Phase I

The test vehicles used in Phase I included a 2006 Freightliner 6x4 tractor equipped with air disc brakes and a Meritor WABCO ESC system as factory-installed options, a 2006 Volvo 6x4 tractor with S-cam drum brakes and a Bendix ESC system included as standard equipment, and a 2000 Fruehauf 53-foot van trailer that was retrofitted with a Meritor WABCO trailer-based RSC system. Tests were conducted by enabling and disabling the stability control systems on the tractor and the trailer to compare the individual performance of each system, evaluate the performance of the combined tractor and trailer stability control systems, establish the baseline performance of each tractor-trailer combination without any stability control system. All tests were conducted with the tractor connected to the trailer, in either the unloaded condition (lightly loaded vehicle weight (LLVW)) or loaded to a 80,000 pound combination weight with the ballast located to produce either a low or high center of gravity height (low CG or high CG) loading condition. During testing, all

[22] The final report is available in the docket. ''Heavy Truck ESC Effectiveness Study Using NADS'' (DOT HS 811 233, November 2009), Docket No. NHTSA–2010–0034–0007.

[23] DOT HS 811 467 (May 2011), Docket No. NHTSA–2010–0034–0009. Results from Phase I are also summarized in the paper ''NHTSA's Class 8 Truck-Tractor Stability Control Test Track Effectiveness'' (ESV 2009. Paper No. 09–0552). Docket No. NHTSA–2010–0034–0008.

[24] Docket No. NHTSA–2010–0034–0046.

[25] Docket No. NHTSA–2010–0034–0045.

combination vehicles were equipped with outriggers.

The first test maneuver evaluated in Phase I was a constant radius circle test (either a 150 foot or a 200 foot radius) conducted on dry pavement. In this constant radius circle test, the driver maintained the vehicle on the curved path while slowly increasing the vehicle speed until the stability control system activated, wheel lift occurred, or the tractor experienced a severe understeer condition.

With the stability control systems disabled, no cases of wheel lift were observed under the LLVW or low CG condition. Under these load conditions, both tractors went into a severe understeer condition. The LLVW tractor did not reach a velocity greater than 40 mph and the low CG tractor did not reach a velocity greater than 34 mph. However, in the high CG condition with the tractor ESC systems disabled, wheel lift occurred in every test that resulted in a lateral acceleration greater than 0.45g at 30 mph.

With the tractor ESC systems enabled, the performance of the two ESC-equipped vehicles improved during the constant radius tests. Both ESC systems limited the maximum lateral acceleration of the tractor by reducing the engine output torque and prevented wheel lift and severe tractor understeer with the different loads tested. With ESC systems enabled, both tractors tested allowed higher maximum lateral accelerations for the LLVW condition compared to the low CG and high CG conditions. There was little difference in peak lateral acceleration for the low CG and high CG conditions.

The trailer-based RSC system limited the maximum lateral acceleration by applying the trailer brakes, which mitigated wheel lift and understeer with the different loads tested. The maximum lateral acceleration of both tractors was limited by the trailer RSC system to below 0.50g for the LLVW condition, 0.40g to 0.50g for the low CG condition, and 0.35g to 0.40g for the high CG condition.

When both tractor- and trailer-based stability control systems were enabled, results were similar to the results of the tractor-based stability control system for the low CG and high CG conditions. Under the LLVW condition, results were similar to the trailer-based RSC system values observed.

The second maneuver evaluated in Phase I was a J-turn, also conducted on dry pavement, in which the test driver accelerated the vehicle to a constant speed in a straight lane and then negotiated 180 degrees of arc along a 150-foot radius curve. The initial maneuver entrance speed was 20 mph and it was incrementally increased in subsequent runs, until a test termination condition was reached. The test terminated upon the occurrence of one of the following: The trailer outriggers making contact with the ground, indicating that wheel lift was occurring; the tractor experiencing a severe understeer condition; a stability control system brake activating; or the maneuver entry speed reaching 50 mph.

For both tractors in the baseline configuration (stability control disabled), trailer wheel lift occurred in all load combinations except for the Freightliner in the LLVW condition, which went into a severe understeer condition at a maneuver entry speed of 50 mph. For the Volvo in the LLVW load condition, trailer wheel lift was observed when the tractor's maximum lateral acceleration exceeded 0.75g at 48 mph. With stability control disabled in the low CG load condition, trailer wheel lift was observed when the tractor's maximum lateral acceleration was greater than 0.67g at 40 mph for the Freightliner and 0.60g at 38 mph for the Volvo. For the high CG load condition, trailer wheel lift was observed when the tractor's maximum lateral acceleration was approximately 0.45g at 33 mph for the Freightliner and 0.42g at 31 mph for the Volvo.

Tractor ESC systems limited the maximum lateral acceleration for both the tractor and the trailer. Wheel lift was not observed for the range of speeds evaluated. For both tractors tested in the low CG and high CG loading conditions, the tractor's ESC intervened at a speed that was well below the speed that would produce trailer wheel lift. With the trailer in the LLVW load condition, the tractor's maximum lateral acceleration was limited to approximately 0.60g for the Freightliner and the Volvo. With the trailer tested in either the low CG or high CG load conditions, the tractor's lateral acceleration was limited to 0.50g and 0.40g for the Freightliner and Volvo respectively.

The trailer-based RSC system also improved the baseline vehicle's roll stability in the J-turn maneuver. For the LLVW load condition, the trailer-based RSC system activated at speeds similar to those of the tractor-based systems. For the low CG and high CG load conditions, the tractor-based systems activated at approximately a 3 mph lower speed than the trailer-based RSC system. With both systems enabled, the tractor-based system activated and mitigated the roll propensity before the trailer RSC system activated.

The third maneuver evaluated in Phase I was a double-lane-change maneuver, in which the test driver accelerated the vehicle up to a constant speed on a dry road surface and then negotiated a lane change maneuver followed by a return to the original lane within physical boundaries (gates) marked by cones. The maneuver entry speed was incrementally increased in subsequent test runs. Although the top speed in this maneuver was intended to be limited to 50 mph for safety reasons, the test driver performed runs at speeds as high as 51 mph.

In the baseline configuration, both tractors completed the maneuver at 50 mph without wheel lift or yaw instability in the LLVW and the low CG loading conditions. In the high CG loading condition, the Freightliner experienced trailer wheel lift at a maneuver entry speed of 41 mph and the Volvo experienced trailer wheel lift at a maneuver entry speed of 45 mph.

With the ESC system, the Freightliner's stability control system was observed to limit peak lateral acceleration to approximately 0.50g, which prevented trailer wheel lift in the high CG load condition for tests performed up to 50 mph. Tests performed at 51 mph resulted in trailer wheel lift. The Volvo's stability control system limited the tractor's maximum lateral acceleration to approximately 0.40g and prevented trailer wheel lift for the high CG condition up to a maximum test speed of 51 mph.

With only a trailer-based RSC system, trailer wheel lift was observed during the high CG load condition when the system was overdriven at 41mph when tested with the Freightliner, which represented no improvement over the baseline condition. Trailer wheel lift was observed at 50 mph when tested with the Volvo, which represented a 5 mph improvement over the baseline condition. When tested with this maneuver in the high CG load condition, the trailer-based RSC system activated the trailer brakes at entrance speeds of 30 and 33 mph for the Freightliner and Volvo, respectively.

All stability control systems tested improved the roll stability of the vehicle over the baseline condition. For each maneuver, the tractor-based stability control systems were able to mitigate trailer wheel lift at the same or higher maneuver entrance speeds than trailer-based systems. The trailer-based RSC system was typically able to mitigate trailer wheel lift at a higher maneuver entry speed than the baseline condition, with the exception of the double-lane-change maneuver with one of the tractors. In the tests with both tractor-

based ESC systems and trailer-based RSC systems enabled, the tractor-based ESC system was often found to be the first system to intervene to reduce wheel lift or understeer.

Based on the results of Phase I, the agency determined that a performance test based on the J-turn was suitable to evaluate tractor and trailer stability control systems. The J-turn maneuver generates a sufficient amount of lateral acceleration to provide a challenging test at reasonable test speeds. The J-turn maneuver is also more representative of the real-world conditions, such as curved off-ramp, that could generate untripped rollover. Because the results from Phase I showed that tractor-based stability control systems increased the roll stability by a larger margin than trailer-based RSC systems, NHTSA concluded that Phase II research should focus on tractor-based stability control systems.

2. Developing a Dynamic Test Maneuver and Performance Measure To Evaluate Roll Stability—Phase II

(a) Test Maneuver Development

The researchers at VRTC conducted Phase II to develop test methods that could evaluate stability control system performance objectively and measures of performance that would ensure that a stability control system could prevent rollover effectively. After Phase I test results demonstrated that a test driver's steering input variation could affect test outcome, an automated steering machine was used for subsequent research. The testing focused on tractor-based stability control systems that were determined to be most effective in preventing rollovers from the Phase I research.

Both the Freightliner and Volvo 6x4 tractors equipped with an ESC system from Phase I were tested, and an RSC electronic control unit was also obtained for the Freightliner. A Sterling 4x2 equipped with a Meritor WABCO RSC system was also tested in Phase II. In addition to the Fruehauf 53-foot van trailer used in Phase I (its trailer-based RSC system was disabled throughout the Phase II testing), five additional trailers were tested, including a second 53-foot van trailer, two 48-foot flatbed trailers, a 9200-gallon tanker trailer, and a 28-foot flatbed trailer which is used as a control trailer in FMVSS No. 121 brake system testing.

The first maneuver evaluated in Phase II was a slowly increasing steer maneuver. The SIS maneuver has been used by the agency and the industry to determine the unique dynamic characteristics of each vehicle. This maneuver is included in the FMVSS No. 126 test procedure for ESC systems on light vehicles. The maneuver provides the steering wheel angle to lateral acceleration relationship for each vehicle, accounting for the differences in steering gear ratios, suspension systems and wheelbases among vehicles. It also normalizes test conditions to account for variations in test conditions, such as road surface friction. The steering wheel angle derived from the SIS test was used to program the automated steering machine for the ramp steer maneuver discussed below.

To initiate the SIS maneuver, the test driver accelerated the vehicle to a constant speed of 30 mph on a dry road surface. The driver then activated the steering machine to input a steadily increasing steering wheel angle up to 270 degrees at a rate of 13.5 degrees per second. The test driver manually maintained constant speed using the accelerator pedal while the tractor's path radius steadily decreased and the tractor's lateral acceleration steadily increased. The SIS maneuvers were conducted with the tractor in the bobtail condition (no trailer attached). The SIS maneuver also demonstrated that tractor-based stability control systems are capable of detecting a high lateral acceleration condition and intervening by reducing the engine output torque.

The SIS maneuver was used to determine the steering wheel angle projected to generate 0.5g of lateral acceleration when traveling at 30 mph. This value varied depending on characteristics of the tractor such as its wheelbase and steering ratio. For tractors, that steering wheel angle and lateral acceleration data was found to have a linear relationship at the lateral acceleration values between 0.05 and 0.3g. Over this range of data a linear regression method followed by linear extrapolation was used to estimate the steering wheel angle at 0.5g lateral acceleration for each SIS maneuver. The final steering wheel angle was then calculated by averaging the values from tests conducted while turning to the left and while turning to the right. The resulting calculated steering wheel angles were 193 degrees for the Freightliner, 199 degrees for the Volvo, and 162 degrees for the Sterling. This indicates that the Sterling, which was a 4x2 configuration, had a higher steering wheel gain than the other tractors which were 6x4 configurations.

The SIS testing was repeated for the three tractors throughout the test program to determine the consistency of the steering wheel angle calculations and the test speeds. The resulting standard deviations in steering wheel angle were 2.5 degrees for the Sterling, 7.4 degrees for the Freightliner, and 10.2 degrees for the Volvo, although the replacement of the tires on the Volvo may have contributed to an increase in steering wheel angle during one of the repeat tests. The tractor speed at the beginning of the SIS steering input ranged from 29.6 to 32.2 mph for all of the tests.

After the SIS testing, tests were conducted using a ramp steer maneuver to assess the roll stability of tractor-trailer combinations and the effectiveness of both types of tractor-based stability control systems. The RSM was derived from and is similar to the J-turn maneuver, but instead of the driver controlling the steering wheel to follow a fixed path, the steering controller turns the steering wheel to an angle determined from the results of the SIS test. One advantage of the RSM over the J-turn maneuver is that the RSM uses a steering machine, which allows for a more consistent and repeatable steering input.

To conduct the RSM, the test driver accelerated the vehicle to a constant speed of one to two mph above the target maneuver entry speed on a dry surface and then released the throttle and de-clutched the engine. Once the vehicle coasted down to the desired maneuver entry speed, the automated steering controller initiated a steering input, at a constant rate of 175 degrees per second, up to the steering wheel angle that was derived for the tractor in the SIS test. Once the steering wheel angle was reached (the end of ramp input), it was held constant for five seconds, and then the controller returned the steering wheel angle back to zero at a steering rate of 175 degrees per second. The initial maneuver entry speed was 20 mph and it was incrementally increased in subsequent runs until a test termination condition was met. The termination conditions were as follows: Two inches of wheel lift occurring at either the tractor drive wheels or the trailer wheels; the tractor reaching a severe oversteer condition (safety cables were installed to limit the tractor-trailer articulation angle for testing safety); or the maneuver entry speed reached 50 mph without a roll or yaw instability condition. Although the intent of the RSM was to evaluate combination vehicle roll stability, testing with the trailers in the unloaded condition resulted in several occurrences of tractor yaw instability.

For all of the RSM tests, each tractor was tested with all six trailers and the trailers were either unloaded, or loaded to a high CG, on-highway combination

weight appropriate for the number of axles on the combination vehicle. For the flatbed and van trailers, the load ballast was placed on 24-inch high tables to produce a high CG height, and the tanker trailer was loaded with water.

The purpose of the RSM test is not to cause a rollover, but to create a high lateral acceleration condition to demonstrate that a stability control system has the capability to reduce the likelihood of a rollover. Typically, wheel lift occurred first at the trailer wheels although the flatbed trailer combinations had tractor drive wheel lift occurring first or in unison with the trailer wheels. In the RSM tests with the stability control system disabled and the trailer in the high CG condition, wheel lift occurred at entry speeds between 25 and 31 mph for all combinations of tractors and trailers. The peak tractor lateral acceleration at wheel lift was in the range of 0.45 to 0.50g, showing that the high CG loading condition was representative of fully loaded tractor-trailers with a medium density cargo.

Tractor-based stability control systems applied the foundation brakes on the tractor and trailer, which reduced the vehicle speed and lateral acceleration during the RSM. The entry speed at which wheel lift was first visible improved to between 31 and 42 mph for three of the four tractors tested (Freightliner RSC, Freightliner ESC, and Volvo ESC).

In tests with the trailer brakes disabled, the entry speed at which wheel lift was detected was between 29 and 41 mph, which showed that the contribution of trailer braking to prevent wheel lift was evident, but that it was relatively small in comparison to the deceleration resulting from tractor braking. The Sterling tractor equipped with an RSC system had wheel lift with three of the trailers at the same speed as with the stability control system disabled, and with the other three trailers at speeds between two and four mph over the disabled test condition. In all of the RSM tests, the Sterling tractor's RSC system was not as effective at mitigating wheel lift for this maneuver.

The results indicated that, in general, the ESC systems provided a higher level of deceleration compared to the RSC systems and typically had the higher maneuver entry speeds prior to wheel lift. However, there were individual trailer combinations in which the RSC system performed as well or slightly better than the ESC system on the Freightliner. We believe the better performance by the RSC system in some tests is attributable to the RSC system having a more aggressive braking strategy than the ESC system tested.

The RSM was then performed with each of the six trailers in the unloaded condition, with the tractor stability control system enabled with the trailer brakes disabled. Tests were not conducted with the systems disabled. The initial maneuver entry speed was 20 mph and was incrementally increased in subsequent runs until the speed reached 50 mph, severe oversteer occurred, or wheel lift occurred. The tractors with ESC systems enabled were able to complete all but one of the RSM tests up to 50 mph without any tractor instability or wheel lift. The Volvo tractor towing the empty tanker trailer resulted in wheel lift of the tractor drive wheels and the trailer wheels at a speed of 47 mph.

In comparison, most of the tests with the tractors equipped with RSC systems towing unloaded trailers resulted in severe tractor oversteer, with the tractor-trailer articulation angle typically reaching the limits allowed by the safety cables. This occurred at speeds between 35 and 39 mph for the Freightliner 6x4 tractor and between 34 and 42 mph for the Sterling 4x2 tractor. However, both of these tractors were able to complete the RSM up to 50 mph when coupled to the unloaded 28-foot control trailer, and the Freightliner reached 50 mph without wheel lift or severe understeer when coupled to the unloaded tanker trailer.

In summary, the goal of the Phase II research was to develop a test maneuver to challenge the roll propensity of a truck tractor. The RSM is similar in test severity to the J-turn and demonstrates that the stability control systems are able to mitigate wheel lift in most cases that occurred when the stability control systems were disabled. In the high CG load condition, the ESC systems were observed to mitigate wheel lift at or above the speed observed with RSC-equipped vehicles, with the exception of a few instances with the Freightliner's ESC system. When tested with the unloaded test trailer, substantial improvements in tractor yaw stability were evident in the tractors equipped with ESC systems during RSM tests.

(b) Performance Measure Development

NHTSA's Phase II testing also examined possible performance measures to evaluate roll stability. In situations where the vehicle's stability limits are approached in a gradual manner, engine/power unit control can improve stability in these situations. However, in situations where stability limits of the vehicle are approached rapidly, application of the vehicle's foundation brakes may be a more appropriate means of improving stability.

The agency investigated four measures for development as metrics for engine/power unit control. They were truck tractor speed, truck tractor lateral acceleration, truck tractor longitudinal acceleration, and actual engine torque and driver requested engine torque.

The forward speed of a truck tractor appears to be directly related to the lateral forces generated during an untripped rollover. Test data from four different vehicles with stability control enabled indicated that forward speed was reduced from the target maneuver entrance speed of 30 mph. However, due to the nature of the roll maneuver, it is possible for the vehicle to lose traction on the inside wheels, which results in a reduction in vehicle speed but does not necessarily enhance vehicle stability.

Lateral acceleration was a possible measure of performance because of its direct relationship in producing the forces associated with untripped rollover. Data from four different tractors with the stability control system enabled indicate that each combination of tractor and stability control system had a different lateral limit that the system has allowed. This shows that the control strategy used by the manufacturer is different depending on the vehicle and system used. One strategy allows the vehicle to build lateral acceleration to a set threshold level and then allows that level to be maintained throughout the maneuver. The other strategy allows lateral acceleration to build and then the stability control system reduces the lateral acceleration. Both of these strategies were observed to increase lateral stability. Because the lateral acceleration limits were different for vehicles using these control strategies, lateral acceleration alone was not found to be a good measure for stability control performance.

Longitudinal acceleration of a vehicle is reduced when a vehicle's stability control system is enabled and is directly related to a reduction in forward speed. On the four vehicles tested, the stability control activation had measurable differences in longitudinal acceleration, but had similar disadvantages to forward speed in being used as a performance metric.

Engine torque measures were observed to be a direct way to determine ESC activation during the SIS tests. Engine torque refers to two different measures. The first relates to the torque output from the engine and is expressed

as a percentage of maximum engine output. The second relates to the throttle pedal used by the driver to control engine torque output. This value is also expressed as a percentage of maximum engine output and is referred to as the ''driver requested torque.'' During normal operation the ''driver requested torque'' and ''engine torque'' measures were observed to be equal to each other. However, during ESC activation when engine control intervened, the two measures were observed to be separate. In every case, the ''engine torque'' was much less than the ''driver requested torque'' and continued to reduce until vehicle stability was regained. After careful review of the data the torque separation activity was confirmed for all the SIS test series in which stability control was enabled for each vehicle. This led the agency to conclude that this measure was a good candidate for further analysis and development as a measure of performance for truck tractors equipped with a stability control system.

The engine torque data analysis was based on the test driver attempting to maintain a constant vehicle speed at the point of stability control engine torque intervention by making a substantial increase in driver-requested engine torque. For the four vehicles tested, the driver requested engine torque after stability control intervention was between 60 percent and 100 percent of engine output whereas the engine torque output after stability control intervention ranged from zero to 60 percent. The analysis of engine torque differentials was limited to the first four seconds after stability control engine torque intervention since none of the SC systems were observed to make substantial reapplications of engine torque output during this initial time-frame. On two vehicles engine torque interventions reduced engine output torque to zero during the first four seconds, and both systems allowed engine torque to be momentarily reapplied to over 50 percent of engine torque output. The Volvo had the highest engine torque output during the first four seconds after intervention, which ranged from 23 percent to 18 percent of maximum engine torque.

The agency also investigated several other measures for development for foundation braking in rollover tests because stability control systems were observed to improve the vehicle's roll stability by applying the foundation brakes. The measures investigated were wheel lift, lateral acceleration, lateral acceleration ratio, trailer lateral acceleration ratio, and trailer roll angle ratio.

Wheel lift is a direct measure of performance with minimal calculations needed to determine its value. The measure is simple and directly represents the pre-crash condition that immediately precedes a rollover. If wheel lift can be prevented, a rollover cannot occur. For our research, wheel lift was considered to occur upon two inches of lift for the tractor drive axle wheels or the trailer wheels. Wheel lift does not always indicate that rollover is imminent, particularly because certain suspension designs will lift a wheel during hard cornering. We estimated the vehicle speed that produced wheel lift during the ramp steer maneuver and found that between 29 mph and 32 mph, there is a high probability of wheel lift occurring on the combination vehicles tested. Given that only four different truck tractors and six different test trailers were used, we believed that the data may not be sufficient to assess the real world service of tractors with ESC expected to function with different trailers having different torsional stiffness and loads.

Using lateral acceleration as a performance metric is based on the principle that a tractor-trailer combination vehicle with a high center of gravity that achieves a certain level of lateral acceleration would roll over. Tests performed on the Freightliner in combination with all trailers configured with a high-CG load, at a mean entrance speed of 28 mph generated a lateral acceleration. The data showed that using tractor maximum lateral acceleration as a performance criteria would not discriminate between vehicles equipped with stability control and those without it. However, it did show that a ratio-based metric could be more appropriate for such a performance metric.

Lateral acceleration ratio is calculated by dividing the tractor's lateral acceleration at a given time interval by the measured lateral acceleration at the end of ramp input, which is the end of the steering maneuver and the point near which the vehicle experiences its peak lateral acceleration. The LAR was plotted at five equal one-second intervals for several truck tractors and test trailers. The plots indicated sharp decreases in LAR caused by activation of the stability control system.

A similar ratio metric for trailers, trailer lateral acceleration ratio, also showed the ability to discriminate between vehicles with stability control systems and those without. A third ratio metric was considered, trailer roll angle ratio based on a test trailer roll angle, but it did not clearly discriminate between vehicles with stability control systems and those without.

3. Developing a Dynamic Test Maneuver and Performance Measure To Evaluate Yaw Stability—Phase III

(a) Test Maneuver Development

The purpose of the Phase III research was to develop maneuvers to evaluate the yaw stability performance of stability control systems on tractors. Although we have examined several maneuvers to evaluate yaw stability, two maneuvers were fully investigated because other maneuvers were not able to provide a consistent, repeatable performance test. We fully considered a sine with dwell test maneuver that is similar to the test maneuver used in FMVSS No. 126 for light vehicles; and a half-sine with dwell (HSWD) test maneuver. The steering inputs for the SWD and HSWD maneuvers are depicted in the figures below, and as discussed in additional detail, variations on the steering wheel angle, the frequency of the sine wave (cycles per second, Hz), and the dwell time were evaluated for both maneuvers. A steering machine was used to achieve consistent steering wheel inputs for these maneuvers.

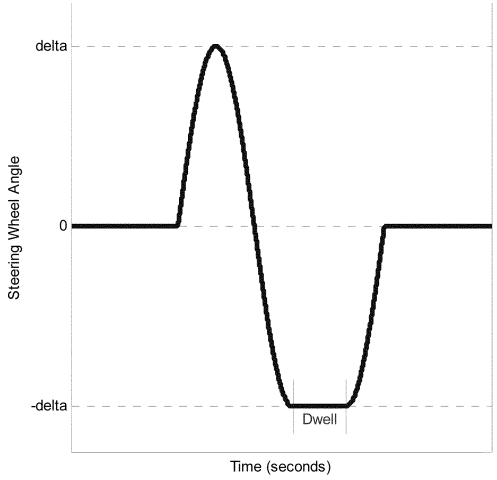


Figure 3: Sine with Dwell profile

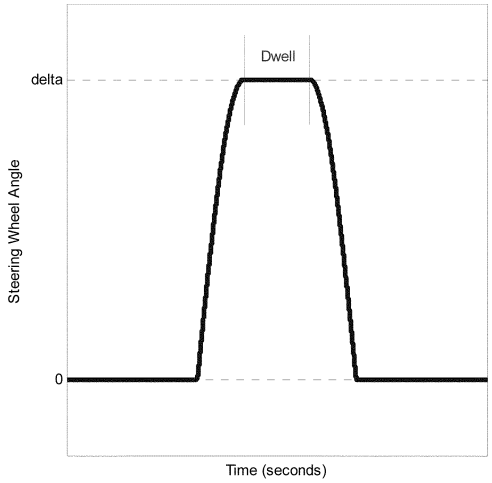


Figure 4: Half Sine with Dwell profile

The test vehicles used in Phase III included: A 2006 Freightliner 6x4, which was tested with both ESC and RSC systems; a 2006 Volvo 6x4 tractor with an ESC system; and a Sterling 4x2 tractor equipped with an RSC system. Although most of the testing was performed using the 28-foot flatbed control trailer, each tractor was also tested with a 53-foot Strick van trailer, a 48-foot Fontaine spread axle flatbed trailer, and a 9600-gallon Heil tanker trailer. Tests were conducted with the trailer brakes both enabled and disabled.

Two tractor loading conditions were used for both the SWD and HSWD testing. Each tractor was tested in the bobtail condition (no trailer attached) and using a trailer loaded over the fifth wheel so that the tractor drive axle(s) was loaded to 60 percent of its gross axle weight rating (GAWR). The yaw instability that occurred in the RSM testing showed that the unloaded 28-foot control trailer was too light to produce yaw instability. Therefore, additional weight was added for these tests. Testing was conducted on two test surfaces: A high-friction dry road surface and a slippery wet Jennite road surface.

Additional SIS tests were performed, similar to the bobtail SIS tests described in Phase II, conducted with each tractor coupled to the 28-foot control trailer and loaded to the 60 percent GAWR condition. The steering wheel angles from these tests were 197 degrees for the Freightliner with ESC, 200 degrees for the Freightliner with RSC, 200 degrees for the Volvo, and 153 degrees for the Sterling. The average tractor lateral acceleration at engine torque intervention in the SIS tests was 0.40g for the Freightliner with ESC, 0.34g for the Freightliner with RSC, 0.35g for the Volvo, and 0.4g for the Sterling.

For the SWD and the HSWD test maneuvers, the maneuver entrance speed for the bobtail tractor tests was 50 mph, and for the tests at 60 percent GAWR the entry speed was 45 mph. The driver accelerated the test vehicle up to a speed slightly over the desired speed in a straight lane, then released the throttle and de-clutched the engine. Once the vehicle coasted down to the desired speed, the automated steering machine initiated either the sinusoidal or half-sine steering input, at a specified test frequency as described below (*e.g.,* 0.3 Hz, 0.5 Hz, etc.), with the steering wheel angle held constant during the dwell, as depicted in the figures. Two dwell times were evaluated as described below, 0.5 and 1.0 second. The initial test run began with a steering wheel angle equal to 30 percent of the angle determined from an SIS test. The test severity was increased in subsequent runs by increasing the steering wheel angle in 10 percentage point increments until reaching 130 percent of the SIS steering wheel angle. Thus, 11 test runs were needed to complete a test series. If severe oversteer or wheel lift greater than two inches was detected, then the test was repeated using the previous steering wheel angle in which the systems was observed to be stable. If the tractor-trailer was stable during the repeated run, additional tests were performed by increasing the steering wheel angle in 5 percent increments until instability was observed.

Tests were conducted on baseline tractors in the 60 percent GAWR condition on dry pavement to evaluate frequency and dwell time for the SWD and HSWD test maneuvers. Frequencies between 0.3 and 0.7 Hz were evaluated. A frequency of 0.5 Hz was found to require the lowest steering scalar to produce severe oversteer in the Sterling and Volvo tractors in the SWD maneuver, and 0.4 Hz was found to require the lowest steering scalar to produce severe oversteer in the Freightliner tractor (and 0.5 Hz was the second-most severe frequency for this tractor). A dwell time of 1.0 second was found to result in severe tractor oversteer at lower steering scalars. Thus the researchers selected a 0.5 Hz frequency and 1.0 second dwell time as the parameters for the SWD and HSWD maneuvers. However, the researchers also found that the SWD maneuver was less sensitive to differences in steering frequency compared to the HSWD maneuver.

In tests conducted with baseline tractors in the bobtail condition, no yaw instability occurred; however, in both the SWD and HSWD tests the Sterling tractor experienced wheel lift at the tractor drive wheels. Seventy test series were conducted on the baseline tractors in the 60 percent GAWR load condition, with fifteen of the series terminated due to roll instability and 28 due to severe tractor oversteer.

In tests conducted with the tractor stability control system enabled and in the 60 percent GAWR load condition, all of the tractors with an ESC system were able to complete the SWD maneuver at test scalars up to 130 percent. However, the tractors equipped with RSC systems experienced severe oversteer in 12 of 15 test series at the steering scalars of 120 and 130 percent. In tests conducted using the HSWD maneuver, the ESC-equipped tractors completed seven of eight test series without tractor yaw instability, and the RSC-equipped tractors experienced

severe oversteer at steering scalars ranging from 80 to 125 percent. In both test maneuvers, the RSC systems improved tractor yaw stability compared to the baseline tractor, but they could not maintain yaw stability at the higher steering scalars.

Additional SWD tests were conducted with the 53-foot van trailer and the 48-foot flatbed trailer using the 60 percent GAWR loading condition. In eight test series conducted with the tractor stability control systems enabled, seven were completed without wheel lift or tractor yaw instability, but the Sterling tractor equipped with an RSC system tested with the 48-foot flatbed reached a termination condition at a steering scalar of 105 percent. In tests with stability control enabled, all of the tractors coupled to the tanker trailer experienced wheel lift in the SWD maneuver at scalars between 60 and 95 percent.

SWD tests were also conducted on a low-friction wet Jennite surface using a lower maneuver entry speed of 30 mph. In the baseline condition with the tractor stability control systems disabled, 43 test series were conducted and a termination condition was reached in only four test series. Testing on the dry, high-friction surface was found to result in more yaw instabilities than the testing conducted on the low-friction, wet Jennite surface.

In summary, the purpose of Phase III research was to develop a maneuver to evaluate the yaw stability of a tractor trailer combination vehicle. VRTC researchers found that the SWD maneuver with a one-second dwell time based on a single cycle of steering input with a frequency of 0.5 Hz conducted on a high friction surface appropriately assessed the ability of an ESC system to improve yaw stability. From this maneuver, performance measure were investigated for lateral stability and responsiveness: the lateral acceleration ratio, which is directly correlated to roll stability and the yaw rate ratio, which the performance metric used in FMVSS No. 126 for light vehicle ESC systems and was found to be a direct performance measure of yaw stability. A responsiveness measure was also studied to evaluate the lateral displacement of a vehicle during SWD maneuvers.

(b) Performance Measure Development

Phase III of NHTSA's research also examined potential measures of yaw instability prevention performance. In light of the conclusion in Phase II that lateral acceleration ratio was a suitable metric to measure a stability control system's ability to prevent lateral acceleration, the agency examined a yaw rate ratio metric. The YRR expresses the lateral stability criteria for the sine with dwell test to measure how quickly the vehicle stops turning, or rotating about its vertical axis, after the steering wheel is returned to the straight-ahead position. Similar to the LAR, the YRR metric is the percent of peak yaw rate that is present at a designated time after completion of steer. This performance metric is identical to the metric used in the light vehicle ESC system performance requirement in FMVSS No. 126. Phase III research found that both LAR and YRR were capable of measuring stability during the SWD maneuver. However, while LAR was better at predicting roll instability, YRR was better at predicting yaw instability.

4. Large Bus Testing

Researchers at VRTC tested three large buses equipped with stability control systems: A 2007 MCI D4500 (MCI #1), a 2009 Prevost H3, and a second 2007 MCI D4500 (MCI #2). The MCI buses were equipped with a Meritor WABCO ESC system and the Prevost was equipped with a Bendix ESC system. RSC systems were not offered on large buses and, consequently, were not evaluated. All of the buses were equipped with air disc brakes. Both the MCI #1 and the MCI #2 had a GVWR of 48,000 lb and a wheelbase of 317 in., and the Prevost had a GVWR of 53,000 lb and a wheelbase of 317 in. Each of the buses had three axles: A steer axle, a drive axle, and a non-driven tag axle.

The MCI #1 was equipped with outriggers supplied by MCI and Meritor WABCO. The outriggers limited the use of higher maneuver entry speeds for tests without the ESC system enabled. At higher speeds, the lower support portion of the outrigger would dig into the test surface and influence the dynamics of the vehicle. Therefore, tests of the MCI #1 at higher speeds had no baseline performance to compare to.

The Prevost and MCI #2 buses were tested using NHTSA-designed outriggers. The outriggers designed for combination vehicles were adapted for installation on the mid-section of each bus, just in front of its drive axle and slightly behind its longitudinal center of gravity. Using these outriggers, the vehicles were able to complete testing for all speeds, with or without ESC enabled.

Each bus was tested using two primary simulated load conditions. The first condition was a lightly loaded vehicle weight (LLVW) that included the weight of the test instrumentation, outriggers, and driver. The second load condition, gross person occupancy weight (GPOW), included the LLVW weight plus the addition of 175-lb water dummies in each available passenger seat without exceeding the GVWR of the vehicle. This condition was used to represent a high CG load that a bus may experience while in service. A third loading condition was conducted with the Prevost, which added ballast to the cargo holds under the mid-section of the bus. This condition loaded the vehicle to its GVWR.

Test maneuvers that were conducted included the 150 ft. constant radius increasing velocity test, SIS, RSM, HSWD, and SWD. Tests were conducted using an automated steering machine, except for the constant radius maneuvers. The severity for each test maneuver was increased either by increasing vehicle speed or steering angle.

SIS maneuvers were conducted under both loading conditions, with ESC systems enabled and disabled, and in both left and right directions in order to characterize each vehicle. Initially, the maneuver was executed exactly as it was for the tractor testing. However it was observed that steering to a maximum steering wheel angle of 270 degrees generated barely over 0.3g of lateral acceleration. From this, it was clear that large buses have a larger steering ratio, and it would take a larger steering input to achieve the appropriate lateral acceleration levels. The steering wheel angle necessary to achieve 0.5g in the LLVW loading condition was 405 degrees for the MCI #1, 352 degrees for the Prevost, and 407 degrees for the MCI #2. In the GPOW loading condition, steering wheel angles were found to be 405 degrees for the MCI #1, 383 degrees for the Prevost, and 461 degrees for the MCI #2.

SIS tests were conducted at GPOW to evaluate the ability of the ESC system to reduce speed by limiting engine torque. For the three buses tested the average speed at activation for each SIS maneuver ranged between 29.8 and 30.6 mph. At four seconds following SC activation the average speed for each SIS had been reduced to 27.9 mph for the MCI #1, 26.5 mph for the Prevost, and 26.6 mph for the MCI #2. Without stability control enabled, speeds did not decrease. The average lateral acceleration for a test series observed at activation was 0.32g for MCI #1, 0.27g for the Prevost, 0.31g for MCI #2.

RSM testing was completed for each bus to evaluate their roll propensity while loaded in the LLVW and GPOW conditions. Tests were conducted using the same RSM protocol as the one developed for tractors. Using an

automated steering machine programmed with the steering wheel angle calculated from the SIS maneuver, tests were conducted with ESC systems enabled and disabled. The initial maneuver entry speed was 20 mph and was incrementally increased in subsequent runs until two inches of wheel lift occurred at any of the wheels, the vehicle went into a severe oversteer condition, or the entry speed reached 50 mph without a roll or yaw instability condition.

For RSM tests with ESC systems disabled and the buses loaded in the LLVW condition, wheel lift was observed in both MCI test vehicles at speeds of 41 to 45 mph, and no wheel lift was observed for tests with the Prevost for the speeds tested. When tested in the GPOW condition, wheel lift was observed at 35 to 39 mph for all vehicles tested.

For RSM tests with ESC systems enabled and the buses loaded in the LLVW condition, no instances of wheel lift were observed over the range of speeds tested. During tests in the GPOW condition wheel lift was not observed in either MCI over the range of speeds tested, but was observed in some of the Prevost tests at speeds between 42 and 48 mph.[26]

SWD testing was completed for each bus to evaluate its yaw propensity while loaded in the LLVW and GPOW conditions. All tests were conducted with the ESC systems enabled and disabled. Using an automated steering machine, the SWD tests were run using steering frequencies of 0.3, 0.4, 0.5, and 0.6 Hz, dwell times of 0.5 and 1.0 seconds, and a maneuver entry speed of 45 mph. Test severity was increased by increasing the steering wheel angle by a scalar from 30 to 130 percent in 10 percent increments. A test series was terminated if the vehicle experienced wheel lift greater than 2 inches, the vehicle spun out, or the steering input reached a terminating scalar of 130 percent.

No instances of spinout were observed during this testing, but tests at higher steering wheel angles produced drift. Although the buses were yaw stable in the maneuvers, the test results demonstrated that the SWD maneuver was challenging the buses' roll propensity. Several SWD test series with the GPOW condition produced wheel lift when the ESC system was disabled. When the ESC systems were enabled, all vehicles were able to complete their series without exceeding either roll or yaw stability thresholds.

The SWD test data from the GPOW load condition were analyzed to determine a frequency and dwell time for a candidate performance maneuver. For all tests with ESC disabled, maneuvers with a 1.0-second dwell time required an equal or lower steering scalar (0 to 50 percent lower) to exceed a threshold of 6 degrees of yaw angle. As with the tractor testing, this suggested that the 1.0-second dwell time was more challenging to large buses because it required less steering to exceed the threshold.

Using only the 1.0-second dwell time tests, analysis to determine the optimum frequency for the SWD test was completed by evaluating the roll and yaw angles. Review of the test data indicated that the largest roll and yaw angles were produced in the maneuvers using 0.4 and 0.5 Hz frequencies.

The large buses were also tested using the HSWD maneuver. Like the SWD, the test results for the HSWD indicated that the longer dwell time was more challenging to stability. Unlike the SWD, the lower frequencies were observed to produce wheel lift at lower steering wheel angle scalars. Tests results from both the SWD and HSWD maneuvers indicated that both maneuvers generated dynamic responses from the vehicles. There were clear differences in lateral acceleration and yaw rate between test series conducted with ESC systems enabled compared to test series with ESC systems disabled. The data showed that ESC systems were reducing both rollover and spinout propensities. However, the SWD maneuver was favored over the HSWD maneuver because the SWD maneuver could be conducted in a smaller area, would be representative of a crash avoidance or lane change maneuver, and its use in FMVSS No. 126 accelerated performance measure research.

This research indicates that large buses equipped with ESC systems can use the same objective performance maneuver as was developed for tractors. Testing also indicates that the same performance measures can be used to assess lateral stability and responsiveness, but the performance measures must be tailored for the vehicle differences.

D. Truck & Engine Manufacturers Association Testing

The Truck & Engine Manufacturers Association (EMA) performed tests on ten tractors listed in the following table equipped with stability control systems using the three test maneuvers developed at VRTC.

TABLE 2—EMA TEST TRACTORS INCLUDING TYPE, GVWR, AND WHEELBASE

Tractor configuration (EMA Vehicle I.D.)	Stability control type	GVWR (lb)	Wheelbase (inches)
6x4 Typical Tractor (Vehicle A)	ESC	52,000	228
4x2 (Vehicle B)	ESC	32,000	140
4x2 (Vehicle C)	RSC with steering wheel angle sensor	34,700	152
6x4 Severe Service (Vehicle D)	ESC	66,000	220
6x4 w/Pusher Axle (Vehicle E)	ESC	86,000	270
8x6 Tridem Drive Axle (Vehicle F)	ESC	89,000	263
6x4 w/Pusher Axle (Vehicle G)	ESC	92,000	243
6x4 Severe Service (Vehicle H)	RSC	60,600	246
6x4 (Vehicle I)	ESC	52,000	232
6x4 (Vehicle J)	ESC	52,350	245

[26] Initial tests conducted with the Prevost demonstrated that the vehicle was able to complete the RSM at up to 48 mph without wheel lift for the GPOW condition. The Prevost was not tested to 50 mph because there was not enough test area to bring the vehicle up to this speed and allow the driver to recover safely if the test needed to be aborted. RSM tests under the same conditions were repeated less than a week later. During these tests, wheel lift greater than 2 inches was observed at speeds of 42 to 44 mph with ESC enabled. Upon further investigation when preparing to de-instrument the vehicle, a broken roll stabilizer bar was discovered. Researchers attributed the change in performance observed to the broken stabilizer bar.

EMA provided its test data to the agency.[27] Although the tractors were not identified by make or model, EMA provided the configuration and weight ratings for each tractor. Eight tractors were subjected to the SIS and RSM to evaluate rollover prevention, and three tractors were subjected to the SWD maneuver, and the ramp with dwell (RWD) maneuver on a low-friction surface to evaluate yaw stability. Two of the tractors were equipped with RSC systems and seven tractors were equipped with ESC systems. EMA also submitted test data for several maneuvers in which the test parameters were varied. With the exception of Vehicle J, EMA did not submit baseline test data—that is, EMA submitted data only for maneuvers with ESC or RSC systems enabled.

1. Slowly Increasing Steer Maneuver

For all tractors, test data were provided for the SIS tests used to derive the steering wheel angle with each tractor in the bobtail condition. In the first SIS series conducted on eight of the tractors, three SIS tests were conducted in each direction on a dry road surface, and a best fit linear regression was used to project the steering wheel angle for a lateral acceleration of 0.5g. The average of the absolute value of each of the six runs was calculated for the final angle.

Compared to the steering wheel angles that were derived for the three VRTC tractors, a much wider range in SWA was seen among EMA's results. The steering wheel angles generally increased with the tractor's wheelbase from an angle of 126 degrees for the 140-inch wheelbase 4x2 to an angle of 291 degrees for the 270-inch wheelbase 6x4 with a pusher axle. For Vehicle H, EMA also provided data from direct measurement of the steering wheel angle from driving the tractor at 0.5g of lateral acceleration. This angle was 290 degrees, which is slightly larger than the calculated value of 281 degrees extrapolated from the SIS test data in the 0.05 to 0.30g operating region. The EMA data provided for these SIS tests did not include information on stability control engine torque reduction.

Additional SIS tests were conducted on three tractors that were to be subsequently tested using the SWD maneuver to evaluate tractor yaw stability. The SIS test conditions were identical to the prior SIS tests. A best fit linear regression was used to project the steering wheel angle for a lateral acceleration of 0.5g, and the average of the absolute value of each of the six runs was calculated for the final angle as in the prior SIS tests. Comparing these data to the prior SIS test results, Vehicle B, which had the smallest angle of 126 degrees in the prior SIS tests, showed a ten degree reduction of its angle in this test series. Vehicle G's angle was nearly identical (203 degrees in the first series vs. 205 degrees in the second series).

2. Ramp Steer Maneuver

For the RSM tests on eight tractors, the tractors were attached to a FMVSS No. 121 control trailer and were loaded to their GVWR by placing the ballast over the fifth wheel, with the ballast placed directly on the trailer deck resulting in a low center of gravity height. The weight on the FMVSS No. 121 control trailer's single axle ranged between 5,720 and 5,930 lb for all eight tractor tests, and the trailer brakes were not enabled. While the weight on the trailer axle is nominally 4,500 lb when the trailer is used for FMVSS No. 121 stopping distance tests, the increased weight in these RSM tests reflects the added weight of the outriggers installed on the trailer. In general, each of the tractors was loaded to its GVWR with the steer, drive, and auxiliary axles loaded to, or very close to, their respective GAWRs. The only exception was the 140-inch wheelbase 4x2 which only had 9,950 lb on the steer axle, although it was rated for 12,000 lb.

In the tests, the stability control systems automatically applied the tractor's foundation brakes to reduce speed and lateral acceleration. The initial vehicle deceleration generally coincided with the end of ramp steer input, indicating that the stability control systems were effective at reducing the lateral acceleration. The speed at wheel lift for EMA's tests ranged from 33 to 38 mph, as compared to 31 to 39 mph for the VRTC tests that used a similar unbraked trailer, but with a higher center of gravity loading condition and a higher overall vehicle test weight. Both 4x2 tractors tested by EMA experienced oversteer in addition to the wheel lift.

3. Sine With Dwell Maneuver

EMA provided test results for the SWD maneuver for four tractors equipped with ESC systems. The sinusoidal steering frequency used for testing was 0.5 Hz and the dwell time was one second. The amplitude of the steering wheel inputs started at 30 percent of the steering wheel angle derived from SIS testing, and in subsequent test runs was increased by 10 percent increments up to 130 percent of the steering angle. The SWD tests were conducted with two tractor loading conditions: Loaded to 60 percent of the drive axle(s) GAWR with the FMVSS No. 121 unbraked control trailer attached (loaded tests), and in the unloaded condition with no trailer attached (bobtail tests). The maneuver entrance speed was 45 mph and the test was conducted on dry pavement.

The results of the loaded tests for Vehicles G and I indicated that both tractors remained roll and yaw stable through the full range of testing, and there were no indications of tractor wheel lift in the test comments or the unprocessed data. The largest steering wheel angle produced the highest peak lateral acceleration, which occurred during the dwell portion of the maneuver for both tractors. Vehicle I reached approximately 0.75g and Vehicle G reached just under 0.6g. Although both tractors were close in wheelbase and tested with similar steering wheel angles, Vehicle G, tested with its liftable axle in the lowered position, was either less responsive in the SWD maneuver or its ESC performed slightly better than the ESC on Vehicle I. Both tractors had similar overall vehicle decelerations; however, the ESC on Vehicle G commanded higher steer axle braking pressures than the ESC on Vehicle I. Vehicle I appeared to have more lateral sliding in the maneuver, as its yaw rate decay was slower at the end of steering input.

Vehicle B (140-inch wheelbase 4x2) exhibited yaw instability in the SWD maneuver. This tractor had high lateral acceleration that was attained at lower steering wheel angles than for the 6x4 tractors. For example, the peak tractor lateral acceleration was already reaching 0.70g at 80 percent of the SIS-derived steering wheel angle, compared to Vehicle I which reached 0.60g and Vehicle G which reached 0.45g at this steering wheel angle scalar. The yaw rate decay after completion of steer was also much slower than for the 6x4 tractors, which appears to indicate that the vehicle was sliding much more and taking longer to return to the straight-ahead position. This is most evident in the testing at 130 percent of the SIS-derived steering wheel angle, in which the decay yaw rate decay was about 3.5 seconds.

The maneuver entrance speed was reduced to 30 mph in the bobtail SWD tests, which were conducted on a low-friction wet Jennite surface. The short wheelbase 4x2 tractor, Vehicle B, appeared to complete all of the test series without any observed instability

[27] Data from Vehicles A through I are included have been placed in the docket. Docket Nos. NHTSA–2010–0034–0011 through NHTSA–2010–0034–0021 and Docket No. NHTSA–2010–0034–0024. Vehicle J testing is discussed in detail in a later section.

or control issues, and the peak tractor lateral acceleration was limited to approximately 0.3g in all tests. However, both 6x4 tractors (Vehicles G and I) appeared to have steering responsiveness issues that were particularly noticeable at higher steering wheel angles. At the reversal in steering wheel angle direction, the yaw rate and lateral acceleration response was delayed, indicating severe understeer. During the dwell portion of the maneuver at higher steering wheel angles, Vehicle I slowly built lateral acceleration up to 0.3g, while Vehicle G achieved similar but slightly lower acceleration levels. Vehicle G's yaw rate also was slower to respond at the completion of steer, taking as long as 2.5 seconds to decay to zero for the test conducted at the highest steering wheel angle tested.

4. Ramp With Dwell Maneuver

The three tractors equipped with ESC systems tested in the SWD maneuvers were also tested to the RWD maneuver. Once the initial steering wheel angle and test speed were attained, the steering machine increased the steering wheel angle to 180 degrees in one second, held that steering wheel angle constant for three seconds (the dwell portion of the maneuver), and then reduced the steering wheel angle to zero in one second. In subsequent RWD test runs, the steering wheel angle was increased in 90 degree increments up to 540 degrees.

The test results show that for Vehicles B and I, the steady-state lateral acceleration (prior to the ramp steer) was approximately 0.2g, and for Vehicle G the steady-state tractor lateral acceleration was approximately 0.1g. When the steering wheel angle was increased during the initial steering ramp input, the lateral acceleration and yaw rate increased slightly and in many of the test runs was then observed to drop off, indicating that the tractor was not responsive to the steering input. During the first two seconds of the steering dwell portion of the maneuver, the tractor lateral acceleration typically remained at 0.25g or less for all tests. During the last one second of the steering dwell, all of the test runs for Vehicles G and I showed steadily increasing lateral acceleration, as high as 0.5g, even as the steering wheel angle was reduced to zero. This indicates that the tractors were in a severe oversteer condition, and the agency speculates that the relatively high lateral acceleration may have been a result of the tractor running off of the low friction wet Jennite surface and onto a higher friction road surface. The test data show that this was always accompanied by braking on the steer axle, which is indicative of oversteer corrections being commanded by the ESC. Vehicle B had much less increase in lateral acceleration at the end of the maneuver and appeared to be under control. Late in the maneuver the commanded brake pressures for Vehicle B showed that both front and rear brake applications were made on the right side of the tractor, and the application pressures were nearly identical. Whether this is a data collection anomaly or stability control braking strategy is not certain, but Vehicle B was the vehicle that exhibited the least amount of oversteer.

The RWD test results demonstrated that the stability control systems on these tractors correctly identified the vehicle loss of control problems (severe oversteer and understeer) and took corrective action, including engine output torque intervention and commanding individual applications of the tractor's foundation brakes. However, the severity of the RWD test maneuver was sufficiently high to overdrive the capability of the stability control systems to mitigate severe understeer.

In summary, EMA provided test data for nine tractors each tested for the three maneuvers developed by NHTSA researchers. The nine tractors included a wider variety of tractor configurations than those tested by the agency, and included severe service tractors, tractors with auxiliary lift axles, a tridem drive axle tractor, and a very short wheelbase two-axle tractor. Slowly increasing steer vehicle characterization tests were conducted on all nine tractors (two with RSC and seven with ESC) in the bobtail condition and the test data were used to extrapolate the steering wheel angle that would provide 0.5g of lateral acceleration at 30 mph. These data produced a wider range of steering wheel angles than had been seen from the agency's tests on its three tractors, with the short wheelbase 4x2 having an angle of only 116 degrees, and a 6x4 tractor with a liftable pusher axle having the highest angle at 291 degrees.

EMA provided ramp steer maneuver test results for eight tractors that were loaded to their GVWRs using an unbraked 28-foot control trailer. Data were only provided for tests with the stability control system enabled, and the RSM was conducted up to speeds at which the system could successfully intervene. The range of speeds achieved at the point of overdriving the stability control systems was similar to the range of speeds from the VRTC RSM tests, although the loading conditions were slightly different. The two 4x2 tractors (one with RSC, and one with ESC) tested by EMA experienced oversteer and wheel lift, while the other tractors all experienced wheel lift.

SWD test results were provided for three tractors, each equipped with ESC, using a 0.5 Hz sinusoidal steering input frequency and a 1.0 second dwell time, and the tractors were tested in the bobtail condition and loaded to 60 percent of drive axle(s) GAWR. In the tests on dry pavement at a maneuver entrance speed of 45 mph, the typical 6x4 completed all tests, while the 6x4 equipped with a lift axle (tested in the lowered position) also completed all tests but appeared to be slower to respond to the steering inputs. The short wheelbase 4x2 tractor appeared to exhibit control problems and at the highest steering wheel angle tested. The sine with dwell tests on the three tractors in the bobtail condition were conducted on a low-friction wet Jennite test surface with a lower maneuver entrance speed of 30 mph. In these tests, the short wheelbase 4x2 tractor completed all tests, while the two 6x4 tractors appeared to experience severe understeer at the higher steering wheel angles tested.

5. Vehicle J Testing

(a) EMA Testing of Vehicle J

In December 2010, EMA provided testing data on a tenth vehicle they tested.[28] Vehicle J was intended to be representative of a typical 6x4 tractor, with a 245 inch wheelbase and a GVWR of 52,350 pounds. EMA subjected Vehicle J to four different test maneuvers: The slowly increasing steer test; the sine with dwell test; a J-turn maneuver, and a wet Jennite drive through test.

EMA first conducted the slowly increasing steer test maneuver with a steering controller on Vehicle J to determine the steering wheel angle that would produce a lateral acceleration of 0.5g. EMA conducted two series of test runs, one in each direction. A best fit linear regression was used to determine that the average steering angle on the six runs that would produce a lateral acceleration of 0.5g was 197 degrees. This value was used for subsequent testing.

EMA next conducted sine with dwell testing. EMA conducted two series of SWD tests—one with the ESC system on and one with the ESC system off. EMA equipped the vehicle with an FMVSS No. 121 control trailer and loaded the

[28] Vehicle J data provided to the agency has been placed in Docket No. NHTSA–2010–0034–0022 and Docket No. NHTSA–2010–0034–0023.

vehicle so that the drive axles were loaded to 60 percent of the GAWR, which resulted in the vehicle being loaded to approximately 78.6 percent of its GVWR.

EMA provided data on six runs of the SWD maneuver. EMA conducted the test at scalars from 0.8 to 1.3 of the SIS-derived steering wheel angle. EMA also provided data on three runs of the SWD maneuver with the system deactivated. Those tests were conducted at scalars of 1.0 and 1.3, and 1.5.

Each test run with the system enabled showed a 20- to 25-mph reduction of speed during the test maneuver. In contrast, tests conducted with the system off indicated only limited speed reduction of less than five mph. This indicated that the ESC system acted to reduce vehicle speed.

Each test run with the system enabled conducted at scalars between 0.8 and 1.2 resulted in a peak lateral acceleration between 0.6g and 0.7g. The lateral acceleration then quickly dropped to zero within 0.3 to 0.4 seconds after the completion of the steer. Yaw rate during the dwell portion of the maneuver peaked at approximately 18 to 22 degrees per second, except at a scalar of 1.2 where yaw rate peaked at approximately 24 degrees per second) and showed a downward trend during the dwell, dropping by approximately five degrees per second. The yaw rate dropped to zero within 0.2 seconds after completion of steer. The vehicle's ESC system used selective braking to reduce the speed, lateral acceleration, and yaw rate responses.

With the system disabled, the test run at a scalar of 1.0 resulted in a peak lateral acceleration of approximately 0.8g. A 0.2g drop in lateral acceleration was observed at the beginning of the dwell portion of the maneuver followed by a sudden rise of the same amount, indicating possible oversteer. The lateral acceleration dropped to zero less quickly than in tests with the system on (approximately 0.5 seconds) after completion of steer. This was largely due to the drop in lateral acceleration starting later with the system off than with the system on. The yaw rate peaked at approximately 21 degrees per second. Unlike with the system on, there was not a clear drop in yaw rate during the dwell portion of the maneuver. The yaw rate also dropped to zero slower than in tests with the system off (approximately 0.25 seconds after completion of steer).

For test runs at steering wheel angle scalars of 1.3, the peak lateral acceleration was slightly lower with the system on (approximately 0.75g) in comparison to the test run with the system off (over 0.8g). Momentary variability in lateral acceleration was observed in both tests, indicating possible tractor instability. Again, with the system on, the lateral acceleration decayed faster at the completion of steer (approximately 0.4 seconds) than it did with the system off (over 0.6 seconds). This was largely due to the reduction in lateral acceleration starting later with the system off than with the system on. The yaw rate peaked for both tests at approximately 25 degrees per second. Again, however, the yaw rate decreased by approximately five degrees during the dwell portion of the maneuver with the system on while no clear decay was observed with the system off. Also, the yaw rate decreased to zero slower after completion of steer with the system off (0.25 seconds) than it did with the system on (less than 0.2 seconds).

EMA also submitted data on one SWD test run with the system off at a steering wheel angle scalar of 1.5. Peak lateral acceleration observed during this test run was nearly 0.9g. The lateral acceleration rate dropped to zero in slightly over 0.5 seconds after completion of steer. The yaw rate peaked at approximately 24 degrees per second. Unlike in runs with lower steering wheel angles, a reduction in yaw rate was observable during the dwell portion. However, that reduction was much sharper, occurring entirely within a 0.5 second period rather than throughout the entire 1.0 second dwell period. Like in prior tests, the yaw rate dropped to zero within approximately 0.25 seconds.

EMA's SWD maneuver test data from Vehicle J demonstrated that the ESC system activated to lower lateral acceleration and yaw rate during the SWD maneuver. However, even with the ESC system turned off, the lateral acceleration and yaw rates dropped relatively quickly at the end of the test maneuver, indicating that the vehicle did not become unstable during testing. Although EMA only provided test data from three runs with the system off compared to six runs with the system enabled, the runs with the system off did include a run with a steering wheel angle scalar of 1.5, which was higher than any run in NHTSA's testing, and no severe incidents of instability were observed.

EMA next conducted J-turn testing both with the system enabled and disabled. The test was conducted on a 150-foot fixed radius curve. The vehicle was tested with an FMVSS No. 121 control trailer and was loaded to the FMVSS No. 121 loading conditions. The tests were conducted at initial entry speeds of 30 to 36 mph, in increments of two mph.

In tests conducted with the ESC system enabled, system activation occurred at each test speed. The system commanded brake activations to reduce vehicle speed to 18 mph from initial speeds of 30 mph and 32 mph, down to 10 mph from an initial speed of 34 mph, and down to 6 mph at an initial speed of 36 mph. The vehicle was able to maintain the lane at all speeds tested. Lateral acceleration peaked at 0.4 to 0.5g at 30 and 32 mph and peaked at 0.6g at 34 mph and 36 mph. Yaw rate peaked at approximately 15 degrees per second at 30 and 32 mph and peaked at approximately 20 degrees per second at 34 mph and 36 mph. At the higher speeds tested, lateral acceleration and yaw rate were observed to drop coincident with speed.

With the system disabled, no reduction in speed during the maneuver was observed. Thus, lateral acceleration and yaw rates remained relatively constant throughout the maneuver. At test speeds of 30 and 32 mph, lateral acceleration peaked at approximately 0.55 to 0.65g and yaw rate peaked at approximately 20 degrees per second. At 34 mph, the lateral acceleration peaked at approximately 0.9g and the steering wheel angle necessary to maintain the lane decreased substantially. Yaw rate peaked at approximately 22 degrees per second and dropped to approximately 15 degrees per second, indicating the vehicle was starting to plow out. At 36 mph, the vehicle plowed out of the lane.

The fourth maneuver EMA performed on Vehicle J was a wet Jennite drive-through (WJDT) maneuver. This maneuver was intended to test yaw stability. The WJDT maneuver is identical to method for determining the maximum drive-through speed when testing vehicles for compliance with S5.3.6.1 of FMVSS No. 121. The vehicle is driven through a 500-foot radius curve with a wet surface having a peak coefficient of friction of approximately 0.5 at successively increasing speeds (up to 40 mph) to determine the maximum speed at which the vehicle can maintain the curve.[29]

EMA performed this test with both the stability control system enabled and disabled in two load configurations. First, the vehicle was tested in the bobtail (unloaded) configuration.

[29] To conduct the FMVSS No. 121 stability and control during braking compliance test, the vehicle is driven at the lesser of 30 mph or 75 percent of the maximum drive-through speed. A full brake application is made and a vehicle must stop at least three times out of four within the 12-foot lane.

Second, the vehicle was loaded to the FMVSS No. 121 test loading condition.

In the bobtail configuration with the ESC system enabled, test runs at 30 and 32 mph yielded no system activation. At 33 mph, system activation occurred as both engine torque reduction and selective braking to improve yaw stability occurred. As a result, the vehicle speed decreased to approximately 29 mph during the maneuver and the driver responded by rapidly straightening the steering wheel. Vehicle yaw rate peaked at approximately 10 degrees per second. A second run at 33 mph showed only brief system activation and a minimal reduction in speed. During two runs at 34 mph, ESC system intervention was again observed as torque reduction and selective braking reduced vehicle speed to 28 to 29 mph and the driver again responded by rapidly straightening the steering wheel. Yaw rate peaked at near 10 degrees per second and again, as the driver responded, decreased. During two runs at 35 mph, the vehicle was unable to maintain the lane due to understeer, despite system intervention.

In the bobtail configuration with the system disabled, at 32 mph, the driver had to adjust steering by adding steering input during both runs attempted at this speed, indicating substantial understeer. During two runs at 33 mph, the vehicle was unable to maintain the lane, despite large steering inputs from the driver.

In the loaded configuration with the ESC system enabled, system activation occurred at a speed of 30 mph, though only slight (1 to 2 mph) reduction in speed was observed. The driver had to increase his steering input, but there was no corresponding increase in yaw rate, indicating understeer. At 32 mph, both engine torque reduction and selective braking occurred to improve yaw stability occurred. As a result, the vehicle speed decreased to approximately 27 to 28 mph during the maneuver. At 34 mph, the ESC system intervened more substantially, resulting in a reduction of speed to approximately 26 mph. Nevertheless, the vehicle was able to maintain the lane. At 35 mph, the vehicle was unable to maintain the lane due to understeer, despite system intervention.

In the loaded configuration with the system disabled, understeer was observed at 32 mph, as evident by substantial increase in steering input by the driver; however, the vehicle was able to maintain the lane. At 33 mph, the vehicle was unable to maintain the lane.

The maximum drive through speed in both vehicle configurations was only 32 mph with the system off, compared to 34 mph with the system on. This demonstrates that an ESC system has some ability to mitigate understeer when navigating a curve on a low-friction surface, and allow the driver to maintain control at higher curve entrance speeds.

(b) NHTSA Testing of EMA's Vehicle J

At NHTSA's request, EMA provided Vehicle J to NHTSA for NHTSA to duplicate EMA's testing.[30] In particular, the agency was interested in the performance of Vehicle J during the sine with dwell maneuver. NHTSA's two 6x4 tractors that were tested in with the SWD represented the upper and lower size bounds of what would be considered a typical 6x4 tractor and both tractors could not maintain stability during a SWD maneuver with the ESC system disabled. Vehicle J's size is within the bounds of the two typical 6x4 tractors tested by NHTSA.

NHTSA conducted 20 test runs of Vehicle J in the SWD maneuver at steering wheel angle scalars of 0.4 to 1.3 of the SIS-derived steering wheel angle attached to VRTC's FMVSS No. 121-style control trailer. When tested with the ESC system disabled at a steering wheel angle scalar of 1.2, NHTSA was able to detect lateral instability that continued for almost two seconds after completion of the SWD maneuver.[31]

It was discovered that EMA conducted its testing of Vehicle J with a control trailer with different specifications than NHTSA used. NHTSA then attempted to duplicate EMA's Vehicle J's testing using the control trailer used by EMA.[32] The results of NHTSA's tests with EMA's control trailer were not meaningfully different than the results of EMA's testing. That is, there were no instances of substantial roll or yaw instability in 20 test runs conducted by NHTSA.

As a result of NHTSA's testing of Vehicle J, the agency discovered that there exist three areas of variability in FMVSS No. 121-style control trailers and loading which, while not necessarily relevant to FMVSS No. 121 testing, could affect the results of stability control system testing if the specifications for an FMVSS No. 121-style control trailer were simply carried over to a stability control standard. First, EMA's control trailer had a wider track width[33] than NHTSA's trailer, which made EMA's trailer, and thereby the combination vehicle, more stable during SWD testing. Second, EMA's control trailer had a lower deck height than NHTSA's trailer, which contributed to a lower center of gravity on EMA's trailer. Third, EMA loaded its trailer with steel for ballast, whereas NHTSA loaded its trailer with concrete for ballast, which also contributed to the lower center of gravity on EMA's trailer because steel would not have to be stacked as high to achieve a full load.

E. Other Industry Research

The SAE Truck and Bus Control Systems Task Force (renamed as the Truck and Bus Stability Control Committee) was formed in 2007 to facilitate information sharing among the industry and government regarding heavy vehicle stability control systems.[34] The information shared included proposed test maneuvers that could potentially be used to evaluate the performance of stability control systems. Although the Task Force has not published any formal documents describing these test maneuvers, the following provides an overview of the maneuvers that have been discussed.

1. Decreasing Radius Test

A decreasing radius test (DRT) was developed to evaluate the roll stability performance of a heavy vehicle stability control system.[35] With the DRT, the test conditions could also be adjusted to evaluate yaw stability as well. In the DRT, the vehicle is accelerated to a constant speed of 29 mph on a dry road surface, and an initial steering input is made to follow a curve with a 150-foot radius. Once the initial curve radius is achieved, the radius is linearly reduced to a radius of 90 feet as the vehicle negotiates 120 degrees of arc. Thus, it is similar to the J-turn maneuver. The speed of 29 mph was derived based on a vehicle dynamics simulation, which estimated that the maneuver would produce 0.3g of lateral acceleration during the initial steering input and this would steadily increase to 0.6g at the 90-foot radius curve.

Tests would be conducted in a loaded condition with the tractor coupled to a trailer and an unloaded condition in a

[30] A copy of NHTSA's Vehicle J test data has been placed in the docket. Docket No. NHTSA–2010–0034–0044.

[31] NHTSA was able to conduct 19 test maneuvers with Vehicle J that did not result in substantial roll instability. NHTSA did not find any yaw instability in any of the 20 test maneuvers.

[32] NHTSA's test data identifies the trailer used by EMA as a ''Link'' trailer and the trailer used by NHTSA as the ''NHTSA'' or ''VRTC'' trailer.

[33] The track width is the distance between the centerlines of a vehicle's left and right tires. In vehicles with dual tires, the track width would be measured from between the dual tires on each side of the vehicle.

[34] See *http://www.sae.org/events/cve/presentations/2007truckbus.pdf* for an overview of the SAE Truck and Bus Council organizational chart.

[35] See Docket No. NHTSA–2010–0034–0036.

bobtail configuration. Because actual vehicle testing had not been conducted using this maneuver, pass/fail criteria have not yet been developed. Simulations of this test have been run using driver-controlled steering inputs; however, parameters could also be developed to conduct this maneuver using an automated steering controller.

2. Lane Change on a Large Diameter Circle

Volvo provided information on the Lane Change on a Large Diameter Circle (LC–LDC) maneuver that they have used to evaluate stability control system performance.[36] In this maneuver the vehicle is driven at a constant speed, just below the threshold speed for rollover or loss of control, around the inside lane of an 800-foot radius curve that has two lanes. The driver then drifts to the outside lane, and steers back into the inside lane. For rollover testing the asphalt road surface is dry and for yaw testing the surface is wet. The test can be conducted using a bobtail tractor, a tractor towing an FMVSS No. 121 control trailer, or a tractor towing any other type of trailer in a fully loaded condition. Volvo evaluated the roll stability performance during this maneuver based on whether the trailer outrigger made contact with the ground. Volvo considers this maneuver to be representative of certain highway segments that are encountered, and that the maneuver is severe enough to fully challenge a stability control system.

3. Yaw Control Tests

Bendix developed two yaw stability test maneuvers to evaluate the ability of stability control systems to prevent severe oversteer and understeer conditions. The first test maneuver is a Sinusoidal Steering Maneuver (SSM) to evaluate oversteer prevention.[37] The first step in this test is to identify the steering wheel angle that produces a tractor lateral acceleration of 0.5g at 30 mph on dry pavement with the tractor in the bobtail condition. Bendix recommended that this angle be derived by either a slowly increasing steer test (SIS test described in section IV.D.2 above) or an equation developed by Bendix for estimating the angle based on the tractor's wheelbase:

$$\text{Steering Wheel Angle } (\delta) = (35.5 \times (\text{tractor wheelbase in meters})) + 30.94$$

The Sinusoidal Steering Maneuver test is then conducted with the tractor in the bobtail condition using a low-friction wet Jennite road surface (nominal peak friction coefficient of 0.5). The vehicle is driven at a constant speed of approximately 30 mph and, as a sinusoidal steering input is initiated (continuous left and right steering inputs using the steering wheel angle determined above), the driver increases the throttle position to request 100 percent of engine torque.

The second test maneuver developed by Bendix was the ramp with a dwell maneuver discussed in section IV.D.4 above.[38] The RWD maneuver is intended to evaluate understeer prevention, though oversteer can also occur during the maneuver. The RWD test is conducted with the tractor in the bobtail condition and using a wet Jennite road surface. The first step in this test is to characterize the vehicle's steering by conducting a series of drive-through speed evaluations at a constant speed on a 500-foot radius curve. Once the maximum constant travel speed is determined (typically between 28 and 32 mph, but not to exceed 35 mph), the steering wheel angle is measured for negotiating the curve at that speed. The RWD test maneuver speed is then conducted at the maximum drive-through speed. Bendix suggested that manual steering by a test driver or an automated steering machine could be used. Once the vehicle has been accelerated to the test maneuver speed, the speed is held constant by the driver and he inputs the drive-through steering wheel angle. After the vehicle reaches a constant lateral acceleration condition, the steering wheel angle is increased to 180 degrees in a period of one second. That increased angle is held constant for three seconds, and then the angle is reduced to zero in a period of one second. Subsequent test runs are conducted by increasing the steering wheel angle in increments of 90 degrees up to 540 degrees.

The RWD test performance measures would be based upon test data showing that the vehicle's stability control system successfully identified a vehicle control problem (understeer or oversteer) and intervened by reducing the engine torque output and commanding the application of individual foundation brakes in a manner that is suitable to mitigate the control problem. Bendix did not believe that vehicle yaw or path-following pass/fail criteria would be appropriate for this test maneuver.

Two maneuvers that the industry has developed to evaluate the performance of stability control systems, lane change on a large diameter circle and sinusoidal steering, can be used to demonstrate that a stability control system is capable of preventing a rollover or a yaw instability condition. The RWD maneuver may exceed the capabilities of stability control systems but provides brake application data that can be reviewed to determine if a stability control system provides the correct control responses to address a severe oversteer or understeer condition.

V. Agency Proposal

Based upon the foregoing research, the agency is proposing a new FMVSS to require ESC systems be installed on truck tractors and buses with a GVWR of greater than 11,793 kilograms (26,000 pounds).[39] There are several issues raised by this proposed rule on which the agency seeks public comment, each of which is discussed in detail in the following sections.

A. NHTSA's Statutory Authority

NHTSA is proposing today's NPRM under the National Traffic and Motor Vehicle Safety Act (''Motor Vehicle Safety Act''). Under 49 U.S.C. Chapter 301, Motor Vehicle Safety (49 U.S.C. 30101 et seq.), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms. ''Motor vehicle safety'' is defined in the Motor Vehicle Safety Act as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' ''Motor vehicle safety standard'' means a minimum performance standard for motor vehicles or motor vehicle equipment. When prescribing such standards, the Secretary must consider all relevant, available motor vehicle safety information. The Secretary must also consider whether a proposed standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths. The

[36] See Docket No. NHTSA–2010–0034–0042.

[37] See Docket No. NHTSA–2010–0034–0037.

[38] See Docket No. NHTSA–2010–0034–0038.

[39] To distinguish this new FMVSS from the light vehicle ESC requirement in FMVSS No. 126, we are proposing to revise the title FMVSS No. 126 to reflect that it is applicable only to light vehicles.

responsibility for promulgation of Federal motor vehicle safety standards is delegated to NHTSA. In making the proposals in today's NPRM, the agency carefully considered all the aforementioned statutory requirements.

B. Applicability

1. Vehicle types

Vehicles with a GVWR greater than 10,000 pounds include a large variety of vehicles ranging from medium duty pickup trucks to different types of single unit trucks, buses, trailers and truck tractors. Vehicles with a GVWR of greater than 10,000 pounds are divided into Classes 3 through 8. Class 7 vehicles are those with a GVWR greater than 11,793 kilograms (26,000 pounds) and up to 14,969 kilograms (33,000 pounds), and Class 8 vehicles are those with a GVWR greater than 14,969 kilograms (33,000 pounds).

The vast majority of vehicles with a GVWR of greater than 4,536 kilograms (10,000 pounds) for which stability control systems are currently available are truck tractors. Approximately 150,000 truck tractors with a GVWR of greater than 11,793 kilograms (26,000 pounds) are manufactured each year. In 2009, about 20 percent of Class 7 and 8 truck tractors were equipped with a stability control system.

About 85 percent of truck tractors sold annually in the U.S. are air-braked three-axle (6x4) tractors with a front axle that has a GAWR of 14,600 pounds or less and with two rear drive axles that have a combined GAWR of 45,000 pounds or less, which we will refer to as ''typical 6x4 tractors.'' Two-axle (4x2) tractors and severe service tractors (those with three axles that are not ''typical 6x4 tractors'' or those with four or more axles) represent about 15 percent of the truck-tractor market in the U.S.

The majority of the research on the effectiveness of stability control systems to date has been performed on typical 6x4 tractors. As a result, the agency's research included two typical 6x4 tractors. The agency also included one 4x2 tractor in its testing because two-axle tractors represent the next largest segment of the truck-tractor market. No severe service tractors were tested. EMA performed tests on nine tractors equipped with stability control systems. The tractors included two 4x2 tractors, two typical 6x4 tractors, two severe service 6x4 tractors, two 6x4 tractors with a liftable auxiliary axle in front of the drive axles, and one 8x6 tractor.

This proposal would also require certain buses to be equipped with an ESC system. We intend the applicability of this proposed requirement to be similar to the applicability of the agency's proposal that certain buses be equipped with seat belts.[40] That proposal was applicable to buses with a gross vehicle weight rating (GVWR) of 11,793 kilograms (26,000 pounds) or greater, 16 or more designated seating positions (including the driver), and at least 2 rows of passenger seats that are rearward of the driver's seating position and are forward-facing or can convert to forward-facing without the use of tools.'' That proposal excluded school buses and urban transit buses sold for operation in urban transportation along a fixed route with frequent stops. The agency is proposing a very similar applicability in this NPRM. We have not made this proposal applicable to buses with a GVWR of exactly 11,793 kilograms (26,000 pounds) in order to exclude Class 6 vehicles from this proposal. We believe that this proposal encompasses the category of ''cross-country intercity buses'' represented in the FARS and FMCSA data (identified in section II.A above) that had a higher involvement of crashes that ESC systems are capable of preventing.

The agency tested three buses, all of which had a GVWR over 14,969 kg (33,000 pounds). There are seven manufacturers or distributors of Class 8 buses covered by this proposal for the U.S. market: Prevost, MCI, VanHool, Daimler/Setra, CAIO, BlueBird, and BCI. Three of them (Prevost, MCI, and VanHool), have stated that an ESC system is a standard feature on their buses sold in the U.S. Daimler/Setra indicated that an ESC system will be available as an option on its buses beginning in model year 2011 and that no decision has been made to make it a standard feature. No official information is available from CAIO, Bluebird, and BCI regarding ESC system availability.

There are also at least nine manufacturers of Class 7 buses covered by this proposal for the U.S. market: Champion, ElDorado National, Federal Coach, Glaval, IC Bus, MCI, Rexhall, Stallion, and VanHool. Many Class 7 buses are built on chassis similar to those of single unit trucks for which ESC has not been widely developed, and we are not aware of any Class 7 bus that is equipped or currently available with ESC. Class 7 buses represent less than 20 percent of the market. Although the agency is not aware of any Class 7 bus currently available with ESC, we are aware that stability control systems are available on a limited number of Class 8 single unit trucks, such as ready mix concrete trucks, refuse trucks, and other air-braked trucks, and that the same technology could be developed for use on Class 7 buses, which we believe are also air-braked vehicles.

Although this proposal would not apply to all buses with a GVWR of greater than 11,793 kilograms (26,000 pounds), we seek comment on whether this proposal should be applied to the types of buses that are excluded from the proposed rule such as school buses and transit buses. We also seek comment on the feasibility of including the Class 7 buses described in the prior paragraph that are built on chassis similar to those of single unit trucks within two years. In particular, we believe that ESC systems are readily available for air-braked buses; however, system availability for any hydraulically braked buses that may be covered by this proposed rule may be more limited. If hydraulically braked buses are covered by this proposal, we request comment on manners in which hydraulically braked buses may be differentiated for exclusion or a different phase-in period.

The agency is not proposing to include single unit trucks with a GVWR over 4,536 kg (10,000 pounds) at this time. There are substantial differences in the complexity of the single unit truck population compared to the truck-tractor population. The single unit truck population has wide variations in vehicle weight, wheelbase, number of axles, center of gravity height, and cargo type, among other things that affect the calibration and performance of stability control systems. While some variation exists in the truck tractor market, the degree of complexity and diversity is substantially less.

Further, the single unit truck market is structurally different than the truck tractor market in that the chassis supplier, who is generally responsible for the brake systems and therefore would likely provide stability control systems, is often different than the final body builder. Hence, the chassis supplier may not have knowledge of critical vehicle design parameters that would affect stability control system calibration. In contrast, manufacturers of truck tractors have more complete control of the final, delivered vehicle.

The complexity of the single unit truck population and the limited crash data available present a significant challenge to determining the effectiveness of stability control on these vehicles. We believe that approximately 1 percent of newly manufactured single-unit trucks are equipped with stability control systems, and that few, if any, of those are for

[40] 75 FR 50,958 (Aug. 18, 2010).

vehicles with hydraulic brakes. The development of stability control system for vehicles over 10,000 pounds GVWR has been focused on air-braked vehicles, which include the truck tractors and buses addressed in this proposal. Because we are concerned about the availability of production-ready systems on these vehicles, they are not included in the proposal. However, we seek comment on these observations.

The agency has initiated a safety benefit study to determine the safety need for stability control on single-unit trucks, and has also initiated vehicle research, similar to the research conducted on truck tractors and large buses described in part IV.C above, which is expected to be completed in 2012. However, the agency proposes to require stability control systems on truck tractors without waiting for the study on the effectiveness of stability control systems on single-unit trucks to be completed. Waiting for that study to be completed would unnecessarily delay the benefits of having stability control systems on truck tractors and large buses, for which testing has been completed the benefits of stability control systems identified.

The agency is not proposing to include a requirement for stability control systems on trailers, primarily because trailer-based RSC systems were judged by the agency research to be much less effective than tractor-based RSC or ESC systems in preventing rollover. Trailer-based RSC systems are capable of applying braking only on the trailer's brakes. Tractor-based systems can command more braking authority by using both the tractor and trailer brakes. As a result, trailer-based RSC systems do not appear to provide additional safety benefits when used in combination with tractor-based RSC or ESC systems. The trailer-based RSC systems provide some improvement in roll stability compared to a base trailer without an RSC system, but a vehicle could still be overdriven at a lower speed with trailer-based RSC systems than with a tractor-based system. This means that the maneuver entrance speed beyond which the stability control system is unable to reduce the vehicle speed to prevent a rollover was lower for the trailer-based system than for the tractor-based system. In addition, the typical service life of a trailer is 20 to 25 years compared with about 8 to 10 years for a truck tractor. Because new tractors are added to the U.S. fleet at a faster rate than new trailers, the safety benefits from stability control systems would be achieved at a faster rate by requiring stability control systems to be installed on a tractor.

Therefore, the agency proposes to require stability control systems on truck tractors and buses with a GVWR of greater than 11,793 kilograms (26,000 pounds).

2. Retrofitting In-Service Truck Tractors, Trailers, and Buses

NHTSA has considered proposing to require retrofitting of in-service truck tractors, trailers, and large buses with stability control systems proposed to be required by this NPRM. The Secretary has the statutory authority to promulgate safety standards for ''commercial motor vehicles and equipment subsequent to initial manufacture.'' [41] The Secretary has delegated authority to NHTSA to ''promulgate safety standards for commercial motor vehicles and equipment subsequent to initial manufacture when the standards are based upon and similar to [an FMVSS] promulgated, either simultaneously or previously, under chapter 301 of title 49, U.S.C.'' [42] Additionally, the Federal Motor Carrier Safety Administration (FMCSA) is authorized to promulgate and enforce vehicle safety regulations, including those aimed at maintaining commercial motor vehicles so they continue to comply with the safety standards applicable to commercial motor vehicles at the time they were manufactured. Although this NPRM does not propose requiring truck tractors, trailers, or large buses to be equipped with stability control systems ''subsequent to initial manufacture,'' we are requesting public comment on several issues related to retrofitting in-service truck tractors, trailers, and buses:

- The extent to which a proposal to retrofit in-service vehicles with stability control systems would be complex and costly because of the integration between a stability control system and the vehicle's chassis, engine, and braking systems.
- The changes necessary to an originally manufactured vehicle's systems that interface with a stability control system, such as plumbing for new air brake valves and lines and a new electronic control unit for a revised antilock brake system.
- The additional requirements that would have to be established to ensure that stability control components are at an acceptable level of performance for a compliance test, given the uniqueness of the maintenance condition for vehicles in service, particularly for items such as tires and brake components that are important for ESC performance.
- The original manufacture date of vehicles that should be subject to any retrofitting requirements.
- Whether the performance requirements for retrofitted vehicles should be less stringent or equally stringent as for new vehicles, and, if less stringent, the appropriate level of stringency.
- The cost of retrofitting a stability control system on a vehicle, which we believe would exceed the cost of including stability control on a new vehicle.

In light of these questions, the agency is not proposing that in-service vehicles be required to be retrofitted with stability control systems. Instead, this proposed requirement would be applicable only to newly manufactured vehicles. However, the comments we receive on the issue of retrofitting will help us determine whether we should issue a separate supplemental NPRM to require a retrofit.

3. Exclusions From Stability Control Requirement

Our proposed rule excludes certain types of low-volume, highly specialized vehicle types. In these cases, the vehicle's speed capability does not allow it to operate at speeds where roll or yaw instability is likely to occur.

Specifically, FMVSS No. 121, *Air brake systems,* excludes certain heavy air-braked heavy vehicles from that standard. For truck tractors and buses, these exclusions include:

- Any vehicle equipped with an axle that has a gross axle weight rating of 29,000 pounds or more.
- Any truck or bus that has a speed attainable in two miles of not more than 33 mph.
- Any truck that has a speed attainable in two miles of not more than 45 mph, an unloaded vehicle weight that is not less than 95 percent of its GVWR, and no capacity to carry occupants other than the driver and operating crew.

We believe that the vehicles that are excluded from the requirements of FMVSS No. 121 should also be excluded from the proposed stability control requirements because the speed at which these vehicles operate would make it unlikely that roll or yaw instability would occur. Accordingly, the proposed stability control requirement excludes these vehicles.

C. ESC System Capabilities

1. Choosing ESC vs. RSC

We are proposing to require that truck tractors and large buses be equipped

[41] See Motor Carrier Safety Improvement Act of 1999, sec. 101(f), Pub. L. 106–159 (Dec. 9, 1999).

[42] See 49 CFR 1.50(n).

with ESC systems rather than RSC systems. An ESC system is capable of all of the functions of an RSC system. In addition, an ESC system has the additional ability to detect yaw instability, provide braking at front wheels, and detect the steering wheel angle. These additions, as demonstrated by NHTSA's testing, allow an ESC system to have better rollover prevention performance than an RSC system in addition to the yaw instability prevention component. This is because the steering wheel angle sensor allows the ESC system to anticipate changes in lateral acceleration based upon driver input and to intervene with engine torque reduction or selective braking sooner, rather than waiting for the lateral acceleration sensors to detect potential instability.

As discussed in greater length in Section VI, mandating ESC systems rather than RSC systems will prevent more crashes, injuries, and fatalities. The additional benefits from ESC systems can be attributed to both the ESC's system's ability to intervene sooner and its ability to prevent yaw instability that would lead to loss-of-control crashes.

Mandating ESC systems rather than RSC systems will result in higher costs to manufacturers. Moreover, our benefit and cost estimates lead to the preliminary conclusion that mandating RSC systems would be more cost-effective than mandating ESC systems. However, these extra costs are more than offset by higher net benefits that would accrue by mandating ESC systems rather than RSC systems.

2. Definition of ESC

Definitional requirements in an FMVSS define and describe the type of system that can be used to meet the performance requirements of a particular FMVSS. However, the inclusion of a definitional requirement in an FMVSS may be design restrictive because it would be based on currently available technology. Limiting the equipment that can be used to satisfy an FMVSS may limit future technological advancements and innovation. As stability control technologies are developed even further, a definitional requirement could be a hindrance to safety improvements if it limits the use of a newly developed equipment or technology that is not addressed by the specified definitional requirement. On the other hand, relying solely on performance-based tests without mandating any specific equipment may require a battery of tests to cover the complete operating range of the vehicle. Given the wide array of possible configurations and operating ranges for heavy vehicles, the agency does not believe it is practical to develop performance tests that would address the full range of possibilities and remain cost-effective. Accordingly, the agency is proposing to include a definitional requirement in this proposed rule that includes equipment that would be required as part of a compliant ESC system. We note that, when developing the ESC requirement for light vehicles, the agency chose to include such a requirement in FMVSS No. 126.

SAE International has a Recommended Practice on *Brake Systems Definitions—Truck and Bus,* J2627 (Aug. 2009), which includes a definition of Electronic Stability Control and Roll Stability Control. SAE International's definition of an ESC system requires that a system have an electronic control unit that considers wheel speed, yaw rate, lateral acceleration, and steering angle and that the system must intervene and control engine torque and auxiliary brake systems to correct the vehicle's path.

The UN ECE Regulation 13 definition for the electronic stability control system, promulgated in Annex 21, includes the following functional attributes for directional control: sensing yaw rate, lateral acceleration, wheel speeds, braking input and steering input; and the ability to control engine power output. For vehicles with rollover control, the functions required by the stability control include: sensing lateral acceleration and wheel speeds; and the ability to control engine power output.

In developing a definition for ESC, the agency has reviewed the functional attributes contained in the SAE and the ECE definitions, and has incorporated portions of both of these definitions in this NPRM. We have developed a definition that is similar in wording to the definition from FMVSS No. 126, which specifies certain features that must be present, that ESC be capable of applying all the brakes individually on the vehicle, and that it have a computer using a closed-loop algorithm to limit vehicle oversteer and understeer when appropriate. Unlike the light vehicle standard, which focuses on yaw stability, this NRPM proposes to require a stability control system that also helps to mitigate roll instability conditions. As a result, we have expanded the definition from the one in FMVSS No. 126 to include a requirement that the system be capable of sensing impending rollover and reducing the vehicle's lateral acceleration to prevent rollover.

Furthermore, we believe that the ESC system must be operational during all phases of driving, including acceleration, coasting, deceleration, and braking, except when the vehicle is below a low-speed threshold where loss of control or rollover is unlikely. According to information the agency has obtained from vehicle manufacturers and ESC suppliers, this low speed threshold for a stability control system is 10 km/h (6.2 mph) for yaw stability control and 20 km/h (12.4 mph) for roll stability control. For the purposes of a proposed regulation, we believe that setting a single low speed threshold would be preferable since the yaw and roll stability functions during a test maneuver are closely intertwined, which could make it difficult to differentiate when the roll or yaw function ends. Therefore, we propose a single threshold of 20 km/h (12.4 mph) as the speed below which ESC is not required to be operational.

Therefore, the agency proposes to require the installation of an ESC system on truck tractors and large buses, which has all of the following attributes:

1. Augments vehicle directional stability by applying and adjusting vehicle brake torques individually at each wheel position on at least one front and at least one rear axle of the vehicle to induce correcting yaw moment to limit vehicle oversteer and to limit vehicle understeer;
2. Enhances rollover stability by applying and adjusting the vehicle brake torques individually at each wheel position on at least one front and at least one rear axle of the vehicle to reduce lateral acceleration of a vehicle;
3. Computer-controlled with the computer using a closed-loop algorithm to induce correcting yaw moment and enhance rollover stability;
4. Has a means to determine the vehicle's lateral acceleration;
5. Has a means to determine the vehicle's yaw rate and to estimate its side slip or side slip derivative with respect to time;
6. Has a means to estimate vehicle mass or, if applicable, combination vehicle mass;
7. Has a means to monitor driver steering input;
8. Has a means to modify engine torque, as necessary, to assist the driver in maintaining control of the vehicle; and
9. When installed on a truck tractor, has the means to provide brake pressure to automatically apply and modulate the brake torques of a towed semi-trailer.

The benefit of an ESC system is that it will reduce vehicle rollovers and loss of control under a wide variety of vehicle operational and environmental conditions. However, the performance

tests proposed in this NPRM would only evaluate ESC system performance under very specific environmental conditions. To ensure that a vehicle is equipped with an ESC system that meets the proposed definition, we are proposing that vehicle manufacturers make available to the agency documentation that would enable us to ascertain that the system includes the components and performs the functions of an ESC system.

We are proposing that the vehicle manufacturer provide a system diagram that identifies all ESC system hardware; a written explanation, with logic diagrams included, describing the ESC system's basic operational characteristics; and a discussion of the pertinent inputs to the computer and how its algorithm uses that information to prevent rollover and limit oversteer and understeer. Because the proposed definition for ESC systems on truck tractors includes the capability to provide brake pressure to a towed vehicle, the agency is proposing to require that, as part of the system documentation, the manufacturer include the information that shows how the tractor provides brake pressure to a towed trailer under the appropriate conditions.

It is common practice for the NHTSA's Office of Vehicle Safety Compliance to request relevant technical information from a manufacturer prior to conducting many of its compliance test programs. The agency included such a requirement in the light vehicle ESC standard. Prior to conducting any of the FMVSS No. 126 compliance tests, NHTSA requires manufacturers to provide the documentation required by that standard, including identification of all ESC system hardware and an explanation of the system operational characteristics. We also request additional information about the ESC system including manufacturer make and model, telltale(s), pertinent owner's manual excerpts and suggested malfunction scenarios. All of the requested information allows NHTSA to verify that the ESC system meets the definitional and operational requirements that cannot necessarily be verified during the performance test. Furthermore, this information aids the test engineers with execution and completion of the compliance test.

D. ESC Disablement

The agency has also considered whether to allow a control for the ESC to be disabled by the driver; however, heavy vehicles currently equipped with ESC systems do not include on/off controls for ESC that would allow a driver to deactivate or adjust the ESC system. Given the lack of on/off switches on heavy vehicles equipped with ESC, we do not propose to allow an on/off switch for ESC systems in this NPRM. Nevertheless, we seek comment on the need to allow an on/off switch. Such comments should address why manufacturers might need this flexibility and how manufacturers would implement a switch in light of the ABS requirements for truck tractors and large buses.

E. ESC Malfunction Detection, Telltale, and Activation Indicator

1. ESC Malfunction Detection

This proposed rule would require that vehicles be equipped with an indicator lamp, mounted in front of and in clear view of the driver, which is activated whenever there is a malfunction that affects the generation or transmission of control or response signals in the vehicle's ESC system. Heavy vehicles presently equipped with ESC generally do not have a dedicated ESC malfunction lamp. Instead, they share that function with the mandatory ABS malfunction indicator lamp or the traction control activation lamp. The agency proposes requiring a separate ESC malfunction lamp because it would alert the driver to the malfunction condition of the ESC and would help to ensure that the malfunction is corrected at the earliest opportunity.

We believe that there are safety benefits associated with such a warning. An ESC malfunction indicator warns the driver in the event of an ESC system malfunction so that the system can be repaired. ESC system activations on a heavy vehicle will be infrequent events in panic situations, and drivers should not experience the activation of a stability control system during the normal operation of the vehicle. Because most steering maneuvers performed during the normal operation of a heavy vehicle are not severe enough to activate the ESC system, a vehicle may be operated for long periods without an ESC activation event. Without such a malfunction indicator, a driver might have no way of knowing that an ESC system is malfunctioning until a loss of control or rollover event occurs. For example, the agency received a complaint recently in which a heavy truck had an inoperative ESC system, but the driver was unaware of the malfunction, primarily due to the lack of a malfunction indicator lamp. The agency believes that such a warning is important to ensure that the driver could have the malfunction corrected at the earliest opportunity in order to continue to realize the system's safety benefits.

The ESC malfunction telltale would be required to remain illuminated continuously as long as the malfunction exists whenever the ignition locking system is in the ''On'' (''Run'') position. The ESC malfunction telltale must extinguish after the malfunction has been corrected. These proposed requirements are identical to the requirements established in the light vehicle ESC standard, FMVSS No. 126, and help to ensure that the system provides a warning indication in the event of a malfunction.

Because many malfunctions cannot be detected when the vehicle is stationary, this NPRM includes a test that would allow the engine to be running and the vehicle to be in motion as part of the diagnostic evaluation. We are aware that some malfunctions are not time-based, but instead require comparisons of sensor outputs generated when the vehicle is driven. Hence, some malfunctions would require certain driving motions to make the ESC system's malfunction detection possible. We believe that an ESC malfunction should be detected within a reasonable time of starting to drive. As a result, we propose that the malfunction telltale illuminate within two minutes after attaining a test speed of 48 km/h (30 mph) so that the parts of a system's malfunction detection capability that depend on vehicle motion can operate. This two-minute period is identical to the period included in the test procedure in FMVSS No. 126 for ESC malfunction detection.

We anticipate that FMCSA will issue a companion proposal to NHTSA's proposal to require ESC on truck tractors and large buses, which would require that the ESC system on a commercial vehicle be maintained in a fully operating condition. In addition, we expect that the roadside inspection procedures developed for commercial vehicle ESC systems would be facilitated by the ESC malfunction telltale and the format that is required to indicate whether or not the system is operational.

2. ESC Malfunction Telltale

The ESC malfunction lamp requirement in this NPRM states that each truck tractor and large bus must be equipped with a telltale that provides a warning to the driver when one or more malfunctions that affect the generation of control or response signals in the vehicle's electronic stability control system is detected. Specifically, the ESC malfunction telltale will be required to

be mounted in the driver's compartment in front of and in clear view of the driver and be identified by the symbol shown for ''ESC Malfunction Telltale'' or the specified words or abbreviations listed in Table 1 of FMVSS No. 101, *Controls and displays.* FMVSS No. 101 includes a requirement for the telltale symbol, or abbreviation, and the color required for the indicator lamp to show a malfunction in the ESC system.

The agency believes that the symbol used to identify ESC malfunction should be standardized with the symbol used on light vehicles. The symbol established in FMVSS No. 126 is the International Organization for Standardization (ISO) ESC symbol, designated J.14 in ISO Standard 2575. The symbol shows the rear of a vehicle trailed by a pair of ''S'' shaped skid marks, shown below in Figure 5. The agency found that the ISO J.14 symbol and close variations were the symbols used by the greatest number of vehicle manufacturers that used an ESC symbol before the requirement was established. Furthermore, FMVSS No. 126 allows, as an option, the use of the text ''ESC'' in place of the telltale symbol. This same option is being proposed.

Figure 5: ESC Malfunction Telltale Symbol in FMVSS No. 101

The color of the ESC malfunction telltale specified in Table 1 of FMVSS No. 101 for light vehicles equipped with ESC is yellow, which is the color used to communicate to the driver the condition of a malfunctioning vehicle system that does not require immediate correction. The agency chose to associate indication of an ESC system malfunction with a yellow telltale color as a warning to the driver because we believe that it communicates the level of urgency with which the driver must seek to remedy the malfunction of the ESC system.

For this proposed rule, we believe that the ESC malfunction telltale and color designation developed for light vehicles would be appropriate for use on heavy vehicles. Accordingly, the agency proposes that the ESC malfunction telltale symbol and color requirements of FMVSS No. 101 be proposed for use on truck tractors and buses, and that the abbreviation ''ESC'' should be allowed as an option instead of the symbol.

In addition to the ESC malfunction telltale being used to warn the driver of a malfunction in the ESC, the telltale is also used as a check of lamp function during vehicle start-up. We believe that the ESC malfunction telltale should be activated as a check of lamp function either when the ignition locking system is turned to the ''On'' (''Run'') position whether or not the engine is running. This function provides drivers with the information needed to ensure that the ESC system is operational before the vehicle is driven. It also provides Federal and State inspectors with the means to determine the operational status of the ESC system during a roadside safety inspection.

Accordingly, this NPRM proposes that the ESC malfunction telltale must be activated as a check of lamp function either when the ignition locking system is turned to the ''On'' (''Run'') position when the engine is not running or when the ignition locking system is in a position between the ''On'' (''Run'') and ''Start,'' which is designated by the manufacturer as a check position.

3. ESC Activation Indicator

The agency is requesting comment on whether there is a safety need for an ESC activation indicator. In the light vehicle ESC rulemaking, the agency considered the safety need for an ESC activation indicator to alert the driver during an emergency situation that the ESC is activating. NHTSA conducted a study using the National Advanced Driving Simulator (NADS), which included experiments to gain insight into the various possibilities regarding ESC activation indicators. The study compared the performance of 200 participants in driving maneuvers on a wet pavement, and used road departures and eye glances to the instrument panel as measures of driver performance. The significant finding was that the drivers who received various ESC activation indicators did not perform better than drivers who were given no indicator. That finding formed the basis for the agency's decision not to require an ESC activation indicator for light vehicles.

F. Performance Requirements and Compliance Testing

The agency's research initially focused on a variety of maneuvers which we could use to evaluate the roll stability performance and the yaw stability performance of truck tractors and large buses. Several of these maneuvers were also tested by industry and some of them are allowed for use in testing for compliance to the UN ECE stability control regulation. The agency's goal was to develop one or more maneuvers that showed the most promise as repeatable and reproducible roll and yaw performance tests for which objective pass/fail criteria could be developed.

As the research program progressed, the data indicated that the ramp steer maneuver to evaluate roll stability performance and the sine with dwell maneuver to evaluate yaw stability performance were the most promising. The slowly increasing steer maneuver was developed to normalize testing conditions for each vehicle so that the level of stringency for each test vehicle would be similar. The agency also found that the SIS maneuver could also be used to evaluate the engine torque reduction capability of a vehicle's ESC system, which is important because engine torque reduction may bring a vehicle under control before brakes are applied. After further testing, the agency was able to develop test parameters for the SWD maneuver so that both roll stability and the yaw stability could be evaluated using a single maneuver and loading condition. This development eliminated the need for the ramp steer maneuver to evaluate roll stability performance.

Therefore, based on testing at VRTC and the results from industry-provided test data, two stability proposed performance tests have been chosen to

evaluate ESC systems on truck tractors and large buses—the SIS test and the SWD test.

The agency also considered the ECE performance tests for heavy vehicle stability control systems, which are included in the brake systems regulation, ECE Regulation 13. The performance test for a heavy vehicle with a directional control function includes meeting the requirements in one of eight tests allowed for compliance. The eight tests are as follows: Reducing radius test (which is identical to the decreasing radius test discussed above), step steer input test, sine with dwell, J-turn, mu-split lane change, double lane change, reversed steering test or ''fish hook'' test, and asymmetrical one period sine steer or pulse steer input test. No test procedure or pass/fail criteria are included in ECE Regulation 13, but it is left to the discretion of the Type Approval testing authority in agreement with the vehicle manufacturer to show that the system is functional.

The issue of whether the U.S. should adopt the stability control requirements similar to those in ECE Regulation 13 is addressed in the context of whether a definitional requirement specifying required equipment along with a performance test that does not include a test procedure or pass/fail criteria would be considered sufficiently objective for a safety standard. The agency considered several of the eight ECE tests that we believed showed the most promise for repeatability and reproducibility, and decided to focus on the SWD test, which is one of the eight tests allowed for compliance testing to ECE Regulation 13. However, in light of the requirement in the Motor Vehicle Safety Act that FMVSSs be stated in objective terms, NHTSA is required to develop objective performance criteria for the SWD test to be set forth in the regulatory text.

1. Characterization Test—SIS

The agency is proposing to conduct compliance testing characterization using a slowly increasing steer to determine the steering wheel angle needed to achieve 0.5g of lateral acceleration at 30 mph and also to evaluate the capability of the ESC system to reduce engine torque. The SIS maneuver has been used for many years by the agency and the industry to determine the unique dynamic characteristics of a vehicle. This maneuver allows the agency to determine the relationship between the steering wheel angle and lateral acceleration for a vehicle, which varies due to different steering gear ratios, different suspension systems, and wheelbase and other dimensions, among other things. To normalize the severity of the SWD maneuver that follows, each vehicle is tested based on its steering wheel angle determined in the SIS maneuver. The agency is proposing a 0.5g lateral acceleration target because our test results indicated that a truck tractor or large bus is highly likely to experience instability at that level of lateral acceleration. Even though the vast majority of truck tractors are typical 6x4 tractors, there are other configurations, such as those with 2-axle or 4-axle configurations and buses, which would require a different steering wheel angle to normalize the test conditions for each different vehicle.

To perform the SIS maneuver, the tractor or bus is driven at a constant speed of 30 mph, and then the steering controller increases the steering wheel angle at a slow, continuous rate of 13.5 degrees per second. The steering wheel angle is increased linearly from zero to 270 degrees and then held constant for one second, after which the maneuver concludes. The vehicle is subjected to two series of runs, one using clockwise steering and the other using counterclockwise steering, with three tests performed for each test series. During each test run, ESC system activation must be confirmed. If ESC system activation does not occur during the maneuver, then the commanded steering wheel angle is increased by 270-degree increments up to the vehicle's maximum allowable steering angle until ESC activation is confirmed.

From the SIS tests, the value ''A'' is determined. ''A'' is the steering wheel angle, in degrees, that is estimated to produce a lateral acceleration of 0.5g for that vehicle. Using linear regression on the lateral acceleration data recorded between 0.05g and 0.3g for each of the six valid SIS tests, a linear extrapolation is used to calculate a steering wheel angle where the lateral acceleration would be 0.5g. If ESC system activation occurs prior to the vehicle experiencing lateral acceleration of 0.3g, then the data used during the linear regression will be that data recorded between 0.05g and the lateral acceleration measured at the time of ESC system activation. The six values derived from the linear regression are then averaged and rounded to the nearest 0.1 degree to produce the final quantity, ''A,'' used during the SWD maneuver.

As part of the SIS characterization test, the engine torque reduction test is also conducted. As mentioned above, during each of the six completed SIS maneuvers, ESC activation is confirmed by verifying that the system automatically attempts to reduce engine torque. To confirm ESC activation, engine torque output and driver requested torque data are collected from the vehicle's J1939 communication data link and compared. During the initial stages of each maneuver, the rate of change over time of engine torque output and driver requested torque will be consistent. Upon ESC activation, the ESC system activation causes a commanded engine torque reduction, even though the driver requests increased torque by attempting to accelerate the vehicle to maintain the required constant speed. Therefore, the rate of change over time of engine torque output and driver requested torque will diverge.

For each of the six SIS test runs, the commanded engine torque and the driver requested torque signals must diverge at least 10 percent 1.5 seconds after the beginning of ESC system activation. This test demonstrates that the ESC system has the capability to reduce engine torque, as required in the functional definition.

The metric used to measure the engine torque reduction performance is stated in terms of the difference in percent between the actual engine torque output and driver requested torque input just after ESC activation. The pass-fail criterion that the agency proposes for this test is that the stability control system must be able to reduce engine torque output by a minimum of 10 percent from the torque output requested by the driver, which will be measured 1.5 seconds after the time when the ESC activated. The vehicles that the agency tested were all able to meet this proposed performance level.

2. Roll and Yaw Stability Test—SWD

The objective of the sine with dwell test is to subject a vehicle to a maneuver that will cause both roll and yaw instabilities and to verify that the ESC system activates to mitigate those instabilities. The SWD test is based on a single cycle of a sinusoidal steering input. For testing, we are proposing to use a frequency of 0.5 Hz (½ cycle per second or 1 cycle in 2 seconds) was used with a pause or dwell of 1.0 second after completion of the third quarter-cycle of the sinusoid. We chose a 0.5 Hz frequency because it produces the most consistently high severity on the majority of the vehicles tested by the agency. Hence, the total time for the steering maneuver is three seconds.

Conceptually, the steering profile of this maneuver is similar to that expected to be used by real drivers during some crash avoidance maneuvers. As the agency found in the

light vehicle ESC research program, the severity of the SWD maneuver makes it a rigorous test while maintaining steering rates within the capabilities of human drivers. We believe that the maneuver is severe enough to produce rollover or vehicle loss-of-control without a functioning ESC system on the vehicle.

For a truck tractor, the SWD test would be conducted with the truck tractor coupled to an unbraked control trailer and loaded with ballast directly over the kingpin. The combination vehicle would be loaded to 80 percent of the tractor's GVWR. Testing indicates that this is sufficient load on the tractor to enable the tractor's stability control mass estimation program to provide full tractor braking intervention during the SWD maneuver. The ballast is placed low on the trailer to minimize the likelihood of actual trailer rollover, and the trailer is equipped with outriggers in case the ESC system does not function properly to prevent the trailer from rolling over.

For a bus, the vehicle is loaded with a 68-kilogram (150-pound) water dummy in each of the vehicle's designated seating positions, which would bring the vehicle's weight to less than its GVWR. No ballast is placed in the cargo hold beneath the passenger compartment so that the desired CG height of the test load can be attained.

The SWD test would be conducted at a speed of 72 km/h (45 mph). An automated steering machine would be used to initiate the steering maneuver. Each vehicle is subjected to two series of test runs. One series uses counterclockwise steering for the first half-cycle, and the other series uses clockwise steering for the first half-cycle. The steering amplitude for the initial run of each series is 0.3A, where A is the steering wheel angle determined from the SIS maneuvers discussed in section V.F.1 above. In each of the successive test runs, the steering amplitude would be increased by increments of 0.1A until a steering amplitude of 1.3A or 400 degrees, whichever is less, is achieved. Upon completion of the two series of test runs, post-processing of the yaw rate and lateral acceleration data to determine the lateral acceleration ratio, yaw rate ratio, and lateral displacement, as discussed below.

(a) Roll Stability Performance

The LAR is a performance metric developed to evaluate the ability of a vehicle's ESC system to prevent rollovers. Lateral acceleration is measured on a bus or a tractor and corrected for the vehicle's roll angle. As a performance metric, the corrected lateral acceleration value is normalized by dividing it by the maximum lateral acceleration that was determined at any time between 1.0 seconds after the beginning of steering and the completion of steering.

Conceptually, stability control system intervention will reduce lateral acceleration of the vehicle during a crash avoidance steering maneuver. This intervention increases the roll stability of the vehicle by reducing the vehicle speed, which results in a reduction in the lateral acceleration, A_y, because $A_y = V^2/R$, where V is the vehicle speed, and R is the radius of curvature of vehicle path. However, lateral acceleration was found to be less favorable than a ''normalized'' calculation, lateral acceleration ratio, developed from the vehicle's lateral acceleration measured during the maneuver because the lateral acceleration alone does not account for different stability thresholds among different vehicles. The agency believes that LAR has the most potential for an accurate measure of an ESC system to prevent rollovers. From the agency's testing, we have noted that LAR differentiates vehicles equipped with stability control systems as well as the potential determine and quantify roll instability. Lateral acceleration ratio is calculated by dividing the vehicle's lateral acceleration, corrected for roll angle, at a specified time after the completion of steer (COS) by the peak corrected lateral acceleration experienced during the second half of the sine maneuver (including the dwell period). The LAR at two time intervals after completion of steer is calculated to determine the change in lateral acceleration from the peak lateral acceleration. A reduction or decay in the lateral acceleration ratio at specified intervals after completion of steer is an indication that the stability control system has intervened to reduce the likelihood of vehicle rollover. The lateral acceleration ratio, LAR, is determined as follows:

$$LAR = \frac{\underline{A_{y\_Veh}}\,(COS + 0.75\ sec, + 1.5\ sec)}{MAX\ (\underline{A_{y\_Veh}})}$$

Where $A\_{y\ Veh}$ (COS + 0.75 sec, + 1.5 sec,) is the corrected for roll lateral acceleration value at the specified time after the completion of steer, and Max A_y is the peak corrected lateral acceleration measured during the second half of the sine maneuver (including the dwell period), *i.e.,* from time 1.0 second after the beginning of steer to the completion of steer.

In developing the performance requirements for light vehicle ESC systems, several commenters requested that the agency include a definition for the term ''lateral acceleration'' and define a method for determining the lateral acceleration at the vehicle's center of gravity. In FMVSS No. 126, the agency uses the definition from SAE J670e, Vehicle Dynamics Terminology, which states, ''Lateral Acceleration means the component of the vector acceleration of a point in the vehicle perpendicular to the vehicle x axis (longitudinal) and parallel to the road plane.'' This definition was carried over, effectively unchanged, to the more recent revision of SAE's Vehicle Dynamics Terminology, SAE J670_200801. The agency is proposing to use the same definition of lateral acceleration for this standard as was used in FMVSS No. 126.

The agency's research also looked at wheel lift measurement as a possible performance measure. Wheel lift is the most intuitive performance measure we considered because wheel lift precedes all rollovers. Wheel lift is considered to be lift that is two inches or greater, which occurs for any wheel of the vehicle, including the control trailer for the tractor during a test. One challenge with using wheel lift is that it does not necessarily indicate that rollover is imminent. For example, certain vehicle suspension designs are likely to cause wheel lift during severe cornering maneuvers, and also non-uniform test surfaces can cause brief instances of wheel lift.

Therefore, the agency proposes evaluating vehicle roll stability performance by calculating the LAR at 0.75 seconds and at 1.5 seconds after the completion of steer. The two performance criteria are described below:

- From data collected from each SWD maneuver executed, a vehicle equipped with a stability control system must have a LAR of 30 percent or less 0.75 seconds after completion of steer. This

LAR will be calculated from the vehicle's lateral acceleration, corrected for roll angle, at its center of gravity position.

• From data collected from each SWD maneuver executed, a vehicle equipped with stability control must have a LAR of 10 percent or less at 1.5 seconds after completion of steer. This LAR will be calculated from the vehicle's lateral acceleration, corrected for roll angle, at its center of gravity position.

The performance criteria mean that 0.75 seconds after the completion of the steering input, the corrected lateral acceleration must not exceed 30 percent of the maximum lateral acceleration recorded during the steering maneuver, and at 1.5 seconds after the completion of the steering input, the lateral acceleration must not exceed 10 percent of the maximum lateral acceleration recorded during the steering maneuver. The agency believes that these criteria represent an appropriate stability threshold. NHTSA's research indicates that an ESC system's ability to maintain an LAR above these criteria would provide an acceptable probability that the vehicle would remain stable and that a level of LAR above these criteria would result in a high probability of the vehicle becoming unstable.

(b) Yaw Stability Performance

The yaw rate ratio is a performance metric used to evaluate the ability of a vehicle's ESC system to prevent yaw instability. The YRR expresses the lateral stability criteria for the sine with dwell test to measure how quickly the vehicle stops turning, or rotating about its vertical axis, after the steering wheel is returned to the straight-ahead position. A vehicle that continues to turn or rotate about its vertical axis for an extended period after the steering wheel has been returned to a straight-ahead position is most likely experiencing oversteer, which is what ESC is designed to prevent. The lateral stability criterion, expressed in terms of YRR, is the percent of peak yaw rate that is present at designated times after completion of steer.

The yaw rate ratio, YRR, is determined as follows:

$$YRR = \frac{\Psi_{Vehicle}\ (COS + 0.75\ sec, +1.5\ sec)}{MAX\ \Psi_{Vehicle}}$$

Where $\Psi_{Vehicle}$ (COS + 0.75 sec, + 1.5 sec) is yaw rate value at a specified time after the completion of steer, and Max $\Psi_{Vehicle}$ is the maximum yaw rate measured during the second half of the sine maneuver including the dwell period from time 1.0 second after the beginning of steer until the completion of steer during each maneuver.

This performance metric is identical to the metric used in the light vehicle ESC system performance requirement in FMVSS No. 126. We believe that this metric is equally applicable to truck tractors and large buses, though it is calculated at different time intervals after the completion of steer.

Therefore, the agency proposes to evaluate yaw stability performance by calculating the YRR at 0.75 seconds and at 1.5 seconds after the completion of steer. The two performance criteria are described below:

• From data collected from each 45-mph SWD maneuver executed, a vehicle equipped with a stability control system must have a YRR of 40 percent or less 0.75 seconds after completion of steer.

• From data collected from each 45-mph SWD maneuver executed, a vehicle equipped with stability control must have a YRR of 15 percent or less at 1.5 seconds after completion of steer.

The performance criteria mean that 0.75 seconds after the completion of the steering, the yaw rate must not exceed 40 percent of the peak yaw rate recorded during the second half of the sine maneuver including the dwell period, and at 1.5 seconds after the completion of the steering input, the yaw rate must not exceed 15 percent of the peak yaw rate recorded. The agency believes that these criteria represent an appropriate stability threshold. NHTSA's research indicates that an ESC system's ability to maintain an YRR above these criteria would provide an acceptable probability that the vehicle would remain stable and that a level of YRR above these criteria would result in a high probability of the vehicle becoming unstable.

(c) Lateral Displacement

Lateral displacement is a performance metric used to evaluate the responsiveness of a vehicle, which relates to its ability to steer around objects. Stability control intervention has the potential to significantly increase the stability of the vehicle in which it is installed. However, we believe that these improvements in vehicle stability should not come at the expense of poor lateral displacement in response to the driver's steering input.

A hypothetical way to pass a stability control performance test would be to make either the vehicle or its stability control system intervene simply by making the vehicle poorly responsive to the speed and steering inputs required by the test. An extreme example of this potential lack of responsiveness would occur if an ESC system locked both front wheels as the driver begins a severe avoidance maneuver that might lead to vehicle rollover. Front wheel lockup would create an understeer condition in the vehicle, which would result in the vehicle plowing straight ahead and colliding with an object the driver was trying to avoid. It is very likely that front wheel lockup would reduce the roll instability of the vehicle since the lateral acceleration would be reduced. This is clearly, however, not a desirable compromise.

Because a vehicle that simply responds poorly to steering commands may be able to meet the proposed stability criteria, a minimum responsiveness criterion is also proposed for the SWD test. Using a lateral displacement metric to measure responsiveness ensures that the vehicle responds to an initial steering input to avoid an obstacle. This metric was chosen because it is objective, easy to measure, has good discriminatory capability, and has a direct relation to obstacle avoidance.

The proposed lateral displacement criterion is that a truck tractor equipped with stability control must have a lateral displacement of 7 feet or more at 1.5 seconds from the beginning of steer, measured during the sine with dwell maneuver. For a bus, the proposed performance criterion is a lateral displacement of 5 feet or more at 1.5 seconds after the beginning of steer. The lateral displacement criteria is less for a bus because a large bus has a longer wheelbase than a truck tractor and higher steering ratio, which makes it less responsive than a truck tractor. The value will be calculated from the double integral with respect to time of the measurement of the corrected for roll lateral acceleration at the vehicle center of gravity, as expressed by the formula:

$$\text{Lateral Displacement} = \iint Ay_{CG}\ dt$$

Where: Ay_{CG} is the corrected for roll lateral acceleration at the center of gravity height of the vehicle

This is the same performance metric used in FMVSS No. 126. Furthermore, the vehicle would be required pass this requirement during the every execution the SWD maneuver where the steering wheel angle is 0.7A or greater.

3. Alternative Test Maneuvers Considered

We have considered other test maneuvers besides the sine with dwell test. The SWD maneuver was tentatively selected over the other maneuvers discussed above and below because our research demonstrates that it has the most optimal set of characteristics, including the severity of the test, repeatability and reproducibility of results, and the ability to address rollover, lateral stability, and responsiveness.

The agency's research initially focused on developing the ramp steer maneuver to evaluate the roll stability performance and the sine with dwell maneuver to evaluate the yaw stability performance. However, after additional testing, we were able to develop test parameters for the sine with dwell maneuver so that both roll stability and yaw stability could be evaluated using a single loading condition and test maneuver. The sine with dwell maneuver has typically been used to evaluate only the yaw instability of a vehicle. The agency has previously used a lightly loaded vehicle weight condition for such evaluations where the lightly loaded condition and the resulting lower CG height were much more likely to cause vehicle directional loss-of-control as opposed to rollover. In the light vehicle ESC standard, the sine with dwell maneuver is used to evaluate only yaw instability, not roll instability, with the vehicle loaded to LLVW only but not to GVWR. Given the different dynamics of heavy vehicles when compared to light vehicles, NHTSA evaluated several loading conditions and found that a loading condition which equals 80 percent of the tractor's GVWR enables us to evaluate roll instability as well as yaw instability.

The number of tests that would be needed to cover all likely vehicle operational conditions for varying vehicle designs is potentially large, and many tests (particularly those using low friction surfaces) may not be sufficiently repeatable for an objective performance requirement. Our testing indicates that the SWD maneuver is sufficiently severe to ensure that nearly all vehicles without ESC would not be able to comply with the proposed performance requirements. For example, the vehicles we tested without ESC either had wheel lift or spun out during the SWD maneuver. Hence, a vehicle that avoids loss of control according to our objective lateral acceleration and yaw rate decay definitions demonstrates that it has an ESC system typical of today's technology and would have safety benefits.

In addition to our test results, the agency thoroughly evaluated the test vehicles and test data submitted by EMA and others to the agency. EMA provided information on one tractor that appeared to satisfy the agency's proposed SWD performance criteria without a stability control system. After careful review of this data, we do not believe this fact means the test has no value.[43] It is possible that there are currently truck tractors or large buses sold today that are exceptionally yaw stable, even in a severe maneuver such as a double lane change, which the SWD maneuver is designed to simulate. When evaluating light vehicles, the agency noted that there was a very small number of vehicles that were stable enough without a stability control system to pass our performance criteria without an ESC system. Therefore, the existence of vehicles that could pass the proposed SWD test without a stability control system simply indicates that it would take many tests to cover all potential instability scenarios across varying vehicle designs in order to design a perfect test regime, as discussed earlier. Such a complex test regime would require excessive costs to manufacturers to ensure compliance and excessive costs to the agency to determine and enforce compliance.

We recognize that manufacturers may wish to base their certification of compliance with this proposed standard on their vehicles' performance in NHTSA's proposed test maneuvers. If manufacturers intend to conduct the maneuvers proposed by the agency, they may need to make additional investments in their facilities or have their certification testing performed at a contractor's facility. However, we believe some manufacturers may have already made these investments, and others would make similar investments as they develop and validate ESC systems for their vehicles. This is based on our understanding of the maneuvers used by the heavy-vehicle industry for ESC system development and validation, some of which include variations of the agency's proposed maneuver.

We also recognize that, over time, manufacturers will be able to develop other methods for certifying compliance with the proposed standard. For example, manufacturers can develop computer models or simulations to demonstrate ESC system performance. However, we recognize that these alternative methods may not be suitable for atypical vehicles that are custom-built for customers. We seek comment on the issues surrounding manufacturers' certification of compliance including the assumptions made regarding manufacturers' current and future test facilities, the methods used by manufacturers to validate ESC system performance, the ability of manufacturers to use other methods (such as computer modeling, simulation, or alternative test maneuvers) to certify compliance, the cost of certification, and the issues surrounding certification of atypical truck tractors.

Below, we discuss the alternative test maneuvers that were considered and what we considered to be acceptable performance criteria for each test. We also discuss why we are choosing the SWD maneuver for compliance testing in lieu of each of these maneuvers. We invite comment on each of these test maneuvers, including whether they should be used instead of, or along with, the proposed compliance test maneuvers.

(a) Characterization Maneuver

While NHTSA has conducted extensive testing using the SIS maneuver, we believe that alternative methods may be used to determine the steering wheel angle needed to achieve 0.5g of lateral acceleration at 30 mph. For example, a test based on the SAE J266 circle test may yield a similar steering wheel angle without requiring the track space necessary to conduct the SIS maneuver. The steering wheel angle that produces 0.5g of lateral acceleration at 30 mph may be above the ESC system's activation threshold for some vehicles, making it impractical to conduct a direct measurement of the steering wheel angle. The agency seeks comment on the feasibility of an alternative characterization test based upon the SAE J266 circle test.

(b) Roll Stability Test Maneuvers

To evaluate roll instability, we have considered two alternative roll stability test maneuvers—the J-turn and the ramp steer maneuver. The two tests are similar in that both maneuvers require the tested vehicle to be driven at a

[43] As discussed earlier, EMA's testing of Vehicle J used a control trailer with a wider track width and a lower deck and used ballast that resulted in a lower vehicle center of gravity than used by NHTSA's researchers. Each of these differences caused EMA's combination vehicle to be more stable than NHTSA's during testing.

constant speed and then the vehicle is turned in one direction for a certain period of time. The test speed and the severity of the turn are designed to cause a test vehicle to approach or exceed its roll stability threshold such that, without a stability control system, the vehicle would exhibit signs of roll instability. Both tests would be performed with the tractor loaded to its GVWR. Furthermore, we would not expect a vehicle that could pass one test to fail the other.

The most notable difference between the J-turn and the RSM maneuvers is that the J-turn is a path-following maneuver. That is, it is performed on a fixed path curve. In contrast, the RSM maneuver is a non-path-following maneuver that is performed with a fixed steering wheel input. For example, during the agency's and EMA's testing, the J-turn maneuver was performed on a 150-foot radius curve. In contrast, the RSM is performed based on a steering wheel angle derived from the SIS test. We would expect that, with the RSM, the radius of the curve would be close to the fixed radius used in the J-turn maneuver. However, in the RSM, the driver would not have to make adjustments and corrections to steering to maintain the fixed path.

When comparing the J-turn to the RSM, the agency considers the RSM to be a preferable test maneuver because the RSM maneuver can be performed with an automated steering wheel controller. Because the J-turn is a path-following maneuver, a test driver must constantly make adjustments to the steering input for the vehicle to remain in the lane throughout the test maneuver. Moreover, driver variability could be introduced from test to test based upon minor variations in the timing of the initial steering input and the position of the test vehicle in the lane.

In addition, the RSM appears to be more consistent because it involves a fixed steering wheel angle rather than a fixed path. There is negligible variability based on the timing of the initial steering input because the test is designed to begin at the initiation of steering input, rather than the vehicle's position on a track. Moreover, an automated steering wheel controller can more precisely maintain the required steering wheel input than a driver can. Therefore, we tentatively conclude that the RSM is more consistent and more repeatable than the J-turn, which is critical for agency compliance testing purposes.

Notwithstanding the above observations, we recognize that many manufacturers perform NHTSA's compliance tests in order to certify that their vehicles comply with NHTSA's safety standards. We also recognize that, over time, manufacturers are likely to use other methods such as simulation, modeling, etc., to determine compliance with Federal Motor Vehicle Safety Standards. In this regard, we observe that, because the J-turn and the ramp steer maneuvers are so similar, manufacturers may be able to determine compliance with a stability control standard by using the J-turn maneuver even if the agency ultimately decides to use the RSM for compliance testing. Thus, if a manufacturer sought to certify compliance based upon performance testing, a manufacturer would not necessarily need to perform compliance testing with an automated steering controller.

In considering the RSM test conditions, the agency looked to its test data and the data submitted by EMA. Data analysis indicated that the RSM test performed from at an initial speed of 30 mph is sufficient to demonstrate effective stability control performance for truck tractors. At GVWR, the tested buses were observed to have different speed thresholds at which wheel lift occurred and stability control initially activated. Without stability control, buses were observed to produce wheel lift between 35 and 39 mph in the RSM, compared to tractors, which ranged from 28 to 30 mph. Large bus stability control systems initially activated at speeds greater than 30 mph in the RSM, which was higher than the 26 mph observed with tractors. In light of these differences, an initial speed of 36 mph was selected for buses to ensure an appropriate level of test severity and that stability control would intervene.

Another issue in conducting the RSM is whether to use fixed rate steering or to steer at a rate such that the full steering input is reached in a fixed time. Using fixed rate steering, the steering wheel is turned a 175 degrees per second until the desired steering wheel angle is reached. If a vehicle with a lower steering wheel angle input, such as a short wheelbase 4x2 tractor, is tested using this steering method, the desired steering wheel angle would be reached relatively quickly after the initial steering input. In contrast, for a longer wheelbase truck or a large bus, the desired steering wheel angle would be reached relatively slowly after the initial steering input. This results in a more severe test for vehicles with a lower steering wheel angle because the predicted lateral acceleration of 0.5g would be reached more quickly than for vehicles with a higher steering wheel angle. In an extreme case with an exceptionally large steering wheel angle, such as a bus with a long wheelbase the system may activate before the full steering wheel is input.

Using a fixed-time steering input, we would program the steering wheel controller to reach the desired steering wheel angle in exactly 1.5 seconds using a constant steering rate, which was derived from the manually steered 150-foot J-turn maneuver. Using this steering method would prevent the RSM results from varying with steering wheel angle input. We are requesting comment as to whether fixed-rate steering or fixed-time steering is a preferable manner for conducting the RSM.

The RSM would use a similar, but not identical lateral acceleration ratio performance metric to evaluate roll stability. As with the SWD maneuver, the LAR used in the RSM would indicate that the stability control system is applying selective braking to lower lateral acceleration experienced during the steering maneuver. In the SWD maneuver, the LAR is the ratio of the lateral acceleration at a fixed point in time to the peak lateral acceleration during the period from one second after the beginning of steer to the completion of steer. In contrast, the LAR metric we would use for the RSM would be the ratio of the lateral acceleration at a fixed point in time to the lateral acceleration at the end of ramp input, which is the moment at which the steering wheel angle reaches the target steering wheel angle for the test. Also, in contrast to the SWD maneuver, the LAR measurements for the RSM would be taken at a time when the steering wheel is still turned. This means that, although the SWD maneuver is a more dynamic steering maneuver, the LAR criteria for the RSM would be greater than the LAR criteria for the SWD maneuver.

The performance criteria for the RSM would depend on whether fixed-rate steering or fixed-time steering input is used. For truck tractors and large buses using fixed-time steering input, we would expect that the LAR would be less than 1.05 two seconds after the end of ramp input and less than 0.8 three seconds after the end of ramp input. For truck tractors tested using fixed-rate steering inputs, we would expect that the LAR would be less than 1.1 two seconds after the end of ramp input (the point in time at which the target steering wheel angle is reached) and less than 0.9 three seconds after the end of ramp input. For buses using fixed-rate steering, we would expect that the LAR would be less than 1.0 two seconds after the end of ramp input and less than 0.7 three seconds after the end of ramp input. The performance criteria for large

buses would be lower because, as we stated above, when using fixed-rate steering input, the longer wheelbases of buses cause the maneuver to be less dynamic.

In a March 2012 submission, which was revised with additional details in April 2012, EMA suggested that NHTSA use different test speeds and performance criteria for the J-turn maneuver.[44] EMA suggested that a test speed that is 30 percent greater than the minimum speed at which the ESC system intervenes with engine, engine brake, or service brake control. Instead of measuring LAR, EMA suggested that, during three out of four runs, the vehicle would be required to decelerate at a minimum deceleration rate. NHTSA has conducted testing on variations of this EMA maneuver, and we plan to conduct further testing. We request comments on EMA's suggested test procedure and performance criteria for the J-turn maneuver.

Based on our testing to date, the agency tentatively concludes that the RSM is a preferable test to the J-run to demonstrate a stability control system's ability to prevent roll instability. However, as discussed in greater detail below, in order to reduce the number of compliance tests that the agency and those manufacturers who choose to demonstrate compliance by conducting the agency's performance tests must perform, the agency proposes using on test maneuver, the SWD, to demonstrate both roll and yaw stability performance. Although we are proposing to use the SWD maneuver for evaluating roll stability, we request comment on issues related to the RSM and J-turn tests, including test conditions, steering input method, and performance criteria.

(c) Yaw Stability Test Maneuvers

After evaluating several maneuvers on different surfaces, the agency was unable to develop any alterative performance-based dynamic yaw test maneuvers that were repeatable enough for compliance testing purposes. Bendix described two maneuvers intended to evaluate the yaw stability of tractors.[45] However, neither of these test maneuvers was developed to a level that would make them suitable for the agency to consider using as yaw performance tests.

In July 2009, EMA provided research information on several yaw stability test maneuvers.[46] One of these maneuvers was the SWD on dry pavement that is similar to what is proposed in this notice. The second maneuver was an SWD maneuver conducted on wet Jennite. The third maneuver was a ramp with dwell maneuver on wet Jennite.[47] EMA did not provide any test data on the last two maneuvers. Thus, we considered them to be concepts rather than fully developed maneuvers that we could consider using for yaw stability testing.

We received no other alternative yaw performance tests from industry until EMA's submission of Vehicle J data in late 2010.[48] EMA suggested using a wet Jennite drive through test maneuver demonstrated yaw performance in a curve on a low friction surface. The maneuver is based upon a maneuver the agency currently conducts on heavy vehicles to verify stability and control of antilock braking systems while braking in a curve. As part of the test, a vehicle is driven into a 500-foot radius curve with a low-friction wet Jennite surface at increasing speeds to determine the maximum drive-through speed at which the driver can keep the vehicle within a 12-foot lane. As with the J-turn, we are concerned about the repeatability of this test maneuver because of variability in the wet Jennite test surface and the driver's difficulty in maintaining a constant speed and steering input in the curve.

In a March 2012 submission, which was revised with additional details in April 2012, EMA provided information about another yaw stability test along with additional information on the J-turn maneuver.[49] This maneuver would simulate a single lane change on a wet roadway surface. It would be conducted within a 4 meter (12 foot) wide path. The roadway condition would be a wet, low friction surface such as wet Jennite with a peak coefficient of friction of 0.5. The other test conditions (*i.e.,* road conditions, burnish procedure, liftable axle position, and initial brake temperatures) would be similar to those proposed in this NPRM. In this maneuver, the truck would enter the path at progressively higher speeds to establish the minimum speed at which the ESC system intervenes and applies the tractor's brakes. The maneuver would then be repeated four times at that speed with the vehicle remaining within the lane at all times during the maneuver. EMA suggests, as a performance criterion, that during at least three of the four runs, the ESC system must provide a minimum level (presently unspecified) of differential braking. The agency has not had an opportunity to conduct testing of this maneuver, but we intend to do so to determine whether this is a viable alternative yaw stability test.

In light of the inability to develop a different performance-based yaw stability test, the agency is proposing to use the SWD test maneuver to evaluate yaw stability performance. Although we are proposing to use the SWD maneuver for evaluating yaw stability, we request comment on other yaw stability tests that could be suitable for performance testing and possible performance criteria for any such test. Furthermore, we specifically request comment on all aspects of EMA's yaw stability test discussed in its March and April 2012 submissions, including the test conditions, test procedure, and possible performance criteria that would allow the agency to test both trucks and buses with this maneuver.

(d) Lack of an Understeer Test

The SWD maneuver is designed to induce both roll and yaw responses from the vehicle being evaluated. However, the agency has no test to evaluate how the ESC responds when understeer is induced. The technique used by a stability control system for mitigating wheel lift, excessive oversteer or understeer conditions is to apply unbalanced wheel braking so as to generate moments (torques) to reduce lateral acceleration and to correct excessive oversteer or understeer. However, for a vehicle experiencing excessive understeer, if too much oversteering moment is generated, the vehicle may oversteer and spin out with obvious negative safety consequences. In addition, excessive understeer mitigation acts like an anti-roll stability control where it momentarily increases the lateral acceleration the vehicle can attain. Hence, too much understeer mitigation can create safety problems in the form of vehicle spin out or rollover.[50]

During the testing to develop FMVSS No. 126, the agency concluded that understanding both what understeer mitigation can and cannot do is complicated, and that there are certain

[44] Docket No. NHTSA–2010–0034–0032; Docket No. NHTSA–2010–0034–0040.

[45] These tests are discussed in section IV.E.3. See Docket No. NHTSA–2010–0034–0037 and Docket No. NHTSA–2010–0034–0038.

[46] Docket No. NHTSA–2010–0034–0035.

[47] This ramp with dwell maneuver is the same one identified by Bendix referenced in the prior paragraph and in section IV.E.3.

[48] Docket No. NHTSA–2010–0034–0022; Docket No. NHTSA–2010–0034–0023.

[49] Docket No. NHTSA–2010–0034–0032; Docket No. NHTSA–2010–0034–0040.

[50] EMA's testing of Vehicle J on the 500-foot wet Jennite curve shows understeer mitigation at maneuver entry speeds up to 34 mph, but at 35 mph, the vehicle could not overcome understeer. See Docket No. NHTSA–2010–0034–0022; Docket No. NHTSA–2010–0034–0023. At these low levels of lateral acceleration, no adverse effects appeared to occur as a result of the understeer mitigation.

situations where understeer mitigation could potentially produce safety disbenefits if not properly tuned. Therefore, the agency decided to enforce the requirements to meet the understeer criterion included in the ESC definition using a two-part process. First, the requirement to meet definitional criteria ensured that all had the hardware needed to limit vehicle understeer. Second, the agency required manufacturers to submit engineering documentation at the request of NHTSA's Office of Vehicle Safety Compliance to show that the system is capable of addressing vehicle understeer.

Based on the agency's experience from the light vehicle ESC rulemaking and the lack of a suitable test to evaluate understeer performance, the agency is not proposing a test for understeer to evaluate ESC system performance for truck tractors and large buses. The agency requests comment on this NPRM's lack of a proposed understeer test.

4. ESC Malfunction Test

During execution of a compliance test the agency proposes simulating several malfunctions to ensure the system and corresponding malfunction telltale provides the required warning to the vehicle operator. Malfunctions are generally simulated by disconnecting the power source to an ESC system component or disconnecting an electrical connection to or between ESC system components. Examples of simulated malfunctions might include the electrical disconnection of the sensor measuring yaw rate, lateral acceleration, steering wheel angle sensor, or wheel speed. When simulating an ESC system malfunction, the electrical connections for the telltale lamp would not be disconnected. Also, because a vehicle may require a driving phase to identify a malfunction, the vehicle would be driven for at least two minutes including at least one left and one right turning maneuver. A similar drive time exists in the FMVSS No. 126 test procedure.

After a malfunction has been simulated and identified by the system, the system is restored to normal operation. The engine is started and the malfunction telltale is checked to ensure it has cleared.

5. Test Instrumentation and Equipment

For the truck tractor and large bus stability control system research program, each test vehicle was fitted with specific instrumentation and equipment necessary to execute each test safely and to collect necessary performance data. The compliance test program proposed in this NPRM would use essentially the same equipment and a subset of the instrumentation. As was done for FMVSS No. 126, the agency proposes including in the regulatory text the basic design parameters for the automated steering machine, outriggers, and the control trailer because this test equipment and instrumentation can influence test vehicle performance. However, the proposed regulatory text does not include a list of the less critical test instrumentation used during the compliance test. The agency's common practice has been to provide instrumentation details, test instrumentation range, resolution, and accuracy for all the required instrumentation in the separate NHTSA Laboratory Test Procedure. Furthermore, the agency is aware that manufacturers and test facilities will be interested in knowing what instruments will be used for a compliance test program. The following table and corresponding discussions identify the critical equipment and instrumentation used by NHTSA's researchers and for the most part, the same or similar is proposed for use by NHTSA's Office of Vehicle Safety Compliance.

TABLE 3—CRITICAL TEST INSTRUMENTATION USED FOR DATA COLLECTION BY NHTSA RESEARCH

Vehicle test instrumentation	Output/input	Range	Resolution	Accuracy	Make/model used
Programmable Steering Machine with Steering Angle Encoder.	Controls Steering Wheel Angle Input.	Max 40–60Nm (29.5–44.3 lb-ft) torque at a hand wheel rate up to 1200 deg/sec.	.....	.....	Automotive Testing Inc. (ATI) Model: Spirit.[3]
	Handwheel Angle	±800 deg	0.25 deg	±0.25 deg.	
Multi-Axis Inertial Sensing System.	Longitudinal, Lateral and Vertical Acceleration.	Accelerometers: ±2 g	Accelerometers: ≤10 ug.	Accelerometers: ≤0.05% of full range	Make: BEI Motion Pak Model: MP–1.
	Roll, Yaw, and Pitch Rate.	Angular rate sensors: ±100 deg/sec.	Angular Rate Sensors: ≤0.004 deg/s.	Angular Rate Sensors: 0.05% of full range.	
Speed Sensor	Vehicle Speed to DAS and Steering Machine.	0–201 km/h (0–125 mph).	.014 km/h (.009 mph)	0.1 km/h full scale	Make: RaceLogic Model: VBox.
Infrared Distance Measuring Sensor.	Left and Right Side Vehicle Height (For calculated vehicle roll angle).	350–850 mm (14–35 inches).	0.3–8.0 mm (0.01–0.3 inches).	1%	Sensor Make: Wenglor. Model: HT66MGV80.

During research additional instrumentation was used for collecting data outside the scope of the proposed standard and that instrumentation is not discussed here. Furthermore, this table does not include a discussion of non-critical instrumentation like the brake pedal load cell used to ensure the test driver does not apply the brake during the maneuver, or the thermocouples used to monitor brake temperatures.

(a) Outriggers

Throughout the agency's research program, truck tractors and buses were equipped with outrigger devices to prevent vehicle rollover. During the program, the agency encountered many instances of wheel lift and outrigger contact with the ground indicating that it was probable that rollover could occur during testing. Over many years of research of ESC systems, it has been proven that outriggers are essential to

ensure driver safety and to prevent vehicle and property damage during NHTSA's compliance testing. Although NHTSA conducted some of its testing with ESC systems disabled, thereby increasing the need for outriggers, outriggers are still necessary as a safety measure during testing of vehicles equipped with an ESC system in case the system fails to activate.

The agency proposes that outriggers be used on all truck tractors and buses tested. Nevertheless, the agency acknowledges, as it did during the development of the light vehicle ESC system testing program, that outriggers have the potential to influence the dynamics of a vehicle during performance testing. For light vehicles, the agency determined that outrigger influence could be noticeable. However, we believe that outrigger influence on heavy vehicles is minimal because of the higher vehicle weight and test load. The agency has invested significant effort in outrigger designs that are both functional and minimize the impact to the test vehicle dynamic performance. To reduce test variability and increase the repeatability of the test results, the agency proposes to specify a standard outrigger design for the outriggers that will be used for compliance testing. The agency used this same approach in FMVSS No. 126 for compliance testing of light vehicle ESC systems. The agency also made available the detailed design specifications by reference to a design document located in the agency public docket.

For truck tractors, the document detailing the outrigger design to be used in testing has been placed in a public docket.[51] This document provides detailed construction drawings, specifies materials to be used, and provides installation guidance. For truck tractor combinations, the outriggers would be mounted on the trailer. The outriggers are mounted mid-way between the center of the kingpin and the center of the trailer axle (in the fore and aft direction of travel), which is generally near the geometric center of the trailer. They will be centered geometrically from side-to-side and bolted up under the traditional flatbed control trailer. Total weight of the outrigger assembly, excluding the mounting bracket and fasteners required to mount the assembly to the flatbed trailer, is approximately 1,490 pounds. The bulk of the mass, over 800 pounds, is for the mounting bracket which is located under the trailer near the vehicle's lateral and longitudinal center of gravity so that its inertial effects are minimized. The width of the outrigger assembly is 269 inches and the contact wheel to ground plane height is adjustable to allow for various degrees of body roll. A typical installation on a flatbed type trailer involves clamping and bolting the outrigger mounting bracket to the main rails of the flatbed.

For buses, the outrigger installations will not be as straightforward as the outrigger installations on the control trailers, and we desire comments on bus outrigger design. This is because outriggers cannot be mounted under the flat structure, but instead must extend through the bus. NHTSA used outriggers on the three large buses tested during its research program and proposes using outriggers for testing buses for compliance with this rule. The agency will use the same outrigger arms of the standard outrigger design that it plans to use for truck tractor testing. Therefore, the size, weight, and other design characteristics will be similar.

The location and manner of mounting the outriggers on buses cannot be identical to truck tractors. Nonetheless, there are a limited number of large bus manufacturers, which results in a limited number of unique chassis structural designs. Also, the agency understands that large bus structural designs do not change significantly from year-to-year. We believe that once outrigger mounts have been constructed for several different bus designs, those mountings can be modified and reused during subsequent testing. The agency has, in the document described above, provided additional engineering design drawings and further installation guidelines for installing the standard outrigger assemble to large buses.

(b) Automated Steering Machine

As part of the heavy vehicle ESC system research programs, the agency performed testing that compared multiple runs with test-driver-generated steering inputs, and found that test drivers cannot provide the same repeatable results as those obtained with an automated steering machine. Therefore, this NPRM proposes that an automated steering machine be used for the test maneuvers on the truck tractors and large buses in an effort to achieve highly repeatable and reproducible compliance test results.

An essential element of any compliance test program is for the test being executed to be reproducible, a test that can be easily executed the same way by different testing facilities, and repeatable, test results from repeated tests of the same vehicle are identical. The proposed 0.5 Hz SWD maneuver is a complex test maneuver where the steering must follow an exact sinusoidal pattern over a three-second time period. For the SWD maneuver, each test vehicle is subjected to as many 22 individual test runs all requiring activation at a specific vehicle speed, each of which will require a different peak steering wheel angle and corresponding steering wheel turning rate. To ensure the agency has an effective compliance program that will not vary from one test laboratory to another, from one test driver to another, or from one test vehicle to another, each maneuver must be repeatable and reproducible. The agency has extensive experience with execution of these and other steering maneuvers utilizing both human drivers and automated steering controllers. Based upon this experience, the agency has determined that a test driver cannot consistently execute these kinds of dynamic maneuvers exactly as required repeatedly. We note that, for the same reasons, the agency currently requires that automated steering machines be used for execution of the steering maneuvers performed under both the NCAP Rollover program and the FMVSS No. 126 light vehicle ESC program.

(c) Anti-Jackknife Cables

The agency proposes using anti-jackknife cables when testing truck tractors. Anti-jackknife cables would prevent the trailer from striking the tractor during testing in the event that a jackknife event occurs during testing. This would prevent damage to the tractor that may occur during testing. We do not believe that the use of anti-jackknife cables would affect test results, nor have we observed any damage to test vehicles, including vehicle finishes, caused by anti-jackknife cables. Nevertheless, we request comment on the necessity of the use of anti-jackknife cables during agency compliance testing.

(d) Control Trailer

The agency proposes using a control trailer to evaluate the performance of a tractor in its loaded condition. A control trailer would not be used when testing buses. In FMVSS No. 121, the agency specifies the use of an unbraked control trailer for compliance testing purposes. An unbraked control trailer minimizes the effect of the trailer's brakes when testing the braking performance of a tractor in its loaded condition.

The agency has also considered using a braked control trailer in ESC performance testing for truck tractors because the tractor-based stability control systems have the capability to apply the trailer brakes during stability

[51] Docket No. NHTSA–2010–0034–0010.

control intervention. This ability provides a slightly greater vehicle retardation that could further help prevent an impending rollover or reduce yaw instabilities.

As described in section IV.C above, the agency conducted numerous vehicle research test maneuvers using six different trailers. For each trailer, a test series was conducted collecting data for each trailer in a braked and unbraked condition. The effects of stability control, trailer brakes, and trailer type were analyzed using a logistical regression model to predict if wheel lift occurred during the test. A test was conducted to determine the effects of trailer brakes when stability control systems were enabled. With stability control systems enabled and trailer braking in the ''off'' position, the trailer was found not to be a significant factor in predicting wheel lift. Hence, the results indicate that the current FMVSS No. 121 unbraked control trailer can be used effectively in the stability control system testing to determine the capability of the tractor-based stability control system.

NHTSA's compliance tests must be objective, repeatable and reproducible. The goal of the testing program is to ensure that the ESC system takes the necessary actions of reducing engine torque and applying brakes to prevent yaw and roll instability. To achieve this goal any trailer type could be used as long as that trailer type becomes the ''standard'' trailer or ''control trailer'' used for all tractor trailer testing. Because it is the tractor performance that is being evaluated, the use of a standardized trailer will allow the test to distinguish the performance differences between different ESC systems and tractor types.

We believe that the current FMVSS No. 121 unbraked control trailer can be used effectively in the stability control testing to determine the capability of an ESC system. However, as discussed in section IV.D.5.(b) earlier, NHTSA's testing of EMA's Vehicle J revealed that the specifications for the control trailer in FMVSS No. 121 were not sufficient to ensure test repeatability.[52]

There were three specifications, not set forth in FMVSS No. 121, which could affect test performance and prevent repeatable, consistent test results using different control trailers. First, the track width of the control trailer is not specified. A trailer with a wider track width would be more stable than a trailer with a narrower track width, potentially affecting test results. Second, the center of gravity of the control trailer is not specified in FMVSS No. 121. The center of gravity of the trailer may be affected by the height of the load deck. A trailer with a higher load deck height would be less stable than a trailer with a lower load deck height. Third, the center of gravity of the load in FMVSS No. 121 testing is only specified to be less than 24 inches above the top of the tractor's fifth wheel. However, a load with a lower center of gravity (for example 12 inches) would be more stable than a load with a higher center of gravity (for example 24 inches).

The performance measures specified in this proposal were based upon NHTSA's testing using the control trailer used by VRTC researchers. Although the track width and center of gravity of the trailer are not specified in the proposed regulatory text and the center of gravity of the load is specified only by an upper bound, we request comment on possible specifications and appropriate levels of variability in trailer track width, trailer CG height, and load CG height for a control trailer to be used during ESC system testing.

(e) Sensors

A multi-axis inertial sensing system would be used to measure longitudinal, lateral, and vertical linear accelerations and roll, pitch, and yaw angular rates. The position of the multi-axis inertial sensing system must be measured relative to the center of gravity of the tractor when loaded. To simplify testing, the vertical center of gravity location is assumed to be at the top of the frame rails for tractors. For buses, the center of gravity height is assumed to be at the height of the main interior floor of the bus. The measured lateral acceleration and yaw rate data are required for determining the lateral displacement, LAR and YRR performance criteria. All six of the sensing system signals are utilized in the equations required to translate the motion of the vehicle at the measured location to that which occurred at the actual center of gravity to remove roll, pitch, and yaw effects.

The vehicle speed would be measured with a non-contact GPS-based speed sensor. Accurate speed data is required to ensure that the SWD maneuver is executed at the required 72.4 ± 1.6 km/h (45.0 ± 1.0 mph) test speed. Sensor outputs are available to allow the driver to monitor vehicle speed and data are provided as input to the automated steering machine for maneuver activation.

Infrared height sensors would be used to collect left and right side vertical ride height or displacement data for calculating vehicle roll angle. One sensor would be mounted on each side of the vehicle. With these data, roll angle is calculated during post-processing using trigonometry and would be used for correcting the measured lateral acceleration data due to the effects caused by body roll.

6. Test Conditions

(a) Ambient Conditions

The ambient temperature range specified in other FMVSSs for outdoor brake performance testing is 0 °C to 38 °C (32 °F to 100 °F). However, when the agency proposed a range of 0 °C to 40 °C (32 °F to 104 °F) for FMVSS No. 126, the issue of tire performance at near freezing temperatures was raised. The agency understood that near freezing temperatures could impact the variability of compliance test results. As a result, the agency increased the lower bound of the temperature range to 7 °C (45 °F) to minimize test variability at lower ambient temperatures. For the same reasons, this NPRM proposes an ambient temperature range of 7 °C to 40 °C (45 °F to 104 °F) for testing.

The agency proposes that the maximum wind speed for conducting the compliance testing for be no greater than 5 m/s (11 mph). This is the same value specified for testing multi-purpose passenger vehicles (MPVs), buses, and trucks under FMVSS No. 126. This is also the same value used for compliance testing for FMVSS No. 135, *Light Vehicle Brake Systems.* For FMVSS No. 126, the agency initially proposed a maximum wind speed of 10 m/s (22 mph) for all vehicles. However, the agency decided to reduce the speed for MPVs, buses, and trucks because of a concern that the higher wind speeds could impact the performance of certain vehicle configurations (*e.g.,* cube vans, 15 passenger vans, vehicles built in two or more stages).[53] Commenters to the proposed rule had estimated that a cross wind of 22 mph could reduce lateral displacement by 0.5 feet, compared to the same test conducted under calm conditions. The agency agreed that wind speed could have some impact on the lateral displacement for certain vehicle configurations and believes that the same argument is applicable testing truck tractors and large buses.

[52] The FMVSS No. 121 control trailer specifications, set forth in S6.1.10.2 and S6.1.10.3 of FMVSS No. 121 provide that the center of gravity of the ballast on the loaded control trailer be less than 24 inches above the top of the tractor's fifth wheel and that the trailer have a single axle with a GAWR of 18,000 pounds and a length, measured from the transverse centerline of the axle to the centerline of the kingpin, of 258 ± 6 inches.

[53] See 72 FR 17286 (Apr. 6, 2007).

Nevertheless, the agency notes that specifying such a low maximum wind speed can impose additional burdens on testing by restricting the environmental conditions under which testing can be conducted.

(b) Road Test Surface

The SWD maneuver executed on a high friction surface is a dynamically challenging maneuver that evaluates the effectiveness of an ESC system. Low friction surfaces, such as wet Jennite, are well known for producing a high degree of braking and handling tests variability compared to similar tests on high friction surfaces. The variability is exacerbated by the difficulty in ensuring a consistent water depth across the test surface. Therefore, this NPRM proposes conducting the SWD test on a dry test surface with a PFC of 0.9, which is typical of a dry asphalt surface or a dry concrete surface. As in other standards where the PFC is specified, we propose that the PFC be measured using an ASTM E1136 standard reference test tire in accordance with ASTM Method E1337–90, at a speed of 64.4 km/h (40 mph), without water delivery. We are proposing incorporating these ASTM provisions into the Standard.

(c) Vehicle Test Weight

The agency proposes that the combined weight of the truck tractor and control trailer be equal to 80 percent of the tractor's GVWR. To achieve this load condition the tractor is loaded with the fuel tanks filled to at least 75 percent capacity, test driver, test instrumentation and ballasted control trailer with outriggers. Center of gravity of all ballast on the control trailer is proposed to be located directly above the kingpin. When possible, load distribution on non-steer axles is in proportion to the tractor's respective axle GAWRs. Load distribution may be adjusted by altering fifth wheel position, if adjustable. In the case where the tractor fifth wheel cannot be adjusted so as to avoid exceeding a GAWR, ballast is reduced so that axle load equals specified GAWR, maintaining load proportioning as close as possible to specified proportioning.

The agency is proposing that liftable axles be in the down position for testing. This is because we are conducting our proposed performance test in a loaded condition. Typically, in real world use, we believe that a truck tractor loaded to 80% of its GVWR would operate with the liftable axle in the down position. Consequently, we propose to conduct compliance testing in that configuration.

For testing large buses, the agency proposes loading the vehicle to a simulated multi-passenger configuration. For this configuration the bus is loaded with the fuel tanks filled to at least 75 percent capacity, test driver, test instrumentation, outriggers and simulated occupants in each of the vehicle's designated seating positions. The simulated occupant loads are obtained by securing a 68 kilogram (150 pound) water dummy in each of the test vehicle's designated seating positions without exceeding the vehicle's GVWR and GAWR. The 68 kilogram (150 pound) occupant load was chosen because that is the occupant weight specified for use by the agency for evaluating a vehicle's load carrying capability under FMVSS Nos. 110 and 120. During loading, if any rating is exceeded the ballast load would be reduced until the respective rating or ratings are no longer exceeded.

(d) Tires

We propose testing the vehicles with the tires installed on the vehicle at time of initial vehicle sale. The agency's compliance test programs generally evaluate new vehicles with new tires. Therefore, we are proposing as a general rule that a new test vehicle have less than 500 miles on the odometer when received for testing.

For testing, the agency proposes that tires be inflated to the vehicle manufacturer's recommended cold tire inflation pressure(s) specified on the vehicle's certification label or the tire inflation pressure label. No tire changes would occur during testing unless test vehicle tires are damaged before or during testing. We are not proposing using inner tubes for testing because we have not seen any tire debeading in any test.

Before executing any SIS and SWD maneuvers, the agency is proposing to condition tires to wear away mold sheen and achieve operating temperatures. To begin the conditioning the test vehicle would be driven around a circle 46 meters (150 feet) in radius at a speed that produces a lateral acceleration of approximately 0.1g for two clockwise laps followed by two counterclockwise laps.

(e) Mass Estimation Drive Cycle

Both truck tractors and large buses experience large changes in payload mass, which affects a vehicle's roll and yaw stability thresholds. To adjust the activation thresholds for these changes, stability control systems estimate the mass of the vehicle after ignition cycles, periods of static idling, and other driving scenarios. To estimate the mass, these systems require a period of initial driving.

The agency proposes to include a mass estimation drive cycle as a part of pre-test conditioning. To complete this drive cycle the test vehicle is accelerated to a speed of 64 km/h (40 mph), and then, by applying the vehicle brakes, decelerated at 0.3g to 0.4g to a stop.

(f) Brake Conditioning

Heavy vehicle brake performance is affected by the original conditioning and temperatures of the brakes. We believe that incompletely burnished brakes and excessive brake temperatures can have an effect on ESC system test results, particularly in the rollover performance testing, because a hard brake application may be needed for the foundation brakes to reduce speed to prevent rollover.

FMVSS No. 126 uses a simple conditioning procedure by executing ten stops from 35 mph followed by three stops at 45 mph. Subsequently, a cool down period of between 90 seconds and 5 minutes is required between each SWD maneuver allowing sufficient time for the brakes to cool down but not so long that the brakes lose all their retained heat. However, for heavy vehicles, brake conditioning and operating temperatures are more critical to brake performance than for light vehicles primarily because the vast majority of heavy vehicles use drum brakes, which require more conditioning than disc brakes. We believe that conditioning needs to be more extensive and a brake temperature range is preferable to a specified cool-down period because each vehicle may have different cooling rates based on its configuration.

The agency is proposing that the brakes be burnished before any testing is executed. We believe that the burnish procedure specified in S6.1.8 of FMVSS No. 121, *Air Brake Systems,* provides the brake conditioning needed for the stability control system testing. The burnish procedure is performed by conducting 500 brake snubs [54] between 40 mph and 20 mph at a deceleration of 10 fp [2]. If the vehicle has already completed testing to FMVSS No. 121, we are not proposing to require the procedure be repeated. Instead, the brakes would be conditioned for the ESC with 40 snubs. The agency proposes that the brake temperatures be in the range of 65 °C to 204 °C (150 °F to 400 °F) at the beginning of each test maneuver. We also propose that the

[54] A snub is a brake application where the vehicle is not braked to a stop but to a lower speed.

brake temperature be measured by plug-type thermocouples installed on all brakes and that the hottest brake be used for determining whether cool-down periods are required.

After the brakes are burnished, immediately prior to executing any SIS or SWD maneuvers, the agency would perform 40 brake application snubs from a speed of 64 km/h (40 mph), with a target deceleration of approximately 0.3g. At end of the 40 snubs, the hottest brake temperature would be confirmed within the temperature range of 65 °C to 204 °C (150 °F to 400 °F). If the hottest brake temperature is above 204 °C (400 °F) a cool-down period would be provided until the hottest brake temperature is measured within that range. If the hottest brake temperature is below 65 °C (150 °F) individual brake stops would be repeated to increase any one brake temperature to within the target temperature range before the compliance testing can be continued.

7. Data Filtering and Post Processing

To determine if a test vehicle meets the performance requirements of the proposed standard, data needs to be measured and processed and ultimately used to calculate the lateral displacement, lateral acceleration ratio and yaw rate ratio performance measures. The agency understands that filtering and post processing methods, if not defined, can have a significant impact on the final test results used for determining vehicle compliance. When developing FMVSS No. 126 the agency received several comments recommending that filtering and processing methods be defined and included in the regulatory text. The agency decided to add to the test procedures section of the final rule's regulatory text a section that specified the critical test filtering protocols and techniques to be used for test data processing. We propose to include the same information in this standard. In addition, the agency proposes to make available on NHTSA's Web site the actual MATLAB code used for post-processing the critical lateral acceleration, yaw rate and lateral displacement performance data.

During post-processing the following data signals will be filtered and conditioned as follows:

1. Filter raw steering wheel angle data with a 12-pole phaseless Butterworth filter and a cutoff frequency of 10 Hz. Zero the filtered data to remove sensor offset utilizing static pretest data.

2. Filter raw yaw, pitch and roll rate data with a 12-pole phaseless Butterworth filter and a cutoff frequency of 3 Hz. Zero the filtered data to remove sensor offset utilizing static pretest data.

3. Filter raw lateral, longitudinal and vertical acceleration data with a 12-pole phaseless Butterworth filter and a cutoff frequency of 3 Hz. Zero the filtered data to remove sensor offset utilizing static pretest data.

4. Filter raw speed data with a 12-pole phaseless Butterworth filter and a cutoff frequency of 2 Hz.

5. Filter left side and right side ride height data with a 0.1-second running average filter. Zero the filtered data to remove sensor offset utilizing static pretest data.

6. The J1939 torque data collected as a digital signal does not get filtered. J1939 torque data collected as an analog signal is to be filtered with a 0.1-second running average filter.

There are several events in the calculation of performance metrics that require determining the time and/or level of an event, including: Beginning of steer, 1.5 seconds after beginning of steer, completion of steer, 0.75 second after completion of steer, and 1.50 seconds after completion of steer. The agency proposes using interpolation [55] for all of these circumstances because interpolation provides more consistent results than other approaches, such as choosing the sample that is closest in time to the desired event.

The beginning of steer is a critical moment during the maneuver because the lateral displacement performance measure is determined at exactly 1.5 seconds after the beginning of steer. For compliance purposes it is essential that the beginning of steer be determined accurately and consistently during each maneuver and each test. The process proposed in this NPRM to identify the beginning of steer uses three steps. The first step identifies when the steering wheel velocity exceeds 40 degrees per second. From this point, steering wheel velocity must remain greater than 40 degrees per second for at least 200 ms. If the condition is not met, the next time steering wheel velocity exceeds 40 degrees per second is identified and the 200 ms validity check is applied. This iterative process continues until the conditions are satisfied. In the second step, a zeroing range defined as the 1.0 second time period prior to the instant the steering wheel velocity exceeds 40 degrees per second. In the third step, the first instance the filtered and zeroed steering wheel angle data reaches minus 5 degrees (when the initial steering input is counterclockwise) or plus 5 degrees (when the initial steering input is clockwise) after the end of the zeroing range is identified. The time identified is taken to be the beginning of steer.

The agency understands that an unambiguous reference point to define the start of steering is necessary in order to ensure consistency when computing the performance metrics measured during compliance testing. The practical problem is that typical ''noise'' in the steering measurement channel causes continual small fluctuations of the signal about the zero point, so departure from zero with very small steering angles does not reliably indicate that the steering machine has started the test maneuver. NHTSA's extensive evaluation of zeroing range criteria has confirmed that the method successfully and robustly distinguishes the initiation of the SWD steering inputs from the inherent noise present in the steering wheel angle data channel. The value for time at the beginning of steer used for calculating the lateral displacement metric is interpolated.

The completion of steer is a critical moment during the maneuver because the LAR and YRR metrics are determined at specific time intervals after the completion of steer. The agency believes that an unambiguous point to define the completion of steer is also necessary for consistency in computing the required performance metrics during compliance testing. The agency proposes considering the first occurrence of the ''zeroed'' steering wheel angle crossing zero degrees after the second peak of steering wheel angle during the sine maneuver to be the completion of steer. Although signal noise results in continual zero crossings as long the data is being sampled, the first zero crossing after the steering wheel has begun to return to the zero position is a logical end to the steering maneuver.

Given the potential for the accelerometers used in the measurement and determination of lateral acceleration and lateral displacement to drift over time, the agency uses the data one second before the start of steering to ''zero'' the accelerometers and roll signal. Prior to the test maneuver, the driver must orient the vehicle to the desired heading, position the steering wheel angle to zero, and be coasting down (*i.e.,* not using throttle inputs) to the target test speed of 45 mph. This process, known as achieving a ''quasi steady-state,'' typically occurs a few seconds prior to initiation of the maneuver, but can be influenced by external factors such as test track traffic,

[55] Interpolation is a way of computing data values at the exact time that any of these events occur, even though the digital samples did not coincide with the exact event point. Rather, one sample is collected slightly before the time of the event and a second sample slightly after the time of the event.

differences in vehicle deceleration rates, etc. Any zeroing performed on test data must be performed after a quasi-steady-state condition has been satisfied, but before the maneuver is initiated. The proposed zeroing duration of one second provides an adequate combination of sufficient time (*i.e.,* enough data is present so as to facilitate accurate zeroing of the test data) and performability (*i.e.,* the duration is not so long that it imposes an unreasonable burden on the driver).

The lateral acceleration data are collected from an accelerometer, corrected for roll angle effects, and resolved to the vehicle's CG using coordinate transformation equations. The use of accelerometers is commonplace in the vehicle testing community, and installation is simple and well understood. However, in most cases, it is not possible to install a lateral acceleration sensor at the location of the vehicle's exact center of gravity. For this reason, it is important to provide a coordinate transformation to resolve the measured lateral acceleration values to the vehicle's center of gravity location. The specific equations proposed to perform this operation, as well as those used to correct lateral acceleration data for the effect of chassis roll angle, will be incorporated into the laboratory test procedure and are included in the MATLAB post processing routines used by the agency.

The equations used for coordinate transformation and vehicle body roll are as follows:

Equation 1: $x''_{corrected} = x''_{accel} - (\Theta'^2 + \Psi'^2)x_{disp} + (\Theta'\Phi' - \Psi'')y_{disp} + (\Psi'\Phi' + \Theta'')z_{disp}$

Equation 2: $y''_{corrected} = y''_{accel} + (\Theta'\Phi' + \Psi'')x_{disp} - (\Phi'^2 + \Psi'^2)y_{disp} + (\Psi'\Theta' - \Phi'')z_{disp}$

Equation 3: $z''_{corrected} = z''_{accel} + (\Psi'\Phi' - \Theta'')x_{disp} + (\Psi'\Theta' + \Phi'')y_{disp} - (\Phi'^2 + \Theta'^2)z_{disp}$

Where:

$x''_{corrected}$, $y''_{corrected}$, and $z''_{corrected}$ = longitudinal, lateral, and vertical accelerations, respectively, at the vehicle's center of gravity

x''_{accel}, y''_{accel}, and z''_{accel} = longitudinal, lateral, and vertical accelerations, respectively, at the accelerometer location

x_{disp}, y_{disp}, and z_{disp} = longitudinal, lateral, and vertical displacements, respectively, of the center of gravity with respect to the accelerometer location

Φ' and Φ'' = roll rate and roll acceleration, respectively

Θ' and Θ'' = pitch rate and pitch acceleration, respectively

Ψ' and Ψ'' = yaw rate and yaw acceleration, respectively

If the sensors used to measure the vehicle responses are of sufficient accuracy, and have been installed and configured correctly, use of the analysis routines provided by NHTSA are expected to minimize the potential for performance discrepancies among NHTSA and industry test efforts. The equations utilized are the same equations used by the agency for its NCAP rollover program and the FMVSS No. 126 light vehicle ESC program, and were derived from equations of general relative acceleration for a translating reference frame utilizing the SAE convention for Vehicle Dynamics Coordinate Systems.

Furthermore, NHTSA does not propose using inertially stabilized accelerometers for this test procedure. Therefore, lateral acceleration must be corrected for vehicle roll angle during data post processing. Non-contact displacement sensors are used to collect left and right side vertical displacements for the purpose of calculating vehicle roll angle. One sensor is mounted on each side of the vehicle, and is positioned at the longitudinal CG. With these data, roll angle is calculated during post-processing using trigonometry as follows:

Equation 4: $a_{yc} = a_{ym}\cos\Phi - a_{zm}\sin\Phi$

Where:

a_{yc} is the corrected lateral acceleration (*i.e.,* the vehicle's lateral acceleration in a plane horizontal to the test surface)

a_{ym} is the measured lateral acceleration in the vehicle reference frame

a_{zm} is the measured vertical acceleration in the vehicle reference frame

Φ is the vehicle's roll angle

Note: The z-axis sign convention is positive in the downward direction for both the vehicle and test surface reference frames.

G. Compliance Dates and Implementation Schedule

The agency proposes that all new typical 6x4 truck tractors and all buses covered by this proposal would be required to meet this proposed standard effective two years after the final rule is published. The current annual installation rate for stability control systems on new truck tractors is approximately 18 percent. Because there are currently only two suppliers of truck tractor and large bus stability control systems, Bendix and Meritor WABCO, we believe that the industry will need lead time to ensure that the necessary production stability control systems are available to manufacturers.

For severe service tractors and tractors with four axles or more, the agency believes that manufacturers of these atypical truck tractors, which represent about 5 percent of annual truck tractor sales, may need additional lead time to develop, test and equip these vehicles with a stability control system. Therefore, we are proposing to require that severe service tractors and other atypical tractors be equipped with ESC systems beginning four years after the final rule is published. We note that we made a similar distinction between typical 6x4 tractors and other tractors in specifying the lead time for amendments to FMVSS No. 121 mandating improved stopping distance performance.[56]

However, in our stopping distance rulemaking, we allowed extra time for two-axle tractors to comply because shorter wheelbase tractors (*i.e.,* two-axle tractors) showed a risk of instability resulting from the improved stopping distance requirements. However, the increased risk of instability in shorter wheelbase vehicles led us to the opposite tentative conclusion in this rulemaking. Because two-axle tractors have a particular risk of instability, we do not believe extending lead time for two-axle tractors is warranted.

The vast majority of new truck tractors are three-axle (6x4) vehicles, which facilitates standardization of ESC for these vehicles. The available test data for typical three-axle (6x4) tractors with stability control systems show that the existing ESC technology should enable these vehicles to readily comply with stability control requirements proposed by the agency. In addition, the agency's benefit analysis indicates that ESC provides substantial safety benefits to truck tractors. Hence, we believe that it is important that the implementation date for ESC on these vehicles be as early as practicable so that these safety benefits could be achieved.

Several manufacturers of Class 8 buses are already offering ESC as standard equipment on their vehicles but we are not aware of any Class 7 bus that is available with ESC. We believe that the manufacturers of Class 7 buses would need some lead time to have the ESC systems developed, tested and installed on their vehicles. Hence, for large buses, the agency proposes an effective date of two years after the final rule is published, primarily to accommodate manufacturers of Class 7 buses.

VI. Benefits and Costs

A. System Effectiveness

As discussed above, direct data that would show the effectiveness of stability control systems is not available

[56] See 49 CFR 571.121, Table IIA.

because stability control system technology on heavy vehicles is so new. Accordingly, NHTSA sponsored a research program with Meritor WABCO and UMTRI to examine the potential effectiveness of stability control systems on the fleet of truck tractors. A copy of UMTRI's report has been placed in the docket.

However, for NHTSA to calculate the effectiveness of stability control systems for truck tractors, two modifications were necessary. First, the UMTRI study based its effectiveness estimates on a simple aggregation of cases rather than weighting the likelihood of occurrence of each case. Second, based on NHTSA's independent review of the 159 cases, two cases were incorrectly categorized as loss of control rather than untripped rollover and the effectiveness rating of six cases were revised downward.

The results of UMTRI's study and the agency's revised effectiveness estimates were published in a January 2011 research note entitled ''Effectiveness of Stability Control Systems For Truck Tractors'' (DOT HS 811 437).[57] The effectiveness estimates from that research note are summarized in the following table.

TABLE 4—EFFECTIVENESS RATES FOR ESC AND RSC BY TARGET CRASHES

[Current NHTSA estimates]

Technology	Overall effectiveness (%)	Untripped rollover effectiveness (%)	Loss of control effectiveness (%)
ESC	28–36	40–56	14
RSC	21–30	37–53	3

For large buses, it was not feasible to conduct a similar statistical analysis because of limited crash data. However, NHTSA's testing revealed that an identical set of test maneuvers could be used to evaluate truck tractor and large bus systems' ability to prevent rollover and loss-of-control crashes. Therefore, for the purpose of this proposal, the effectiveness of ESC and RSC systems on large buses was assumed to be identical to the performance of systems on truck tractors.

B. Target Crash Population

The initial target crash population for estimating benefits includes all crashes resulting in occupant fatalities, MAIS 1 and above nonfatal injuries, and property damage only crashes that were the result of either (a) first-event untripped rollover crashes and (b) loss-of-control crashes (*e.g.,* jackknife, cargo shift, avoiding, swerving) that involved truck tractors or large buses and might be prevented if the subject vehicle were equipped with a stability control system. For this analysis, particularly in multi-vehicle crashes, the subject vehicle is the at-fault or striking vehicle. The initial target crash populations were retrieved from the 2006–2008 Fatality Analysis Reporting System (FARS) and General Estimate System (GES). The FARS data were used for evaluating fatal crashes and the GES data were used for evaluating nonfatal crashes. The injury data were converted to MAIS format and the following number of crashes, fatalities, injuries, and deaths were estimated.

TABLE 5—INITIAL TARGET CRASHES, MAIS INJURIES, AND PROPERTY DAMAGE ONLY VEHICLE CRASHES BY CRASH TYPE

Crash type	Crashes	Fatalities	MAIS 1–5 Injuries	PDOVs
Rollover	5,510	111	2,217	3,297
Loss of control	4,803	216	1,141	3,935
Total	10,313	327	3,358	7,332

Source: 2006–2008 FARS, 2006–2008 GES.
PDOVs: property damage only vehicles.

The 2006–2008 crash data were then adjusted to take account of ESC and RSC system installation rates in 2006–2008 and in model year 2012. To determine the number of crashes that could be prevented by requiring that ESC systems be installed on new truck tractors, the agency had to consider two subsets of the total crash population—those vehicles that would not be equipped with stability control systems (Base 1 population) and those vehicles that would be equipped with RSC systems (Base 2 population). The Base 1 population would benefit fully from this proposal. However, the Base 2 population would benefit only from the incremental increased effectiveness of ESC systems over RSC systems.

Based upon data obtained from industry, the agency estimates that about 1.9 percent of truck tractors in the on-road fleet in 2008 were equipped with ESC systems and 3.3 percent were equipped with RSC systems. Based upon manufacturer production estimates, about 26.2 percent of truck tractors manufactured in model year 2012 would be equipped with ESC systems and 16.0 percent would be equipped with RSC systems. Adjusting the initial target crash populations using these estimates, the agency was able to estimate the Base 1 and Base 2 populations and the projected target crash population (Base 1 + Base 2) expressed in the following table.

[57] Docket No. NHTSA–2010–0034–0043.

TABLE 6—PROJECTED CRASHES, MAIS INJURIES, AND PROPERTY DAMAGE ONLY VEHICLE CRASHES BY CRASH TYPE, CRASH SEVERITY, INJURY SEVERITY, AND VEHICLE TYPE FOR 2012 LEVEL

Crash type	Crashes	Fatalities	MAIS 1–5 Injuries	PDOVs
Base 1				
Rollover	3,263	66	1,313	1,952
Loss of Control	2,786	125	662	2,283
Total	6,049	191	1,975	4,235
Base 2				
Rollover	903	18	364	540
Loss of Control	771	35	183	632
Total	1,674	53	547	1,172
Base 1 + Base 2 (Projected Target Population)				
Rollover	4,166	84	1,677	2,492
Loss of Control	3,557	160	845	2,915
Total	7,723	244	2,522	5,407

Source: 2006–2008 FARS, 2006–2008 GES.
PDOVs: property damage only vehicles.

The agency has also examined the same crash data sources for large buses. Based upon this examination, the agency estimates that an average of one target bus rollover and one target bus loss-of-control crash occurs per year that would be affected by this proposal.

C. Benefits Estimate

ESC systems are crash avoidance countermeasures that would mitigate and even prevent crashes. Preventing a crash not only would save lives and reduce injuries, it also would alleviate crash-related travel delays and property damage. Therefore, the estimated benefits include both injury and non-injury components. The injury benefits are the estimated fatalities and injuries that would be mitigated or eliminated by ESC. The non-injury benefits include the travel delay and property damage savings from crashes that were avoided by ESC. Savings from reducing property-damage-only vehicle crashes also were included in the non-injury benefits.

The benefits estimates for rollover crashes are presented in a range in this analysis. This is the result of a range of ESC effectiveness figures in addressing rollover crashes that were used for the analysis. In contrast, at the publication, there is only one effectiveness estimate for addressing loss-of-control crashes.

The benefits of this proposal were derived by multiplying the projected target population by the corresponding effectiveness rates. As shown in Table 7, this proposal would prevent 1,807 to 2,329 target crashes, 49 to 60 fatalities, and 649 to 858 MAIS 1–5 injuries. Furthermore, the proposal would eliminate 1,187 to 1,499 property-damage-only crashes. Table 7 presents the benefits by target crash type.

TABLE 7—ESTIMATED BENEFITS OF THE PROPOSAL

Crash type	Crashes	Fatalities	MAIS 1–5 Injuries	PDOVs
Base 1 Benefits				
Rollover	1,305–1,827	26–37	526–735	781–1,093
Loss of Control	390	18	93	320
Total	1,695–2,217	44–55	619–828	1,101–1,413
Base 2 Benefits				
Rollover	27	1	11	16
Loss of Control	85	4	19	70
Total	112	5	30	86
Benefits of the Proposal (Base 1 + Base 2)				
Rollover	1,332–1,854	27–38	537–746	797–1,109
Loss of Control	475	22	112	390
Total	1,807–2,329	49–60	649–858	1,187–1,499

Source: 2006–2008 FARS, 2006–2008 GES.
PDOVs: property damage only vehicles.

The non-injury benefits also include savings from the elimination of crash-related travel delay and vehicle property damage. Table 8 shows the total travel delay and property damage savings from this proposal, broken down by target crash type. These benefits were derived by determining the unit cost of property damage and travel delay for each level of crash severity (*e.g.,* fatal, MAIS 1–5, or property damage only) and multiplying that cost by the number of incidents of each type of crash prevented. As shown in Table 8, this proposal would save (undiscounted) $17.1 to $22.0 million from travel delays and property damage as a result of crashes that would be prevented by this proposal.

TABLE 8—TOTAL TRAVEL DELAY AND PROPERTY DAMAGE SAVINGS

[Undiscounted 2010 $]

	Property damage	Travel delay	Property damage + travel delay
Rollover—Lower Bound	$7,713,841	$4,655,187	$12,369,028
Rollover—Upper Bound	10,735,872	6,475,446	17,211,318
Loss of Control	3,006,977	1,765,804	4,772,781
Total—Lower Bound	10,720,818	6,420,991	17,141,809
Total–Upper Bound	13,742,849	8,241,250	21,984,099

D. Cost Estimate

The cost of this proposal is derived from the product of the average unit cost of an ESC system and the number of vehicles affected by this proposal. The number of vehicles affected by this proposal would include vehicles that would have no stability control systems and vehicles that would be equipped with RSC systems. Therefore, when considering vehicles equipped with RSC systems, the average cost would be the difference between the cost of an ESC system and the cost of an RSC system.

Based upon data received from manufacturers, the agency estimates that the average unit cost for an ESC system is $1,160 and the average unit cost for an RSC system is $640; therefore, the incremental cost of installing an ESC system instead of an RSC system is $520 per vehicle. The agency did not receive cost information from large bus manufacturers. However, because the components used on truck tractors and buses are nearly identical, the unit cost estimates for truck tractors are used for buses.

The agency has estimated that 150,000 truck tractors and 2,200 buses covered by this proposal would be produced in model year 2012. As stated earlier, the agency estimates that 26.2 percent of truck tractors and 80 percent of buses covered by this proposal manufactured in model year 2012 would be equipped with ESC systems. In addition, 16.5 percent of truck tractors would be equipped with RSC systems. Accordingly, 57.8 percent of truck tractors and 20 percent of buses would be required to be equipped with an ESC system and 16.5 percent of truck tractors would be required to upgrade from an RSC system to an ESC system.

Table 9 summarizes the costs of this proposal based on the estimated unit cost of an ESC system and the number of vehicles that would need to be equipped with ESC systems. As shown in Table 10, the incremental cost of providing ESC systems compared to manufacturers' planned production in model year 2012 would cost $113.1 million for truck tractors and $0.5 million for large buses. Therefore, the total cost of this proposal is estimated to be $113.6 million.

TABLE 9—ANNUAL TOTAL COSTS FOR THE PROPOSAL

[2010 $]

	Technology upgrade needed		
	None	Incremental ESC	ESC
Truck Tractors:			
% Needing Upgrade	26.2%	16.0%	57.8%
150,000 Sales Estimated	39,300	24,000	86,700
Costs per Affected Vehicle	0	$520	$1,160
Total Costs	0	$12.5 M	$100.6 M
Large Buses:			
% Needing Upgrade	80%	0%	20%
2,200 Sales Estimated	1,760	0	440
Costs per Affected Vehicle	0	$520	$1,160
Total Costs	0	0	$0.5 M

M: million.

TABLE 10—SUMMARY OF VEHICLE COSTS

[2010 $]

	Average vehicle costs	Total costs
Truck Tractors	$753.7	$113.1 M
Large Buses	232.0	0.5 M
Total	746.1	113.6 M

M: million.

We also note that manufacturers may incur costs to certify their vehicles as compliant with the proposed standard. We have estimated the cost to conduct the proposed test maneuvers. We believe that the execution of the proposed SIS and SWD maneuvers would cost approximately $15,000 per test, assuming access to test facilities, tracks, and vehicles. Because it is not possible to anticipate how many tests manufacturers might choose to run to certify a specific make, model, and configuration, the agency cannot estimate the total compliance costs for manufacturers. However, compliance costs are implicitly included in the estimated consumer cost, which includes a 150% markup to account for fixed and overhead costs.

E. Cost Effectiveness

Safety benefits can occur at any time during the vehicle's lifetime. Therefore, the benefits are discounted at both 3 and 7 percent to reflect their values in 2010 dollars, as reflected in Table 11. Table 11 also shows that the net cost per equivalent life saved from this proposal ranged from $1.5 to $2.0 million at a 3 percent discount rate and from $2.0 to $2.6 million at a 7 percent discount rate. The net benefits of this proposal are estimated to range from $228 to $310 million at a 3 percent discount rate and from $155 to $222 million at a 7 percent discount rate.

TABLE 11—SUMMARY OF COST-EFFECTIVENESS AND NET BENEFITS BY DISCOUNT RATE

[2010 $]

	3% Discount		7% Discount	
	Low	High	Low	High
Fatal Equivalents	51	63	40	50
Injury Benefits	$328,197,087	$405,419,931	$257,409,480	$321,761,850
Property Damage and Travel Delay Savings	$13,862,581	$17,778,541	$11,006,756	$14,115,990
Vehicle Costs*	$113,562,400	$113,562,400	$113,562,400	$113,562,400
Net Costs	$99,699,819	$95,783,859	$102,555,644	$99,446,410
Net Cost Per Fatal Equivalent	$1,954,898	$1,520,379	$2,563,891	$1,988,928
Net Benefits	$228,497,268	$309,636,072	$154,853,836	$222,315,440

*Vehicle costs are not discounted, since they occur when the vehicle is purchased, whereas benefits occur over the vehicle's lifetime and are discounted back to the time of purchase.

F. Comparison of Regulatory Alternatives

The agency considered two alternatives to the proposal. The first alternative was requiring RSC systems be installed on all newly manufactured truck tractors and buses covered by this proposal. The second alternative was requiring RSC systems be installed on all newly manufactured trailers.

Regarding the first alternative, requiring RSC systems be installed on truck tractors and large buses, our research has concluded that RSC systems are less effective than ESC systems. Overall for the target crash population, our research has indicated that RSC systems have a 21 to 30 percent effectiveness rate, whereas ESC systems have a 28 to 36 percent effectiveness rate. An RSC system is only slightly less effective at preventing rollover crashes than an ESC system (37 to 53 percent versus 40 to 56 percent effective, respectively), but it is much less effective at preventing loss of control crashes (3 percent versus 14 percent). However, RSC systems are only estimated to cost $640 per unit, whereas ESC systems are estimated to cost $1,160 per unit. Furthermore, only approximately 57.8% of truck tractors would be required to install RSC systems based on the data discussed earlier regarding manufacturers' plans.

A summary of the cost effectiveness of RSC systems is set forth in Table 12. When comparing this alternative to the regulatory proposal, requiring RSC systems rather than ESC systems would be slightly more cost effective. However, this alternative would save fewer lives and have lower net benefits than this proposal.

TABLE 12—SUMMARY OF COST-EFFECTIVENESS AND NET BENEFITS BY DISCOUNT RATE ALTERNATIVE 1—REQUIRING TRACTOR-BASED RSC SYSTEMS

[2010 $]

	3% Discount		7% Discount	
	Low	High	Low	High
Fatal Equivalents	31	43	24	34
Injury Benefits	$199,492,347	$276,715,191	$154,445,688	$218,798,058
Property Damage and Travel Delay Savings	$9,714,383	$13,649,563	$7,713,126	$10,837,621
Vehicle Costs*	$55,769,600	$55,769,600	$55,769,600	$55,769,600
Net Costs	$46,055,217	$42,120,037	$48,056,474	$44,931,979
Net Cost Per Fatal Equivalent	$1,485,652	$979,536	$2,002,353	$1,321,529
Net Benefits	$153,437,130	$234,595,154	$106,389,214	$173,866,079

*Vehicle costs are not discounted, since they occur when the vehicle is purchased, whereas benefits occur over the vehicle's lifetime and are discounted back to the time of purchase.

The second alternative considered was requiring trailer-based RSC systems to be installed on all newly manufactured trailers. Trailer-based RSC systems would only be expected to prevent rollover crashes. Based on 2006–2008 GES data, 98 percent of the target truck-tractor crashes involve truck tractors with trailers attached. Therefore, the base crash population would be 98 percent of Base 1 discussed above.

As discussed in the proposal, it became apparent during testing that trailer-based stability control systems were less effective than tractor-based systems because trailer-based systems could only control the trailer's brakes. Based upon the agency's test data, it is estimated that the effectiveness of trailer-based RSC systems in preventing rollover crashes is 7 to 10 percent. Therefore, the benefits of trailer-based RSC systems in preventing rollover are about 17.2 percent of tractor-based ESC systems.

The agency estimates that about 203,000 new trailers are manufactured each year. Further, based on information from manufacturers, the agency estimates that a trailer-based RSC system would cost $400 per trailer. Available data indicates that less than 0.2 percent of the current annual production of trailers comes with RSC systems installed. Assuming all new trailers would be required to install RSC, the cost of this alternative is estimated to be $81.2 million.

Table 13 sets forth a summary of the cost effectiveness of trailer-based RSC systems. Because the operational life of a trailer (approximately 45 years) is much longer than that of a truck tractor, it would take longer for trailer-based RSC systems to fully penetrate the fleet than it would for any tractor-based system. Therefore, when the benefits of trailer-based RSC systems are discounted at a 3 and 7 percent rate, there is a much higher discount factor. As can be seen in Table 13, this results in this alternative having negative net benefits and a high cost per life saved. Also, this alternative would have no effect on buses. Accordingly, the agency does not favor this alternative.

TABLE 13—SUMMARY OF COST-EFFECTIVENESS AND NET BENEFITS BY DISCOUNT RATE ALTERNATIVE 2—REQUIRING TRAILER-BASED RSC SYSTEMS

[2010 $]

	At 3% Discount		At 7% Discount	
	Low	High	Low	High
Fatal Equivalents	5	7	3	5
Injury Benefits	$30,754,672	$43,935,246	$20,700,937	$29,572,767
Property Damage and Travel Delay Savings	$1,459,169	$2,038,560	$982,165	$1,372,153
Vehicle Costs*	$81,200,000	$81,200,000	$81,200,000	$81,200,000
Net Costs	$79,740,831	$79,161,440	$80,217,835	$79,827,847
Net Cost Per Fatal Equivalent	$15,948,166	$11,308,777	$26,739,278	$15,965,569
Net Benefits	−$48,986,159	−$35,226,194	−$59,516,898	−$50,255,080

*Vehicle costs are not discounted, since they occur when the vehicle is purchased, whereas benefits occur over the vehicle's lifetime and are discounted back to the time of purchase.

The information in Tables 12 and 13 can be contrasted with this proposal. A summary of the total costs and benefits and annualized costs and benefits of this proposal appears in Table 14.

TABLE 14—ESTIMATED TOTAL COSTS AND BENEFITS OF THE PROPOSAL

[In millions of 2010 dollars]

	Total costs	Injury benefits	Property damage and travel delay savings	Cost per equivalent live saved	Net benefits
At 3% Discount	$113.6	$328–$405	$13.9–$17.8	$1.5–$2.0	$228–$310
At 7% Discount	113.6	257–322	11.0–14.1	2.0–2.6	155–222

VII. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the beginning of this document, under **ADDRESSES**. You may also submit your comments electronically to the docket following the steps outlined under **ADDRESSES**.

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit the following to the NHTSA Office of Chief Counsel (NCC–110), 1200 New Jersey Avenue SE., Washington, DC 20590: (1) A complete

copy of the submission; (2) a redacted copy of the submission with the confidential information removed; and (3) either a second complete copy or those portions of the submission containing the material for which confidential treatment is claimed and any additional information that you deem important to the Chief Counsel's consideration of your confidentiality claim. A request for confidential treatment that complies with 49 CFR Part 512 must accompany the complete submission provided to the Chief Counsel. For further information, submitters who plan to request confidential treatment for any portion of their submissions are advised to review 49 CFR part 512, particularly those sections relating to document submission requirements. Failure to adhere to the requirements of Part 512 may result in the release of confidential information to the public docket. In addition, you should submit two copies from which you have deleted the claimed confidential business information, to Docket Management at the address given at the beginning of this document under **ADDRESSES**.

Will the Agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated at the beginning of this notice under **DATES**. In accordance with our policies, to the extent possible, we will also consider comments that Docket Management receives after the specified comment closing date. If Docket Management receives a comment too late for us to consider in developing the proposed rule, we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by Docket Management at the address and times given near the beginning of this document under **ADDRESSES**.

You may also see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov* and follow the on-line instructions provided.

You may download the comments. The comments are imaged documents, in either TIFF or PDF format. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

VIII. Regulatory Analyses and Notices

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking is considered economically significant and was reviewed by the Office of Management and Budget under E.O. 12866, ''Regulatory Planning and Review.'' The rulemaking action has also been determined to be significant under the Department's regulatory policies and procedures. NHTSA has placed in the docket a Preliminary Regulatory Impact Analysis (PRIA) describing the benefits and costs of this rulemaking action. The benefits and costs are summarized in section VI of this preamble.

Consistent with Executive Order 13563 and to the extent permitted under the Vehicle Safety Act, we have considered the cumulative effects of the new regulations stemming from NHTSA's 2007 ''NHTSA's Approach to Motorcoach Safety'' plan and DOT's 2009 Motorcoach Safety Action Plan, and have taken steps to identify opportunities to harmonize and streamline those regulations. By coordinating the timing and content of the rulemakings, our goal is to expeditiously maximize the net benefits of the regulations (by either increasing benefits or reducing costs or a combination of the two) while simplifying requirements on the public and ensuring that the requirements are justified. We seek to ensure that this coordination will also simplify the implementation of multiple requirements on a single industry.

NHTSA's Motorcoach Safety Action Plan identified four priority areas—passenger ejection, rollover structural integrity, emergency egress, and fire safety. There have been other initiatives on large bus performance, such as ESC systems—an action included in the DOT plan—and an initiative to update the large bus tire standard.[58] In deciding how best to initiate and coordinate rulemaking in these areas, NHTSA examined various factors including the benefits that would be achieved by the rulemakings, the anticipated vehicle designs and countermeasures needed to comply with the regulations, and the extent to which the timing and content of the rulemakings could be coordinated to lessen the need for multiple redesign and to lower overall costs. After this examination, we decided on a course of action that prioritized the goal of reducing passenger ejection and increasing frontal impact protection because many benefits could be achieved expeditiously with countermeasures that were readily available (using bus seats with integral seat belts, which are already available from seat suppliers) and whose installation would not significantly impact other vehicle designs. Similarly, we have also determined that an ESC rulemaking would present relatively few synchronization issues with other rules, because the vehicles at issue already have the foundation braking systems needed for the stability control technology and the additional equipment necessary for an ESC system are sensors that are already available and that can be installed without significant impact on other vehicle systems. Further, we estimate that 80 percent of the affected buses already have ESC systems. We realize that a rollover structural integrity rulemaking, or an emergency egress rulemaking, could involve more redesign of vehicle structure than rules involving systems such as seat belts, ESC, or tires.[59] Our decision-making in these and all the rulemakings outlined in the ''NHTSA's Approach to Motorcoach Safety'' plan and DOT's Motorcoach Safety Action Plan will be cognizant of the timing and content of the actions so as to simplify requirements applicable to the public and private sectors, ensure that requirements are justified, and increase the net benefits of the resulting safety standards.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to 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 effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR Part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)).

[58] 75 FR 60037 (Sept. 29, 2010).

[59] The initiative on fire safety is in a research phase. Rulemaking resulting from the research will not occur in the near term.

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. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this NPRM under the Regulatory Flexibility Act. I certify that this NPRM will not have a significant economic impact on a substantial number of small entities. This proposed rule would directly impact manufacturers of truck-tractors, large buses, and stability control systems for those vehicles. NHTSA believes these entities do not qualify as small entities.

C. Executive Order 13132 (Federalism)

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rulemaking would not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The final rule would 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.''

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which ''[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' 49 U.S.C. 30103(e). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of such State common law tort causes of action by virtue of NHTSA's rules, even if not expressly preempted. This second way that NHTSA rules can preempt is dependent upon there being an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer, notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Order 13132 and 12988, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.,* the language and structure of the regulatory text) and objectives of today's rule and finds that this rule, like many NHTSA rules, prescribes only a minimum safety standard. As such, NHTSA does not intend that this rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard announced here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

D. Executive Order 12988 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729; Feb. 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties file suit in court; (6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The issue of preemption is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

E. Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19855, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental, health, or safety risk that the agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

This notice is part of a rulemaking that is not expected to have a disproportionate health or safety impact on children. Consequently, no further analysis is required under Executive Order 13045.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. There is not any information collection requirement associated with this NPRM.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA to evaluate and use existing voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law (*e.g.,* the statutory provisions regarding NHTSA's vehicle safety authority) or otherwise impractical. Voluntary consensus standards are technical standards developed or adopted by voluntary consensus standards bodies. Technical standards are defined by the NTTAA as ''performance-based or design-specific technical specification and related management systems practices.'' They pertain to ''products and processes, such as size, strength, or technical performance of a product, process or material.''

Examples of organizations generally regarded as voluntary consensus standards bodies include ASTM International, the Society of Automotive Engineers (SAE), and the American National Standards Institute (ANSI). If NHTSA does not use available and potentially applicable voluntary consensus standards, we are required by the Act to provide Congress, through OMB, an explanation of the reasons for not using such standards.

This NPRM proposes to require truck tractors and large buses to have electronic stability control systems. In the proposed definitional requirement, the agency adapted the criteria from the light vehicle ESC rulemaking, which was based on (with minor modifications) SAE Surface Vehicle Information Report on Automotive Stability Enhancement Systems J2564 Rev JUN2004 that provides an industry consensus definition of an ESC system. In addition, SAE International has a Recommended Practice on Brake Systems Definitions—Truck and Bus, J2627 AUG2009 that has been incorporated into the agency's definition. The agency has also incorporated by reference two ASTM standards in order to provide specifications for the road test surface. These are: (1) ASTM E1136–93 (Reapproved 2003), ''Standard Specification for a Radial Standard Reference Test Tire,'' and (2) ASTM E1337–90 (Reapproved 2008), ''Standard Test Method for Determining Longitudinal Peak Braking Coefficient of Paved Surfaces Using a Standard Reference Test Tire.''

H. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). Before promulgating a NHTSA rule for which a written statement is needed, section 205 of the UMRA generally requires the agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of why that alternative was not adopted.

This NPRM will not result in any expenditure by State, local, or tribal governments or the private sector of more than $100 million, adjusted for inflation. When $100 million is adjusted by the implicit gross domestic product price deflator for the year 2010, the result is $136 million. This NPRM is not subject to the requirements of sections 202 and 205 of the UMRA because it is not estimated to result in an expenditure of more than $136 million annually by State, local, or tribal governments or the private sector.

I. National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

J. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by addling tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this proposal.

K. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

L. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

List of Subjects in 49 CFR Part 571

Imports, Incorporation by reference, Motor vehicle safety, Motor vehicles, Rubber and rubber products, and Tires.

Proposed Regulatory Text

In consideration of the foregoing, we propose to amend 49 CFR part 571 to read as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

1. The authority citation for part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

2. Revise paragraphs (d)(32) and (d)(33) of § 571.5 to read as follows:

§ 571.5 Matter incorporated by reference.

* * * * *

(d) * * *

(32) ASTM E1136–93 (Reapproved 2003), ''Standard Specification for a Radial Standard Reference Test Tire,'' approved March 15, 1993, into §§ 571.105; 571.121; 571.126; 571.135; 571.136; 571.139; 571.500.

(33) ASTM E1337–90 (Reapproved 2008), ''Standard Test Method for

Determining Longitudinal Peak Braking Coefficient of Paved Surfaces Using a Standard Reference Test Tire,'' approved June 1, 2008, into §§ 571.105; 571.121; 571.126; 571.135; 571.136; 571.500.

* * * * *

3. Revise the heading of § 571.126 to read as follows:

§ 571.126 Standard No. 126; Electronic stability control systems for light vehicles.

* * * * *

4. Add § 571.136 to read as follows:

§ 571.136 Standard No. 136; Electronic stability control systems for heavy vehicles.

S1. *Scope.* This standard establishes performance and equipment requirements for electronic stability control (ESC) systems on heavy vehicles.

S2. *Purpose.* The purpose of this standard is to reduce crashes caused by rollover or by directional loss-of-control.

S3. *Application.* This standard applies to truck tractors and buses with a gross vehicle weight rating of greater than 11,793 kilograms (26,000 pounds). However, it does not apply to:

(a) Any truck tractor or bus equipped with an axle that has a gross axle weight rating (GAWR) of 29,000 pounds or more;

(b) Any truck tractor or bus that has a speed attainable in 2 miles of not more than 33 mph;

(c) Any truck tractor that has a speed attainable in 2 miles of not more than 45 mph, an unloaded vehicle weight that is not less than 95 percent of its gross vehicle weight rating (GVWR), and no capacity to carry occupants other than the driver and operating crew;

(d) Any bus with fewer than 16 designated seating positions (including the driver);

(e) Any bus with fewer than 2 rows of passenger seats that are rearward of the driver's seating position and are forward-facing or can convert to forward-facing without the use of tools;

(f) School buses; and

(g) Any urban transit buses sold for operation as a common carrier in urban transportation along a fixed route with frequent stops.

S4. *Definitions.*

Ackerman Steer Angle means the angle whose tangent is the wheelbase divided by the radius of the turn at a very low speed.

Electronic stability control system or *ESC system* means a system that has all of the following attributes:

(1) That augments vehicle directional stability by applying and adjusting the vehicle brake torques individually at each wheel position on at least one front and at least one rear axle of the vehicle to induce correcting yaw moment to limit vehicle oversteer and to limit vehicle understeer;

(2) That enhances rollover stability by applying and adjusting the vehicle brake torques individually at each wheel position on at least one front and at least one rear axle of the vehicle to reduce lateral acceleration of a vehicle;

(3) That is computer-controlled with the computer using a closed-loop algorithm to induce correcting yaw moment and enhance rollover stability;

(4) That has a means to determine the vehicle's lateral acceleration;

(5) That has a means to determine the vehicle's yaw rate and to estimate its side slip or side slip derivative with respect to time;

(6) That has a means to estimate vehicle mass or, if applicable, combination vehicle mass;

(7) That has a means to monitor driver steering inputs;

(8) That has a means to modify engine torque, as necessary, to assist the driver in maintaining control of the vehicle and/or combination vehicle; and

(9) That, when installed on a truck tractor, has the means to provide brake pressure to automatically apply and modulate the brake torques of a towed semi-trailer.

Initial brake temperature means the average temperature of the service brakes on the hottest axle of the vehicle immediately before any stability control system test maneuver is executed.

Lateral acceleration means the component of the vector acceleration of a point in the vehicle perpendicular to the vehicle x axis (longitudinal) and parallel to the road plane.

Oversteer means a condition in which the vehicle's yaw rate is greater than the yaw rate that would occur at the vehicle's speed as result of the Ackerman Steer Angle.

Peak friction coefficient or *PFC* means the ratio of the maximum value of braking test wheel longitudinal force to the simultaneous vertical force occurring prior to wheel lockup, as the braking torque is progressively increased.

Sideslip or *side slip angle* means the arctangent of the lateral velocity of the center of gravity of the vehicle divided by the longitudinal velocity of the center of gravity.

Understeer means a condition in which the vehicle's yaw rate is less than the yaw rate that would occur at the vehicle's speed as result of the Ackerman Steer Angle.

Yaw Rate means the rate of change of the vehicle's heading angle measure in degrees per second of rotation about a vertical axis through the vehicle's center of gravity.

S5. *Requirements.* Each vehicle must be equipped with an ESC system that meets the requirements specified in S5 under the test conditions specified in S6 and the test procedures specified in S7 of this standard.

S5.1 *Required Equipment.* Each vehicle to which this standard applies must be equipped with an electronic stability control system, as defined in S4.

S5.2 *System Operational Capabilities.*

S5.2.1 An electronic stability control system must be operational over the full speed range of the vehicle except at vehicle speeds less than 20 km/h (12.4 mph), when being driven in reverse, or during system initialization.

S5.2.2 An electronic stability control system must remain capable of activation even if the antilock brake system or traction control is also activated.

S5.3 *Performance Requirements.*

S5.3.1 *Slowly Increasing Steer Maneuver.* During the slowly increasing steer test maneuver performed under the test conditions of S6 and the test procedure of S7.6, the vehicle with the ESC system enabled must satisfy the engine torque reduction criteria of S5.3.1.1.

S5.3.1.1 The engine torque reduction when measured 1.5 seconds after the activation of the electronic stability control system must be at least 10 percent less than the engine torque requested by the driver.

S5.3.2 *Sine With Dwell Maneuver.* During each sine with dwell maneuver performed under the test conditions of S6 and the test procedure of S7.10, the vehicle with the ESC system enabled must satisfy the roll stability criteria of S5.3.2.1 and S5.3.2.2, the yaw stability criteria of S5.3.2.3 and S5.3.2.4, and the responsiveness criterion of S5.3.2.5 during each of those tests conducted with a commanded steering wheel angle of 0.7A or greater, where A is the steering wheel angle computed in S7.6.2.

S5.3.2.1 The lateral acceleration measured at 0.75 seconds after completion of steer of the sine with dwell steering input must not exceed 30 percent of the peak value of the lateral acceleration recorded during the 2nd half of the sine maneuver (including the dwell period), *i.e.,* from time 1 second after the beginning of steer to the completion of steer during the same test run.

S5.3.2.2 The lateral acceleration measured at 1.5 seconds after completion of steer of the Sine With

Dwell steering input must not exceed 10 percent of the peak value of the lateral acceleration recorded during the 2nd half of the sine maneuver (including the dwell period), *i.e.,* from time 1 second after the BOS to the COS during the same test run.

S5.3.2.3 The yaw rate measured at 0.75 seconds after completion of steer of the Sine With Dwell steering input must not exceed 40 percent of the peak value of the yaw rate recorded during the 2nd half of the sine maneuver (including the dwell period), *i.e.,* from time 1 second after the BOS to the COS during the same test run.

S5.3.2.4 The yaw rate measured at 1.5 seconds after completion of steer of the Sine With Dwell steering input must not exceed 15 percent of the peak value of the yaw rate recorded during the 2nd half of the sine maneuver (including the dwell period), *i.e.,* from time 1 second after the BOS to the COS during the same test run.

S5.3.2.5 The lateral displacement of the vehicle center of gravity with respect to its initial straight path must be at least 2.13 meters (7 feet) for each truck tractor and at least 1.52 meters (5 feet) for each bus when computed 1.5 seconds after the BOS.

S5.3.2.5.1 The computation of lateral displacement is performed using double integration with respect to time of the measurement of lateral acceleration at the vehicle center of gravity, as expressed by the formula:

$$\text{Lateral Displacement} = \iint Ay_{CG}\, dt$$

S5.3.2.5.2 Time t = 0 for the integration operation is the instant of steering initiation, known as the BOS.

S5.4 *ESC System Malfunction Detection.* Each vehicle shall be equipped with an indicator lamp, mounted in front of and in clear view of the driver, which is activated whenever there is a malfunction that affects the generation or transmission of control or response signals in the vehicle's electronic stability control system.

S5.4.1 The ESC malfunction telltale must illuminate only when a malfunction exists and must remain continuously illuminated for as long as the malfunction exists, whenever the ignition locking system is in the ''On'' (''Run'') position.

S5.4.2 The ESC Malfunction telltale must be identified by the symbol shown for ''Electronic Stability Control System Malfunction'' or the specified words or abbreviations listed in Table 1 of Standard No. 101 (49 CFR 571.101).

S5.4.3 The ESC malfunction telltale must be activated as a check of lamp function either when the ignition locking system is turned to the ''On'' (''Run'') position when the engine is not running, or when the ignition locking system is in a position between the ''On'' (''Run'') and ''Start'' that is designated by the manufacturer as a check position.

S5.4.4 The ESC malfunction telltale need not be activated when a starter interlock is in operation.

S5.4.5 The ESC malfunction telltale lamp must extinguish at the next ignition cycle after the malfunction has been corrected.

S5.5 *ESC System Technical Documentation.* To ensure that a vehicle is equipped with an ESC system that meets the definition of ''ESC System'' in S4, the vehicle manufacturer must make available to the agency, upon request, the following documentation:

S5.5.1 A system diagram that identifies all ESC system hardware. The diagram must identify what components are used to generate brake torques at each controlled wheel, determine vehicle lateral acceleration and yaw rate, estimate side slip or the side slip derivative, monitor driver steering inputs, and for a tractor, generate the towed vehicle brake torques.

S5.5.2 A written explanation describing the ESC system basic operational characteristics. This explanation must include a discussion of the system's capability to apply brake torques at each wheel, how the system estimates vehicle mass, and how the system modifies engine torque during ESC system activation. The explanation must also identify the vehicle speed range and the driving phases (acceleration, deceleration, coasting, during activation of ABS or traction control) under which the ESC system can activate.

S5.5.3 A logic diagram that supports the explanation provided in S5.5.2.

S5.5.4 Specifically for mitigating, avoiding, and preventing vehicle rollover, oversteer, and understeer conditions, a discussion of the pertinent inputs to the computer or calculations within the computer and how its algorithm uses that information and controls ESC system hardware to limit these loss of control conditions.

S6. *Test Conditions.* The requirements of S5 shall be met by a vehicle when it is tested according to the conditions set forth in the S6. On vehicles equipped with automatic brake adjusters, the automatic brake adjusters must remain activated at all times.

S6.1 *Ambient conditions.*

S6.1.1 The ambient temperature is between 7 °C (45 °F) and 40 °C (104 °F).

S6.1.2 The maximum wind speed is no greater than 5 m/s (11mph).

S6.2 *Road test surface.*

S6.2.1 The tests are conducted on a dry, uniform, solid-paved surface. Surfaces with irregularities and undulations, such as dips and large cracks, are unsuitable.

S6.2.2 The road test surface produces a peak friction coefficient (PFC) of 0.9 when measured using an American Society for Testing and Materials (ASTM) E1136–93 (Reapproved 2003) standard reference test tire (incorporated by reference,, in accordance with ASTM Method E 1337–90 (Reapproved 2002), at a speed of 64.4 km/h (40 mph), without water delivery (both documents incorporated by reference, see § 571.5).

S6.2.3 The test surface has a consistent slope between 0% and 1%.

S6.3 *Vehicle conditions.*

S6.3.1 The ESC system is enabled for all testing, except for the ESC Malfunction test in S7.11.

S6.3.2 *Test Weight.*

S6.3.2.1 *Truck tractors.* The combined total weight of the truck tractor and control trailer (specified in S6.3.4) is 80 percent of the tractor GVWR. The tractor is loaded with the fuel tanks filled to at least 75 percent capacity, test driver, test instrumentation, and a ballasted control trailer with outriggers. Center of gravity of all ballast on the control trailer is located directly above the kingpin. The load distribution on non-steer axles is adjusted so that it is proportional to the tractor's respective rear axles GAWRs by adjusting the fifth wheel position, if adjustable. If the fifth wheel of the truck tractor cannot be adjusted without exceeding a GAWR, ballast is reduced so that axle load is equal to or less than the GAWR, maintaining load proportioning as close as possible to specified proportioning.

S6.3.2.2 *Buses.* A bus is loaded to a simulated multi-passenger configuration. For this configuration the bus is loaded with the fuel tanks filled to at least 75 percent capacity, test driver, test instrumentation and simulated occupants in each of the vehicle's designated seating positions. The simulated occupant loads are attained by securing a 68-kg (150-lb) water dummy in each of the test vehicle's designated seating positions without exceeding the vehicle's GVWR and each axle's GAWR. If any rating is exceeded the ballast load is reduced until the respective rating or ratings are no longer exceeded.

S6.3.3 *Transmission selector position.* The transmission selector

control is in a forward gear during all maneuvers.

S6.3.4 *Control Trailer.*

S6.3.4.1 The control trailer is an unbraked flatbed semi-trailer that has a single axle with a GAWR of 8,165 kilograms (18,000 pounds) and a length of 655 + 15 cm (258 + 6 inches) when measured from the transverse centerline of the axle to the centerline of the kingpin.

S6.3.4.2 The center of gravity height of the ballast on the loaded control trailer is less than 61 cm (24 inches) above the top of the tractor's fifth wheel.

S6.3.5 *Tires.* The vehicle is tested with the tires installed on the vehicle at time of initial vehicle sale. The tires are inflated to the vehicle manufacturer's recommended cold tire inflation pressure(s) specified on the vehicle's certification label or the tire inflation pressure label.

S6.3.6 *Outrigger.* An outrigger is used for testing each vehicle. The outrigger is designed with a maximum weight of 726 kg (1,600 lb), excluding mounting fixtures.

S6.3.7 *Automated steering machine.* A steering machine programmed to execute the required steering pattern is used during the slowly increasing steer and sine with dwell maneuvers. The steering machine is capable of supplying steering torques between 40 to 60 Nm (29.5 to 44.3 lb-ft). The steering machine is able to apply these torques when operating with steering wheel velocities up to 1200 degrees per second.

S6.3.8 *Truck Tractor Anti-jackknife System.* The truck tractor is equipped with anti-jackknife cables that allow a minimum articulation angle of 45 degrees between the tractor and the control trailer.

S6.3.9 *Special drive conditions.* A vehicle equipped with an interlocking axle system or a front wheel drive system that is engaged and disengaged by the driver is tested with the system disengaged.

S6.3.10 *Liftable axles.* A vehicle with a liftable axle is tested with the liftable axle down.

S6.3.11 *Initial brake temperature.* The initial brake temperature is not less than 65 °C (150 °F) and not more than 204 °C (400 °F).

S6.3.12 *Thermocouples.* The brake temperature is measured by plug-type thermocouples installed in the approximate center of the facing length and width of the most heavily loaded shoe or disc pad, one per brake. A second thermocouple may be installed at the beginning of the test sequence if the lining wear is expected to reach a point causing the first thermocouple to contact the rubbing surface of a drum or rotor. The second thermocouple is installed at a depth of 0.080 inch and located within 1.0 inch circumferentially of the thermocouple installed at 0.040 inch depth. For center-grooved shoes or pads, thermocouples are installed within 0.125 inch to 0.250 inch of the groove and as close to the center as possible.

S6.4 *Selection of compliance options.* Where manufacturer options are specified, the manufacturer shall select the option by the time it certifies the vehicle and may not thereafter select a different option for the vehicle. Each manufacturer shall, upon request from the National Highway Traffic Safety Administration, provide information regarding which of the compliance options it has selected for a particular vehicle or make/model.

S7. *Test Procedure.*

S7.1 *Tire inflation.* Inflate the vehicle's tires to the cold tire inflation pressure(s) provided on the vehicle's certification label or tire information label.

S7.2 *Telltale lamp check.* With the vehicle stationary and the ignition locking system in the ''Lock'' or ''Off'' position, activate the ignition locking system to the ''On'' (''Run'') position or, where applicable, the appropriate position for the lamp check. The ESC system must perform a check of lamp function for the ESC malfunction telltale, as specified in S5.3.3.

S7.3 *Mass Estimation Cycle.* While driving in a straight line, one stop is performed from a speed of 65 km/h (40 mph), with a target longitudinal deceleration between 0.3–0.4g.

S7.4 *Tire Conditioning.* Condition the tires using the following procedure to wear away mold sheen and achieve operating temperature immediately before beginning the Brake Conditioning, SIS and SWD maneuver test runs.

S7.4.1 The test vehicle is driven around a circle 46 meters (150 feet) in radius at a speed that produces a lateral acceleration of approximately 0.1g for two clockwise laps followed by two counterclockwise laps.

S7.5 *Brake Conditioning.* Conditioning and warm-up the vehicle brakes must be completed before and during execution of the SIS and SWD maneuver test runs.

S7.5.1 Prior to executing the first series of SIS maneuvers for a test vehicle, the brakes are burnished according to the procedure in S6.1.8 of Standard No. 121, *Air brake systems.*

S7.5.2 After the brakes are burnished in accordance with S7.5.1, initiate the vehicle compliance test according to S7.6. For a vehicle on which a full FMVSS No. 121 compliance test was performed, immediately prior to executing any slowly increasing steer or sine with dwell maneuvers, the brakes are burnished using 40 brake application snubs from a speed of 64 km/h (40 mph) to a speed of 32 km/h (20 mph), with a target deceleration of approximately 0.3g. After each brake application, accelerate to 64 km/h (40 mph) and maintain that speed until making the next brake application at a point 1 mile from the initial point of the previous brake application. At end of the 40 snubs, the hottest brake temperature is confirmed to be within the temperature range of 65 °C–204 °C (150 °F–400 °F). If the hottest brake temperature is above 204 °C (400 °F) a cool down period is performed until the hottest brake temperature is measured within that range. If the hottest brake temperature is below 65 °C (150 °F) individual brake stops shall be repeated to increase any one brake temperature to within the target temperature range of 65 °C–204°C (150 °F–400 °F) before the subject maneuver can be performed.

S7.6 *Slowly Increasing Steer Test.* The vehicle is subjected to two series of runs of the slowly increasing steer test using a constant vehicle speed of 48.3 ± 1.6 km/h (30.0 ± 1.0 mph) and a steering pattern that increases by 13.5 degrees per second until ESC system activation is confirmed. Three repetitions are performed for each test series. One series uses counterclockwise steering, and the other series uses clockwise steering. During each run ESC activation is required for the Engine Torque Reduction test and is confirmed as specified in S7.7.

S7.6.1 The slowly increasing steer maneuver sequence is started using a commanded steering wheel angle of 270 degrees. If ESC activation did not occur during the maneuver then the commanded steering wheel angle is increased by 270 degree increments up to the vehicle's maximum allowable steering angle or until ESC activation is confirmed.

S7.6.2 From the slowly increasing steer tests, the quantity ''A'' is determined. ''A'' is the steering wheel angle in degrees that is estimated to produce a lateral acceleration of 0.5g for the test vehicle. Utilizing linear regression on the lateral acceleration data recorded between 0.05g and 0.3g, and then linear extrapolation out to a lateral acceleration value of 0.5g, A is calculated, to the nearest 0.1 degrees, from each of the six satisfactory slowly increasing steer tests. If ESC activation occurs prior to the vehicle experiencing

a lateral acceleration of 0.3g then the data used during the linear regression will be that data recorded between 0.05g and the lateral acceleration measured at the time of ESC activation. The absolute value of the six A's calculated is averaged and rounded to the nearest 0.1 degrees to produce the final quantity, A, used during the sine with dwell maneuvers below.

S7.7 *Engine Torque Reduction Test.* During each of the six completed slowly increasing steer test maneuvers, ESC activation is confirmed by comparing the engine torque output and driver requested torque data collected from the vehicle J1939 communication data link. During the initial stages of each maneuver the two torque signals with respect to time will parallel each other. Upon ESC activation, the two signals will diverge when ESC system activation causes a commanded engine torque reduction and the driver attempts to accelerate the vehicle maintaining the required constant test speed causing an increased driver requested torque.

S7.7.1 During each of the six slowly increasing steer test runs, verify the commanded engine torque and the driver requested torque signals diverge at least 10 percent 1.5 seconds after the beginning of ESC activation occurs as defined in S7.12.15.

S7.7.2 If ESC activation does not occur in all of the six slowly increasing steer test maneuvers the test is terminated.

S7.8 After the quantity A has been determined in S7.6, without replacing the tires, the tire and brake conditioning procedures described in S7.4 and S7.5 are performed immediately prior to conducting the sine with dwell test.

S7.9 Check that the ESC system is enabled by ensuring that the ESC malfunction telltale is not illuminated.

S7.10 *Sine With Dwell Test.* The vehicle is subjected to two series of test runs using a steering pattern of a sine wave at 0.5 Hz frequency with a 1.0 sec delay beginning at the second peak amplitude as shown in Figure 1 (sine with dwell maneuver). One series uses counterclockwise steering for the first half cycle, and the other series uses clockwise steering for the first half cycle. Before each test run brake temperatures are monitored and the hottest brake is confirmed to be within the temperature range of 65 °C–204 °C (150 °F–400 °F).

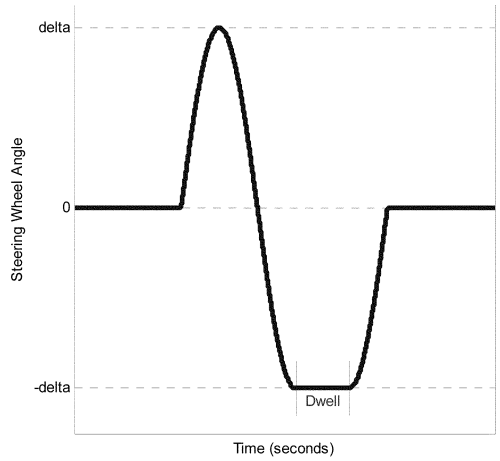


Figure 1. Steering wheel input for Sine with Dwell Maneuver.

S7.10.1 For manual transmissions, the steering motion is initiated with the vehicle coasting (dropped throttle) with the clutch disengaged at 72.4 ± 1.6 km/h (45.0 ± 1.0 mph). For automatic transmissions, the steering motion is initiated with the vehicle coasting and the transmission in the ''drive'' selection position.

S7.10.2 In each series of test runs, the steering amplitude is increased from run to run, by 0.1A, provided that no such run will result in steering amplitude greater than that of the final run specified in S7.10.4.

S7.10.3 The steering amplitude for the initial run of each series is 0.3A where A is the steering wheel angle determined in S7.6.

S7.10.4 The steering amplitude of the final run in each series is the lesser of 1.3A or 400 degrees. If any 0.1A increment, up to 1.3A, is greater than 400 degrees, the steering amplitude of the final run shall be the 0.1A amplitude that is closest or equal to, but not exceeding, 400 degrees.

S7.10.5 Upon completion of the two series of test runs, post processing of the yaw rate and lateral acceleration data to determine Lateral Acceleration Ratio (LAR), Yaw Rate Ratio (YRR) and lateral displacement, is done as specified in S7.12.

S7.11 *ESC Malfunction Detection.*

S7.11.1 Simulate one or more ESC malfunction(s) by disconnecting the power source to any ESC component, or disconnecting any electrical connection between ESC components (with the vehicle power off). When simulating an ESC malfunction, the electrical connections for the telltale lamp(s) are not to be disconnected.

S7.11.2 With the vehicle initially stationary and the ignition locking system in the ''Lock'' or ''Off'' position, activate the ignition locking system to the ''Start'' position and start the engine. Place the vehicle in a forward gear and obtain a vehicle speed of 48.3 ± 8.0 km/h (30.0 ± 5.0 mph). Drive the vehicle for at least two minutes including at least one left and one right turning maneuver and at least one service brake application. Verify that within two minutes of obtaining this vehicle speed the ESC malfunction indicator illuminates in accordance with S5.3.

S7.11.3 Stop the vehicle, deactivate the ignition locking system to the ''Off'' or ''Lock'' position. After a five-minute period, activate the vehicle's ignition locking system to the ''Start'' position and start the engine. Verify that the ESC malfunction indicator again illuminates to signal a malfunction and remains illuminated as long as the engine is running or until the fault is corrected.

S7.11.4 Deactivate the ignition locking system to the ''Off'' or ''Lock'' position. Restore the ESC system to

normal operation, activate the ignition system to the ''Start'' position and start the engine. Verify that the telltale has extinguished.

S7.12 *Post Data Processing—Calculations for Performance Metrics.* Engine torque reduction, lateral acceleration and yaw rate decay calculations, and lateral responsiveness checks must be processed utilizing the following techniques:

S7.12.1 Raw steering wheel angle data is filtered with a 12-pole phaseless Butterworth filter and a cutoff frequency of 10Hz. The filtered data is then zeroed to remove sensor offset utilizing static pretest data.

S7.12.2 Raw yaw, pitch and roll rate data is filtered with a 12-pole phaseless Butterworth filter and a cutoff frequency of 3 Hz. The filtered data is then zeroed to remove sensor offset utilizing static pretest data.

S7.12.3 Raw lateral acceleration data is filtered with a 12-pole phaseless Butterworth filter and a cutoff frequency of 6Hz. The filtered data is then zeroed to remove sensor offset utilizing static pretest data. The lateral acceleration data at the vehicle center of gravity is determined by removing the effects caused by vehicle body roll and by correcting for sensor placement via use of coordinate transformation. For data collection, the lateral accelerometer shall be located as close as possible to the position of the vehicle's longitudinal and lateral centers of gravity.

S7.12.4 Raw vehicle speed data is filtered with a 12-pole phaseless Butterworth filter and a cutoff frequency of 2 Hz.

S7.12.5 Left and right side ride height data is filtered with a 0.1-second running average filter.

S7.12.6 The J1939 torque data collected as a digital signal does not get filtered. J1939 torque collected as an analog signal is filtered with a 0.1-second running average filter.

S7.12.7 Steering wheel velocity is determined by differentiating the filtered steering wheel angle data. The steering wheel velocity data is then filtered with a moving 0.1-second running average filter.

S7.12.8 Lateral acceleration, yaw rate and steering wheel angle data channels are zeroed utilizing a defined ''zeroing range.'' The ''zeroing range'' is the 1.0-second time period prior to the instant the steering wheel velocity exceeds 40 deg/sec. The instant the steering wheel velocity exceeds 40 deg/sec is the instant defining the end of the ''zeroing range.''

S7.12.9 The beginning of steer (BOS) is the first instance filtered and zeroed steering wheel angle data reaches -5 degrees (when the initial steering input is counterclockwise) or +5 degrees (when the initial steering input is clockwise). The value for time at the BOS is interpolated.

S7.12.10 The Completion of Steer for the sine with dwell maneuver (COS) is the time the steering wheel angle returns to zero. The value for time at the COS is interpolated.

S7.12.11 The peak lateral acceleration is the maximum lateral acceleration measured during the second half of the sine maneuver, including the dwell period from 1.0 second after the BOS to the COS. The lateral accelerations at 0.75 and 1.0 seconds after COS are determined by interpolation.

S7.12.12 The peak yaw rate is the maximum yaw rate measured during the second half of the sine maneuver, including the dwell period from 1.0 second after the BOS to the COS. The yaw rates at 0.75 and 1.0 seconds after COS are determined by interpolation.

S7.12.13 Determine lateral velocity by integrating corrected, filtered and zeroed lateral acceleration data. Zero lateral velocity at BOS event. Determine lateral displacement by integrating zeroed later velocity. Zero lateral displacement at BOS event. Lateral displacement at 1.50 seconds from BOS event is determined by interpolation.

S7.12.14 The ESC activation point is the point where the measured driver demanded torque and the engine torque first begin to deviate from one another (engine torque decreases while driver requested torque increases) during the slowly increasing steer maneuver. The torque values are obtained directly from each vehicle's SAE J1939 communication data bus. Torque values used to determine the ESC activation point are interpolated.

S8. *Compliance Date.*

S8.1 *Buses.* All buses manufactured on or after [date that is two years after publication of a final rule implementing this proposal] must comply with this standard

S8.2 *Truck tractors.*

S8.2.1 All two-axle and three-axle truck tractors with a front axle that has a GAWR of (14,600 pounds) or less and with two rear drive axles that have a combined GAWR of (45,000 pounds) or less manufactured on or after [date that is two years after publication of a final rule implementing this proposal] must comply with this standard.

S8.2.2 All truck tractors manufactured on or after [date that is four years after publication of a final rule implementing this proposal] must comply with this standard.

Issued: May 15, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–12212 Filed 5–16–12; 4:15 pm]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Rule To Remove the Morelet's Crocodile From the Federal List of Endangered and Threatened Wildlife; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R9–ES–2010–0030; 92210–1113–0000–C6]

RIN 1018–AV22

Endangered and Threatened Wildlife and Plants; Final Rule To Remove the Morelet's Crocodile From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: Under the authority of the Endangered Species Act of 1973, as amended (Act), we, the U.S. Fish and Wildlife Service (Service), are removing the Morelet's crocodile (*Crocodylus moreletii*) throughout its range from the Federal List of Endangered and Threatened Wildlife due to recovery. This action is based on a thorough review of the best available scientific and commercial data, which indicate that the species' status has improved to the point that the Morelet's crocodile is not likely to become threatened within the foreseeable future throughout all or a significant portion of its range. After the effective date of this final rule, the Morelet's crocodile will remain protected under the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

DATES: This rule becomes effective June 22, 2012.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 400, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Janine Van Norman, Chief, Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703–358–2171; facsimile 703–358–1735. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

(1) Purpose of the Regulatory Action

We are delisting the Morelet's crocodile throughout its range due to recovery under the Endangered Species Act (16 U.S.C. 1531 et seq.) Conservation actions by the three range countries of Mexico, Belize, and Guatemala have eliminated or significantly reduced the threats to the species to point that it is no longer endangered or threatened. Wild populations have increased substantially since restrictions on commercial harvest and trade were instituted in the 1970s. Species experts now widely characterize Morelet's crocodile populations as healthy.

(2) Major Provision of the Regulatory Action

This action is authorized by the Endangered Species Act of 1973 (Act), as amended.

We are amending § 17.11(h), subchapter B of chapter I, title 50 of the Code of Federal Regulations by removing the entry for ''Crocodile, Morelet's'' from the List of Endangered and Threatened Wildlife.

(3) Costs and Benefits

This is a delisting action, and the Office of Management and Budget (OMB) has designated it as not significant. Therefore, we have not analyzed the costs or benefits of this rulemaking action.

Previous Federal Actions

The Morelet's crocodile was listed as endangered throughout its entire range under the predecessor of the Act via a rule published in the **Federal Register** on June 2, 1970 (35 FR 8491). Import into, export from, or re-export from the United States, as well as other prohibitions, including movement in the course of a commercial activity and sale in interstate or foreign commerce, of endangered species and their parts and products, are prohibited under the Act unless otherwise authorized. Authorizations for endangered species can only be made for scientific purposes or to enhance the propagation or survival of the species. On July 1, 1975, the Morelet's crocodile was listed in Appendix I of CITES. These protections were put in place because the species had suffered substantial population declines throughout its range due to habitat destruction and overexploitation through the commercial crocodilian skin trade. CITES Appendix I includes species that are ''threatened with extinction which are or may be affected by trade.''

On May 26, 2005, the Service received a petition from the Government of Mexico's Comisión Nacional para el Conocimiento y Uso de la Biodiversidad (CONABIO) to remove the Morelet's crocodile from the List of Endangered and Threatened Wildlife at 50 CFR 17.11.

Based on the information provided, the Service's 90-day finding on the petition, which was published in the **Federal Register** on June 28, 2006 (71 FR 36743), stated that the petition provided substantial information to indicate that the requested action may be warranted. In that finding, we announced that we had initiated a status review of the species as required under section 4(b)(3)(A) of the Act, and that we were seeking comments on the petition, as well as information on the status of the species, particularly in Belize and Guatemala. The Service also solicited comments or additional information from counterparts in Mexico, Belize and Guatemala.

On April 27, 2011, the Service published in the **Federal Register** a rule proposing to delist the Morelet's crocodile from the Federal List of Endangered and Threatened Wildlife (76 FR 23650). With publication of the proposed rule, we implemented the Service's peer review process and opened a 60-day comment period to solicit scientific and commercial information on the species from all interested parties. For more detailed information on previous Federal actions, please refer to the April 2011 proposed rule.

We based this action on a review of the best scientific and commercial information available, including all information received during the public comment period. In the April 27, 2011, proposed rule, we requested that all interested parties submit information that might contribute to development of a final rule. We also contacted appropriate scientific experts and organizations and invited them to comment on the proposed delisting. We received comments from five individuals; two of those comments were from peer reviewers.

Summary of Comments and Recommendations

We reviewed all comments we received from the public and peer reviewers for substantive issues and new information regarding the proposed delisting of this species, and we address those comments below. Overall, the commenters and peer reviewers supported the proposed delisting. Belize and Guatemala did not submit comments.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from six individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from two of the peer reviewers from whom we requested comments. They generally agreed that the description of the biology and habitat for the species was accurate and based on all relevant literature. Some new information was provided, as well as technical clarifications, as described below. Technical corrections suggested by the peer reviewers have been incorporated into this final rule. In some cases, it has been indicated in the citations by ''personal communication'' (pers. comm.), which could indicate either an email or telephone conversation; in other cases, the research citation is provided. *Public Comments*

The Service only received substantive comments from peer reviewers. There were no substantive comments from the public.

Peer Reviewer Comments

(1) Comment: One peer reviewer disagreed with our statement that ''Unlike most other species of crocodilians, the Morelet's crocodile lacks bony plates beneath the skin (osteoderms) * * *'' The reviewer stated that 14 of 23 extant crocodilian species share that same characteristic. He suggested we change the language to ''Like many crocodilians * * *''

Our Response: The Service agrees, and we have revised the statement to incorporate this change.

(2) Comment: One peer reviewer suggested that caution be made when discussing threats; we should not assume that mortality factors affecting some crocodiles constitute a threat that affects population recruitment or population growth trajectory. He noted that crocodilians have a robust life-history strategy, including repeated production of offspring at intervals throughout their life cycle; long reproductive lives; high fecundity; and low egg and hatchling survival, likely enhanced by crocodilian parental care demonstrated for most species, including *Crocodylus moreletii.* The combined result is that crocodilians can sustain relatively high levels of mortality at all life stages without reducing recruitment or population growth. Thus the persistence of some anthropogenic threats at low levels such as killing, subsistence hunting, and fishing net entanglement are unlikely to constitute significant impacts to population persistence or even to recovery.

Our Response: We agree, and have included revised language in this rule.

(3) Comment: One peer reviewer stated that although the finding refers to a ''rule,'' there were very few rules governing this species, unlike other crocodilian species such as the saltwater crocodile, some caimans, and Nile crocodile, in which there are requirements governing trade, use, marking, etc.

Our Response: Those particular crocodilians were reclassified to ''Threatened'' status under the Act with a special rule under section 4(d) of the Act, governing crocodilians (see 50 CFR 17.42(c)). The Service notes that the Morelet's crocodile is being delisted, and will no longer fall under the provisions of the Act, and therefore will have no further requirements under the Act. However, this species will be subject to the requirements of 50 CFR part 23 regulations, concerning the Convention on International Trade in Endangered Species of Wild Fauna and Flora, (CITES), and 50 CFR part 13 (General Permit Procedures) and 50 CFR part 14 (Importation, Exportation, and Transportation of Wildlife). We have included this statement in this final rule.

(4) Comment: One reviewer stated that they were not aware of any information on trade, biology, or populations in Guatemala. However, they spoke to Dr. Frank Mazzotti regarding his work referenced in the proposed rule (76 FR 23682) pertaining to a national crocodile management program with the Belize Forestry Department and Lamanai Field Research Center. The reviewer reports with Dr. Mazzotti's consent that this effort has resulted in little progress being made. As of June 20, 2011, Dr. Mazzotti was in Belize trying to reactivate the program.

Our Response: We have updated the section pertaining to Dr. Mazzotti's efforts in trying to reactivate this effort.

(5) Comment: One peer reviewer asserted our statement pertaining to the Morelet's crocodile's size attained at sexual maturity was incorrect: ''Morelet's crocodiles attain sexual maturity at about 4.9 ft. (1.5 m) in length, at approximately 7–8 years of age.'' The reviewer asserted that this only pertains to females (see Platt et al. 2008). Males attain sexual maturity at larger sizes than females, although this size may vary by habitat, nutrition, etc.

Our Response: We revised that section to reflect this correction.

(6) Comment: One peer reviewer asserted our statement pertaining to ''Nests, usually constructed of leaf mounds * * *'' was incomplete. They stated that Morelet's crocodile nests are constructed of various types and components of vegetation such as grasses and sedges, leaves and soil, as well as other materials, such as woody debris.

Our Response: We revised that section to include the other nesting materials highlighted by the peer reviewer.

(7) Comment: One peer reviewer noted that the proposed rule had a number of repetitious sections where the same information was presented almost word for word (e.g. the sections describing Mexico's 2010 CITES proposal.)

Our Response: We agree, and have limited the CITES 2010 discussion to Factor D., Inadequacy of Existing Regulatory Mechanisms, *Mexico's Proposal To Transfer the Morelet's Crocodile to CITES Appendix II.* We refer back to this discussion in Factor D as needed.

(8) One of the peer reviewers expressed concern about effective enforcement, after delisting. He stated that, due to financial constraints, limited personnel, and other factors, ''effective enforcement of wildlife laws and regulations can be difficult to impossible to achieve in the range countries.

Our Response: The principle threat to Morelet's crocodiles was trade for the crocodilian skin trade. Illegal harvest or killing of individuals perceived as threats to humans or livestock cannot be completely precluded, but enforcement of controls on domestic and international trade severely limit any commercial incentives. In this rule we state that even with this delisting of the species under the Endangered Species Act, ''the status of the species under CITES, which is an international trade agreement (see Factor D., Inadequacy of Existing Regulatory Mechanisms, *Mexico's Proposal To Transfer the Morelet's Crocodile to CITES Appendix II*), will continue to preclude the trade of wild specimens for commercial purposes and therefore should not create additional pressure on wild populations in any of the range states, as long as enforcement remains effective.'' The Service feels that enforcement under CITES is effective at curtailing illegal trade of Morelet's crocodile, and there is no indication that it will change in the immediate future.

Summary of Changes From Proposed Rule

We fully considered the comments we received from the public on the proposed rule when developing this final delisting of the Morelet's crocodile. This final rule incorporates changes to our proposed delisting based on the comments that we received (discussed above) and newly available scientific and commercial information. Reviewers generally commented that the proposed rule was very thorough and comprehensive. We made some technical corrections based on new, although limited, information presented by the peer reviewers. None of the information, however, changed our determination that delisting this species is warranted.

Species Information

Three species of crocodilians occur in Mexico and Central America. The Morelet's crocodile and the American crocodile (*Crocodylus acutus*) co-occur in Mexico, Belize, and Guatemala (Schmidt 1924, pp. 79 and 85; Stuart 1948, p. 45). While their ranges overlap, the American crocodile has a much larger range than the Morelet's crocodile, and is found in the United States in the State of Florida, as well as in the Caribbean, on Pacific and Atlantic coasts of Central America and in northern South America, in Venezuela, Colombia, Ecuador, and northern Peru. A third species, the common or spectacled caiman (*Caiman crocodilus*) occurs in Mexico and Guatemala, but is absent from Belize. The distribution of the common caiman also extends into northern South America (Ross 1998, pp. 14–17; Thorbjarnarson 1992, pp. 82–85). The Morelet's crocodile was named after a French naturalist, P.M.A. Morelet (1809–1892), who discovered this species in Mexico, in 1850 (Britton 2008, p. 1). The type locality of the species was later restricted to ''Guatemala, El Peten, Laguna de Peten'' when the species was scientifically described. In Mexico, the Morelet's crocodile is known as ''lagarto'' or ''swamp crocodile'' (Rodriguez-Quivedo et al. 2008).

The Morelet's crocodile is a ''relatively small species'' that usually attains a maximum length of approximately 9.8–11.5 ft. (3–3.5 m (Sánchez 2005, p. 4); Britton 2008, p. 1)), with most wild adults ranging in length 6.6–8.2 ft. (2–2.5 m). Hurley (2005, p. 2), however, reported specimens attaining 15.4 ft. (4.7 m). Platt and Rainwater (2005, p. 25) stated that size estimates where shorter lengths were documented were probably based on populations that had been heavily impacted by hunting, and which now contained few large adults. The Morelet's crocodile is distinguished from other crocodiles, particularly the partially sympatric (having the same or overlapping distribution) and somewhat larger American crocodile, by the number of dorsal scales in each transverse row on its back, the number and arrangement of nuchal scales (located at the nape of the neck), and irregular scales on the ventrolateral (lower side) surface of the tail (Meerman 1994, p. 110; Navarro Serment 2004, pp. 55–56; Platt and Rainwater 2005, p. 27; Hernández Hurtado *et al.* 2006, p. 376; Platt *et al.* 2008b, p. 294). The Morelet's crocodile has six nuchal scales of similar size compared to other crocodile species, which have either four nuchal scales or four large nuchal scales and two small ones (CITES 2010a, p. 11). Like many crocodilians, the Morelet's crocodile lacks bony plates beneath the skin (osteoderms), making their skin more valuable as leather (Hurley 2005, p. 9). Adults have a yellowish-olive black skin, usually showing big black spots at the tail and at the back area, which in some adults can be entirely black. The ventral (underside) area is light in color, with a creamy yellowish tone. A thick and soft skin has made the Morelet's crocodile desirable for commercialization (CITES 2010a, p. 3).

Opportunistic carnivores, juvenile Morelet's crocodiles feed on small invertebrates, especially insects and arachnids, while subadults eat a more diverse diet including mollusks, crustaceans, fish, amphibians, and small reptiles. Adult crocodiles consume reptiles, birds, and mammals (Platt *et al.* 2002, p. 82; Sánchez 2005, p. 7; Platt *et al.* 2006, pp. 283–285; CITES 2008, p. 9, CITES 2010a, p. 3). This species is also known to exhibit necrophagy (consumption of dead animal carcasses over an extended period (several days)) and interspecific kleptoparasitism (stealing of food from one individual by another individual) (Platt *et al.* 2007, p. 310). Female Morelet's crocodiles attain sexual maturity at about 4.9 ft. (1.5 m) in length, at approximately 7–8 years of age. Males attain sexual maturity at larger sizes than females, although this size may vary by habitat, nutrition, and other environmental factors (Rainwater 2011, pers. comm.)

A growth rate of 0.63 inches (in) per month (1.6 centimeters (cm) per month) was observed in Morelet's crocodiles during the first 3 years of life under protected conditions in Mexico, while a rate of 0.94–1.18 in per month (2.4–3.0 cm per month) was achieved under farming conditions (Pérez-Higareda *et al.* 1995, p. 173). Adult females build nests and lay 20–40 eggs per clutch (Hurley 2005, p. 3; Sánchez 2005, p. 6), with an average of 35 eggs per clutch (CITES 2008, p. 9; CITES 2010a, p. 3). Nests consist of mounds composed of grasses, sedges, leaves, soil and woody material (Rainwater 2011, pers. comm.), and are generally constructed at the beginning of the wet season (April–June). They are located on the shores of freshwater wetlands, as well as in coastal lagoons and mangrove patches (Platt *et al.* 2008a, pp. 179–182).

An analysis based on DNA microsatellite data from hatchlings collected at 10 Morelet's crocodile nests in Belize showed that progeny from 5 of the 10 nests were sired by at least two males (McVay *et al.* 2008, p. 643). These data suggested that multiple paternities was a mating strategy for the Morelet's crocodile and was not an isolated event. In addition, this information may be useful in the application of conservation and management techniques for the species.

The eggs of Morelet's crocodiles hatch in September–October, 65–90 days after they are laid. Females attend the nest during incubation, and can assist the newborns to leave the nest. Both parents protect juveniles against predators and other adult crocodiles (CITES 2010a, p. 3). Nest failures due to flooding and predation, both avian and mammalian, are common (Platt *et al.* 2008a, p. 184). Expected lifespan in the wild is 50–65 years (Hurley 2005, p. 4.) The Morelet's crocodile exhibits and shares with other crocodilians many acoustic and visual signals that convey reproductive, territorial, and other types of information (Senter 2008, p. 354).

The Morelet's crocodile occurs primarily in freshwater environments such as lakes, swamps, and slow-moving rivers, but can temporarily inhabit intermittent freshwater bodies, such as flooded savannahs, and is occasionally observed in brackish coastal lagoons (Villegas 2006, p. 8). Floating and emergent vegetation provide cover to protect young crocodiles from predators, including cannibalism by adult crocodiles (Sánchez 2005, p. 7). In contrast to the Morelet's crocodile, the American crocodile feeds mainly on fish and occurs primarily in coastal or brackish environments, such as coastal mangrove swamps, brackish and saltwater bays, lagoons, marshes, tidal rivers, and brackish creeks. American crocodiles can also be found in abandoned coastal canals and borrow pits, and may range inland into freshwater environments preferred by the Morelet's crocodile, such as lakes and lower reaches of large

rivers. American and Morelet's crocodiles have been known to lay eggs within the same nest mound as conspecifics, suggesting a more gregarious and tolerant demeanor (Brien *et al.* 2007, pp. 17–18).

The historical distribution of the Morelet's crocodile comprised the eastern coastal plain of Mexico, most of the Yucatan Peninsula, Belize, and northern Guatemala (Hurley 2005, p. 1), with an estimated historical distribution covering 173,746 mi^2 (450,000 km^2) (Sigler and Domínguez Laso 2008, pp. 11–12). Approximately 51 percent of the original geographic distribution in Mexico remains undisturbed, while approximately 49 percent is disturbed or altered (Mexico 2006, p. 17, CITES 2010a, p. 16). In linear terms, the amount of undisturbed shoreline habitat available in Mexico to the Morelet's crocodile is about 15,534 mi (25,000 km) of shoreline, which is approximately 72 percent of the total undisturbed shoreline habitat available throughout the species' range. According to CONABIO, the amount of undisturbed shoreline habitat available to the Morelet's crocodile in Belize and Guatemala is estimated to be 2,050 mi (3,300 km) and 4,163 mi (6,700 km), respectively, or 9 and 19 percent of the total undisturbed shoreline habitat available throughout the species' range (CONABIO 2005, pp. 16–19).

Historical estimates of total population sizes in the three range countries are unavailable or imprecise, and we were not able to find any additional data on historical, rangewide population estimates for the species. While not quantifiable or documented by field surveys, Lee (1996, p. 134) characterized the historical distribution and abundance of the Morelet's crocodile in the Yucatan Peninsula of Mexico as follows: ''Throughout its range, nearly every local aguada (flood) has (or had) its lagarto, which generally proves to be *C. moreletii.''* The same probably could be said about Belize and Guatemala.

It has been widely reported, however, that by the middle of the 20th century, populations of Morelet's crocodiles were widely depleted due primarily to overharvest for commercial purposes during the 1940s and1950s. In ''Crocodiles: An action plan for their conservation,'' Thorbjarnarson (1992, p. 68 and the references cited therein) characterized the Mexican populations of Morelet's crocodiles in the early 1990s as very depleted in the Mexican States of Tamaulipas and Veracruz, recovering to some degree and viable in northeastern Mexico, and severely threatened in Tabasco State and Campeche State. However, populations of Morelet's crocodiles were not depleted in southern Chiapas State and eastern Quintana Roo State (Sian Ka'an Biosphere Reserve).

Few historical estimates for the Morelet's crocodile in Belize are available, but based on surveys during 1978 and 1979, Abercrombie *et al.* (1980, p. 103) reported that very few adults were observed in areas where they had previously been relatively abundant. This condition was attributed to overexploitation (i.e., commercial trade in hides). Thorbjarnarson (1992, p. 55) characterized the Morelet's crocodile populations in the early 1990s as generally depleted in the northern part of Belize, but relatively abundant in several other areas. Abercrombie *et al.* estimated the total population of Morelet's crocodiles older than 9 months of age in Belize at 2,200–2,500 individuals (Abercrombie *et al.* 1982, p. 16). Nothing was known in the scientific literature at that time about populations in the southern part of Belize. The only available countrywide estimates for the Morelet's crocodile in Belize suggested a total population size of 25,000–30,000 individuals that was declining in number in 1945, was near depletion between 1970 and 1980, and, in response to several protective measures, had undergone a slow recovery by 2000 to about 20,000 individuals (Finger *et al.* 2002, p. 199).

Thorbjarnarson (1992, p. 64) characterized the Guatemalan populations in the early 1990s as depleted, but capable of recovery. He indicated that 75 individuals had been reported at three lakes in the Petén Region, in the northern portion of the country, and that Morelet's crocodiles were known to be common in other parts of that region.

By the late 1990s, little had changed with regard to our knowledge of the distribution and abundance of the Morelet's crocodile. In ''Crocodiles: Status survey and conservation action plan (second edition),'' Ross (1998, pp. 46–47) characterized several populations of Morelet's crocodiles in all three countries as depleted. In some areas, however, including the Lacandón Forest (Chiapas State, Mexico) and the Sian Ka'an Biosphere Reserve (Quintana Roo State, Mexico), healthy populations of the Morelet's crocodile existed. These findings were based on anecdotal reports and incidental records; numerical data were not readily available.

Based on extrapolations of habitat relationships (e.g., vegetation type, size of wetland/riverine feature, and disturbance factors, described in more detail in CONABIO 2005, pp. 16–19) and frequency of encounter rates (derived from country-specific field research), the potential global population of free-ranging Morelet's crocodiles in 2004 was estimated to be 102,432 individuals (all age classes; 79,718 individuals in Mexico, 8,803 in Belize, and 13,911 in Guatemala), including approximately 19,400 adults (CONABIO 2005, pp. 17–19).

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations, 50 CFR 424, set forth the procedures for listing, reclassifying, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in reclassifying or delisting a species. For species that are already listed as endangered or threatened, the analysis of threats must include an evaluation of both the threats currently facing the species, and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal or reduction of the Act's protections. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species was classified were in error.

Factor A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The overharvest for commercial purposes, rather than habitat destruction or modification, was the primary reason for the Morelet's crocodile being listed under the Act and its inclusion in CITES. However, the Act requires an analysis of current and future potential impacts to the species based on modification or destruction of habitat.

The petition (CONABIO 2005) highlights habitat degradation as a potential threat, especially if it involves lack of prey and eventual contamination of water bodies. Currently, the extent of habitat degradation is estimated to be moderate in Mexico and Belize, and slightly higher in northern Petén, Guatemala (CONABIO 2005, Annex 1, p. 10). However, as stated previously, historical estimates of rangewide habitat destruction for the Morelet's crocodile are unavailable or imprecise. We found that the data on habitat destruction were primarily presented separately for each individual country. Therefore, the following analysis of the potential threats to the species from habitat destruction or modification first presents the specific information available for the Morelet's crocodile in each country, and then presents the general information that was available for the species as a whole.

Mexico

The Morelet's crocodile is known historically from 10 states in Mexico (from east to west): Quintana Roo, Yucatán, Campeche, Chiapas, Tabasco, Veracruz, Oaxaca, Hidalgo, San Luis Potosí, and Tamaulipas (Aguilar 2005, p. 2). Based on available information and interviews during a 1995 site visit to Mexico by the IUCN Crocodile Specialist Group, Ross (1998, pp. 13) suggested ''with some confidence'' that the Morelet's crocodile was widely distributed throughout most of its original range. These states were resurveyed between 2000 and 2004 to assess current Morelet's crocodile populations in those areas.

Surveys conducted between 2000 and 2004 documented the widespread distribution and relative abundance of wild populations of the Morelet's crocodile in Mexico (Domínguez-Laso *et al.* 2005, pp. 21–30; also summarized in Sánchez Herrera 2000, pp. 17–19; CONABIO 2005, pp. 11–13 and Annex 5; Sánchez Herrera and Álvarez-Romero 2008, p. 415; García *et al.* 2007, pp. 31–32; Sigler and Domínguez Laso 2008, pp. 11–13). Surveys found Morelet's crocodiles at 63 sites across all 10 Mexican states comprising the species' entire historic range in Mexico (CONABIO 2005, p. 12). Habitat evaluations based on five environmental components rated habitat quality as excellent at 10 sites (24 percent), or as favorable or suitable at 24 sites (57 percent). Furthermore, evidence of the presence of the Morelet's crocodile was found in cultivated areas and at sites with ''intermediate'' quality habitats (CONABIO 2005, p. 13). This suggested that the Morelet's crocodile does not require undisturbed habitat in order to occupy a site. Habitat mapping resulted in an estimated minimum of 15,675 mi (25,227 km) of shoreline as suitable Morelet's crocodile habitat in Mexico, which is 72 percent of the estimated suitable shoreline habitat available throughout the species' range (CONABIO 2005, pp. 14–16).

Population characteristics of the Morelet's crocodiles in Mexico were also determined during the 2000–2004 field surveys. All age classes were well represented (34 percent juveniles, 47 percent subadults, and 19 percent adults), indicating good recruitment (Domínguez-Laso *et al.* 2005, p. 31). A higher proportion of males to females (1.55 to 1 overall versus about 1 male per female) were observed in all age classes, except older subadults (Domínguez-Laso *et al.* 2005, pp. 33–34). Mean frequency of encounter, based on 62 localities surveyed—excluding one outlier site with an atypically large crocodile population—was 5.76 individuals per 0.62 mi (= 1 kilometer (km) of shoreline ((mode = 3.16 individuals per km); Domínguez-Laso *et al.* 2005, pp. 30, 40). These frequency of encounter rates were similar to those reported for other sites, for example: (1) Sigler *et al.* (2002, p. 222) reported rates of 8.33–18.5 individuals per km) at various sites throughout Mexico and commented that these were the highest rates ever reported for that country; (2) Cedeño-Vázquez (2002, p. 353) reported rates of 1–2 individuals per km), when present (22 of 40 surveys; 711 individuals counted; all age classes represented; hatchlings in September), at Bahia de Chetumal and Río Hondo, Mexico (n = 17 sites) and commented on the recovery of the species; (3) Cedeño-Vázquez *et al.* (2006, p. 15) reported rates of 7.6 and 5.3 individuals per km at La Arrigueña, Campeche State, and commented that this suggested a healthy population. A population estimate—based on (a) extrapolations of 3.16 individuals per km, (b) 19 percent adults, and (c) a cautious estimate of occupied habitat (15,675 mi (25,227 km) of river habitat)—produced a result of approximately 79,718 wild individuals (all ages) in Mexico comprising 78 percent of the total wild population, including approximately 15,146 adults in Mexico (Domínguez-Laso 2005, p. 40).

New information now available to the Service documents updates in the geographic distribution of the Morelet's crocodile in Mexico. Because of several unauthorized introductions or escapes from captive-breeding facilities in areas outside of the reported range of the species, the Morelet's crocodile has become established in the wild at three sites: Chacahua, Oaxaca State; Villa Flores, Chiapas State; and Laguna de Alcuzahue, Colima State (Álvarez Romero *et al.* 2008, p. 415). Several captive-breeding facilities along the Pacific coast in western Mexico contain Morelet's crocodiles. These facilities are located in areas outside of the reported range of the species, but potentially within appropriate habitat for this species. Concerns have been raised about these introductions and the potential negative impacts of this ''exotic'' or ''invasive'' species on the local biota (Álvarez Romero *et al.* 2008, pp. 415, 417). Although genetic evidence suggests that hybridization with the American crocodile is a long-standing, natural situation (Ross, 2011 pers. comm.), Mexico is making efforts to diagnose potential threats to the native American crocodile caused by hybridization with the introduced Morelet's crocodile on the Pacific coast of Mexico. The goal of these efforts is to generate morphological and molecular identification materials and study the population dynamics of the American crocodile. It will include monitoring and harvest of Morelet's crocodiles and hybrids for scientific research (CITES 2010a, p. 6).

According to the information presented in CONABIO 2005, the Morelet's crocodile in Mexico occupies at least 12 protected areas (CONABIO 2005, p. 30 and Annex 6). Part of the Sistema Nacional de Áreas Naturales Protegidas (SINANP or National System of Protected Natural Areas, described more fully in the Factor D section, Inadequacy of Existing Regulatory Mechanisms), encompasses 13 percent of the species' range and includes the following areas: Los Tuxtlas Biosphere Reserve, Pantanos de Centla Biosphere Reserve, Laguna de Términos Biosphere Reserve, Hampolol Wildlife Conservation and Research Center, El Palmar State Preserve, Ría Lagartos Biosphere Reserve, Yum Balam Biosphere Reserve, Laguna Nichupte, Sian Ka'an Biosphere Reserve, Bahia Chetumal (Bay), and Río Hondo (River).

The Government of Mexico's 2010 CITES proposal to transfer the Morelet's crocodile from CITES Appendix I to CITES Appendix II provided updated information on the number of protected areas for the Morelet's crocodile in Mexico. About 77 Federal and certified protected areas in Mexico provide shelter and legal protection to the Morelet's crocodile in its potential range. Of these, 11 have records of the species covering 7,763,147 acres (3,141,634 hectares (ha)) (CITES 2010a, pp. 11, 17–20). The Government of

Mexico designated 8 of the 11 protected areas containing Morelet's crocodiles as Biosphere Reserves, and the 3 remaining protected areas containing Morelet's crocodiles as Flora and Fauna Protection Areas. As stated above, these protected areas are part of SINANP (described more fully in the Factor D section, Inadequacy of Existing Regulatory Mechanisms).

The Government of Mexico's 2010 CITES proposal used both a narrative description (CITES 2010a, p. 11) and a list (CITES 2010a, pp. 17–20) to indicate that there are 11 federally protected areas in Mexico containing Morelet's crocodile. CONABIO 2005 used a narrative description (CONABIO 2005, p. 30) to indicate that there are at least 12 federally protected areas in Mexico containing Morelet's crocodile (CONABIO 2005, p. 30), but did not include a list of the federally protected areas. Based on the information available to the Service, we were unable to find any additional data to explain the difference in the numbers of federally protected areas cited in these two documents. The Government of Mexico's 2010 CITES proposal is the more recent document, and we consider it to contain the best available scientific and commercial data on the number of federally protected areas in Mexico.

The Convention on Wetlands of International Importance especially as Waterfowl Habitat (also known as the Ramsar Convention) is an intergovernmental treaty that provides a framework for international cooperation for the conservation of wetland habitats. CONABIO 2005 did not provide information on whether the Ramsar Convention protects any Morelet's crocodile habitat in Mexico. However, this information was included in the Government of Mexico's 2010 CITES proposal. According to their 2010 CITES proposal, there are 41 Ramsar sites in the potential range of the Morelet's crocodile in Mexico, 13 of which have records of the species covering 6,779,875 ac (2,743,718 ha) (CITES 2010a, pp. 11, 17–20).

According to the information presented in CONABIO 2005, one of the main potential threats to the Morelet's crocodile is habitat destruction and fragmentation due to residential and infrastructure development, such as dams, roads, residential areas, and irrigated fields (CONABIO 2005, Annex 2, pp. 4–5). The information presented in CONABIO 2005 indicated that land reform and the ensuing colonization of undeveloped areas are a potential threat to the Morelet's crocodile, but the Government of Mexico has no such actions planned at this time (CONABIO 2005, p. 33). This threat of habitat degradation is ameliorated in Mexico by the Ley General de Equilibrio Ecológico y Protección al Ambiente (LGEEPA; General Ecological Equilibrium and Environmental Protection Law). This 1988 law has strict restrictions against land use changes in Mexico, especially for undisturbed habitat such as those areas used by the Morelet's crocodile (CONABIO 2005, p. 25). This law is supported by several others in Mexico that ensure the conservation of native flora and fauna in Mexico (see discussion in the Factor D section, Inadequacy of Existing Regulatory Mechanisms; also see CONABIO 2005, Annex 3).

According to the information presented by CONABIO, even in the historic context of prolonged habitat alteration, wild populations of Morelet's crocodiles remained abundant; so much so that large, commercial exploitation of the species was occurring up until federal and international protections were put in place 40 years ago. Alteration of Morelet's crocodile habitat occurring since then may have produced some additional reductions in local populations, but these reductions are not comparable to those of the past. In addition, even in areas where changes to the original environment are not reversible, evidence points to a certain degree of tolerance by Morelet's crocodiles, especially when the habitat alterations are a result of agriculture or low technology livestock production (CONABIO 2005, p. 25).

Based on surveys, it appears that the Morelet's crocodile in Mexico occurs in all 10 states from where it traditionally has been reported (CONABIO 2005, pp. 11–19). Although approximately 49 percent of the original range in Mexico has been altered, much of the altered habitat is still occupied by the Morelet's crocodile. Approximately 77,220 mi^2 (200,000 km^2) of undisturbed habitat remains in Mexico, which is equivalent to approximately 15,534 mi (25,000 km) of shoreline. The Government of Mexico protects habitat occupied by the Morelet's crocodile in 11 areas designated by the Government of Mexico as either Biosphere Reserves or Flora and Fauna Protection Areas covering a total of 7,763,147 ac (3,141,634 ha). In addition, the Ramsar Convention protects Morelet's crocodile habitat at 13 sites in Mexico covering 6,779,875 ac (2,743,718 ha). We do not have any information or data on the amount of geographic overlap, if any, between the areas of habitat protected by the Government of Mexico versus that protected by the Ramsar Convention. Therefore, we considered these two protection mechanisms as providing separate, but complementary, habitat protection as part of our analysis of habitat protection under this final rule.

We find that the information presented in the petition, as well as the additional information available to the Service, represents the best available scientific and commercial data on habitat destruction or modification for Morelet's crocodiles in Mexico. Although moderate habitat destruction or modification is currently affecting local populations of Morelet's crocodiles in Mexico, and this is likely to continue in the foreseeable future, these activities would not have a significant impact on the species because they would be subject to conservation measures under the Government of Mexico's regulatory framework. This framework will continue to provide adequate protection to the Morelet's crocodile and its habitat in the foreseeable future. Surveys conducted found Morelet's crocodiles at 63 sites across all 10 Mexican states comprising the species' entire historic range in Mexico (CONABIO 2005, p. 12). Given that Mexico contains more than 85 percent of the species' natural range and an estimated 78 percent of all wild individuals, that 7,763,147 ac (3,141,634 ha) of habitat are protected by the Government of Mexico, and that 6,779,875 ac (2,743,718 ha) of habitat are protected by the Ramsar Convention, we conclude that habitat destruction or modification is neither a threat to, nor is it anticipated to significantly impact, the Morelet's crocodile in Mexico in the foreseeable future.

Belize

The Morelet's crocodile was historically known from all six districts in Belize (from north to south): Corozal, Orange Walk, Belize, Cayo, Toledo (Anonymous 1998), and Stann Creek (Platt et al 1999, p. 397.) According to information provided by CONABIO, virtually all of the country contained suitable habitat for the species. The style of economic development in Belize has not required massive alteration of the natural environment. Thus, in general, no extensive and drastic alteration of Morelet's crocodile habitat has occurred in Belize (CONABIO 2005, p. 26). The current amount of altered versus unaltered current habitat for the Morelet's crocodile in Belize is unknown, but CONABIO estimated the current amount of potentially suitable habitat to be approximately 2,050 mi (3,300 km) of shoreline (CONABIO 2005, pp.14–19).

While the species is widespread in the northern portion of the country, it is naturally limited to a narrow region of lowlands along the coast in the southern part of Belize, which is otherwise mountainous (Schmidt 1924, p. 80; Abercrombie *et al.* 1982, pp. 12–16; Platt *et al.* 1999, p. 395; Platt and Thorbjarnarson 2000a, pp. 25–26). Teams not associated with the Mexican effort to delist the species recently surveyed these states, in part, to assess Morelet's crocodile populations in those areas. Based on recent surveys, all six districts historically known to contain Morelet's crocodiles were surveyed in a general characterization of the biodiversity of Belize (Boles 2005, p. 4; Belize Forest Department 2006, p. 22; Biological-Diversity.info Web site 2009). At Spanish Creek Wildlife Sanctuary, in the north-central part of the country, Meerman *et al.* (2004, pp. 23–24 and 30–32) determined that the Morelet's crocodile was fairly common at the site (frequency of encounter rate = 1.4–2.4 individuals per km). At Mayflower Bocawina National Park, near the coast in the southeastern part of the country, Meerman *et al.* (2003b, p. 30) unexpectedly located the Morelet's crocodile at fast-flowing streams such as Silk Grass Creek. While this specimen could have been introduced at the site, its occurrence could also be natural. Along the Macal River, in west-central Belize, Stafford *et al.* (2003, pp. 18, 20) located a breeding population of the Morelet's crocodile (frequency of encounter rate = 1.48 individuals per km (2001) and 1.25 individuals per km (2002)) at a mountainous site at 1,476 ft. (450 m) elevation (higher than expected). A total population size at the Macal River site was calculated to be, at minimum, about 94 individuals (Stafford *et al.* 2003, p. 19).

Earlier comparisons between spotlight surveys conducted in northern Belize in 1979–1980 and 1992–1997 also showed that Morelet's crocodiles were widely distributed and relatively abundant across several habitat types and levels of human accessibility (Platt and Thorbjarnarson 2000b, p. 23). In addition to an extensive system of nature reserves, including significant areas of crocodile habitat, these researchers noted relatively high Morelet's crocodile encounter rates in wetlands surrounding sugarcane fields in this area. Morelet's crocodiles were observed in canals and ditches within the municipal limits of Belize City and Orange Walk, as well as in wetlands easily accessible from many villages (Platt and Thorbjarnarson 2000b, p. 23).

Population characteristics of Morelet's crocodiles in Belize were also determined during these surveys. Size class distribution—25.4 percent adults in the 1990s, compared with 5–10 percent in an earlier study—was consistent with population recovery from past overexploitation (Platt and Thorbjarnarson 2000b, p. 24). Platt and Thorbjarnarson (2000b, pp. 23, 26) reported an overall frequency of encounter of 1.56 individuals per km; encounter rates were much higher in nonalluvial (8.20 individuals per km) and alluvial (6.11 individuals per km) lagoons than in rivers and creeks (0.95 individuals per km) or in mangrove habitats (0.24 individuals per km). While a significant, male-biased sex ratio (5.3 males per 1 female versus about 1 male per female) was identified, the reasons were unclear (Platt and Thorbjarnarson 2000a, pp. 23, 27). Based on extrapolations of habitat relationships in Mexico (which results in an estimated 2,080 mi (3,347 km) of potential habitat in Belize) and an average frequency of encounter of 2.63 individuals per km, CONABIO stated that these results suggested a total Belize population estimate for the Morelet's crocodile of about 8,803 individuals in the wild (all age classes), comprising 9 percent of the total wild population, including about 1,673 adults (CONABIO 2005, p. 18). Although this is not a typically constructed population estimate, this estimate constitutes the best available scientific and commercial data for the nationwide abundance of Morelet's crocodiles in Belize. Although Platt suggested that these overall values for Belize may be somewhat inflated because habitat in southern Belize is less suitable for Morelet's crocodiles than areas in the north (Platt 2008, pers. comm.), frequency of encounter values for Morelet's crocodile populations and total population sizes in Belize may have further increased due to continued protection for over a decade since these surveys in the 1990s. Boles (2005, p. 4) and Belize Forest Department (2006, p. 22), based on countrywide analyses, both suggested that the Morelet's crocodile had ''recovered'' in Belize and could be categorized as ''healthy.''

CONABIO did not present information about the distribution and abundance of the Morelet's crocodile in protected areas in Belize. Other information obtained by the Service, however, suggests that the species is present in many protected areas in Belize, including: Sarstoon Temash National Park (Meerman *et al.* 2003a, p. 45), Mayflower Bocawina National Park (Meerman *et al.* 2003b, p. 30), and Spanish Creek Wildlife Sanctuary (Meerman *et al.* 2004, pp. 30–31). Overall, about 18–26 percent of the national territory of Belize is under some form of protection (BERDS 2005b, p. 1; Young 2008, p. 29). In several of these protected areas, natural resource extraction is permitted from the site, thus potentially limiting these areas' contribution to the conservation status of the Morelet's crocodile. However, we have no evidence that resource extraction in these Belizean protected areas is currently or anticipated to affect significantly the Morelet's crocodile.

We find that the data presented by CONABIO, and additional data available to the Service, represent the best available scientific and commercial data on habitat destruction or modification for Morelet's crocodiles in Belize. Although habitat destruction or modification is currently affecting some local populations of Morelet's crocodiles in Belize, and this is likely to continue in the foreseeable future, we do not have any evidence that habitat destruction or modification is currently or anticipated to be a threat to the Morelet's crocodile in Belize.

Guatemala

The Morelet's crocodile was historically known from the northern portion of Guatemala (States of Petén and Alta Verapaz; Schmidt 1924, pp. 79–84). According to information provided by CONABIO, the Petén region of Guatemala was scarcely populated by humans before 1960 (an estimated 15,000 to 21,000 inhabitants in approximately 12,960 square miles (33,566 km^2) or about one third of Guatemala's area) (CONABIO 2005). In 1961, the Government of Guatemala started an official program to foster colonization in the region, and this caused environmental alteration, as well as increased human conflicts with crocodiles. Slightly more than 50 percent of the potential habitat for the Morelet's crocodile has been altered in Guatemala (CONABIO 2005, p. 26). While the current amount of altered versus unaltered habitat for the Morelet's crocodile in Guatemala is unknown, CONABIO estimated the current amount of potentially suitable habitat to be approximately 4,163 mi (6,700 km) of shoreline (CONABIO 2005, pp.14–19). According to information provided by CONABIO, studies on the status of Morelet's crocodile habitat and population in Guatemala are underway, and the potential threats to the species are under assessment (CONABIO 2005, p. 26).

Recent nationwide survey results are not available for Guatemala, but populations appear to remain in their

historical range in the northern part of the country, especially the central portion of the State of Petén, Laguna del Tigre National Park (northwestern portion of the State of Petén) (Castañeda Moya *et al.* 2000, p. 63), and the El Mirador-Río Azul National Park (ParksWatch 2002, p. 3). The Laguna del Tigre National Park, the largest national park in Guatemala and the largest protected wetland in Central America, is home to the largest numbers of Morelet's crocodiles in Guatemala (ParksWatch 2003, p. 1).

While information regarding the distribution and abundance of Morelet's crocodile in Guatemala is sparse, investigations conducted in Laguna del Tigre National Park (date unspecified, reported in 1998) estimated 4.35 individuals per km in the Sacluc River and 2.1 individuals per km in the San Pedro River, with a population structure typical of stable populations (Castañeda Moya 1998a, p. 13). Castañeda Moya (1997, p. 1; 1998a, p. 521) characterized Morelet's crocodile distribution in the northern State of Petén, Guatemala, as fragmented, with the healthiest populations in the northern region of Petén, where human impact was lower. In a follow-up study at Laguna del Tigre National Park, Castañeda Moya *et al.* (2000, pp. 62–63) reported a mean frequency of encounter rate for the entire park of 4.3 individuals per km, with maximum values of 12.28 individuals per km at Flor de Luna and 11.00 individuals per km at Laguna La Pista. The Morelet's crocodile was more frequently encountered in closed aquatic systems than in open aquatic systems. Juveniles were more frequently observed than were adults.

Based on extrapolations of habitat relationships in Mexico (which resulted in an estimated 4,159.8 mi (6,694.5 km) of potential habitat in Guatemala) and an average frequency of encounter of 2.078 individuals per km, CONABIO stated that there is an estimated total Guatemalan population of Morelet's crocodile of about 13,911 individuals in the wild (all age classes) comprising 13 percent of the total wild population, including about 2,643 adults (CONABIO 2005, p. 18). Although this is not a typically constructed population estimate, this population estimate constitutes the best available scientific and commercial data for the nationwide abundance of Morelet's crocodiles in Guatemala.

While Guatemala has regulatory mechanisms in place to protect these habitats, it appears that the Government of Guatemala, until recently, was not able to enforce them adequately. Resource extraction, drug trade, a lack of regulatory enforcement, and financial issues limited protected areas' potential contribution to the conservation status of the Morelet's crocodile ((Instituto de Agricultura, Recursos Naturales y Agrícolas, Universidad Rafael Landivar, and Asociación Instituto de Incidencia Ambiental (IARNA URL IIA) 2006, pp. 88–92). For example, the Laguna del Tigre National Park, together with the Laguna del Tigre Protected Biotope (a small area with a distinct set of environmental conditions that supports a particular ecological community of plants and animals) was considered critically threatened by drug trade, land grabs, the presence of human settlements, expanding agriculture and cattle ranching, poaching, forest fires, the oil industry, and the almost complete lack of institutional control over the area (ParksWatch 2003, p. 11). ParksWatch also deemed this national park, and its surrounding area, would not meet its biological diversity objectives in the immediate future unless urgent steps were taken (ParksWatch 2003, p. 11). However, the following year, ParksWatch noted major improvements at Laguna del Tigre since their 2003 report. We have obtained information on the specific protections recently provided to Morelet's crocodiles in the conservation areas of Guatemala, and events that reveal a commitment by the Guatemalan government to curtail illegal activities harmful to Laguna del Tigre National Park. We will go into detail in the Factor D section, *Inadequacy of Existing Regulatory Mechanisms.*

Castañeda Moya *et al.* (2000, p. 61), based on historical references, cited increased destruction of habitat due to human encroachment as having an adverse effect on the species. Based on the research at Laguna del Tigre National Park, Castañeda Moya *et al.* (2000, pp. 61, 65) indicated that sibal (sawgrass) (*Cladium jamaicense*) was extensively burned each year. This burning constituted a major impact to the Morelet's crocodile habitat, as sibal habitat offered suitable insulation, food availability, nesting cover, and protection from predators. Furthermore, the fires facilitated the expansion of savannahs consisting almost exclusively of jimbal (*Bambusa longifolia*). Studies on the Morelet's crocodile in Petén suggest fires in jimbal groves prevent Morelet's crocodiles from reproducing because fire affects nesting sites (ParksWatch 2003, p. 13). In a more general sense, the U.S. Agency for International Development (USAID) (2002, pp. 19–23) and Ruiz Ordoñez (2005, pp. 2–8) indicated several conservation threats at the national level in Guatemala, including habitat loss, habitat degradation, habitat fragmentation, overutilization of resources, environmental contamination and degradation, and the introduction of exotic species.

For the past 10 years, USAID and the Wildlife Conservation Society (WCS) having been working with other nongovernmental organizations (NGOs) and the Guatemalan government to combat these issues. In their ''Maya Biosphere Landscape Conservation Area, Guatemala, Implementation Plan FY 2008'' (WCS 2009, page 3), the WCS highlighted their central goals for ensuring the conservation of wide-ranging target species, including the Morelet's crocodile, were to contain the advance of the Laguna del Tigre agro-pastoral frontier and maintain the comparatively intact eastern bloc of the Maya Biosphere Reserve (MBR) forest. Strategies to reduce impacts to wildlife in the MBR landscape include involving people in local communities, forest concessions, governments, and NGOs in local conservation efforts; developing adaptive management strategies to address tactical threats across the landscape; and educating local communities on best management practices across the MBR and beyond. Since 2003, efforts by the WCS have reduced areas burned in the MBR in Guatemala. Through educating locals on best management practices, conducting aerial flights, utilizing remote sensing to monitor changes in forest cover and fire, and establishing and patrolling a 47-km fire break, along with regularly reporting to the Guatemalan and provincial governments and national media, WCS's efforts have resulted in a 90 percent reduction in areas burned in the Laguna del Tigre portion of the MBR ((WCS 10 year report, no date given, p. 6)).

In addition, the president of Guatemala recently deployed 250 specially trained soldiers to recover fully all the protected zones of El Petén in Laguna del Tigre National Park. The contingent, called the ''green battalion,'' will work jointly with the Guatemalan Attorney General's Office. This effort is aimed at combating drug trafficking and removal or destruction of natural and archeological resources in Laguna del Tigre, El Petén region of the MBR (Latin American Herald Tribune 2010).

El Mirador-Río Azul National Park in northeastern Guatemala is located in the department of Petén and maintains a population of Morelet's crocodiles (ParksWatch 2002, p. 3). The park is composed of two sections, which are divided by the Dos Lagunas Biotope. The western section is known as El

Mirador and the eastern part is known as Río Azul. This area is considered by World Resources Institute to be the last pristine Guatemalan rainforest. It is also one of the few protected areas that have experienced little deforestation over the years. No permanent human residents live within the park borders or in its immediate surrounding areas. El Mirador-Río Azul National Park is considered vulnerable, by ParksWatch, meaning that immediate conservation measures are not needed at this time, but monitoring is necessary to ensure the protection and maintenance of its biological diversity in the near future (ParksWatch 2002, p. 3). NGOs such as Asociación Balam, WCS-Guatemala, the Asociatión of Forest Communities of Petén (ACOFOP), the Guatemalan National Park Service (CONAP), the Guatemalan Archeological Institute (IDAEH), and the office of the Executive Secretary of the President of Guatemala formed an alliance called the ''Mesa Multisectorial para el Area Natural y Cultural de Mirador-Rio Azule.'' This alliance was formed to develop consensus among its team members regarding the long-term protection of the park and provide sustained economic contribution to the people of the MBR and of Guatemala.

While CONABIO estimated that slightly more than 50 percent of the potential habitat for the Morelet's crocodile has been altered in Guatemala, they gave no information indicating to what extent (CONABIO 2005, p. 26). Very little information has been collected about the consequences of forest fires, hunting, and habitat fragmentation to the Morelet's crocodile. However, Mexico saw the presence of the Morelet's crocodile in cultivated areas and at sites with ''intermediate'' quality habitats (CONABIO 2005, p. 13) in its own country, and Belize noted relatively high Morelet's crocodile encounter rates in wetlands surrounding sugarcane fields, canals, and ditches within the municipal limits of Belize (Platt and Thorbjarnarson 2000b, p. 23). This information suggests that the Morelet's crocodile does not require undisturbed habitat in order to occupy a site. The current amount of altered versus unaltered habitat for the Morelet's crocodile in Guatemala is unknown, but CONABIO estimated the current amount of potentially suitable habitat to be approximately 4,163 mi (6,700 km) of shoreline (CONABIO 2005, pp. 14–19).

Other Threats to the Species' Habitat

Recreational and Educational Activities

Nonconsumptive recreational or educational uses in the form of ecotourism are ongoing and may grow in magnitude in the future. While CONABIO did not present precise information about the number of companies or sites visited by tourists, an informal internet search suggested that large numbers of ecotourism companies and nature sites in all three range countries were involved in this activity. At Tikal National Park in Guatemala, for example, the number of visitors has increased from 14,594 visitors in 1981, to 141,899 visitors in 2002 (IARNA URL IIA 2006, p. 103). Many of these visitors potentially visited Morelet's crocodile areas in the Petén Region that are in the immediate vicinity of the park as part of their ecotourism experience.

While we cannot completely rule out the potential for adverse effects to the Morelet's crocodile due to disturbance from ecotourism activity in Tikal National Park, we have found no evidence of such effects. Furthermore, we do not have any information to indicate that ecotourism is likely to become a serious problem in the future. Successful ecotourism, by its very nature, relies on the continued conservation and protection of the natural resources it uses. Although the number of visitors to protected areas is increasing and the demand for ecotourism may grow in the future, the ecotourism industry has a significant incentive to ensure that its activities do not become a serious problem to the Morelet's crocodile and its habitat in the future.

Mazzotti *et al.* (2005, p. 984), however, did identify the following negative impacts associated with tourism development at Sian Ka'an Biosphere Reserve (Mexico):

(1) Habitat loss;

(2) Alteration of surface and underground water flow;

(3) Ground water pollution;

(4) Extraction of resources;

(5) Erosion and sedimentation;

(6) Decrease in biodiversity; and

(7) Reduced traditional and recreational use for local communities.

Visual pollution, including trash, as well as ''jeep safaris'' (caravans of small convertible sports utility vehicles being driven through the reserve) and boat traffic, is also increasing at Sian Ka'an Biosphere Reserve (Mazzotti *et al.* 2005, p. 992). While none of these factors was specifically linked to the Morelet's crocodile, all could apply were the situation to deteriorate. However, we do not have any information to indicate that the situation will deteriorate in the future. Biosphere Reserves in Mexico are part of the United Nations Educational, Scientific, and Cultural Organization's (UNESCO) ''Man and the Biosphere'' program and are legally protected under Mexican federal laws. Key features of biosphere reserves are core zones of complete protection of key resources surrounded by mixed-use buffer zones. These buffer zones are particularly important given the pressures on the Sian Ka'an Biosphere Reserve from tourism, and its culturally and archeologically significant areas (Mazzotti *et al.* 2005, p. 982). Recognizing these potential negative factors, geographically dispersed ecotourism involving limited numbers of visitors under controlled conditions to observe and photograph specimens from canoes, photographic blinds, or hiking trails can provide relatively benign opportunities to local residents for economic benefits that can serve as an alternative or disincentive to harvest the Morelet's crocodile (CONABIO 2005, p. 28).

There is also evidence that ecotourism, as well as scientific research and wildlife conservation, are compatible activities with respect to the Morelet's crocodile. In Mexico, for example, ecotourists accompany biologists associated with the Amigos de Sian Ka'an group as they conduct surveys of the Morelet's crocodile at Sian Ka'an Biosphere Reserve, along the eastern coast of the Yucatan Peninsula, Quintana Roo State (EcoColors Tours 2010, pp. 1). At another site, the La Ventanilla Eco-tourism Project in Oaxaca State, Mexico, international volunteers assist local residents and biologists to conserve the Morelet's crocodile, turtles, iguanas, and other species of wildlife (Volunteers for International Partnership-Mexico 2010, pp. 1–4). In Belize, tourists, as well as wildlife researchers from the United States and their Belizean counterparts, are implementing an ecological field study of the Morelet's crocodile at Lamanai Outpost Lodge and Research Station that eventually will lead to the development of a national management plan for the species (The Croc Docs 2010, pp. 1–6). If the biological data, in part collected by the ecotourists, support harvest, and effective enforcement regulations can be developed and implemented, this plan may include commercial exploitation of the Morelet's crocodile. In Guatemala, scientists and ecotourists are working cooperatively with the ProPetén group to undertake conservation work at the Scarlet Macaw Biological Station in the

Maya Biosphere Reserve (ProPetén 2009, p. 1). While these activities differ with regard to specific details, in general they provide positive conservation benefits to the Morelet's crocodile and demonstrate that ecotourism, as well as scientific research and wildlife conservation, can be compatible with respect to the species.

Agriculture, Grazing, and Infrastructure Development

Agriculture, grazing, and infrastructure development (such as dams, roads, residential areas, and irrigated fields) generally are indirect impacts in that the purpose of the action is not focused on the crocodile. These activities can be either consumptive (for example, destruction of nests and eggs by machinery) or nonconsumptive (for example, loss of access to traditional nesting or feeding sites), and are generally manifested through habitat loss or fragmentation. Depending on the nature and extent of these activities, they may have a substantial negative impact on local Morelet's crocodile populations. Although agriculture, grazing, and infrastructure development are currently affecting local populations of Morelet's crocodiles, and this is likely to continue in the foreseeable future, we do not have any evidence that these activities are currently, or anticipated to be, a rangewide threat to the Morelet's crocodile.

Summary of Factor A

Although some habitat degradation has occurred in Mexico, this threat is ameliorated by the LGEEPA. This law has strict restrictions against land use changes in Mexico, especially for undisturbed habitat such as those areas used by the Morelet's crocodile (CONABIO 2005, p. 25). The Sistema Nacional de Áreas Naturales Protegidas (SINANP) also provides significant habitat protection in Mexico. The SINANP created designated protected areas because these areas contain key or representative ecosystems or species, or ecosystems or species that are at risk and require strict control. In Mexico, at least 11 protected areas contain populations of the Morelet's crocodile (CITES 2010a, pp. 17–20). In Belize, at least three protected areas contain Morelet's crocodile populations (Meerman *et al.* 2003a, p. 45; Meerman *et al.* 2003b, p. 30; Meerman *et al.* 2004, pp. 30–31). Mexico and Belize contain the majority of all wild Morelet's crocodiles (87 percent) and the majority of the potentially suitable habitat throughout the species' range (81 percent). We find that, although habitat destruction and modification is affecting individual crocodiles locally, the overall level of habitat protection in Mexico and Belize is currently adequate, and we anticipate that it will remain so.

Based on current information, Guatemala contains the remaining 13 percent of the wild Morelet's crocodiles and the remaining 19 percent of the potentially suitable habitat throughout the species' range. Although the Morelet's crocodile occupies at least two protected areas in Guatemala (Castañeda Moya *et al.* 2000, p. 63), one, the El Mirador-Río Azul National Park, has no permanent human presence either in or surrounding the park and contains the last pristine rainforest in Guatemala, which has experienced very little deforestation. The NGO community has partnered with the President of Guatemala to establish a coalition to ensure long-term protection of this important national park, while providing for sustainable economic incentives to the people of the MBR and of Guatemala. The second protected area, Laguna del Tigre National Park, has been affected by past human encroachment, fire, deforestation, grazing, and infrastructure development. Although these factors may have affected local populations of Morelet's crocodiles, we have no evidence that it has affected the species rangewide. The government of Guatemala and the local and international NGO community have again partnered to address these issues through direct interventions, including local and international community in conservation efforts; and educating people on the use of best management practices. These efforts have resulted in a 90 percent reduction in fires in Laguna del Tigre National Park, and the successful interdiction of individuals conducting unlawful activities.

Despite the localized impacts in all three countries, the current rangewide distribution of Morelet's crocodile now closely resembles the historical rangewide distribution. The species has existing available high-quality habitat, has a healthy population distribution, is abundant at known sites, and is expanding into new sites. Even in the face of habitat alteration, this species has been shown to occupy disturbed habitat. There have been observed increases in the relative abundance of the species, and a total population size of approximately 19,400 adults in the three range countries. Species experts now widely characterize Morelet's crocodile populations as healthy. In addition, crocodilians are known to have a robust history strategy, including repeated production of offspring at intervals throughout the life cycle; long reproductive lives; high fecundity; and low egg and hatchling survival, likely enhanced by crocodilian parental care demonstrated for most species, including *C. moreletii.* The combined result is that crocodilians can sustain relatively high levels of mortality at all life stages without reducing recruitment or population growth. Thus the persistence of some anthropogenic threats at low levels such as killing, subsistence hunting, and fishing net entanglement are unlikely to constitute significant impacts to population persistence or even to recovery (Ross, 2011 pers. comm.).

Although some local factors continue to affect the habitat for Morelet's crocodile, we have no information to indicate that these local factors are of sufficient magnitude to have a range-wide impact on the species to the point that would cause the Morelet's crocodile to meet the definition of either an endangered or a threatened species. Therefore, we find that the present or threatened destruction, modification, or curtailment of its habitat or range is not likely to threaten or endanger the Morelet's crocodile in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Commercial Harvest (Legal and Illegal Trade)

The Morelet's crocodile was included in Appendix I of CITES on July 1, 1975. Species included in Appendix I are species threatened with extinction that are or may be affected by trade. CITES prohibits international trade in specimens of these species unless the trade is not found to be detrimental to the survival of the species, the specimens in trade were legally acquired, and the purpose of the import is not for primarily commercial purposes or the specimen meets one of the exemptions established under the CITES Treaty. A more thorough explanation of CITES is found in the ''*Convention on International Trade in Endangered Species of Wild Fauna and Flora''* discussion under the section *Factor D. Inadequacy of Existing Regulatory Mechanisms.*

Overexploitation for commercial purposes prior to 1970 is widely accepted as the primary cause of a drastic, rangewide population decline of Morelet's crocodile (Platt and Thorbjarnarson 2000b, p. 21; CONABIO 2005, p. 27). Historically, commercial overexploitation, through the harvest of adult animals from the wild, was a

much greater threat to the Morelet's crocodile than habitat loss. During the first half of the 20th century, hundreds of thousands of skins per year were marketed (CITES 2008, pp. 17, 20). The precise magnitude of the trade is unclear, however, because trade data for the Morelet's crocodile was recorded at a higher taxonomic level incorporating other crocodilians. See, for example, Loa Loza 1998a, pp. 134–135 and Arroyo-Quiroz *et al.* 2007, p. 933. It is reported that prior to 1975, hide dealers in Belize purchased up to 12,000 skins annually, and an unknown number of skins were exported illegally in contravention to Mexican law (Plat and Thorbjarnarson 2000b, p. 21). Precise estimates of historical trade from Mexico or Guatemala were unavailable. Even now, the commercial market for designer fashion items made from high-quality crocodile skins, such as leather belts, footwear, wallets, and handbags, is highly lucrative. For example, a single pair of shoes may retail for hundreds of dollars, a handbag for several thousand dollars, and a tote bag for tens of thousands of dollars.

Legal Trade

In 1997, the Government of Mexico established a system for registering, supervising, and enforcing Unidad de Manejo y Administración (UMAs; Conservation Management and Administrative Units) for intensive reproduction of economically valuable natural resources, including the captive breeding of Morelet's crocodiles (CONABIO 2005, Annex 3, pp. 3–5). Commercial use of Morelet's crocodiles in Mexico for domestic trade was strictly limited to animals raised in closed-cycle, captive-breeding operations regulated by the Government of Mexico under the UMA system. For international trade, commercial trade was restricted to animals raised in these closed-cycle, captive-breeding operations registered with the CITES Secretariat. In order for these closed-cycle, captive-breeding operations to be successful, great care was given to satisfying the biological requirements of the species (Cremieux *et al.* 2005, p. 417; Brien *et al.* 2007, pp. 1–26). According to León Velázquez (2004, p. 52), there were approximately 30,000 Morelet's crocodiles in captive-breeding facilities in Mexico in 2004. There were 38,449 Morelet's crocodiles housed in 19 Mexican closed-cycle, captive-breeding operations in 2008 (CITES 2010a, p. 24). Currently, the annual production of Morelet's crocodiles in Mexican closed-cycle, captive-breeding operations does not exceed 40,000 individuals (CITES 2010a, p. 8).

Under Mexican law, closed-cycle, captive-breeding operations wishing to make their Morelet's crocodiles available for commercial use must demonstrate that they are able to go beyond the F2 generation of reproducing individuals. This requirement supports the use of Morelet's crocodiles that is compatible with conservation of the species by offsetting the demand for crocodiles taken from the wild. Such facilities produced a variety of items including skins/hides, meat, live individuals as pets, stuffed figurines, and leather products (fashion accessories) for both domestic and international trade.

Based on CITES annual reports for the period 1996–2005, Caldwell (2007, pp. 6–7) noted relatively low levels of international legal trade in products from Mexican captive-breeding operations during 1996–1999 (fewer than 200 skins/year), but higher levels during 2000–2005 (2,430 skins in 2001; 1,591 skins in 2002; and below 1,000 skins per year during the rest of the period). Japan has been the main importer of products from Mexican captive-breeding operations, with lesser quantities going to France, Italy, the Republic of Korea, and Spain (Caldwell 2007, p. 6).

The United Nations Environment Programme—World Conservation Monitoring Centre (UNEP–WCMC) manages a trade database on behalf of the CITES Secretariat. Each Party to CITES is responsible for compiling annual reports to the CITES Secretariat regarding their country's trade in species protected under CITES. UNEP–WCMC enters the data from these annual reports into a trade database, which is used to analyze trade in CITES specimens. Due to the time needed to compile the data, the most recent year for which comprehensive trade statistics are available is normally 2 years prior to the current year.

In general, prior to 2010, international legal trade consisted of small quantities of unfinished hides/skins or finished leather products, exported primarily from Mexico to Japan and European countries, as well as biological specimens destined for research. These countries process the unfinished hides/skins into leather products such as belts, footwear, wallets, and handbags that in turn are sold within their own country or re-exported for sale to other countries. Due to the listing status of the species under the Act, the United States cannot be a commercial destination for Morelet's crocodile skins and products. It is currently illegal to import Morelet's crocodile skins and products into the United States, unless the import is for scientific or enhancement purposes.

In 2010, the Government of Mexico submitted a proposal to the 15th Meeting of the CITES Conference of the Parties (CoP15) to transfer the Morelet's crocodile throughout its range to Appendix II of CITES with a zero quota for trade in wild specimens because the Government of Mexico concluded that the Morelet's crocodile no longer met the criteria for inclusion in Appendix I (see Factor D, *Mexico's Proposal To Transfer the Morelet's Crocodile to CITES Appendix II;* CITES 2010a, p. 1).

According to the 2010 CITES proposal to transfer the Morelet's crocodile to Appendix II, the UNEP–WCMC CITES Trade Database showed that, until 2007, the parts and derivatives of the Morelet's crocodile most commonly found in trade were skins, skin pieces, and leather products, although other products include live specimens, eggs, bodies, scales, skulls, and shoes were also traded. The largest exporter between 2001 and 2007 was Mexico (8,498 skins, 750 skin pieces, and 1,193 leather products), followed by Belize with 116 bodies, 766 eggs, and 3,124 specimens for scientific purposes (exported to the United States). The major importing countries were Japan (6,170 skins), United States (3,124 specimens for scientific purposes), Italy (1,219 skins), the Republic of Korea (560 skins), France (375 skins), and Spain (162 skins) (CITES 2010a, p. 8).

According to the CITES (CITES 2010a) proposal to transfer the Morelet's crocodile to Appendix II, the national harvest of animals from closed-cycle operations authorized in Mexico amounts to fewer than 2,000 skins per year since the year 2000. In the period between 2000 and 2009, 119 CITES export permits were issued in Mexico for a total of 12,276 Morelet's crocodile skins. However, the total potential production from closed-cycle, captive-breeding operations were about 16,500 individuals and approximately 10,000 skins per year (CITES 2010a, p. 7).

We examined the information on Mexico's closed-cycle, captive-breeding operations in Annex 3 of the 2010 CITES proposal. According to the information provided in the Annex, there were 19 closed-cycle, captive-breeding operations registered as UMAs for the Morelet's crocodile in Mexico. Only 4 of the 19 UMAs had a captive population sufficient to support commercial trade, and only 2—both of which were registered with CITES—of these 4 could support international commercial trade. As of 2008, the captive population in these four UMAs ranged from 1,237 to 28,673 individuals.

The two UMAs that were not registered with CITES had the potential to produce 1,100 skins per year for local commercial trade (CITES 2010a, Annex 3, p. 24). The population levels for the remaining 15 UMAs were relatively low by comparison, ranging from 6 to 576 individuals. Rather than supporting commercial trade, 4 of the remaining 15 UMAs supported exhibition, 7 had no commercial production, 3 contributed to the economic support of the local community, and 1 was used for research.

Three of these 19 Mexican captive-breeding operations were also registered with CITES, and could therefore commercially trade Morelet's crocodile products internationally, as well as domestically while the species was listed under Appendix I. However, one of these CITES-registered captive-breeding operations contains only six individuals, and is used for exhibition purposes. Only two of the three CITES-registered captive breeding operations commercially produce enough Morelet's crocodile skins with the annual production potential for international trade. These two captive-breeding operations have the potential to produce an estimated 2,500 skins annually for international trade (CITES 2010a, pp. 7 and 24, Annex 3). Please see the discussion in the Factor D section, Inadequacy of Existing Regulatory Mechanisms, for additional information on the three CITES-registered captive-breeding operations.

There are no captive-breeding facilities in Belize or Guatemala that are providing specimens or skins for trade, either domestically or internationally under the CITES captive-breeding exception (CITES 2010c). In Belize, Morelet's crocodiles are officially protected from commercial harvest. Platt and Thorbjarnarson (2000b) found no evidence of commercial poaching of Morelet's crocodiles for skins or meat in Belize (Platt and Thorbjarnarson 2000b, p. 27). Reportedly, the species is not subject to commercial activities in Guatemala, given that Guatemala's Comisión Nacional de Áreas Protegidas (CONAP; National Commission on Protected Areas, also known as the Guatemalan National Park Service) prohibits the export and trade in wild specimens of endangered species (CITES 2010a, p. 7).

Illegal Trade

According to the 2010 CITES proposal to transfer the Morelet's crocodile to Appendix II, the UNEP–WCMC CITES Trade Database showed few illegal movements of parts and derivatives of the Morelet's crocodile between 1975 and 2007 from Mexico, Guatemala, and Belize, with the United States as the only destination. This suggests that there is a very low level of illegal trade and that it is only with the United States; however, enforcement actions are not a required field for CITES Annual Reports. Unlike the United States, most countries do not specify the action taken on imports. Thus, the fact that illegal trade to the United States is documented in the WCMC database does not mean that this is the only illegal trade in the species. That said, between 1982 and 2005, items found to have been ''illegally'' imported to the United States from Mexico were mainly leather products (308) and shoes (419 pairs). It is quite possible that these U.S. imports derived from legal operations in Mexico, but were precluded from import into the U.S. because of the Morelet's crocodile's endangered status under the Endangered Species Act.

Considering the same caveats pertaining to WCMC data, there were eight records of illegal trade occurring from Guatemala (between 1989 and 1997), mainly involving pairs of shoes (27), and one case in Belize, which involved the export of 31 eggs in 1995. Regarding Guatemala, Castañeda-Moya (1998) stated that illegal capture of the species continued in the Petén region in that year. However, he admitted that the volume of such activity had decreased compared to the situation 25 years before (CITES 2010a, p. 8).

Recent data available on illegal trade in the Morelet's crocodile between 1975 and 2007 showed that the United States reported illegal imports (UNEP–WCMC CITES Trade Database 2010a). The data on illegal imports are based on the numbers of items that were seized and confiscated by law enforcement personnel in both the United States and in other countries. This information is not included in CITES annual reports for each country; the United States is the exception. The majority of the illegal Morelet's crocodile parts and derivatives confiscated upon arrival into the United States between 1975 and 2007 came from Mexico (20 skins, 28 handbags, 243 leather items, 419 pairs of shoes, 3 watch straps, 9 bodies, 10 garments, 2 live animals, and 65 small leather products). Again, these items could have come from legal operations in Mexico, but were a violation at the time under the Act due to the Morelet's crocodile's endangered status. A significantly smaller number of illegal items originated from Guatemala (1 skin, 2 handbags, 1 leather item, 27 pairs of shoes, and 1 body) and Belize (31 eggs). The majority of the illegal trade reportedly began in 1985, but began to decline steadily starting in 2000. Between 2005 and 2007, there were only a few reported illegal imports of Morelet's crocodile into the United States, and these were small leather products from Mexico (UNEP–WCMC CITES Trade Database 2010b).

The Government of Mexico's Federal Prosecutor for Environmental Protection (PROFEPA) has investigated illegal trade in live animals, presumably for the pet trade. A potential illegal market in live animals is under analysis, and would be expected to involve the Mexican cities of Guadalajara, Monterrey, and Mexico City (Mexico 2006, p. 41). Illegal harvest or killing of individuals perceived as threats to humans or livestock cannot be completely precluded, but enforcement of controls on domestic and international trade severely limit any commercial incentives. PROFEPA performs inspections to prevent laundering of wild Morelet's crocodile specimens and other illegal activities. According to Mexico (Mexico 2006, pp. 39–42), 85 specimens were confiscated in 2003, 2 in 2004, 80 in 2005, and 14 in 2006 (partial results). In addition, and according to Paola Mosig, Program officer for TRAFFIC North America in Mexico, 20 seizures with a total of 48 live specimens, as well as 25 belts and 2 wallets were confiscated in 2007 (Mosig 2008, pers. comm.). According to TRAFFIC, the Wildlife Trade Monitoring Network, these seizures are indicative of a strong enforcement program that deters illegal trade (Mosig 2008, pers. comm.).

Current Trade

In accordance with Article II, paragraph 2(a) of CITES, and CITES Resolution Conf. 9.24 (Rev CoP14) Annex 1, the Government of Mexico submitted a proposal (CoP15 Prop. 8) to CoP15 to transfer the Morelet's crocodile throughout its range to Appendix II of CITES with an annotation requiring a zero quota for wild specimens that was further amended by adding the phrase, ''for commercial purposes'' (CITES 2010a, p. 1). The Government of Guatemala opposed Mexico's CITES proposal as it pertains to the species in Guatemala, based on the limited knowledge of the population and population trends in Guatemala; the threats to the species from deforestation and pollution in Guatemala; and the possibilities of illegal, cross-border trade taking place from Guatemala to Mexico. As a result, the parties to CITES agreed that Morelet's crocodiles in Mexico and Belize should be transferred to CITES Appendix II but that Morelet's

crocodiles in Guatemala remain in CITES Appendix I (CITES 2010b, p. 2). The change in CITES status for Morelet's crocodiles in Mexico and Belize became effective on June 23, 2010. Because of the zero quota annotation, transferring the Morelet's crocodile to CITES Appendix II precludes the trade of wild specimens for commercial purposes and therefore should not create additional pressure on wild populations in any of the range states, as long as enforcement remains effective. Consequently, international commercial trade in Morelet's crocodiles under CITES is currently limited to individuals from sources other than wild populations. However, once the Appendix-II listing went into effect for Morelet's crocodiles in Mexico and Belize, international trade of Morelet's crocodiles in Mexico and Belize under CITES was no longer limited to facilities that are registered with the CITES Secretariat pursuant to the resolution on registration of operations that breed Appendix-I animal species for commercial purposes (Resolution Conf. 12.10 (Rev. CoP15)).

According to Mexico's 2010 CITES proposal, the current level of international trade in the Morelet's crocodile is around 8,600 individuals in 10 years (an average of 860 individuals per year). The Morelet's crocodile represents only a small fraction of the global trade in crocodilians, far behind the market leaders: brown spectacled caiman (*Caiman crocodilus fuscus*), American alligator (*Alligator mississippiensis*), and Nile crocodile (*Crocodylus niloticus*). Current trends in international trade do not indicate a threat to the Morelet's crocodile in the wild (CITES 2010a, p. 8). In addition, the Government of Mexico's proposal to move the Morelet's crocodile to CITES Appendix II allows only individuals from sources other than wild populations to be exported, and this provision remains in effect with the zero quota for wild specimens traded for commercial purposes. The risk of laundering of wild specimens through farms is very low, because the quality of skins produced in captivity is much higher than wild-caught skins, and demand in international trade focuses on high-quality skins (CITES 2010a, pp. 8, 23). It should be noted that there are a number of CITES-recognized production methods that are not ''wild'' and not ''bred in captivity.'' Mexico or any other country is free to propose a change to the annotation at the next CoP removing this limitation. However, there is no indication at this time that a change is imminent.

To see if our results would be comparable to Mexico's assessment, we queried the UNEP–WCMC CITES Trade Database for the number of Morelet's crocodile skins legally exported between 1998 and 2008, and found similar results for the current level of legal trade cited above by the Government of Mexico. According to the UNEP–WCMC CITES Trade Database, Mexico exported 8,780 skins between 1998 and 2008, an average of 878 skins per year (UNEP–WCMC CITES Trade Database 2010b). Two of the previously CITES-registered captive-breeding operations in Mexico have the potential to produce 2,500 skins per year for international trade (CITES 2010a, Annex 3, p. 24), which is more than adequate to meet the current demand for legal trade of fewer than 900 skins per year. Now that this rule is final, Morelet's crocodile products may be imported into the United States and the demand for international trade may increase. However, we do not believe this potential increase in international trade is likely to threaten or endanger wild Morelet's crocodiles due to the adequate supply of captive-bred individuals in Mexico available for legal international commercial trade under CITES.

Besides CITES and the Act, no other international measures control the cross-border movement of the Morelet's crocodile (CITES 2010a, p. 10). When this final rule is effective, (see **DATES** above), the prohibitions of the Act are removed, and Morelet's crocodile parts and products may be imported into the United States for commercial purposes, provided they do not originate in Guatemala. However, cross-border movement of the Morelet's crocodile throughout its range will still be regulated through CITES (Appendix II for Mexico and Belize; Appendix I in Guatemala).

Subsistence Harvest

The overharvest for commercial purposes, other than subsistence harvest, was the primary reason for the Morelet's crocodile listing under the Act and under CITES. Although subsistence harvest has historically had an impact on some local populations of Morelet's crocodiles, these impacts have diminished over time and do not currently have a significant impact on the species as a whole.

Indigenous cultures in Mexico, Belize, and Guatemala have a long history of using the Morelet's crocodile for subsistence and cultural purposes (Maimone Celorio *et al.* 2006, pp. 40–43; Zamudio 2006, pp. 5–8; Méndez-Cabrera and Montiel 2007, p. 132). Historically, the Maya Indians in Mexico consumed small quantities of the eggs and meat of the Morelet's crocodile (Maimone Celorio *et al.* 2006, pp. 40–43; Zamudio 2006, pp. 5–8; Méndez-Cabrera and Montiel 2007, p. 132). Hunting and harvest techniques were based on traditional knowledge by these people of the behavior and ecology of the Morelet's crocodile (Cedeño-Vázquez and Zamudio Acedo 2005, pp. 8–9). More recently (1965–1980), and in response to a demand by outside buyers and businessmen, Maya hunters harvested large quantities of hides for commercial purposes, but that activity now has largely been discontinued (Zamudio *et al.* 2004, p. 344).

Indigenous and nonindigenous people in Belize, generally poor farmers, also engaged in large-scale, commercial harvest of hides during the previous century, but that practice was primarily based on economic instead of cultural reasons (Hope and Abercrombie 1986, p. 146). Abercrombie *et al.* (1982, p. 19) made a distinction between master hunters in Belize, generally older men who made extensive forays into the forest in search of specific game species, and part-time hunters, generally younger men who made short-term, opportunistic outings and often harvested Morelet's crocodiles. Among other uses, the Morelet's crocodile also has important roles in indigenous art, medicine, and religion (Stocker *and Armsey,* 1980, p. 740; Cupul-Magaña 2003, pp. 45–48), and is used locally for handicrafts, jewelry, decorations, and curios (BERDS 2005a, p. 1). Meerman *et al.* (2003a, p. 49) noted a relative scarcity of fish and fish predators such as crocodiles in the Sarstoon Temash National Park in Belize. They suspected that fish populations are depressed, and that over-fishing by humans must play a role. People engaged in fishing along the Upper Temash River also annually collect Morelet's crocodile eggs from nests located along water channels for human consumption. In some years, one or more nests escape discovery, so the eggs are not collected. As a result, baby crocodiles are subsequently seen that year. Heavy fishing also reduces the potential prey base for the Morelet's crocodile. The heavy predation on eggs together with the depletion of the Morelet's crocodile's prey base may be responsible for the low crocodile count along the river (Meerman *et al.* 2003a, pp. 42, 45).

Castañeda Moya (1998a, p. 521; 1998b, p. 13) listed illegal hunting as a threat to Morelet's crocodile in the Petén region of Guatemala, but did not provide a numerical estimate of the

take. ARCAS, an animal welfare group in Guatemala, reported the rescue or recovery of 49 live individuals (about 8 per year), most likely from pet dealers or private individuals, during the period 2002–2007 (ARCAS 2002, p. 3; 2003, p. 2; 2004, p. 2; 2005, p. 2; 2006, p. 3; 2007, p. 3). We do not have any information describing the effect of these threats on the status of wild populations in Guatemala.

Although subsistence harvest continues to affect negatively some local populations of the Morelet's crocodile, the impacts appear to be very small. We have no evidence that subsistence harvest is currently or anticipated to significantly affect the Morelet's crocodile throughout its range. The current rangewide distribution of the Morelet's crocodile closely mirrors the historical rangewide distribution, with a total population size of approximately 19,400 adults in the three range countries.

Scientific Research

Scientific research in and of itself also constitutes a use of the Morelet's crocodile. Research in the three range countries has mainly focused on field surveys for the occurrence of the species, relative to abundance and habitat quality, which do not require removal of specimens. Research protocols followed so far have been those accepted worldwide and do not involve significant alteration of habitat or behavior (CITES 2010a, p. 7). Several scientific research projects on the Morelet's crocodile have focused on field surveys that involve capture, handling, or invasive techniques to identify, for example, the species, sex, or size class of the specimen, as well as to collect biological specimens or to attach an identification tag. If conducted according to standard protocols, these physical activities pose little risk of injury or disturbance to the subject crocodiles. Several studies have also entailed, for example, night surveys using bright spotlights (Castañeda Moya *et al.* 2000, p. 62), stomach flushing (Platt *et al.* 2006, p. 282), collection of small blood samples (Dever *et al.* 2002, p. 1079), or the gathering of nonviable eggs from nests for contaminants analyses (Rainwater *et al.* 2002a, p. 320). None of these studies has cited any negative effects due to handling or observation on the Morelet's crocodile populations.

All three range countries regulate scientific research and collection. According to the UNEP–WCMC CITES Trade Database, 3,124 specimens were exported for scientific purposes from Mexico to the United States. From an administrative standpoint, a permit at the state or Federal level regulates the collection of biological samples for scientific purposes in Mexico. In Mexico, the Mexican Endangered Species List (NOM–126–SEMARNAT–2000) regulates the collection of biological samples from wild species for scientific use. In addition, the Governments of Belize and Guatemala regulate scientific collection and research. In Belize, this type of export is subject to strict protocols and provisions of the Wildlife Protection Act (CITES 2010a, p. 7).

With the Appendix-II designation for Morelet's crocodiles in Mexico and Belize, individuals or institutions wishing to import scientific samples originating from those countries will no longer be required to obtain a CITES import permit. However, the CITES import permit requirement will still be in effect for Guatemala, and CITES export permits or re-export certificates, regardless of the country of origin, will be required. The elimination of import permits, while continuing the CITES requirement for export permits and re-export certificates, may result in additional scientific collecting and research to benefit the species while ensuring that adequate protections for the species remain in place (see the Factor D section, Inadequacy of Existing Regulatory Mechanisms, below).

In conclusion, we are not aware of any evidence that utilization of the Morelet's crocodile for scientific research purposes poses anything more than a low risk to the subject individuals; furthermore, risks at the population level are probably negligible. To the contrary, these studies (surveys and sampling) provide useful information essential to monitoring the status and continued health of individuals as well as populations. These studies also allow ecotourists in these countries to work with the scientific community in the collection of Morelet's crocodile data (Volunteers for International Partnership 2009, pp. 1–4.) This provides ecotourists with an opportunity to observe the Morelet's crocodile in its native habitat and to gain firsthand knowledge about the conservation of the species.

Ranching

Although the Belize-Guatemala-Mexico Tri-national Strategy for the Conservation and Sustainable Use of Morelet's Crocodile (see the Post Delisting Monitoring section, below) includes long-term plans for ranching, none of the range countries have given any indication they plan to ranch Morelet's crocodiles within the foreseeable future.

Summary of Factor B

While uncontrolled commercial harvests nearly extirpated the Morelet's crocodile, the species has largely recovered because of being protected under CITES and the Act in the early 1970s, as well as the implementation of CITES trade controls by all three range countries. All of the range countries currently continue to prohibit harvest of wild Morelet's crocodiles.

Illegal international and domestic trade still occurs, but levels remain low. Any incidence of illegal killing that may have occurred has not prevented the observed population increase of the species. The potential remains for illegal cross-border trade, as well as the laundering of wild specimens through existing captive-breeding operations in Mexico, but enforcement in Mexico is relatively strict. Given the increased effectiveness of law enforcement personnel with regard to the implementation of CITES, the increased supply of captive-bred Morelet's crocodiles in Mexico that are now available for commercial trade as a result of the Morelet's crocodile's transfer to CITES Appendix II, and the increasing awareness of these regulations by the public, we anticipate that illegal trade in wild Morelet's crocodiles will decrease in the majority of the species' range in the foreseeable future.

The Government of Mexico's Federal Prosecutor for Environmental Protection (PROFEPA) performs inspections to prevent laundering of wild Morelet's crocodile specimens and other illegal activities. In Belize, the importation and exportation of wildlife requires a permit and is subject to strict protocols and provisions of the Wildlife Protection Act; hunting of scheduled species for scientific or educational purposes in Belize also requires a permit. There was a declining trend in seizures of illegal specimens and products from 1998–2007. According to TRAFFIC, these seizures are indicative of a strong enforcement program that deters illegal trade (Mosig 2008, pers. comm.).

Other uses such as scientific research are either benign or involve relatively small numbers of Morelet's crocodiles. In addition, and given the steps that the Government of Mexico is taking internally to promote the sustainable commercial use of Morelet's crocodiles, we anticipate that commercial uses will increase in the foreseeable future, especially in Mexico, but that captive-bred specimens will be used instead of wild individuals.

In conclusion, we find that the overutilization for commercial, recreational, scientific, or educational purposes is not a significant factor affecting the Morelet's crocodile throughout its range, both now and for the foreseeable future.

Factor C. Disease or Predation

Inter-specific interactions, namely disease and predation, can have significant impacts on the conservation status of a species. At the time CONABIO petitioned us to delist the Morelet's crocodile, disease was not considered a significant conservation threat to the Morelet's crocodile. However, the West Nile Virus (WNV) has been detected in several Mexican populations of the Morelet's crocodile. According to Farfán-Ale *et al.* (2006, pp. 910–911), six specimens tested negative to the WNV at the Mérida Zoo, Yucatan State, Mexico, during 2003–2004, while six of seven specimens tested positive to the WNV at Ciudad del Carmen, Campeche State, Mexico, in 2004. All crocodiles, including those not sampled, showed no signs of illness at the time of the testing or during the 3 months that followed (Farfán-Ale *et al.* (2006, p. 911).

In a separate survey conducted during May–October 2005, Hidalgo-Martínez *et al.* (2008, p. 80) detected the WNV in six of seven Morelet's crocodiles at Zoológico La Venta, Villahermosa, Tabasco State, Mexico. All animals were healthy at the time of serum collection, and none had a history of WNV-like illness. The presence of WNV antibodies in animals from those zoos demonstrated the presence of WNV in those regions and indicated a potential risk of infection in animals. The magnitude of that potential risk, however, has not been determined. West Nile Virus was responsible for a significant number of deaths of farmed American alligators in the U.S. State of Georgia during separate outbreaks in 2001 and 2002 (Farfán-Ale *et al.* 2006, p. 908). However, we do not have any information to indicate that WNV causes illness in the Morelet's crocodile. The sample sizes in the above studies on Morelet's crocodile were small; much larger studies are needed. However, the best available information does not suggest that WNV is a threat or likely to become a threat.

Predation on Morelet's crocodile eggs and juveniles is a common natural phenomenon, posing no risk to healthy populations. They are preyed upon more frequently at the juvenile stage by many birds and medium-sized mammals (CITES 2010a, p. 4). Larger juveniles and subadults are less susceptible than small juveniles are to predation, and only large carnivores such as jaguars (*Panthera onca)* (Navarro Serment 2004, p. 57) pose a risk to adult crocodiles. Larger Morelet's crocodiles may prey upon the juveniles of their species. However, this tends to act as an early factor promoting population regulation and adult spacing. Aggressive interactions among adults seem to be reduced by this mechanism, especially in populations with too many adults. In populations with a steady state of age distribution, cannibalism usually remains at a minimum (CONABIO 2005, p. 29). We are unaware of any unnatural rates of predation affecting any age class of Morelet's crocodile, and we have no indication that predation will exacerbate other threats to the species in the future.

Other interspecific interactions can also affect the conservation status of a species. The Morelet's crocodile and the American crocodile co-occur and may compete with each other for resources along the freshwater-saltwater interface in coastal Mexico and Belize. Platt and Thorbjarnarson (2000a, p. 16; 2000b, pp. 24–26) reported relatively higher frequency of encounter rates for the Morelet's crocodile at alluvial and nonalluvial lagoons, mangrove forest, and rivers and creeks, collectively characterized as inland sites, while the American crocodile was relatively more abundant in offshore cays and the Turneffe Atoll. These differences were attributed to the smaller body size of the Morelet's crocodile, as well as past exploitation patterns by hunters and subsequent niche expansion by this species (Platt and Thorbjarnarson 2000b, p. 26). There was no indication, however, that interspecific competition between the Morelet's and the American crocodiles was a serious conservation problem.

Parasites have been also reported for the Morelet's crocodile, but have not been identified as a conservation threat. In Mexico, trematodes (parasitic flatworms commonly called flukes) and nematodes (unsegmented worms commonly called roundworms) have been reported (Moravec and Vargas-Vázquez 1998, p. 499; Moravec 2001, p. 47) from the Yucatan Peninsula, but health problems with the crocodile hosts were not noted. Rainwater *et al.* (2001a, p. 836) reported ticks (*Amblyomma dissimile* and *Amblyomma* sp.), but noted that parasitism by ticks on the Morelet's crocodile was rare in Belize and elsewhere.

Padilla Paz (2008, p. vi) characterized hematology, body index, and external injuries for 103 Morelet's crocodiles from the northern wetlands of Campeche State, Mexico. These variables were used to characterize the health of the animals. Captive Morelet's crocodiles evaluated for that study presented significantly more injuries than did wild individuals. Parasitism with nematodes (*Paratrichosoma recurvum*) was greater in wild crocodiles than in captive individuals. No serious health issues were identified in individuals in either group (Padilla Paz 2008, pp. 67–68).

Individual Morelet's crocodiles can also have physical issues that can affect their well-being. Rainwater *et al.* (2001b, pp. 125–127) reported 2 individuals among 642 Morelet's crocodiles captured in Belize with a missing forelimb. Known in the technical literature as ectromelia, this condition was probably the result of congenital defects and not due to an injury. Both individuals otherwise appeared to be in good condition.

Summary of Factor C

While the full impact of WNV on the Morelet's crocodile has yet to be determined, there is no indication at present that WNV poses a threat to the species, and other interspecific interactions do not appear to be adversely affecting the Morelet's crocodile. In conclusion, we find that neither disease nor predation is a significant factor affecting the Morelet's crocodile throughout its range, both now and for the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

CITES

CITES (the Convention, or Treaty) is an international agreement between member governments to ensure that the international trade in plants and wildlife does not threaten the species' survival. It provides varying degrees of protection to more than 30,000 species of animals and plants, whether they are traded as live specimens, parts, or products. Countries that have agreed to be bound by the Convention (that have ''joined'' CITES) are known as Parties. Although CITES is legally binding on the Parties, it does not take the place of national laws. Rather, it provides a framework to be respected by each Party, which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level. For many years, CITES has been among the international conservation agreements with the largest membership, with now 175 Parties (*http://www.cites.org*).

CITES works by subjecting international trade in specimens of selected species to certain controls. Trade includes any movement into or out of a country and is not limited to commercial movement. All import, export, re-export, and ''introduction from the sea'' of species covered by the Convention have to be authorized through a permitting system. The species covered by CITES are listed in three Appendices, according to the degree of protection they need (CITES 2009c).

Appendix I include species threatened with extinction that are or may be affected by trade. Trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Appendix III includes species that have been unilaterally listed by a Party to assist in the implementation of the listing Party's national legislation to conserve and monitor trade in the listed species. The Conference of the Parties (CoP), which is the decision-making body of the Convention and comprises all its member countries, has agreed on a set of biological and trade criteria to help determine whether a species should be included in Appendices I or II. As Appendix-III listings are a unilateral decision, Parties do not need to abide by the same biological and trade criteria adopted by the Parties. At each regular meeting of the CoP, Parties submit proposals based on those criteria to amend these two Appendices to add, remove, or reclassify species (such as the Government of Mexico's 2010 proposal to transfer the Morelet's crocodile from Appendix I to Appendix II). Parties discuss these amendment proposals during the CoP, and then they are submitted for adoption by the Parties (*http://www.cites.org*).

A specimen of a CITES-listed species may be imported into or exported (or re-exported) from a Party only if the appropriate permit or certificate has been obtained prior to the international trade and presented for clearance at the port of entry or exit.

Regulation of Trade in Appendix-I Specimens

Both an export permit or re-export certificate must be issued by the country of export and an import permit from the country of import must be obtained prior to international trade for Appendix-I species. An export permit may only be issued if: (1) The country of export determines that the export will not be detrimental to the survival of the species; (2) the specimen was legally obtained according to the animal and plant protection laws in the country of export; (3) live animals or plants are prepared and shipped for export to minimize any risk of injury, damage to health, or cruel treatment; and (4) an import permit has been granted by the importing country. Likewise, the requirements for a re-export certificate are that the country of re-export determines: (1) That the specimen was imported into their country in accordance with CITES; (2) that live animals or plants are prepared and shipped for re-export to minimize any risk of injury, damage to health, or cruel treatment; and (3) that an import permit has been granted.

Issuance of import permits for Appendix-I species will also need a determination from the country of import that the import will not be for purposes that are detrimental to the survival of the species, the proposed recipient of live animals or plants is suitably equipped to house and care for them, and the purpose of the import is not for primarily commercial purposes. Thus, with few exceptions, Appendix-I species cannot be traded for commercial purposes.

Regulation of Trade in Appendix-II Specimens

In contrast to the trade requirements for an Appendix-I species, CITES does not require an import permit from the destination country as a condition for the export and re-export of an Appendix-II species, unless it is required by the destination country's national law. However, an export permit or re-export certificate is required from the exporting country prior to the international trade taking place. An export permit may only be issued for Appendix-II species if the country of export determines that: (1) The export will not be detrimental to the survival of the species; (2) the specimen was legally obtained according to the animal and plant protection laws in the country of export; and (3) live animals or plants are prepared and shipped for export to minimize any risk of injury, damage to health, or cruel treatment.

A re-export certificate may only be issued for Appendix-II species if the country of re-export determines that: (1) The specimen was imported into their country in accordance with CITES and (2) live animals or plants are prepared and shipped for re-export to minimize any risk of injury, damage to health, or cruel treatment.

Parties to CITES are required to monitor both the export permits granted and the actual exports for Appendix II species. If a Party determines that the export of an Appendix-II species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which the species might become eligible for inclusion as an Appendix-I species, then that Party must take suitable measures to limit the number of export permits granted for that species (CITES article IV, paragraph 3).

CITES Registered Captive-Breeding Operations

Prior to the Morelet's crocodile in Mexico and Belize being downlisted to Appendix II, it could be treated as an Appendix-II species and internationally traded commercially *only* if the specimen originated from a captive-breeding operation registered with the CITES Secretariat in accordance with CITES Resolution Conf. 12.10 (Rev. CoP15) ''Guidelines for a procedure to register and monitor operations that breed Appendix-I animal species for commercial purposes.'' These captive-breeding operations may only be registered if specimens produced by that operation qualify as ''bred in captivity'' according to the provisions of Resolution Conf. 10.16 (Rev.). To qualify as bred in captivity, specimens must be born in a controlled environment where the parents mated. In addition, breeding stock must be established in accordance with the provisions of CITES and relevant national laws, and in a manner not detrimental to the survival of the species in the wild. Breeding stock must also be maintained without the introduction of specimens from the wild, except for the occasional addition of animals, eggs, or gametes meeting certain requirements. The breeding stock must have produced offspring of second generation (F2) in a controlled environment or be able to demonstrate that it is capable of reliably producing second-generation offspring in a controlled environment. Resolution Conf. 12.10 (Rev. CoP15) defines the term ''bred in captivity for commercial purposes'' as ''any specimen of an animal bred to obtain economic benefit, including profit, whether in cash or kind where the purpose is directed toward sale, exchange, or provision of a service or any other form of economic use or benefit.'' Countries operating CITES-registered operations must ensure that the operation, ''will make a continuing meaningful contribution according to the conservation needs of the species'' (CITES 2007b, pp. 1–2). Under the exception in the Treaty and

Resolution Conf. 12.10 (Rev. CoP15), specimens of Appendix-I species originating from CITES-registered captive-breeding operations can be traded for commercial purposes, and shipments only need to be accompanied by an export permit issued by the exporting country. The importer is not required to obtain an import permit because these specimens are treated as CITES Appendix II. Countries that are Parties to CITES should restrict their imports of Appendix-I captive-bred specimens to those coming only from CITES-registered operations. Additional information on CITES-registered operations can be found on the CITES Web site at *http://www.cites.org/eng/resources/registers.shtml.*

Prior to the downlisting of the species in Mexico and Belize, three CITES-registered operations for Morelet's crocodiles were located in Mexico. These facilities, while no longer registered with the CITES Secretariat, are still in operation (CITES 2010a, p. 24, Annex 3). The names of these operations are:

(1) Cocodrilos Mexicanos (established in 1989; (former) registration number A–MX–501) in Culiacan, Sinaloa State. In 2008, this operation contained 28,673 captive Morelet's crocodiles for commercial production (CITES 2010a, p. 24, Annex 3).

(2) Industrias Moreletii (established in 1993; (former) registration number A–MX–502) in Villahermosa, Tabasco State. In 2008, this operation contained 1,237 captive Morelet's crocodiles for commercial production (CITES 2010a, p. 24, Annex 3).

(3) Cocodrilos de Chiapas (established in 1989; (former) registration number A–MX–503) in Tapachula, Chiapas State. In 2008, this operation contained six captive Morelet's crocodiles for exhibition purposes (CITES 2010a, p. 24, Annex 3).

When the CITES Appendix-II designation became effective on June 23, 2010, for Morelet's crocodiles in Mexico and Belize, commercial international trade in captive Morelet's crocodiles was no longer limited to crocodiles originating from the three operations that were registered with the CITES Secretariat. However, with the annotated listing, no export of wild-caught specimens for commercial purposes is allowed. Thus, any commercial export will continue to come from sources other than wild populations. There are currently 19 closed-cycle, captive-breeding operations registered with the Government of Mexico as UMAs for the production of Morelet's crocodile in Mexico. Under Mexican law, UMAs registered with the Government of Mexico must be closed-cycle and prove that they can produce individuals beyond the F2 generation (UMAs are described more fully below). Only 4 of the 19 UMAs have a captive population sufficiently large to support commercial trade, and only 2, Cocodrilos Mexicanos and Industrias Moreletii, of these 4 UMAs currently support international commercial trade() (CITES 2010a, Annex 3, p. 24). Importing Morelet's crocodiles from Mexican captive-breeding operations no longer requires a CITES import permit because a CITES import permit is not required for Appendix-II species. However, a CITES export permit or re-export certificate is still required. Although the two remaining UMAs capable of supporting trade (Cacahuatal in Veracruz State and Punta del Este in Campeche State) currently do not contain enough Morelet's crocodiles to support international commercial trade, they do have enough potential annual production to produce enough skins to support local commercial trade (CITES 2010a, Annex 3, p. 24).

Because the Morelet's crocodile in Guatemala is listed as an Appendix-I species under CITES, the only way that Morelet's crocodiles and their parts and products from Guatemala could legally be traded commercially in international trade is if a captive-breeding operation were to be registered with the CITES Secretariat. However, because Guatemala does not currently have any captive-breeding operations that are registered with the CITES Secretariat, the commercial international trade in Morelet's crocodile products from Guatemala remains restricted.

However, under the current listing of the species under the Act, it remains illegal to import Morelet's crocodiles or their parts or products into the United States, regardless of the source, unless the purpose of the import is for scientific research or enhancement of propagation or survival of the species. When this final rule is effective (see DATES above), the prohibitions of the Act are removed. Morelet's crocodile parts and products originating from sources other than wild populations from Mexico and Belize may be imported into the United States for commercial purposes, as long as the required CITES export permit or re-export certificate has been granted. As discussed earlier, however, an export permit will not be granted unless the exporting country finds that the export will not be detrimental to the species and the specimen was lawfully acquired.

Mexico's Proposal To Transfer the Morelet's Crocodile to CITES Appendix II

At the 2008 CITES Animals Committee meeting, the Government of Mexico submitted for comment and review a draft proposal to transfer Mexico's population of Morelet's crocodile from Appendix I to Appendix II based on Mexico's belief that the Morelet's crocodile no longer met the criteria for inclusion in Appendix I (CITES 2008a, pp. 1–28; CITES 2008a, p. 32). Committee members were generally favorable of the proposal, but had several technical questions and suggestions. The Government of Mexico subsequently revised their 2008 proposal and formally submitted a 2010 CITES proposal for consideration at CoP15, held in March 2010 in Doha, Qatar (Government of Mexico 2010). The 2010 proposal was to transfer the Morelet's crocodile throughout its range to Appendix II (CoP15 Prop. 8). The CITES Secretariat reviewed the proposal and agreed that the Morelet's crocodile no longer met the biological criteria for an Appendix-I species and recommended that the proposal be adopted.

The Government of Mexico's 2010 CITES proposal recommended transferring the Morelet's crocodile from Appendix I to Appendix II because the species no longer met the criteria for inclusion in Appendix I. Under the 2010 proposal, the transfer to Appendix II applied to all three range countries. The 2010 proposal included an annotation establishing a zero quota for wild specimens. The zero quota would prohibit any international trade in wild specimens within the context of CITES, thereby limiting the trade in Morelet's crocodile and its products to those originating from sources other than wild specimens. Although the Belize-Guatemala-Mexico Tri-national Strategy for the Conservation and Sustainable Use of Morelet's Crocodile (see the Post-delisting Monitoring section, below) includes long-term plans for ranching, none of the range countries have indicated they plan to ranch Morelet's crocodiles within the foreseeable future.

The Government of Mexico consulted with the Governments of Belize and Guatemala on their 2010 CITES proposal. The Government of Belize supported the proposal, but did not provide documents to the CITES Secretariat to indicate their official support. According to the Government of Mexico's 2010 CITES proposal, the Government of Guatemala supported the proposal in part, but recommended transferring only the Mexican

population of Morelet's crocodile in captive-breeding operations to Appendix II, with a zero quota for wild specimens traded for commercial purposes. In a letter from Guatemala's Consejo Nacional de Areas Protegidas to the Ambassador of Mexico dated 5 June 2009 (CITES 2010a, Annex 4, p. 25), the Government of Guatemala indicated that it did not support the Government of Mexico's 2010 CITES proposal as written. They recommended verifying that moving captive Morelet's crocodiles in Mexico to Appendix II would not put wild Morelet's crocodiles in Mexico at risk. They supported Mexico's transfer of captive-bred populations of Morelet's crocodiles from Appendix I to Appendix II provided the parties ensure the following:

- They verify that wild populations of Morelet's crocodiles in Mexico will not be at risk as they are moved from Appendix I to II;
- If Mexico's proposal at CoP15 is approved, then measures should be put in place for strict monitoring and enforcement on the Mexico-Guatemala border;
- That the marking of live animals be done by methods that cannot be falsified and that skins be tagged in accordance with CITES to maintain chain of custody;
- That the tagging methods for Mexican populations of Morelet's crocodile be widely circulated to range countries and those countries importing parts and products as well as live specimens.

Under Guatemala's recommended scenario, Morelet's crocodiles in Mexico and Belize would be in Appendix II, with a zero quota for wild specimens traded for commercial purposes, and all Morelet's crocodiles in Guatemala would remain on Appendix I (CITES 2010a, pp. 12, 25–26). The Appendix-II designation became effective on June 23, 2010. As a result, Morelet's crocodiles and their products from Mexico and Belize from sources other than wild populations are now allowed to enter international trade for commercial purposes under CITES. They are not, however, currently able to enter the United States market because the Act's prohibitions remain in effect. The international commercial trade in all *wild* Morelet's crocodiles remains restricted.

At this time, the Government of Mexico intends to export products derived from Morelet's crocodiles raised in its captive-breeding operations that are registered with the Government of Mexico as UMAs, and that have a proven track record of producing offspring beyond the F2 generation (CITES 2008, p. 23; CITES 2010a, p. 9).

Now that the Morelet's crocodile in Mexico and Belize is transferred to CITES Appendix II with an annotation providing a zero quota for wild specimens traded for commercial purposes, and when this delisting rule becomes effective (see **DATES,** above), live Morelet's crocodiles and parts and products originating from any captive-breeding operations in Mexico (and Belize, if any) may be imported into the United States. In addition, Morelet's crocodile products manufactured in other countries could also be re-exported into the United States if those skins originated in Mexico or Belize and were not derived from wild populations. Live Morelet's crocodiles and parts or products originating from Guatemala will remain in CITES Appendix I, with its associated trade restrictions remaining in place.

CITES National Legislation Project

Through Resolution Conf. 8.4 (Rev. CoP15), the Parties to CITES have adopted a process, the National Legislation Project, to evaluate whether Parties have adequate domestic legislation to successfully implement the Treaty. In reviewing a country's national legislation, the Secretariat considers whether a Party's domestic laws designate the responsible Scientific and Management authorities, prohibit trade in violation of the Convention, have penalty provisions in place for illegal trade, and provide for seizure of specimens that were illegally traded or possessed.

While both Guatemala and Mexico's legislation have been determined to be sufficient to properly implement the Treaty, Belize's national legislation was considered lacking. As part of the National Legislative Project, Belize has submitted a plan to revise their legislation to the Secretariat in March 2010, but as of the publication of this final rule, Belize has not officially enacted any revised legislation (CITES 2010e). Although a trade suspension was put in place for Belize for one orchid species, *Myrmecophila tibicinis,* the suspension was in relation to the *Review of Significant Trade in Specimens of Appendix II species* (CITES 2010d) and not due to Belize's current legislation implementing CITES. After the effective date of this final rule (see DATES, above), CITES will continue to protect the Morelet's crocodile throughout its range by regulating international trade.

All three countries also have protected-species and protected-areas legislation under the jurisdiction of specific ministries or departments. The three range countries have an extensive regulatory framework to control activities with respect to the Morelet's crocodile and its habitat. Mexico is unique among the three range countries in that the Government of Mexico also has legislation regulating captive-breeding operations.

Mexico

The Government of Mexico has a strict and comprehensive legal framework to regulate the conservation and sustainable use of the Morelet's crocodile in Mexico:

(1) *Ley General de Equilibrio Ecológico y Protección al Ambiente (LGEEPA; General Ecological Equilibrium and Environmental Protection Law)*—This is the primary Mexican law for environmental matters and is the principal legal instrument that regulates the Morelet's crocodile in Mexico (CONABIO 2005, Annex 3, p. 1). Passed in 1988, this law applies to and integrates the three levels of government within the context of natural resources: Federal, state, and municipal. With regard to trade in wildlife species, including the Morelet's crocodile, the LGEEPA contains the basis to regulate all activities, including importation, exportation, seizures, sustainable use, violations, fines, animal welfare, and legal possession. While 45 articles within the Mexican LGEEPA deal with environmental contamination (CONABIO 2005, Annex 3, p. 1), we are not aware of any specific provisions or their relevance to Morelet's crocodile.

(2) *Ley General de Vida Silvestre (LGVS: General Wildlife Law)*— Passed in 2000, this law regulates the use, conservation, and management of domestic wild fauna and flora and their habitat (CONABIO 2005, Annex 3, pp. 1–2). This law is based on the principle of sustainable use. Any activity with regard to wild fauna and flora must comply with certain requirements: The activity must be supported by an approved management plan; the quantity to be harvested must be less than natural recruitment (replacement); and the harvest must not have negative impacts on the wild populations, their habitat, or biological activities. With regard to the Morelet's crocodile, harvest of wild populations is not permitted, and harvest under this law would only be permitted for specimens obtained through closed-cycle, captive-breeding operations that have programs that contribute to the development of wild populations (CITES 2010a, p. 9).

According to the LGVS, alien specimens or populations are those occurring outside their natural range

(such as the Morelet's crocodiles found on the Pacific coast of Mexico), including hybrids. Such specimens or populations can only be managed in captivity, and with prior approval. A management plan must be in place with established security and contingency measures to avoid any negative effects on the conservation of wild native specimens and populations or their habitat. LGVS establishes management, control, and remediation measures for individuals or populations considered harmful. Measures may consist of capture/collection for the development of recovery, restocking, and reintroduction projects; for research or environmental education activities; for relocation of specimens (subject to prior evaluation of the destination habitat and condition of the individuals); for elimination or eradication of individuals/populations; or of actions or devices to keep the individuals away, disperse them, make access difficult, or reduce the damage they cause (CITES 2010a, p. 9).

(3) *Programa de Conservación de la Vida Silvestre y Diversificación Productiva en el Sector Rural (Program for Wildlife Conservation and Productive Diversification of the Rural Sector)*—Launched in 2000, this program defines the conceptual, strategic, legal, and administrative framework that governs any initiative for the conservation and use of wild species (CITES 2010a, p. 8). The goal of this program is to establish incentives for private and public initiatives that favor natural resources conservation, as well as provide economic opportunities for private entities for the sustainable use of these resources (CONABIO 2005, Annex 3, pp. 2–3). Based on a biological evaluation of the species, this program promotes the use and conservation of priority species of plants and animals, including the establishment of wildlife production units and technical advisory committees such as the COMACROM (Subcomité Técnico Consultivo para la Conservación, Manejo y Aprovechamiento Sustentable de los Crocodylia en México; Technical Advisory Subcommittee for the Conservation, Management, and Sustainable Use of the Crocodilians in Mexico) in the case of the Morelet's crocodile. Created by the Government of Mexico in 1999, COMACROM includes scientists, technicians, NGOs, producers, authorities, and other stakeholders. It participates in meetings of the IUCN Crocodile Specialist Group (CSG) and contributes publications to the CSG (CITES 2010a, p. 8).

(4) *Norma Oficial Mexicana NOM–059–SEMARNAT–2001*—Passed in 2001, this regulation provides legal protection to domestic endangered species of fauna and flora, and provides a mechanism to evaluate extinction risks (CONABIO 2005, Annex 3, p. 3). The Método de Evaluación de Riesgo de Extinción de Especies Silvestres de México (MER; Method to Evaluate Wildlife Extinction Risks in Mexico), one of the parts of this regulation, has four categories of risk: Probably extinct in the wild, in peril, threatened, and subject to special protection. The Morelet's crocodile is included in the category ''subject to special protection.'' This regulation defines the category ''subject to special protection'' as ''those species or populations that might find themselves threatened by factors that adversely affect their viability, thus determining the need to promote conservation or recovery and the recovery and conservation of associated species populations. (This category may include lower risk categories of the IUCN classification).''

Although the Government of Mexico no longer classifies the Morelet's crocodile as ''endangered'' or ''threatened,'' classification as ''subject to special protection'' under Mexican Official Law NOM–059–SEMARNAT–2001 allows legal protection at the national level (CITES 2010a, p. 9). Including the Morelet's crocodile in this category allows the Government of Mexico to make sure it still meets the conservation needs of important species from both a biologically and socioeconomic standpoint before the species can be considered to be endangered or threatened. CONABIO recommended keeping the Morelet's crocodile in this category of ''subject to special protection'' to maintain existing measures of conservation, technical supervision, monitoring and enforcement in order to avoid the species' having a higher risk category in the future (CONABIO 2005, p. 4 and Annex 2, p. 5).

(5) *Norma Oficial Mexicana NOM–126–SEMARNAT–2000*—Passed in 2000, this regulation oversees scientific research and collection by individual domestic and foreign researchers, as well as by institutions (CONABIO 2005, Annex 3, p. 3). If a species is also regulated under CITES, the appropriate permit or certificate must be obtained under this regulation. Scientific research or collections involving the Morelet's crocodile are regulated under these provisions.

(6) *Sistema de Unidades de Manejo para la Conservación de la Vida Silvestre (SUMA; Wildlife Conservation Management and Administration Unit System)*—In 1997, the Government of Mexico established a system for registering, supervising, and enforcing UMAs (Unidad de Manejo y Administración; Conservation Management and Administrative Units) for intensive reproduction of economically valuable natural resources, including captive farming of Morelet's crocodiles (CONABIO 2005, Annex 3, pp. 3–5). The goal of this regulation was to ensure that biodiversity conservation be considered within the context of the production and socioeconomic needs of the country. This system combined a broad range of entities or facilities (''units'') under a single administrative program, including zoological and botanical gardens, greenhouses, and animal breeding centers. Through these units, the Government of Mexico promotes natural resources uses that are responsible and planned. Extensive and intensive captive-breeding units for the Morelet's crocodile are covered under this system. In exchange for the right to harvest the Morelet's crocodile under controlled conditions, closed-cycle, captive-breeding unit operators are required to develop and implement an approved management plan for the site, as well as to conserve the species' habitat and other species that use that habitat. Strict animal husbandry practices and welfare considerations are required under these plans.

Legal registration of approved UMAs requires proof of captive production beyond the F2 generation (CITES 2010a, p. 9). For intensive UMAs, such as captive-breeding operations in Mexico, the Government of Mexico requires the UMAs to submit regular reports that must include information on births and deaths, number and identification of traded specimens, and management activities (CITES 2010a, p. 10).

The Government of Mexico uses three methods to mark live Morelet's crocodiles registered with the Wildlife Division through the corresponding inventories of UMAs. The first method is interdigital staples on the feet. The second method is the traditional method of cutting notches in the tail scales and is only used by some operations (CITES 2010a, p. 10). These marks are registered with the Government of Mexico. The third method is the Universal Tagging System required by CITES for the export of skins (Resolution Conf. 11.12 (Rev. CoP15)), which consists of a plastic security tag with the UMA registration number, the species code, a serial number, and the year of production or harvest. Any application for a CITES export permit must include the number of the authorized specimen based on the interdigital tag and the skin's plastic

security tag, and is used to track skins and other products (CITES 2010a, p. 10).

Approximately 50 UMAs have been registered for rearing Morelet's crocodiles in Mexico since the 1980s, primarily for domestic commerce. Nineteen of them are still actively managing the species, and 3 were registered with the CITES Secretariat when the species in Mexico was included in Appendix I (CITES 2010a, p. 11). Only 5 of the 19 UMAs have the potential for annual commercial production of products made from Morelet's crocodile (CITES 2010a, p. 24).

(7) *Sistema Nacional de Áreas Naturales Protegidas (SINANP; National System of Protected Natural Areas)*—Passed in 2000, this system is made up of parcels identified as Protected Natural Areas (CONABIO 2005, Annex 3, p. 5). These Protected Natural Areas are created by Presidential decree and the activities on them are regulated under the LGEEPA, which requires that the Protected Natural Areas receive special protection for conservation, restoration, and development activities. The National Commission of Natural Protected Areas (CONANP), a decentralized organ of the Government of Mexico's Ministry of Environment and Natural Resources (SEMARNAT), currently administers 173 federal natural areas representing more than 62,396,392 ac (25,250,963 ha). These natural areas are categorized as: Biosphere Reserves, National Parks, Natural Monuments, Areas of Natural Resource Protection, Areas of Protection of Flora and Fauna, and Sanctuaries.

These areas are protected under Mexican law because they contain key or representative ecosystems or species, or ecosystems or species that are at risk and require strict control. Many ecosystems or species, including the Morelet's crocodile, are protected under this system. According to the Government of Mexico, SINANP includes at least 12 protected areas occupied by Morelet's crocodile, covering an estimated 13 percent of the species' geographic range (CONABIO 2005, p. 30).

(8) *Código Penal Federal (Federal Penal Code)*—The code contains a special section for environmental crimes (CONABIO 2005, Annex 3, pp. 5–6). These penalties apply to those who commit crimes against plants or animals, as well as to individuals who illegally use or commercialize regulated species without authorization. These penalties apply to crimes involving the Morelet's crocodile.

In order to implement and enforce the laws and regulations mentioned above, SEMARNAT created the office of the Procuraduría Federal de Protección al Ambiente (PROFEPA; Federal Prosecutor for Environmental Protection) and the Programa para la Inspección y Vigilancia en Puertos, Aeropuertos y Fronteras (Ports, Airports, and Borders Inspection and Enforcement Program) (CONABIO 2005, Annex 3, p. 6). Under this program, imports and exports for key products regulated by SEMARNAT are inspected at 65 points of entry and exit to prevent laundering. Morelet's crocodile products are regulated under this program. PROFEPA implements the Environmental Inspection Program at ports, airports, and borders, as well as the Wildlife Inspection Program, which monitors all stages of the use of wild species and ensures their protection. Inspection and enforcement programs make these Mexican laws and regulations more effective, especially at airports and border ports of entry and exit. Specific actions include the verification of cross-border movements in compliance with CITES and other international agreements in coordination with customs authorities; inspection of areas of wildlife harvest, stockpiling, distribution, and sale; surveillance of areas of wildlife distribution and harvest; and special operations in areas of wildlife harvest, stockpiling, distribution and sale, in coordination with public law enforcement and judicial authorities (Govt. of Mexico 2010, p. 11). Mexico has implemented several programs to prevent and combat illegal harvest, including the System of Wildlife Management Units (SUMA) which is based on six key elements: (1) Registration with the Wildlife Division (DGVS Dirección General de Vida Silvestre—SEMARNAT, CITES Management Authority); (2) proper habitat management; (3) monitoring of wild populations of the species harvested; (4) controlled harvest (including periodic reports and inventories on each UMA); (5) management plan approved and registered with the Wildlife Division; and (6) certificate of production and market/tagging methods. SEMARNAT conducts random inspections of UMAs and, if any issues are detected in the management plan, carries out population studies, including sampling activities and species inventories, and producing periodic reports on these findings (CITES 2010a, p. 10).

We do not have any information on whether the Mexican legal framework specifically authorizes subsistence hunting or cultural use of the Morelet's crocodile, or on the current level of enforcement, or whether the enforcement is considered adequate.

Belize

The Government of Belize also has a legal framework that regulates the conservation and sustainable use of the Morelet's crocodile, along with other species of birds, mammals, and reptiles (collectively known as Scheduled species). In general terms, the Wildlife Protection Act prohibits illegal harvest and export in Belize (Government of Belize 2000 pp. 7–9). The Forestry Department, within the Ministry of Natural Resources and the Environment, is the relevant government agency with respect to the Morelet's crocodile. Under this legislation, the Game Warden controls hunting of these species. Certain activities are prohibited, and a license is required. For example, hunting of the Morelet's crocodile is prohibited. Importation and exportation of wildlife is subject to strict protocols and provisions of the Wildlife Protection Act and requires a permit. Hunting of certain species for scientific or educational purposes also requires a permit. The legislation also identifies offenses and penalties.

In addition to the Wildlife Protection Act, the Government of Belize is in the process of developing and implementing a National List of Critical Species (Meerman 2005a, pp. 1–8; Meerman 2005b, p. 38). This list is based, in part, on the procedures used by IUCN Red List of Threatened Animals (see IUCN 2001, version 3.1, 35 pp.). Within the context of the Belize Protected Areas Policy and System Plan, this list will serve as a basis for the Belize Red Data List. According to the 2005 list (Meerman 2005a, p. 8), the Morelet's crocodile is categorized as ''CD'' (Conservation Dependent) in Belize due to the following factors: small range, hunted, economic importance, charismatic species drawing national and international attention, and persecuted as perceived pest. Under the 2005 list, Conservation Dependent species are taxa that are the focus of a continuing taxon-specific or habitat-specific conservation program for the taxon in question, the cessation of which would result in the taxon qualifying for one of the threatened categories on the list within 5 years (Meerman 2005a, p. 3).

These laws and regulations provide legal protection to the Morelet's crocodile in Belize. We have no information on whether the Wildlife Protection Act is sufficiently enforced. The CITES Legislation Project (CITES 2010e) concluded that Belize's national

legislation does not meet any of the requirements for implementing CITES. However, Belize has submitted a plan and draft legislation to CITES as of March 2010, but has not officially enacted the legislation. In spite of this assessment by CITES, trade data seem to indicate the threat of unregulated trade from Belize is minimal.

Guatemala

The Government of Guatemala also has a legal framework that regulates the conservation and sustainable use of natural resources, including the Morelet's crocodile (IIA URL FCAA IARNA 2003, pp. 67–69; IARNA URL IIA 2006, pp. 104–107; República de Guatemala 2007, pp. 3–4, 31). In general terms, and based on our review of other materials, natural resources management is under the jurisdiction of the Ministerio de Ambiente y Recursos Naturales (Ministry of the Environment and Natural Resources; USAID 2002, pp. 44–45; República de Guatemala 2007, pp. 3–4, 9). The main legislation in this regard is Decreto Número 4–89 (*Ley de Áreas Protegidas,* Gobierno de Guatemala 1989, pp. 1–24; Birner *et al.* 2005, p. 290; *Law of Protected Areas and Amendments/Revisions*). This decree established the Comisión Nacional de Áreas Protegidas (CONAP; National Commission on Protected Areas). CONAP has been tasked to run the Sistema Nacional de Áreas Protegidas (SIGAP; National System of Protected Areas; IARNA URL IIA 2006, pp. 104–107). In Guatemala, the Morelet's crocodile is included in the Endangered Species List (Resolution No. ALC/032–99 of CONAP) in Category 2, ''Seriously Endangered,'' which includes species that are endangered because of habitat loss, trade, the very small size of their populations, and/or endemism with limited distribution (CITES 2010a, p. 9).

In the past, threats to the Morelet's crocodile and its habitat in Guatemala, compounded with the lack of funding and personnel, made it difficult for the Government of Guatemala to adequately enforce these laws and regulations. Ongoing conservation actions were often overwhelmed by slow economic development, high levels of poverty, unequal land distribution, a highly segmented society, and the effects of more than 3 decades of civil war (Birner *et al.* 2005, pp. 285, 292). In 2003, Laguna del Tigre National Park was considered by ParkWatch as critically threatened due to drug trade, land grabs, the presence of human settlements, expanding agriculture and cattle ranching, poaching, forest fires, the oil industry, and an almost complete lack of institutional control over the area (ParksWatch 2003, pp. 1, 11). However, in 2004, ParksWatch stated that the staff at Laguna del Tigre had doubled in size since their 2003 report (ParksWatch 2004, p, 30.) Seventy-three park rangers, 10 archeological site guards, and 96 Army personnel were hired to staff the park, and since the increase in staffing, both the park and the biotope are ''constantly patrolled.'' In addition, the Wildlife Conservation Society and USAID continued its ''Biodiversity Conservation at a Landscape Scale'' program and have provided a comprehensive plan with specific goals to preserve and protect wildlife in the Maya Biosphere Reserve (MBR) in Guatemala through conserving wildlife species and their habitat, while maintaining the economic productivity of renewable natural resources. They are fulfilling these goals by establishing specific parameters: ''to develop adaptive and participatory strategy to reduce threats to wildlife in the MBR; to develop, implement, and monitor sustainable mechanisms to reduce threats to wildlife and ecosystems across the MBR landscape; to learn and teach best management practices for the conservation of the MBR and beyond; and to guide, design, and test wildlife-focused planning'' (WCS 2008, p. 3). For the past 9 years, the WCS has been conducting over-flights of Laguna del Tigre National Park with the Guatemalan National Park Service and LightHawk, a volunteer-based environmental aviation organization, and has used that information to identify illegal colonization, resulting in successfully removing illegal squatters (80+ families) from the area. In addition, over-flights revealed marijuana clearings on the eastern-most port of Mirador-Río Azule National Park in 2007. WCS over-flights helped to monitor fires, locate illegal settlements, and notify the national and provincial government as well as the national media of illegal activities. As a result, the presence of fires in Laguna del Tigre National Park has been reduced by 90 percent. In addition, WCS has taken an active role in educating locals and concessionaires on best management practices for sustainable use of forest products (WCS 10 year report, no date given, p. 6).

In August 2010, the president of Guatemala announced that he was deploying 250 soldiers to recover fully all the protected zones of El Petén in the Laguna del Tigre section of the MBR. This ''Green Battalion'' was deployed specifically to protect the Laguna del Tigre National Park and work jointly with the National Civil Police and the Attorney General's Office to combat drug trafficking and the illegal harvest of natural resources and archaeological sites of that region of the MBR (Latin American Herald Tribune, December 6, 2010).

The Government of Guatemala is also participating in the Tri-national Strategy (see the Post-delisting Monitoring section below) for Morelet's crocodile, wherein specific actions directed toward the Morelet's crocodile are defined. Conservation actions in Guatemala are being developed and implemented within the context of the Convention on Biological Diversity and the National Biodiversity Strategy and Action Plan (Birner *et al.* 2005, p. 285). Many outstanding accomplishments have been achieved in Guatemala in terms of biodiversity conservation (IARNA URL IIA 2006, p. 22), and the Guatemalan government seems committed to ensuring that environmental management and enforcement efforts continue.

Summary of Factor D

Based on the fact that all three range countries are Parties to CITES, have protected-species and protected-areas legislation, implemented that legislation, and enforce relevant laws, the current regulatory mechanisms appear to be adequate to conserve the Morelet's crocodile in the majority of the species' range. As per the CITES National Legislation Project (CITES 2010e), both Guatemala and Mexico's legislation meet all the requirements for implementing CITES. Belize's national legislation was considered not to meet any of the requirements for implementing CITES. However, Belize has submitted a plan and draft legislation to CITES as of March 2010, but has not officially enacted the legislation. Per decisions made during CoP15, the CITES protections for Morelet's crocodiles in Guatemala will remain unchanged. They will remain protected as an Appendix-I species, with those CITES trade restrictions remaining in place.

Together, Mexico and Belize contain the majority of wild individuals (87 percent) and the estimated potentially suitable habitat (81 percent) throughout the species' range. We anticipate that these conditions will remain essentially the same, both domestically and internationally, in the foreseeable future. However, we did not solely rely on these future measures in finding the species is no longer endangered or threatened.

Existing regulatory mechanisms, including CITES and domestic prohibitions on harvest of wild

Morelet's crocodiles, have played a vital role in the resurgence of Morelet's crocodiles over the last 40 years. While some trade restrictions could be lifted in the future, particularly to allow increased trade in captive-bred specimens now that Morelet's crocodiles in Mexico and Belize have been moved to CITES Appendix II with a zero export quota for wild specimens traded for commercial purposes, we believe such lifting of restrictions would pose little risk to the species. All three range countries restrict the use of wild specimens, and the Government of Mexico has institutions with proven track records to administer and enforce controls on captive-breeding operations and laundering of illegal specimens. Should the zero export quota for wild specimens traded for commercial purposes be lifted, it may create greater enforcement challenges in all three range countries in the foreseeable future because the taking of wild Morelet's crocodiles could be authorized. If this happens, the requirements of CITES Appendix II will apply. The exporting country will be required to determine that the export is not detrimental to the survival of the species in the wild and specimens are legally acquired prior to issuing a permit authorizing the export. However, a change to the annotation would require approval of two-thirds of the Parties voting at a CoP and cannot be achieved unilaterally by any of the range countries. Therefore, we do not have any indication that CITES and the regulatory mechanisms of the range countries will be inadequate to continue to protect the species in the wild when this delisting rule becomes effective, or if ranching or wild harvest are authorized in the future.

The reproduction and survival rates of wild Morelet's crocodiles are currently robust. Populations remain stable throughout most of their range, and have expanded their range in some areas. In conclusion, we find that, taken together, the currently existing protections described above are adequate, and they will remain adequate to protect the Morelet's crocodile and its habitat in the majority of its range now and within the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Human-Crocodile Conflicts

The Morelet's crocodile is known to attack humans. While data about these conflicts are limited, anecdotal reports suggest that these conflicts are widespread and ongoing. In a well-documented attack in Belize in August 2001, a Morelet's crocodile attacked a 13-year-old male and caused him to drown in the Belama area of Belize City (Finger *et al.* 2002, p. 198).

More often, human-crocodile conflicts involving the Morelet's crocodile are more benign. In Mexico, for example, the Crocodile Museum (Chiapas State; about 80 cases per year) assists local officials through the capture, rescue, and relocation of local crocodilians (all three species, including the Morelet's crocodile) that are considered potentially dangerous or, because of their location (close proximity to human activities), they might be killed by local inhabitants (Domínguez-Laso 2008, p. 5). Abercrombie *et al.* (1982, p. 19) reported that the Morelet's crocodile was generally feared in Belize. Finger *et al.* (2002, p. 199) indicated that development related to human occupation (such as residential areas and infrastructure) in Morelet's crocodile habitat around Belize City was generating increasing numbers of human-crocodile conflicts. Windsor *et al.* (2002, p. 418) also noted that the practice of feeding the Morelet's crocodile by residents and tourists was becoming more common and was also generating increasing numbers of human-crocodile conflicts in Belize. According to Platt and Thorbjarnarson (2000a, p. 27), large Morelet's crocodiles, despite legal protections, are still perceived as threats to humans and livestock, and are occasionally killed near residential areas in Belize. While educational programs are needed for local residents and visitors to deter this activity, it may also be necessary to develop a problem crocodile removal program to resolve these conflicts (Windsor *et al.* 2002, p. 418). No information was available about human-crocodile conflicts in Guatemala. Although human-crocodile conflicts are affecting local populations of Morelet's crocodiles, and this is likely to continue in the foreseeable future, we do not have any evidence that it is currently or anticipated to be a threat to the species as a whole.

Environmental Contaminants

Environmental contaminants are known to have negative impacts on terrestrial vertebrates (Smith *et al.* 2007, p. 41), including crocodilians (Ross 1998, p. 3). The primary routes through which terrestrial reptiles, including the Morelet's crocodile, are exposed to environmental pollutants are ingestion of contaminated prey, dermal contact, maternal transfer, and accumulation of chemicals into eggs from contaminated nesting media (Smith *et al.* 2007, p. 48). With regard to the Morelet's crocodile, organochlorine contaminants have been detected in the scutes (external scales) (DeBusk 2001, pp. viii–ix) and the chorioallantoic membrane (CAM) of hatched Morelet's crocodile eggs (Pepper *et al.* 2004, pp. 493, 495), as well as in whole contents analysis of nonviable crocodile eggs (Wu *et al.* 2000a, p. 6,416; 2000b, p. 671; Wu *et al.* 2006, p. 151).

The most common organochlorine found in studies of Morelet's crocodile in Belize was DDE (dichlorodiphenyldichloroethylene), detected in 100 percent of eggs collected by Wu *et al.* (2000b, p. 673) and 69 percent of CAMs sampled by Pepper *et al.* (2004, p. 495). Organochlorines have also been detected at additional sites throughout coastal Belize and the interior highlands (Meerman 2006a, p. 26; Wu *et al.* 2006, p. 153). Although exposure to organochlorines has been linked to adverse effects on population health of the American alligator in Florida (several studies cited by Wu *et al.* 2000b, p. 676), no population-level effects were detected in Belize (McMurry and Anderson 2000, pp. 1, 4; Wu *et al.* 2000b, p. 676). Rainwater (2003, pp. xii, 38), however, later suggested that some of the sites that had been chosen for comparative purposes in fact had similar contaminant profiles and that some study results suggesting no significant differences between sites may be equivocal.

Reproductive impairment due to endocrine-disrupting contaminants has been demonstrated elsewhere in crocodilians and is suspected to occur with Morelet's crocodiles in Belize due to known contaminant levels (Selcer *et al.* 2006, p. 50; Rainwater *et al.* 2008, p. 101). Initial results have not documented contaminant-induced vitellogenin in blood plasma in the Morelet's crocodile, but this condition may occur in the wild in Belize; studies are ongoing (Selcer *et al.* 2006, p. 50; Rainwater *et al.* 2008, pp. 101, 106–107).

Mercury was detected in nonviable Morelet's crocodile eggs collected from eight nests across three localities in northern Belize in 1995 (Rainwater *et al.* 2002a, p. 320; Rainwater *et al.* 2002b, p. 190). While mercury was detected in all eggs sampled, the mean concentration per egg was among the lowest reported values for any crocodile species. No overt signs of mercury toxicity or evidence of a population decline was noted for Morelet's crocodiles at the site (Rainwater *et al.* 2002a, pp. 321–322).

All samples for studies of organochlorine and mercury contaminants cited above came from Belize, and we are not aware of any

similar investigations elsewhere in the Morelet's crocodile range (Mexico or Guatemala). As reproduction and survival rates of Morelet's crocodiles are currently robust, we do not have any reason to believe that environmental contaminants are currently likely to cause the Morelet's crocodile to become in danger of extinction within the foreseeable future.

Populations currently remain stable throughout most of the species range, and have even expanded their range in some areas. This provides empirical evidence of the species' intrinsic resilience and adaptability. There is no evidence that environmental contaminants currently pose a threat to the species. Although environmental contaminants may represent a potential threat, especially given the potential for long-term bioaccumulation of contaminants during the species' long reproductive life, given this species' resiliency we do not have any data to indicate that they are likely to become a threat in the foreseeable future.

Manmade factors that could affect the continued existence of the Morelet's crocodile, according to CONABIO (CONABIO 2005, p. 32), were the construction and operation of oil extraction infrastructure and thermoelectric plants. The operation of chemical and manufacturing industries could also become a threat if potentially toxic residual materials are disposed of improperly. These activities, however, are highly regulated by the Ley General de Equilibrio Ecológico y Protección al Ambiente (LGEEPA; General Ecological Equilibrium and Environmental Protection Law) and the Attorney General for the Protection of the Environment (PROFEPA). Under LGEEPA, every new project has to fulfill strict protocols for the assessment of environmental impacts before it can be approved.

As discussed above in the Factor D., Inadequacy of Existing Regulatory Mechanisms, section, the Government of Guatemala opposed the Government of Mexico's 2010 CITES proposal based, in part, on threats to the species from pollution in Guatemala (CITES 2010a, p. 6). However, we do not have any information or data on the extent of the impact, if any, that pollution may have on the Morelet's crocodile in Guatemala.

Genetic Diversity and Integrity

At least three factors have been identified as potential threats with respect to the Morelet's crocodile: (1) Genetic heterogeneity; (2) hybridization; and (3) male-biased sex ratios.

Genetic Heterogeneity

Evaluation of nine microsatellite loci (highly repetitive DNA sequences) from Morelet's crocodiles in Belize suggested a high degree of genetic heterogeneity within local populations, relatively high levels of migration among populations, and no evidence of a major genetic bottleneck due to population depletion in the mid-1900s (Dever and Densmore 2001, pp. 543–544; Dever *et al.* 2002, p. 1084). Population bottlenecks are a period when a species population drops to such a low level that many genetic lineages become extinct and genetic variation is reduced to a few individuals, resulting in genetic homogeneity. If severe, it can lead to inbreeding. Endangered species that do not become extinct might expand their populations, but with limited genetic diversity, they may not be able to adapt to changing environmental conditions. The high degree of genetic heterogeneity found in Morelet's crocodiles was attributed to frequent migration by individuals among the several adjacent Morelet's crocodile populations. Ray *et al.* (2004, pp. 455–457) found low levels of genetic diversity in the mitochondrial control region of Morelet's crocodiles at 10 sites in northern Belize and at one site each in northern Guatemala and Mexico, but these results were inconsistent with a population bottleneck and may be typical of crocodilian populations. Other studies of the repetitive sequences in the mitochondrial control are ongoing in the Morelet's crocodile and may be a useful tool for researchers investigating population dynamics of this species (Ray and Densmore 2003, p. 1012).

Hybridization

Data suggest that some hybridization between Morelet's crocodiles and American crocodiles has always periodically occurred in the wild in areas where both species are sympatric, and that the hybridization is more frequent than previously believed (Cedeño-Vázquez *et al.,* 2008, pp. 666–667; Rodríguez *et al.* 2008, p. 678). In fact, Ross (2011, pers. comm.) states that ''evidence suggests that hybridization is a long standing, quite natural situation, and likely a stable hybrid zone of the sort described for many other species. While it is of considerable scientific and evolutionary interest, it does not constitute a threat to the species in its present form.''

While the first hybrids were identified in coastal areas of eastern Belize, later studies also located hybrids in Mexico along the eastern and northern coasts of the Yucatan Peninsula (Ray *et al.* 2004, p. 449; Cedeño-Vázquez *et al.* 2008, p. 661; Rodríguez *et al.* 2008, p. 674).

Hybridization involves several key issues. First, hybridization appears to be bidirectional (males of one species with females of the other species, and vice versa). In addition, hybrids (confirmed by laboratory tests) do not always exhibit physical characteristics (such as body size, shape, or coloration) that are a mixture of both species, and they are not always readily identifiable as such in the hand. Furthermore, F2 hybrids and backcrosses of hybrids to nonhybrids have been reported. These circumstances hinder the field identification of potential hybrids.

Ray *et al.* (2004, p. 459) stated that further assessment of genetic contact between these two species should precede reclassification of Morelet's crocodile under CITES, presumably because of uncertainty regarding numbers of genetically pure individuals in Belize. While populations of both the Morelet's crocodile and the American crocodile suffered from the hunting pressures of the 1950s and 1960s, the American crocodile has been slower to recover. Indeed, Ray *et al.* (2004, p. 459) noted that hybridization likely represents a greater danger to the genetic integrity of the larger but rarer American crocodile than to the Morelet's crocodile in Belize. The Service believes this concern bears additional investigation, but is not sufficient to warrant continued endangered or threatened status under the Act for the Morelet's crocodile.

One hypothetical concern about hybridization is that supplementation of wild Morelet's crocodile populations in Mexico with captive-bred crocodiles might affect the genetic integrity of wild populations. While analyses of captive-bred populations have not been published, differences in the nature and extent of genetic variation of these populations compared with wild populations might be expected. It is not clear if these differences, if they occur, would be significant or important from a conservation standpoint. Furthermore, this issue may be a moot point. Although agreements between captive-breeding operations and the Government of Mexico require breeders to make available up to 10 percent of their offspring for reintroduction to the wild, or as breeding stock for other crocodile farms in the country, no releases of captive-bred stock have occurred (Mexico 2006, p. 28). No releases have occurred because the current total population sizes of wild populations in Mexico, according to Mexican officials, are sufficiently large to render releases unnecessary (CITES

2008, p. 23). However, accidental escapes and deliberate releases of the Morelet's crocodile from captive-rearing units outside of the species' natural range have occurred in wetland habitats along the Pacific coast of Mexico. These wetland habitats are already occupied by the naturally occurring American crocodile, and interactions between the two crocodile species are likely (Ross 1995, p. 14). These escapes and releases of Morelet's crocodiles may pose risks to the genetic integrity of naturally occurring American crocodiles, but probably not to Morelet's crocodiles. The Government of Mexico is making efforts to diagnose potential threats to the native American crocodile caused by hybridization with the introduced Morelet's crocodile on the Pacific coast of Mexico. The goal of these efforts is to generate morphological and molecular identification materials and study the population dynamics of the American crocodile. The efforts will include monitoring and harvest of Morelet's crocodiles and hybrids for scientific research (CITES 2010a, p. 6).

Although hybridization between American and Morelet's crocodiles continues to affect some local populations of the Morelet's crocodile, the impacts appear to be very small. We have no evidence that hybridization is currently or anticipated to significantly affect the Morelet's crocodile throughout its range.

Male-Biased Sex Ratios

Another potential risk from supplementation of wild populations with captive-bred Morelet's crocodiles is that of skewed sex ratios (greater proportion of males in captive populations). Incubation temperature affects the sex ratio of crocodilian species differently (Escobedo-Galván 2006, p. 131). Like many crocodilian species, the Morelet's crocodile exhibits temperature-dependent sex determination. Incubation temperatures greater than about 93 °F (34 °C) or less than 90 °F (32 °C) produce females, while temperatures between 90–93 °F (32–34 °C) generally produce males (Escobedo-Galván 2006, p. 133; Escobedo-Galván *et al.* 2008, p. 2). Some wild populations of the Morelet's crocodile in Belize also have greater proportions of males than females (5.3 males per 1 female), but seem to be healthy (Platt and Thorbjarnarson 2000a, p. 23). We do not have any evidence that skewed sex ratios currently pose a threat to the species. Although skewed sex ratios may represent a potential threat, especially given the potential for skewed sex ratios as a result of climate change, this information is not sufficient to be able to judge the timing of this potential, i.e., that it will manifest within the foreseeable future. Therefore, we do not have any information to indicate that it is likely to become a threat in the foreseeable future.

Natural Weather Events

Natural weather can affect the Morelet's crocodile. Hurricanes or heavy seasonal rains, for example, may pose risks to Morelet's crocodile eggs located in nests along water channels. Flooding associated with hurricanes or rains, however, may also provide conservation benefits to the Morelet's crocodile by facilitating movements of individuals across the landscape, thereby promoting gene flow (CITES 2010a, p. 6). Furthermore, extended dry periods can result in the temporary disappearance of ephemeral water bodies, with concomitant increases in Morelet's crocodile densities and intraspecific interactions at nearby sites that still have water. There is no evidence, however, that natural weather conditions have been a problem for the Morelet's crocodile, which has adapted to these weather conditions. Therefore, we have no reason to believe that natural weather events are currently likely to cause the Morelet's crocodile to become in danger of extinction within the foreseeable future throughout all or any significant portion of its range.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) concluded that warming of the climate system is unequivocal (IPCC 2007a, p. 30) and sea levels are expected to rise well into the foreseeable future (Bates *et al.* 2008, pp. 20, 28–29). Numerous long-term changes have been observed including changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns, and aspects of extreme weather including droughts, heavy precipitation, heat waves, and the intensity of tropical cyclones (IPCC 2007b, p. 7). Based on scenarios that do not assume explicit climate policies to reduce greenhouse gas emissions, global average temperature is projected to rise by 2–11.5 °F by the end of this century (relative to the 1980–1999 time period) (USGCRP 2011, p. 9). Species that are dependent on specialized habitat types, limited in distribution, or occurring already at the extreme periphery of their range will be most susceptible to the impacts of climate change. While continued change is certain, the magnitude and rate of change is unknown in many cases.

The information currently available on the effects of climate change and the available climate change models do not make sufficiently accurate estimates of location and magnitude of effects at a scale small enough to apply to the range of the Morelet's crocodile. We do not have any information on the projected impacts to the Morelet's crocodile because of climate change, particularly the potential impacts of shifting global temperatures on sex ratios. The study by Escobedo-Galván *et al.* (2008) regarding climate change's projected impacts to the American crocodile illustrates the possible impacts to the Morelet's crocodile. This study, entitled ''Potential effects of climate change on the sex ratio of crocodiles'' (Escobedo-Galván *et al.* 2008), was presented at the February 2008 International Science Symposium: Climate Change and Diversity in the Americas. The study selected several areas in Florida and western Mexico that contain American crocodiles, and used the current environmental information for these areas to predict how increased temperatures would affect the potential geographical distribution and sex ratios of the species in Florida, the Caribbean, and Central America.

Based on a preliminary analysis (focusing on the geographic distribution and sex ratios of American crocodiles in the present, 2020, and 2050), Escobedo-Galván *et al.* (2008) postulated that the geographic distribution and sex ratios of American crocodile populations in different parts of the range would change in response to temperature and sea-level parameters. Crocodiles are ectothermic, relying on external sources of heat to regulate their body temperature. They control their body temperature by basking in the sun, or moving to areas with warmer or cooler air or water temperatures. Optimal growth in crocodilians has been found to occur around 88 °F (31 °C), with appetites and effective digestion diminishing below 84 °F (29 °C) (Brien *et al.* 2007, p. 15). As global temperatures increase, areas that are currently too cool to support American and Morelet's crocodiles may become warm enough to support them in the future. According to Escobedo-Galván *et al.* 2008, increased global temperatures and sea level would benefit the American crocodile by significantly increasing its potential habitat and distribution. Their study predicted that the current potential distribution for the American crocodile would expand 69 percent in 2020, and 207 percent in 2050. This is an 81 percent increase in potential distribution from 2020 to 2050

(Escobedo-Galván *et al.* 2008, presentation, pp. 9–10).

The study also predicted that increased global temperatures would have a significantly negative impact on the sex ratios of the American crocodile. Like many other crocodilian species, both the American and the Morelet's crocodile exhibit temperature-dependent sex determination. The macroclimate (global climate) affects the mesoclimate (the temperature outside of a crocodile's nest), which in turn affects the microclimate (the temperature inside of a crocodile's nest), which in turn determines the proportion of males to females produced in the nest (Escobedo-Galván *et al.* 2008, presentation, p. 4). Incubation temperatures greater than about 93 °F (34 °C) or less than 90 °F (32 °C) produce females while temperatures between 90–93 °F (32–34 °C) generally produce males (Escobedo-Galván 2006, p. 133; Escobedo-Galván *et al.* 2008, p. 2). Thus, the production of males is entirely dependent upon a sustained incubation temperature range of only 3 degrees. Incubation temperatures greater than 97 °F (36 °C) are at the upper end of the tolerance range for reptile eggs and result in death of embryos and stress to the surviving hatchlings (Escobedo-Galván *et al.* 2008, presentation, p. 2).

According to Escobedo-Galván *et al.* (2008), the current sex ratio of the American crocodile favors females (based on potential species distribution): 75 percent of the potential species distribution has fewer males than females, 15 percent has an equal number of males and females, and 10 percent has more males than females. The study predicted that by 2020, the sex ratio is expected to shift in favor of males due to increases in nest temperature as a result of climate change: 24 percent of the potential species distribution will have fewer males than females, 16 percent will have an equal number of males and females, and 60 percent will have more males than females (Escobedo-Galván *et al.* 2008, presentation, pp. 11–12). Under this scenario, the number of females produced will be reduced significantly by 2020, which in turn will reduce the overall total eggs laid in each breeding season. Of the eggs laid, more are likely to become males, which in turn would further reduce the number of breeding females produced over time. Escobedo-Galván *et al.* (2008) predicted that by 2050, American crocodiles would become extinct in Florida, the Caribbean, or Central America (Escobedo-Galván *et al.* 2008, presentation, p. 13).

Although American crocodiles are found primarily in saline and brackish environments, they can also be found in abandoned coastal canals and borrow pits, and may range inland into freshwater environments preferred by Morelet's crocodiles, such as lakes and lower reaches of large rivers. American crocodiles are extremely adaptable in their nesting strategy, and while they mainly nest in holes, individuals will readily build mound nests if suitable materials are available. American and Morelet's crocodiles have been known to lay eggs within the same nest mound as conspecifics, suggesting a more gregarious and tolerant demeanor (Brien et al. 2007, pp. 17–18). Sea-level rise would significantly expand the amount of inland saline and brackish coastal habitat available to the American crocodile, and correspondingly decrease the amount of inland freshwater habitat available to the Morelet's crocodile. The area of available land would also be reduced as a result of sea-level rise, further increasing competition between the two species for terrestrial activities such as nesting and basking on the shoreline.

The study by Escobedo-Galván *et al.* (2008) did not provide any information or data on the effects of climate change on the Morelet's crocodile. Although the American crocodile and Morelet's crocodile have overlapping ranges, similar life-history requirements, and may lay eggs in the same nest, we do not have any evidence that climate change currently poses a threat to the Morelet's crocodile. Ross (2010, pers. comm.) noted that while climate change constitutes one of the most pressing potential threats to biodiversity, crocodilians seem the most adapted to be minimally impacted. ''Crocodilians have demonstrably survived several previous periods of climate change comparable to current and predicted scenarios and while they may well change distribution and experience sex ratio and physiological effects, these seem well within the capacity of this species. They seem likely to be one of those species that will adapt to climate change, neither going extinct or requiring significant movement or mitigation.'' Thus, although climate change may represent a potential threat to the Morelet's crocodile, all indications are that it is not likely to become a threat to this species in the foreseeable future.

Other Potential Concerns

Other information obtained by the Service, however, suggests that the construction and operation of dams to generate electricity could be a conservation threat to the Morelet's crocodile (for example, the Chalillo hydroelectric dam in Belize on the Macal River, an area inhabited by the Morelet's crocodile) (Environment News Service 2004, p. 1; Hogan 2008, p. 2). At the national level, six main environmental issues affecting natural resources have been identified for Belize: (1) High deforestation rate; (2) solid and liquid waste management issues; (3) rising poverty rates; (4) rapid coastal development; (5) ineffective institution and legal frameworks; and (6) oil discovery (Young 2008, p. 18).

We do not have any information to indicate the extent of the impact, if any, that these environmental issues may have on the Morelet's crocodile in Belize. There is no evidence that these environmental issues in Belize currently pose a threat to the species. Although they may represent a potential threat, we do not have any data to indicate that they are likely to become a threat in the foreseeable future.

There has been some information indicating that fishing nets (for fish and turtles) and death by drowning are threats to the Morelet's crocodile in Guatemala, but we do not have information regarding specific rates of injury or mortality (CITES 2008, p. 18). CONABIO (2005, p. 27) suggested that the number of crocodiles accidentally captured in nets in Guatemala was low, but the basis for this claim was unclear. Platt and Thorbjarnarson (2000b, p. 27) noted that ''a limited number of crocodiles'' drown in fish and turtle nets in northern Belize each year. There is no evidence that fishing currently poses a threat to the species. Although it may represent a potential threat, we do not have any data to indicate that it is likely to become a threat in the foreseeable future.

Summary of Factor E

Few, if any, natural or manmade factors are anticipated to affect the continued existence of the Morelet's crocodile. While natural factors such as hurricanes and extended dry seasons (CONABIO 2005, p. 32) may affect the species, we believe that the species has evolved with these kinds of events, and the events do not pose a threat to the species.

Several phenomena are categorized here as other natural or manmade factors that were considered as potentially affecting the conservation status of the Morelet's crocodile in the foreseeable future. Our knowledge about these factors is incomplete and uneven among the three range countries. Environmental contaminants, especially DDE and mercury, have been widely

reported for Belize. To date, however, there is no evidence of negative effects to the Morelet's crocodile due to exposure to organochlorines even though these contaminants have been linked to documented adverse effects on population health in a similar species, the American alligator.

Vitellogenin induction in males, suggesting endocrine disruption due to environmental contamination, is predicted in Belize, but has not been documented. These factors do not appear to pose a conservation threat to the Morelet's crocodile in Belize at this time. Information about environmental contaminants in Mexico and Guatemala with regard to the Morelet's crocodile is limited. Potential environmental contaminant issues with respect to the Morelet's crocodile probably are the least well known in Mexico, but that country has an extensive legal framework to resolve any problems that may develop, especially if contaminants also become a public health issue. We do not have any information to indicate that environmental contaminants pose a danger to the species throughout its range. Although environmental contaminants may represent a potential threat, especially given the potential for bioaccumulation of contaminants during the species' long reproductive life, we do not have any data to indicate that environmental contaminants are likely to become a threat to the species in the foreseeable future.

Bycatch in fishing nets has been mentioned as a potential problem in Guatemala. In Belize, a ''limited number of crocodiles'' may die or be injured in nets (Platt and Thorbjarnarson 2000b, p. 27), while information about the potential negative effects of fishing nets on the Morelet's crocodile in Mexico is limited. Overall, these local impacts do not appear to have any significant impact on Morelet's crocodiles. Although bycatch in fishing nets may represent a potential threat, we do not have any data to indicate that it is likely to become a threat in the foreseeable future.

Genetic diversity and integrity is a relatively complicated subject with respect to the Morelet's crocodile, and our knowledge across the three range countries is uneven. Studies in Belize suggest that wild populations in that country have a high degree of genetic diversity (Dever and Densmore 2001, pp. 543–544; Dever *et al.* 2002, p. 1084). Hybridization between the Morelet's crocodile and the American crocodile has been documented for eastern Belize and the eastern and northern coasts of the Yucatan Peninsula in Mexico (Ray *et al.* 2004, p. 440; Cedeño-Vázquez *et al.* 2008, p. 661; Rodriguez *et al.* 2008, p. 674). The nature and extent of genetic variation of captive-bred populations with respect to wild populations, as well as male-biased sex ratios, are also poorly understood issues, but potentially important in Mexico where captive-bred individuals may eventually be released into the wild. There is no indication, however, that the Morelet's crocodile suffers from any genetic limitations throughout its range.

Natural weather events do not appear to have any population-level impacts to the Morelet's crocodile, which has evolved to thrive in this climate. We also do not have any evidence that climate change poses a threat to the species. Although climate change may represent a potential threat, especially given the crocodilian requirement for temperature dependent sex determination, we do not have any data to indicate that climate change is likely to become a threat in the foreseeable future.

Although some local factors continue to affect the Morelet's crocodile, we do not have any information to indicate that these factors are of sufficient magnitude to affect any population of the Morelet's crocodile. In conclusion, we find that other natural and manmade factors are not a significant factor affecting the Morelet's crocodile throughout its range, both now and for the foreseeable future.

Finding

We have carefully assessed the best scientific and commercial data available and have determined that the Morelet's crocodile is no longer endangered or threatened throughout all of its range. When considering the listing status of the species, the first step in the analysis is to determine whether the species is in danger of extinction or likely to become endangered throughout all of its range. For instance, if the threats on a species are acting only on a portion of its range, but the effects of the threats are such that they do not place the entire species in danger of extinction or likely to become endangered, we would not retain the entire species on the list.

In developing this final rule, we have carefully assessed the best scientific and commercial data available regarding the threats facing this species, as well as the ongoing conservation efforts by the three range countries. This information indicates that numbers of Morelet's crocodiles have significantly increased over the past 4 decades since being categorized as depleted by species experts in the 1970s. In Mexico and Belize, the species is broadly distributed geographically, essentially occupying the entire historical range, and age classes reflect healthy reproduction and recruitment into a wild breeding population of about 10,000–20,000 adults (Ross 2000, p. 3; CONABIO 2005, p. 19).

We have identified a number of potential threats to the Morelet's crocodile. Some of these potential threats may directly or indirectly affect individual Morelet's crocodiles, while others may affect Morelet's crocodile habitat. The contributions of these potential threats, identified in the Summary of Factors Affecting the Species sections above, are discussed in approximate descending magnitude of impact in the foreseeable future:

(1) A continuation of wild harvest for ranching or direct export may pose a threat to the species if the countries decide to change course. However, if conducted in compliance with CITES, the wild harvest would have to be non-detrimental for the specimens to enter international trade. Our assessment of the risk associated with this potential threat is based primarily on the demonstrated adverse effects of past overharvest on populations. Additional monitoring programs and adequate regulatory mechanisms would need to be established prior to legalizing ranching. Such mechanisms would be important to prevent the laundering of illegally harvested Morelet's crocodiles. We find that, taken together, the currently existing protections (described above in the Factor D section, Inadequacy of Existing Regulatory Mechanisms) are adequate, and they will remain adequate to protect the Morelet's crocodile and its habitat in the majority of its range now and within the foreseeable future.

(2) The detection of organic and inorganic environmental contaminants in Morelet's crocodile eggs in Belize indicates that impacts from concentrations of environmental contaminants may represent a potential threat because Morelet's crocodiles have a long lifespan during which contaminants may bioaccumulate. However, there is no evidence that environmental contaminants are currently affecting populations (numbers and reproduction appear to be robust). In order to determine that environmental contaminants may be a threat to the Morelet's crocodile in the future, their presence in the environment must be occurring at a level that affects the long-term population levels over at least a significant portion of the range of the species. We know of no ongoing monitoring of environmental contaminants anywhere in the species'

range. Although 45 articles within the Mexican LGEEPA deal with environmental contamination (CONABIO 2005, Annex 3, p. 1), we have not received a detailed analysis of the specific provisions and their relevance to Morelet's crocodile. We are unaware of regulatory mechanisms governing activities that discharge environmental contaminants that potentially affect Morelet's crocodile in Belize. However, we do not have any data to indicate that environmental contaminants are likely to become a threat in the foreseeable future.

(3) Although habitat loss and degradation continues to negatively affect the habitat for some local populations of the Morelet's crocodile, we do not have any information to indicate that it is of sufficient magnitude to have a rangewide impact on the species to the point that would cause the Morelet's crocodile to meet the definition of either an endangered or a threatened species. The species' relatively wide distribution throughout its historical range and apparent tolerance for habitats in proximity to agriculture, grazing, and human habitation are substantial factors mitigating these impacts to Morelet's crocodiles over the next several decades. We anticipate that these conditions will remain essentially the same in the foreseeable future due to the adequate regulatory mechanisms in place to protect suitable habitat for the Morelet's crocodile in the majority of its range (see discussion above under the Factor D. section, Inadequacy of Existing Regulatory Mechanisms).

The Morelet's crocodile continues to be affected by a variety of potential residual threats. It is likely that development, hurricanes and other storm events, random human disturbance, fishery activities, oil spills, and infestation by parasites will continue to impact individual crocodiles into the future. Although these impacts are generally expected to continue intermittently at low levels into the foreseeable future, we do not expect these impacts to significantly affect the Morelet's crocodile to the point that they would result in declines in the rangewide status of the species.

Although some potential threats to the Morelet's crocodile remain throughout its range, as discussed above, they are at a low enough level they are not having a significant population-level or demographic effect on Morelet's crocodile populations in Mexico and Belize; in fact, most populations are stable and/or increasing and still occur in their historical range. Any low-level threats occurring in Guatemala are currently being addressed by the Guatemalan national and provincial governments with the help of the local and international NGO community. We do not believe, based on the best available information, that the extent of potential threats to the species in Guatemala, even if the extent of the potential threats increase, will cause the Morelet's crocodile to become endangered or threatened in the future. The government of Guatemala recognizes the importance of this and other landscape species in the Guatemalan Maya Biosphere and are implementing regulatory and enforcement controls to combat human encroachment, land clearing, fires, and other illegal activities that may pose a threat to these species. In addition, Guatemala's request to keep Guatemala's populations of Morelet's crocodile in Appendix I attests to their commitment to ensure trade does not affect Guatemala's wild Morelet's crocodile populations.

The population viability analysis (PVA) conducted by Sanchez (Sánchez 2005) suggests the probability of survival of a population of 30,000 individuals (roughly ⅓ of the actual population of Morelet's crocodiles), subject to high-stress conditions, is approximately 86 percent, and the long-term prognosis for the survival and genetic diversity of the Morelet's crocodile throughout its range is very good, estimating that the average time to reach the quasi-extinction threshold of 500 individuals being 483 years (Sánchez 2005, pp. 43–61).

A species is ''endangered'' for purposes of the Act if it is in danger of extinction throughout all or a significant portion of its range and is ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. The word ''range'' is used here to refer to the range in which the species currently exists, and the word ''significant'' refers to the value of that portion of the range being considered to the conservation of the species.

In considering the foreseeable future as it relates to the status of the Morelet's crocodile, we defined the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, events or effects can and should be anticipated, or the threats reasonably extrapolated. We considered the historical data to identify any relevant threats acting on the species, ongoing conservation efforts, data on species abundance and persistence at individual sites since the time of listing, and identifiable informational gaps and uncertainties regarding residual and emerging threats to the species, as well as population status and trends. We then looked to see if reliable predictions about the status of the species in response to those factors could be drawn. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future, in the form of extrapolating the trends. We also considered whether we could reliably predict any future events, not yet acting on the species and, therefore, not yet manifested in a trend, that might affect the status of the species, recognizing that our ability to make reliable predictions into the future is limited by the variable quantity and quality of available data. Following a range-wide threats analysis, we evaluated whether the Morelet's crocodile is endangered or threatened in any significant portion(s) of its range.

As required by the Act, we considered the five factors, alone and in combination, in assessing whether the Morelet's crocodile is endangered or threatened throughout all or a significant portion of its range. We reviewed the petition, information available in our files, comments and information received after the publication of our 90-day finding (71 FR 36743; June 28, 2006), comments received after the publication of our 12-month finding and proposed rule (76 FR 23650; April 27, 2011) and other available published and unpublished information, and we consulted with recognized experts. We have carefully assessed the best available scientific and commercial data regarding the past, present, and future threats faced by the Morelet's crocodile. We found that although some localized impacts to individual Morelet's crocodiles still occur, such as habitat loss from agricultural development, they have been reduced enough so as to not affect the species on a population level. In addition to the five-factor analysis, we also considered the progress made by the range countries towards addressing previous threats to Morelet's crocodiles. We took into consideration the conservation actions that have occurred, are ongoing, and are planned. Since listing, the species' status has improved because of the following:

- National and international laws and treaties have minimized the impacts of hunting and trade in wild-caught specimens.
- Morelet's crocodile populations are stable or increasing.
- Total population size is approximately 19,400 adults in the three range countries.

• Species experts now widely characterize Morelet's crocodile populations as healthy.

• The current rangewide distribution of Morelet's crocodile now closely resembles the historical rangewide distribution.

• Range countries have improved efforts to protect and manage Morelet's crocodile habitat.

• The long-term prognosis for the survival and genetic diversity of the Morelet's crocodile throughout its range is very good.

In sum, the ongoing development and updating of management plans, the active management of habitat, the ongoing research, and the protections provided by laws and protected lands provide compelling evidence that recovery actions have been and will continue to be successful.

The primary factor that led to the listing of the Morelet's crocodile was trade. However, the trend today is towards increasing population sizes, with trade restricted to ''sources other than wild'' specimens only. We find that the localized impacts identified in the three range countries, when combined with the increase in population sizes, ongoing active research and management, and protections provided by range countries, those impacts are not of sufficient imminence, intensity, or magnitude to indicate that the Morelet's crocodile is threatened with extinction now or in the foreseeable future. Consequently, we have determined that Morelet's crocodile is no longer endangered or threatened throughout its range.

Having determined that the Morelet's crocodile is no longer endangered or threatened throughout its range, we must next determine if the threats to the Morelet's crocodile are not uniformly distributed such that populations in one portion of its range experience higher a level of threats than populations in other portions of its range.

Significant Portion of Its Range

The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines ''species'' as any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature. The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations either: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

For the purposes of this finding, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, then that species is an ''endangered species.'' The same analysis applies to ''threatened species.'' Based on this interpretation and supported by existing case law, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species will be listed as endangered or threatened, respectively, and the Act's protections will be applied across the species' entire range.

We conclude, for the purposes of this finding, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice, as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this finding, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this finding, and as explained further below, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. Resiliency describes the characteristics of a species and its habitat that allow it to recover from periodic disturbance. Redundancy (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. Representation (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitat types is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one or more of these concepts.

For the purposes of this finding, we determine whether a portion qualifies as ''significant'' by asking whether without that portion, the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' (a portion of the range of a species is ''significant'' if its contribution to the viability of the

species is so important that without that portion, the species would be in danger of extinction) establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: Listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this finding carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this finding, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even the species being in danger of extinction in that portion would be sufficient to cause the species in the remainder of the range to be endangered; rather, the *complete extirpation* (in a hypothetical future) of the species in that portion would be required to cause the species in the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant or to analyzing portions of the range in which there is no reasonable potential for the species to be endangered or threatened. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the determination that a species is in danger of extinction in a significant portion of its range is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats to the species occurs only in portions of the species' range that clearly would not meet the biologically based definition of ''significant,'' such portions will not warrant further consideration.

After reviewing the potential threats throughout the range of the Morelet's crocodile, we determine that there is one portion, Guatemala, in which threats could be considered to be concentrated. However, Guatemala comprises a small portion of the overall range of the Morelet's crocodile. The estimated number of Morelet's crocodiles in Guatemala is 13 percent of the potential global population estimate. The extent of undisturbed habitat in Guatemala is estimated to be 19 percent of the total range of undisturbed habitat for the species (CONABIO 2005, pp. 16–19).

As stated above, a portion of the range of a species is ''significant'' if it contributes to the viability of the species, and is so important that without that portion, the species would be in danger of extinction. Although Guatemala's commitment to the conservation of the Morelet's crocodile and its habitat has markedly improved, past drug trade, land grabs, the presence of human settlements, expanding agriculture and cattle ranching, poaching, forest fires, the oil industry, habitat fragmentation, environmental contamination, introduction of invasive species, and an almost complete lack of institutional control over their protected areas (IARNA URL IIA 2006, pp. 88–92) has greatly limited, Guatemala's potential contribution to the conservation status of the species. In addition, we have no information indicating that the Guatemala population is genetically different from the remainder of the range, and we are unaware of any data or information indicating that the Morelet's crocodile in Guatemala is ecologically unusual, unique, or otherwise significant to the species as a whole in any way. We find that if there were a loss of the Guatemalan range, it would be unlikely to place the remainder of the species in danger of extinction. Thus, we conclude that Guatemala does not qualify as a significant portion of the species' range, and therefore find that the species does not warrant listing throughout a significant portion of its range.

Distinct Vertebrate Population Segment

Section 3(16) of the Act defines ''species'' to include any species or subspecies of fish and wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)). After assessing whether or not the Morelet's crocodile is endangered or threatened throughout all or a significant portion of its range, we next consider whether a distinct vertebrate population segment (DPS) of the Morelet's crocodile meets the definition of endangered or is likely to become endangered in the foreseeable future (threatened).

To interpret and implement the DPS provisions of the Act and congressional

guidance, the Service and the National Marine Fisheries Service (now the National Oceanic and Atmospheric Administration—Fisheries Service) published the *Policy Regarding the Recognition of Distinct Vertebrate Population Segments* (DPS Policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under the DPS Policy, we evaluate a set of elements in a three-step process in order to make our decision concerning the establishment and classification of a possible DPS. These elements are applied similarly for additions to or removals from the Federal Lists of Endangered and Threatened Wildlife and Plants.

These elements include: (1) The discreteness of a population in relation to the remainder of the taxon to which it belongs; (2) the significance of the population segment to the taxon to which it belongs; and (3) the population segment's conservation status in relation to the Act's definitions of ''endangered'' species and ''threatened'' species.

First, the Policy requires the Service to determine that a vertebrate population is discrete in relation to the remainder of the taxon to which it belongs. Discreteness refers to the ability to delineate a population segment from other members of a taxon based on either (1) Physical, physiological, ecological, or behavioral factors; or (2) international governmental boundaries that result in significant differences in control of exploitation, management, or habitat conservation status, or regulatory mechanisms that are significant in light of section 4(a)(1)(D) of the Act—the inadequacy of existing regulatory mechanisms.

Second, if we determine that the population is discrete under one or more of the discreteness conditions, then a determination is made as to whether the population is significant to the larger taxon to which it belongs in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list a DPS be used ''sparingly and only when the biological evidence indicates that such action is warranted.'' In carrying out this examination, we consider available scientific evidence of the population's importance to the taxon to which it belongs. This consideration may include, but is not limited to the following: (1) The persistence of the population segment in an ecological setting that is unique or unusual for the taxon; (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon; (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historical range; and (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics from other populations of the species. The Service may determine that a population segment is significant to the taxon to which it belongs based on sufficiently strong evidence with respect to any one of these considerations.

Lastly, if we determine that a population segment is significant to the taxon to which it belongs based on these considerations, then the policy requires an analysis of the population segment's conservation status in relation to the Act's definitions of ''endangered species'' and ''threatened species.''

Discreteness

The first step in our DPS analysis for the Morelet's crocodile was to determine whether there were any populations of the Morelet's crocodile that were discrete in relation to the remainder of the taxon to which it belongs. Under the DPS Policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon because of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act—the inadequacy of existing regulatory mechanisms. Recognition of international boundaries when they coincide with differences in the management, status, or exploitation of the species under the Act is consistent with CITES, which recognizes international boundaries for these same reasons. CITES is implemented in the United States by the Act.

Physical, Physiological, Ecological, or Behavioral Factors

We do not have any data or information to indicate that there are any physical, physiological, ecological, or behavioral facts that separate any populations of the Morelet's crocodile. The historical distribution of the Morelet's crocodile comprised the eastern coastal plain of Mexico, most of the Yucatan Peninsula, Belize, and northern Guatemala (Hurley 2005, p. 1), with an estimated historical distribution covering 173,746 mi^2 (450,000 km^2) (Sigler and Domínguez Laso 2008, pp. 11–12). The Morelet's crocodile is a wide-ranging species that occurs primarily in freshwater environments such as lakes, swamps, and slow-moving rivers. This species of crocodile can temporarily inhabit intermittent freshwater bodies such as flooded savannahs and is occasionally observed in brackish coastal lagoons (Villegas 2006, p. 8).

We do not have any data or information to indicate that any populations of the Morelet's crocodile exhibit genetic or morphological discontinuity that may indicate that they are a separate population. Although we do not have any data or information on the dispersal strategies for the Morelet's crocodile that would indicate a population may be discrete, we have no evidence to suggest that there are barriers that would prevent the Morelet's crocodile from dispersing within its known range. The current rangewide distribution of the Morelet's crocodile closely mirrors the historical rangewide distribution, and there is a large amount of high-quality habitat available. Therefore, we have no evidence suggesting that the Morelet's crocodile is isolated in any part of its range.

International Differences in Species' Conservation Status

As discussed above in the Factor D section, Inadequacy of Existing Regulatory Mechanisms, all three range countries are Parties to CITES. In addition, data and information available to the Service indicates that all three range countries have federally protected-species and protected-areas legislation under the jurisdiction of specific ministries or departments that control activities that affect the Morelet's crocodile and its habitat. Mexico's Federal legal framework is particularly robust. The CITES National Legislation Project (*http://www.CITES.org*) deemed both Mexico and Guatemala's national legislation as Category 1, meeting all the requirements to implement CITES. Belize is currently considered to be Category 3 (not meeting the requirements for implementing CITES), but has submitted to CITES a national legislation plan and draft of legislation, which, if adopted, may qualify Belize as Category 1.

Based on current data and information available to the Service, the Governments of Mexico, Guatemala, and

Belize appear to be adequately enforcing their respective legal frameworks, both at the federal level and under CITES. Mexico and Belize contain the majority of wild Morelet's crocodiles (87 percent) and the majority of the potentially suitable habitat (81 percent) throughout the species' range. Because of this adequate enforcement, the majority of the threats to the species and its habitat have been eliminated in Mexico and Belize. Although some residual threats remain, these threats have been reduced to a low enough level that they are not having significant population level or demographic effects.

In contrast, based on data and information available to the Service, it appears that in the past, the Government of Guatemala was not able to enforce adequately their legal framework to protect the Morelet's crocodile and its habitat in Guatemala. The lack of funding and personnel made enforcement of Guatemala's legal framework especially challenging. Conservation actions were often overwhelmed by slow economic development, high levels of poverty, unequal land distribution, a highly segmented society, and the effects of more than three decades of civil war (Birner *et al.* 2005, pp. 285, 292).

For example, ParkWatch (2003) noted that a designation as a national park or important wetland conservation area in Guatemala does not necessarily afford protection to the Morelet's crocodile or its habitat. The Laguna del Tigre National Park, located in Petén region of Guatemala, is home to the largest population of Morelet's crocodiles in Guatemala. The park was considered by ParkWatch as critically threatened due to drug trade, land grabs, the presence of human settlements, expanding agriculture and cattle ranching, poaching, forest fires, the oil industry, and an almost complete lack of institutional control over the area (ParksWatch 2003, pp. 1, 11). However, by 2004, ParksWatch stated that the staff at Laguna del Tigre had doubled in size since their 2003 report. Seventy-three park rangers, 10 archeological site guards, and 96 Army personnel were hired to staff the park and since the increase in staffing, both the park and the biotope are ''constantly patrolled.'' In addition, the Wildlife Conservation Society continued its ''Biodiversity Conservation at a Landscape Scale'' program (with USAID) for Guatemala and has provided a comprehensive plan with specific goals to preserve and protect wildlife in the Maya Biosphere Reserve in Guatemala through conserving wildlife species and their habitat, while maintaining the economic productivity of renewable natural resources. They are fulfilling these goals by establishing specific parameters: ''to develop adaptive and participatory strategy to reduce threats to wildlife in the MBR; to develop, implement, and monitor sustainable mechanisms to reduce threats to wildlife and ecosystems across the MBR landscape; to learn and teach best management practices for the conservation of the MBR and beyond; and to guide, design, and test wildlife-focused planning'' (WCS 2008, p. 3). These efforts were endorsed by the president of Guatemala through his office's attendance at the Mesa Multisectorial roundtable discussion held in Guatemala in 2009.

Many outstanding accomplishments have been achieved in Guatemala in terms of biodiversity conservation (IARNA URL IIA 2006, p. 22), and efforts to achieve desired levels of environmental management are ongoing. In August 2010, the president of Guatemala announced that he is deploying 250 soldiers to recover fully all the protected zones of El Petén in the Laguna del Tigre section of the MBR. This ''Green Battalion'' was deployed specifically to protect the Laguna del Tigre National Park and to work jointly with the National Civil Police and the Attorney General's Office to combat drug trafficking and the illegal harvest of natural resources and archaeological sites of that region of the MBR (Latin American Herald Tribune, December 6, 2010). Additional help from WCS and USAID includes establishing over-flights to monitor fires, locating illegal settlements, and notifying the national and provincial governments (as well as the national media) of illegal activities. These efforts have resulted in additional personnel added to parks, removal of settlements, consistent patrols and cessation of illegal activities, and educating locals and concessionaires on best management practices for sustainable use of forest products.

Castañeda Moya (1998a, p. 521; 1998b, p. 13) listed illegal hunting as a threat to Morelet's crocodile in the Petén region of Guatemala (CITES 2010a), but did not provide a numerical estimate of the take. ARCAS, an animal welfare group in Guatemala, reported the rescue or recovery of 49 live individuals (about 8 per year), most likely from pet dealers or private individuals, during the period 2002–2007 (ARCAS 2002, p. 3; 2003, p. 2; 2004, p. 2; 2005, p. 2; 2006, p. 3; 2007, p. 3).

The Government of Guatemala acknowledged these issues when it opposed Mexico's 2010 CITES proposal to transfer the Morelet's crocodile from Appendix I to Appendix II throughout its range (See Factor D. Inadequacy of Regulatory Mechanisms, *Mexico's Proposal To Transfer the Morelet's Crocodile to CITES Appendix II.* As a result of the Government of Guatemala's past inability to adequately enforce their legal framework, the Morelet's crocodile in Guatemala may be still subject to some illegal hunting and some destruction of habitat due to previous human encroachment. This constitutes a difference in control of exploitation, management of habitat, conservation status, or regulatory mechanisms that is significant in light of section 4(a)(1)(D) of the Act.

We have determined, based on the best available data and information, that the population of Morelet's crocodiles in Guatemala is discrete due to the significant difference in the control of exploitation, management of habitat, conservation status, or regulatory mechanisms between international boundaries. Therefore, we have determined that the Guatemala population of the Morelet's crocodile meets the requirements of our DPS Policy for discreteness.

Significance

Having determined that the population of Morelet's crocodiles in Guatemala is discrete under one or more of the discreteness conditions described in the DPS Policy, we determined whether the population in Guatemala is significant. We evaluate its biological and ecological significance based on ''the available scientific evidence of the discrete population segment's importance to the taxon to which it belongs'' (61 FR 4722). We make this evaluation in light of congressional guidance that the Service's authority to list a DPS be used ''sparingly.'' As precise circumstances are likely to vary considerably from case to case, the DPS Policy does not describe all the classes of information that might be used in determining the biological and ecological importance of a discrete population. However, the DPS Policy describes four possible classes of information that provide evidence of a population segment's biological and ecological importance to the taxon to which it belongs. As specified in the DPS Policy (61 FR 4722), consideration of the population segment's significance may include, but is not limited to the following: (1) Persistence of the population segment in an ecological setting that is unusual or unique for the taxon; (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon; (3) evidence that the population

segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historical range; and (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Persistence in a Unique Ecological Setting

As stated in the DPS Policy, occurrence in an unusual ecological setting may be an indication that a population segment represents a significant resource warranting conservation under the Act (61 FR 4724). In considering whether the population occupies an ecological setting that is unusual or unique for the taxon, we evaluate whether the habitat includes unique features not used by the taxon elsewhere and whether the habitat shares many features common to the habitats of other populations. As stated above, the Morelet's crocodile is a wide-ranging species that occurs primarily in freshwater environments such as lakes, swamps, and slow-moving rivers. This species of crocodile can temporarily inhabit intermittent freshwater bodies such as flooded savannahs and is occasionally observed in brackish coastal lagoons (Villegas 2006, p. 8). All 3 of the Morelet's crocodile's range countries have similar freshwater habitats utilized by this species. We do not have any evidence to indicate that the Guatemala population of the Morelet's crocodile occurs in habitat that includes unique features not used by the taxon elsewhere in its range. Morelet's crocodile habitat in the Laguna del Tigre National Park consists of flooded savannahs and marshes that are typical of the species' habitat throughout its range. Therefore, we conclude that the discrete population of Morelet's crocodiles in Guatemala is not ''significant'' because of persistence in a unique or unusual ecological setting.

Significant Gap in the Taxon's Range

As stated in the DPS Policy, evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon is potentially an indication that a population segment represents a significant resource warranting conservation under the Act (61 FR 4724). As the Ninth Circuit has stated, ''[t]he plain language of the second significance factor does not limit how a gap could be important'' (*National Ass'n of Home Builders* v. *Norton,* 340 F.3d 835, 846 (9th Cir. 2003)). Thus, we considered a variety of ways in which the loss of the Guatemala population of the Morelet's crocodile might result in a significant gap in the range of species. Namely, we considered whether Guatemala contributed to the resiliency, redundancy, or representation of the taxon's range. As stated previously in the Significant Portion of its Range analysis, the Service concluded that due to the small size of the Guatemalan portion of the Morelet's crocodile's range and the small population size of the species in Guatemala, its overall contribution to the species was limited. While Guatemala has regulatory mechanisms in place to protect their national parks, it appears that until recently, the government was unable to enforce them adequately. Although Guatemala has conserved several areas of the Morelet's crocodile's range, past threats limited this population's contribution to the species (IARNA URL IIA 2006, pp. 88–92).

The Morelet's crocodile in Guatemala does not significantly contribute to the resiliency, redundancy, or representation of the species or its range, including, but not limited to, the size of the range, habitat quality, habitat variability, or genetic uniqueness. The majority of the species' range occurs in Mexico and Belize, which contain the majority of all wild Morelet's crocodiles (87 percent) and the majority of the potentially suitable habitat throughout the species' range (81 percent). Guatemala is surrounded to the east by Belize, and the north and west by Mexico. It is the southernmost range of the species, which resides primarily in the northern part of the country. Guatemala shares several rivers with the other range countries, including but not limited to, the Rio San Pedro, Rio Pasión, and the Rio Ixcán with Mexico, and the Rio Mopán with Belize. All 3 countries share the Rio Azule. Because they move throughout these river systems, should a discrete population segment of Morelet's crocodiles in Guatemala decrease for any reason (which we have concluded is unlikely), then it is likely that Morelet's crocodiles in Mexico and Belize, where 87 percent of the species exist, could expand their range and recolonize any potential habitat in Guatemala. Finally, in spite of Guatemala's recent successes in mitigating localized threats to Morelet's crocodile habitat, Guatemala's biological contribution to the conservation status of the species is limited, due to past impacts from the drug trade, land grabs, the presence of human settlements, expanding agriculture and cattle ranching, poaching, forest fires, the oil industry, habitat fragmentation, environmental contamination, introduction of invasive species, and lack of institutional control over their protected areas. Thus, we have determined that, although the loss of a discrete population segment in Guatemala may create a gap, we conclude that such a loss would not create a significant gap in the range of the species.

Natural Occurrence of a Taxon Abundant Elsewhere as an Introduced Population

As stated in the DPS Policy, evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historical range may be an indication that a population segment represents a significant resource warranting conservation under the Act (61 FR 4724). This element does not apply to the Morelet's crocodile in Guatemala. The Guatemala population of the Morelet's crocodile does not represent the only surviving natural occurrence of the Morelet's crocodile throughout the range of the taxon. After the protections of the Act and CITES were put in place in the 1970s, populations of Morelet's crocodiles increased and expanded their range naturally over time to the point that they have recovered and are now found in all areas of their historical range.

Marked Differences in Genetic Characteristics

As stated in the DPS Policy, evidence that a discrete population segment differs markedly from other populations of the species in its genetic characteristics may be an indication that a population segment represents a significant resource warranting conservation under the Act (61 FR 4724).

Genetic diversity and integrity is a relatively complicated subject with respect to the Morelet's crocodile, and our knowledge across the three range countries is uneven. The genetic data we do have are with respect to hybridization between Morelet's crocodiles and American crocodiles. Thus, we have no information indicating that the Guatemala population is markedly different from the remainder of the range

Summary of Significance

First, we do not have any data or information to indicate that the Guatemala population of the Morelet's crocodile occurs in habitat that includes unique features not used by the taxon elsewhere in its range. Morelet's crocodile habitat in the Laguna del Tigre

National Park consists of flooded savannahs and marshes that are typical of the species' habitat throughout its range. Second, we conclude that based on Guatemala's limited biological contribution to the range of the species, the loss of Morelet's crocodiles in 13 percent of their range would not constitute a significant gap in the range of the species, due to the loss of a population that is ecologically unusual, unique, or otherwise significant to the species as a whole in any way (for example, in terms of species or habitat), or that contributes substantially to the representation, resiliency, or redundancy of the species. Third, the Guatemala population of the Morelet's crocodile does not represent the only surviving natural occurrence of the Morelet's crocodile throughout the range of the taxon. Finally, the Guatemala population of the Morelet's crocodile does not have any genetic characteristics that are markedly different from Morelet's crocodiles elsewhere in the range of the taxon. Therefore, based on the information available to the Service, we conclude that the discrete population of Morelet's crocodiles in Guatemala does not meet the requirements under our DPS Policy for significance.

Based on the best available data and information, we conclude that the Guatemala population of the Morelet's crocodile meets the requirements of our DPS Policy for discreteness, but does not meet the requirements of our DPS policy for significance in relation to the remainder of the taxon (i.e., Morelet's crocodiles in Mexico and Belize). The population of Morelet's crocodiles in Guatemala is discrete due to the significant difference in the control of exploitation, management of habitat, conservation status, or regulatory mechanisms between international boundaries. This difference is evidenced by the fact that Morelet's crocodiles in Guatemala remain listed under Appendix I of CITES, while those in Mexico and Belize were downgraded to Appendix II. The discrete population of Morelet's crocodiles in Guatemala does not meet the requirements of our DPS policy for significance because it: (1) Does not occur in habitat that includes unique features not used by the taxon elsewhere in its range; (2) would not constitute a significant gap in the range of the species due to the loss of a population that contributes substantially to the representation, resiliency, or redundancy of the species; (3) does not represent the only surviving natural occurrence of the Morelet's crocodile throughout the range of the taxon; and (4) does not have any genetic characteristics that are markedly different from Morelet's crocodiles elsewhere in the range of the taxon. Therefore, we conclude that the population of the Morelet's crocodile in Guatemala is not a DPS pursuant to our DPS Policy and, therefore, is not a listable entity under section 3(16) of the Act.

Effects of This Final Rule

This final rule revises our regulations at 50 CFR 17.11(h) by removing the Morelet's crocodile throughout its range from the Federal List of Endangered and Threatened Wildlife. Our regulations do not authorize designating critical habitat in areas outside of the United States. Specifically, our regulations at 50 CFR 424.12(h) specify that critical habitat shall not be designated within foreign countries or in other areas outside of U.S. jurisdiction. Because no critical habitat was ever designated for this species, this rule will not affect 50 CFR 17.95.

The prohibitions and conservation measures provided by the Act, particularly through section 9, will no longer apply after the effective date of this rule (see **DATES,** above). This rulemaking, however, does not affect the protection given to the Morelet's crocodile under CITES. Delisting under the Act allows U.S. import, re-export, and commercial activity in Morelet's crocodiles and their parts and products originating from any country, including the three range countries, provided that the requirements of 50 CFR part 13 (General Permit Procedures), 50 CFR part 14 (Importation, Exportation, and Transportation of Wildlife) and 50 CFR part 23 (CITES) have been met.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires the Secretary of Interior, through the Service, to implement a system in cooperation with the States to monitor for not less than 5 years the status of all species that are removed from the Lists of Endangered and Threatened Wildlife and Plants (50 CFR 17.11 and 17.12) due to recovery. This monitoring requirement is to ensure prevention of significant risk to the well-being of recovered species.

Species monitoring is also called for under CITES. CITES Resolution Conf. 9.24 (Rev. CoP 15) provides criteria for including species under CITES Appendices I and II. Through the resolution, the parties have resolved that the status of species included in Appendices I and II should be regularly reviewed by the range countries and proponents, in collaboration with the CITES Animals Committee or Plants Committee, in order to monitor the effectiveness of CITES protections, subject to the availability of funds (CITES 2007a, p. 3).

At the international level, perhaps the most important ongoing conservation effort for the Morelet's crocodile is the agreement by the three range countries to develop and implement the Belize-Guatemala-Mexico Tri-national Strategy for the Conservation and Sustainable Management of Morelet's Crocodile (*Crocodylus moreletii*) (Estrategia Tri-nacional Belice-Guatemala-México para la Conservación y el Manejo Sostenible del Cocodrilo de Morelet (*Crocodylus moreletii*) (Tri-national Strategy) (Sánchez 2006).

This initiative began in June 2001, at Laguna del Tigre National Park, Petén, Guatemala, when representatives of the three countries met to discuss matters of mutual interest. A follow-up meeting attended by about 25 species experts and government officials from all three range countries took place in April 2006 (Mexico City, Mexico). Two working groups were formed: (1) Technical and Scientific Matters; and (2) Administration, Management, and Uses. Group members discussed technical issues for 2 days, and generated a series of products, commitments, and agreements. The first group produced or agreed to compile a series of documents, including distribution maps, survey techniques, scientific literature, and databases (e.g., geographic information system). The second group agreed to work toward a regional assessment of the conservation status of the Morelet's crocodile, as well as development and implementation of regional actions to improve the conservation status of the species (institutional capacity building, project development and implementation, and development of a regional captive-breeding program). The final product of the workshop was the development of ''Estrategia Regional para el Manejo y la Conservación del Cocodrilo de Morelet (*Crocodylus moreletii*) (Regional Strategy for the Management and Conservation of the Morelet's Crocodile) (Regional Strategy), found on pp. 43–53 of the Tri-national Strategy document (Sanchez 2006). This Regional Strategy outlines a series of objectives, products, and working protocols to accomplish the goals of the Tri-national Strategy. As these tasks are completed, they will significantly enhance the conservation status of the Morelet's crocodile.

According to Sánchez Herrera and Álvarez-Romero (2006), as a result of this initiative, the three range countries have agreed to implement the Regional

Strategy, which also includes monitoring the species. The three range countries plan to implement the Regional Strategy by:

(1) Conducting population surveys in defined priority areas using systematic and coordinated monitoring, with standardized fieldwork methods and techniques.

(2) Developing a shared biological and geographical information system.

(3) Identifying priority areas and routes for conservation and surveillance, along with those for future potential for ranching.

(4) Supporting and developing educational programs and outreach materials.

(5) Promoting personnel training and experience exchange, including field techniques and surveillance.

(6) Promoting species-friendly production projects such as closed-cycle farms (and eventually future ranching), along with the development of a legal regional market and a certification strategy for Morelet's crocodile products.

(7) Raising funds in support of the activities and tasks outlined in the Strategy (Sánchez Herrera and Álvarez-Romero 2006, p. 263).

In 2003, CONABIO requested the Natural History and Ecology Institute of Chiapas (IHNE) to develop a study on ''Determination of the status of the wild populations of the Morelet's crocodile (Crocodylus moreletii) in Mexico and evaluation of its status in CITES'' (called the CoPan Project) (CITES 2010a). The Government of Mexico is making efforts to design and implement a countrywide monitoring program for the populations and habitat of the Morelet's crocodile, including the possibility of involving Belize and Guatemala. The aim is to build on the experiences and results of the CoPan Project and the suggestions made at the 23rd meeting of the CITES Animals Committee (Geneva, April 2008, see the Animals Committee summary record labeled as document AC23) to obtain better information about the status and trends of relevant populations of the species and their habitat. The program will be developed in the framework of the Tri-national Strategy (CITES 2010a, p. 9). The Government of Mexico has established contacts with the Governments of Belize and Guatemala as part of the Tri-National Strategy (CITES 2008, p. 32).

Stage 1 of the project is currently under way. It aims to develop a preliminary design of the program, considering relevant areas in the range of the species. Ideally, areas could be selected in the three countries, based on the COPAN Project and subsequent studies. The design was reviewed and assessed in a 2010 workshop involving species experts and authorities, who agreed upon on the most appropriate methods and define time intervals, routes/localities and variables to take into account for crocodiles and their habitat. A manual was developed to ensure the effectiveness of fieldwork and training of staff. This stage also includes the design of a database where information will be organized and centralized (CITES 2010a, p. 9).

To date, the preliminary design proposes a monitoring effort with biannual sampling throughout the range of the species, with observations made in at least three routes per defined region (e.g., 12 regions in Mexico) using nighttime counts. In addition, one of the three routes per region will be selected for capture-mark-recapture of individuals and standard data/sample collection, as well as nest location and monitoring. Information obtained will make it possible to estimate relative abundance indices to detect variations in the population in time; determine the sex and age ratio and the general status and activity of individuals; and obtain data on the reproductive effort and success of the species, and on habitat critical for breeding (CITES 2010a, pp. 9–10).

Stage 2 will be implemented once the monitoring program has been published. It will consist of implementing the actions decided, including setting up and training the field teams; signing the relevant cooperation agreements; carrying out field work, and developing the database. Information stored in the database will be periodically analyzed to produce estimates of the population and its trends in the short, medium, and long term (CITES 2010a, pp. 9–10) (CITES 2010a, p. 10).

In Belize, Dr. Frank Mazzotti (University of Florida) is collaborating with the Belize Forestry Department to develop a national crocodile management program (The Croc Docs 2009, pp. 1–8). This project seeks to develop, in collaboration with the Lamanai Field Research Center, a monitoring program for these species. Along with the monitoring program, the project will develop a training program for government and nongovernment personnel in Belize so that the monitoring program can be maintained. This long-term program has great potential to provide ongoing conservation benefits to the Morelet's crocodile in Belize. However, recent information suggests that little progress has been made for this monitoring program in Belize, and it is currently in the process of being reactivated.

The Act requires the Service to monitor the status of the species in cooperation with the States. The Act defines the term ''State'' as ''any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.'' For species found entirely outside of the United States and therefore outside the areas defined as a ''State'' under the Act, we must cooperate with the species' range countries to meet the post-delisting monitoring requirements of the Act to ensure that the species will maintain its recovered status throughout its range after the protections of Act are removed. As the species experts, the range countries are best qualified to develop and implement a range-wide post-delisting monitoring plan for their species. When this rule becomes effective (see **DATES,** above), and the Morelet's crocodile is delisted under the Act, we will work with the range countries to monitor the status of the species throughout its range via the range countries' implementation of the existing monitoring requirements under CITES, the Tri-national Strategy, the Belizean monitoring program discussed above, and any additional monitoring plans that may be developed in the future.

Peer Review

In accordance with our joint peer review policy with the National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' that was published in the **Federal Register** on July 1, 1994 (59 FR 34270), and the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we sought the expert opinions of six independent specialists regarding the science in this rule. The purpose of peer review is to ensure that listing, reclassification, and delisting decisions are based on scientifically sound data, assumptions, and analyses. We sent copies of the April 27, 2011, proposed rule to the peer reviewers immediately following publication in the **Federal Register.** We invited these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions in the proposed delisting of the Morelet's crocodile. Although we solicited peer review from 6 peer reviewers, only 2 responded. We summarized the opinions of these 2 reviewers in this final rule, and considered their input and any additional information we received as

part of our process of making this final decision.

Required Determinations

Clarity of Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (a) Be logically organized; (b) Use the active voice to address readers directly; (c) Use clear language rather than jargon; (d) Be divided into short sections and sentences; and (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us page numbers and the names of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We have determined that we do not need to prepare an environmental assessment or environmental impact statement, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Endangered Species 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 the references used to develop this rule is available upon request from the Endangered Species Program in our Headquarters office (see **FOR FURTHER INFORMATION CONTACT** 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 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; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

§ 17.11 [Amended]

■ 2. Amend § 17.11(h) by removing the entry for ''Crocodile, Morelet's'' under ''REPTILES'' from the List of Endangered and Threatened Wildlife.

Dated: May 11, 2012.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2012–12263 Filed 5–22–12; 8:45 am]

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Part V

Environmental Protection Agency

Sixty-Ninth Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments; Notice

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2011–1020; FRL–9346–3]

Sixty-Ninth Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Toxic Substances Control Act (TSCA) Interagency Testing Committee (ITC) transmitted its 69th Report to the EPA Administrator on April 5, 2012. In the 69th ITC Report, which is included with this notice, the ITC is adding a category of cadmium compounds including any chemical that contains cadmium as part of that chemical's structure, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds (including 14 Action Plan chemicals and 55 related compounds) to the TSCA *Priority Testing List.* In addition, the ITC is removing 103 cadmium compounds and 14 High Production Volume (HPV) Challenge Program orphan chemicals from the *Priority Testing List* during this reporting period (June to November 2011). The ITC is adding the category of cadmium compounds and removing 103 cadmium compounds to provide a more comprehensive approach to assessing cadmium compounds' safety.

DATES: Comments must be received on or before June 22, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–1020, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2011–1020. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2011–1020. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Dr. John D. Walker, Interagency Testing Committee (7401M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–7527; fax number: (202) 564–7528; email address: *walker.johnd@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This notice is directed to the public in general. It may, however, be of particular interest to you if you manufacture (defined by statute to include import) and/or process TSCA-covered chemicals and you may be identified by the North American Industrial Classification System (NAICS) codes 325 and 32411. Because this notice is directed to the general public and other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or 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 EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

The Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 *et seq.*) authorizes the EPA Administrator to promulgate regulations under TSCA section 4(a) requiring testing of chemicals and chemical groups in order to develop data relevant to determining the risks that such chemicals and chemical groups may present to health or the environment. Section 4(e) of TSCA established the ITC to recommend chemicals and chemical groups to the EPA Administrator for priority testing consideration. Section 4(e) of TSCA directs the ITC to revise the TSCA section 4(e) *Priority Testing List* at least every 6 months.

You may access additional information about the ITC at *http://www.epa.gov/opptintr/itc.*

A. The 69th ITC Report

The ITC is adding a category of cadmium compounds including any chemical that contains cadmium as part of that chemical's structure, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds (including 14 Action Plan chemicals and 55 related compounds) to the TSCA section 4(e) *Priority Testing List.* In addition, the ITC is removing 103 cadmium compounds and 14 HPV Challenge Program orphan chemicals from the *Priority Testing List* during this reporting period (June to November 2011). The ITC is adding the category of cadmium compounds and removing 103 cadmium compounds to provide a more comprehensive approach to assessing cadmium compounds' safety.

B. Status of the Priority Testing List

The *Priority Testing List* includes 2 alkylphenols, 16 chemicals with insufficient dermal absorption rate data, and 164 HPV Challenge Program orphan chemicals, a category of cadmium compounds including any chemical that contains cadmium as part of that chemical's structure, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds (including 14 Action Plan chemicals and 55 related compounds).

List of Subjects

Environmental protection, Chemicals, Hazardous substances.

Dated: May 15, 2012.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

Sixty-Ninth Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency

Table of Contents

Summary

The ITC is adding a category of cadmium compounds including any chemical that contains cadmium as part of that chemical's structure, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds (including 14 Action Plan chemicals and 55 related compounds) to the Toxic Substances Control Act (TSCA) section 4(e) *Priority Testing List.* In addition, the ITC is also removing 103 cadmium compounds and 14 High Production Volume (HPV) Challenge Program orphan chemicals from the *Priority Testing List* during this reporting period (June to November 2011). The ITC is adding the category of cadmium compounds and removing 103 cadmium compounds to provide a more comprehensive approach to assessing cadmium compounds' safety.

The TSCA section 4(e) *Priority Testing List* is Table 1 of this unit.

TABLE 1—TSCA SECTION 4(E) PRIORITY TESTING LIST

[November 2011]

ITC Report	Date	Chemical name/group	Action
31	January 1993	2 Chemicals with insufficient dermal absorption rate data, methylcyclohexane and cyclopentane.	Designated.
32	May 1993	10 Chemicals with insufficient dermal absorption rate data	Designated.
35	November 1994	4 Chemicals with insufficient dermal absorption rate data, cyclopentadiene, formamide, 1,2,3-trichloropropane and *m*-nitrotoluene.	Designated.
37	November 1995	Branched 4-nonylphenol (mixed isomers)	Recommended.

TABLE 1—TSCA SECTION 4(E) PRIORITY TESTING LIST—Continued

[November 2011]

ITC Report	Date	Chemical name/group	Action
41	November 1997	Phenol, 4-(1,1,3,3-tetramethylbutyl)-	Recommended.
55	December 2004	161 High Production Volume (HPV) Challenge Program orphan chemicals	Recommended.
56	August 2005	3 HPV Challenge Program orphan chemicals	Recommended.
68	May 2011	Cadmium	Recommended.
69	November 2011	Cadmium compounds	Recommended.
69	November 2011	6 Non-phthalate plasticizers	Recommended.
69	November 2011	25 Phosphate ester flame retardants	Recommended.
69	November 2011	2 Other flame retardants	Recommended.
69	November 2011	9 Chemicals to which children living near hazardous waste sites may be exposed	Recommended.
69	November 2011	69 Diisocyanates and related compounds	Recommended.

I. Background

The ITC was established by TSCA section 4(e) ''to make recommendations to the Administrator respecting the chemical substances and mixtures to which the Administrator should give priority consideration for the promulgation of rules for testing under section 4(a). * * * At least every six months * * *, the Committee shall make such revisions to the *Priority Testing List* as it determines to be necessary and transmit them to the Administrator together with the Committee's reasons for the revisions'' (Public Law 94–469, 90 Stat. 2003 *et seq.,* 15 U.S.C. 2601 *et seq.*). ITC reports are available from *regulations.gov* (*http://www.regulations.gov*) after publication in the **Federal Register**. The ITC produces its revisions to the *Priority Testing List* with administrative and technical support from the ITC staff, ITC members, and their U.S. Government organizations, and contract support provided by the Environmental Protection Agency (EPA). ITC members and staff are listed at the end of this report.

II. TSCA Section 8 Reporting

A. TSCA Section 8 Reporting Rules

Following receipt of the ITC's report (and the revised *Priority Testing List*) by the EPA Administrator, EPA's Office of Pollution Prevention and Toxics (OPPT) may add the chemicals from the revised *Priority Testing List* to the TSCA section 8(a) Preliminary Assessment Information Reporting (PAIR) rule (40 CFR part 712) and/or the TSCA section 8(d) Health and Safety Data Reporting (HaSDR) rule (40 CFR part 716). The PAIR rule requires manufacturers (including importers) of chemicals added to the *Priority Testing List* to submit to EPA certain production and exposure information (*http://www.epa.gov/oppt/chemtest/pubs/pairform.pdf*). As provided for in the PAIR rule, whenever EPA announces the receipt of an ITC report, EPA amends, unless otherwise instructed by the ITC, the PAIR rule by adding the recommended (or designated) chemicals that have been added to the *Priority Testing List* by the ITC.

The HaSDR rule requires certain past, current, and proposed manufacturers, importers, and (if specified by EPA) processors of listed chemicals to submit to EPA copies and lists of unpublished health and safety studies on the listed chemicals that they manufacture, import, or (if specified by EPA) process. As provided for in the HaSDR rule, whenever EPA announces the receipt of an ITC report, EPA amends, unless otherwise instructed by the ITC, the HaSDR rule by adding the recommended (or designated) chemicals that have been added to the *Priority Testing List* by the ITC.

B. ITC's Use of TSCA Section 8 and Other Information

The ITC's use of TSCA section 8 and other information is described in the 52nd ITC Report (Ref. 1).

C. New Request To Add Chemicals to the TSCA Section 8(d) HaSDR Rule

The ITC is requesting that EPA add a category of cadmium compounds including any chemical that contains cadmium as part of that chemical's structure, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds to the TSCA section 8(d) HaSDR rule. The category of cadmium compounds, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds are discussed in section IV of this report.

III. ITC's Activities During This Reporting Period (June to November 2011)

During this reporting period, the ITC discussed the need to expand the definition of the cadmium compounds beyond the 103 cadmium compounds recommended in the 68th ITC Report (Ref. 2). As a result the ITC is recommending a category of cadmium compounds including any chemical that contains cadmium as part of that chemical's structure and removing the 103 cadmium compounds from the *Priority Testing List*. The ITC is adding the category of cadmium compounds and removing 103 cadmium compounds to provide a more comprehensive approach to assessing cadmium compounds' safety.

In addition, the ITC discussed the use of TSCA section 8(d) to obtain biomonitoring data. As a result of these discussions, the ITC is adding 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, and 9 chemicals to which children living near hazardous waste sites may be exposed to the *Priority Testing List* and asking EPA to add these chemicals to the TSCA section 8(d) HaSDR rule to obtain biomonitoring data. The ITC also discussed adding a category of 69 diisocyanates and related compounds to the *Priority Testing List* and to the TSCA section 8(d) HaSDR rule to facilitate EPA's ability to obtain existing studies. Finally, the ITC discussed EPA's Notice of Proposed Rulemaking (NPRM) for HPV Challenge Program chemicals (Ref. 3). As a result of these discussions the ITC is removing 14 HPV Challenge Program orphan chemicals from the *Priority Testing List*.

IV. Revisions to the TSCA Section 4(e) *Priority Testing List*

A. Chemicals Added to the Priority Testing List

1. *Cadmium compounds*—i. *Recommendation*. The EPA and the

Consumer Product Safety Commission (CPSC) request that the ITC add the category cadmium compounds to the *Priority Testing List* to obtain health and safety studies on cadmium compounds that are present in any consumer product. The cadmium compounds category includes any chemical that contains cadmium as part of that chemical's structure.

ii. *Rationale for recommendation.* The EPA and the CPSC are concerned with the content of cadmium and cadmium compounds in certain children's toys, jewelry, and other consumer products due to known toxicity and health concerns from exposure to cadmium and cadmium compounds. The EPA has expanded the cadmium compounds category to include any chemical that contains cadmium as part of that chemical's structure to capture information on more than the 103 cadmium compounds listed in the 68th ITC Report (Ref. 2). Cadmium remains on the *Priority Testing List* as recommended in the 68th ITC Report.

iii. *Supporting information.* The supporting information for cadmium and cadmium compounds is described in the 68th ITC Report. However, the supporting information for this report is for cadmium and cadmium compounds, not cadmium or cadmium compounds.

iv. *Information needs.* EPA and CPSC need health and safety studies for assessing the extent and degree of exposure and potential hazard associated with cadmium and cadmium compounds including: Epidemiological or clinical studies; occupational exposure, health effects, and ecological effects studies; and environmental fate studies (including relevant physical chemical properties).

For example, EPA and CPSC need studies about the total amount of cadmium and cadmium compounds contained in a product, the solubility, and bioavailability of cadmium and cadmium compounds (including accessibility of cadmium and cadmium compounds to children and studies of the age and foreseeable behavior of children exposed to a product for children and/or children's toys), the foreseeable duration and route of potential cadmium and cadmium compounds exposure through contact with products, and studies on the marketing, patterns of use, and lifecycle of cadmium-containing products.

2. *Non-phthalate plasticizers, phosphate ester flame retardants, and other flame retardants*—i. *Recommendation.* The CPSC requests that the ITC add 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, and 2 other flame retardants to the *Priority Testing List* to obtain biomonitoring studies on the identity and quantity of urinary metabolites. This recommendation is coordinated with the Agency for Toxic Substances and Disease Registry (ATSDR) and the National Institute of Environmental Health Sciences (NIEHS).

ii. *Rationale for recommendation.* The CPSC is requesting that 6 non-phthalate plasticizers be added to the *Priority Testing List* because they need biomonitoring data on urinary metabolites. Phthalate plasticizers are being replaced with non-phthalate plasticizers, such as acetyl tri-*n*-butyl citrate (Chemical Abstract Service Registry Number (CAS No.) 77–90–7); di(2-ethylhexyl) adipate (CAS No. 103–23–1); di(2-ethylhexyl) terephthalate (CAS No. 6422–86–2); 2,2,4-trimethyl-1,3-pentanediol diisobutyrate (CAS No. 6846–50–0); 1,2-cyclohexanedicarboxylic acid, 1,2-diisononyl ester (CAS No. 16612–78–8); and 1,2-cyclohexanedicarboxylic acid, 1,2-dinonyl ester, branched and linear ester (CAS No. 474919–59–0) (Table 2 of this unit). The 6 non-phthalate plasticizers identified in Table 2 of this unit are known to be used in children's products, including teething rings and soft plastic toys and have the potential to migrate from these products into human saliva.

In addition, the CPSC is requesting that 25 phosphate ester flame retardants and 2 other flame retardants be added to the *Priority Testing List* because they need biomonitoring data on urinary metabolites. The flame retardants identified in Tables 3A, 3B, and 4 of this unit are known to be used in upholstered furniture, automobile upholstery, and children's products such as car seats, play pens, and toys. These flame retardants are substitutes for pentabromodiphenyl ether, which was withdrawn from the market due to environmental and health concerns.

iii. *Supporting information*—a. *Non-phthalate plasticizers.* The non-phthalate plasticizer, di(2-ethylhexyl) adipate (CAS No. 103–23–1) was added to the *Priority Testing List* in the 28th ITC Report (Ref. 4). Di(2-ethylhexyl) adipate was recommended for chemical fate, ecological effects, and health effects testing because of extensive human and environmental exposures. Di(2-ethylhexyl) adipate was removed from the *Priority Testing List* in the 32nd ITC Report because manufacturers committed to develop dossiers and necessary test data under the Screening Information Data Set (SIDS) program of the Organization for Economic Cooperation and Development (OECD) (Ref. 5). Di(2-ethylhexyl) terephthalate (CAS No. 6422–86–2) was added to the *Priority Testing List* in the 11th ITC Report as bis(2-ethylhexyl) terephthalate (Ref. 6). Di(2-ethylhexyl) terephthalate was recommended for chemical fate, ecological effects, and health effects testing because of extensive human and environmental exposures. Di(2-ethylhexyl) terephthalate was removed from the *Priority Testing List* in the 13th ITC Report (Ref. 7). Di(2-ethylhexyl) terephthalate was removed because EPA developed a Negotiated Testing Agreement with the chemical's manufacturers to conduct the testing (Ref. 8). 2,2,4–Trimethyl-1,3-pentanediol diisobutyrate (CAS No. 6846–50–0) has been reviewed by OECD and a SIDS dossier has been developed (*http://www.inchem.org/documents/sids/sids/6846500.pdf*). 1,2–Cyclohexanedicarboxylic acid, 1,2-diisononyl ester (CAS No. 166412–78–8) is a plasticizer for ''PVC and other polar polymers and can be used in applications that are particularly sensitive from a toxicological point of view'' (*http://www2.basf.us/plasticizers/pdfs/Hex_DINCH_e_08_04.pdf*). 1,2-Cyclohexanedicarboxylic acid, 1,2-dinonyl ester, branched and linear (CAS No. 474919–59–0) is a plasticizer that is ''recommended for medical products, toys and food packaging applications.'' Dreyfus and Babich have demonstrated that all six of these non-phthalate plasticizers migrate into simulated saliva (Ref. 9).

b. *Phosphate ester flame retardants.* Tributyl phosphate (CAS No. 126–73–8) was recommended with intent to designate in the 18th ITC Report (Ref. 10). Tributyl phosphate was recommended for chemical fate, ecological effects, and health effects testing because of extensive human and environmental exposures. Tributyl phosphate was also added to the May 19, 1986 PAIR and HaSDR rules (Ref. 11). After reviewing extensive voluntary data submissions from manufacturers and reports submitted in response to the May 19, 1986 PAIR and HaSDR rules, the ITC designated tributyl phosphate for chemical fate, ecological effects, and health effects testing in the 19th ITC Report (Ref. 12). Tributyl phosphate was removed from the *Priority Testing List* in the 22nd ITC Report (Ref. 13). Tributyl phosphate was removed from the *Priority Testing List* because EPA proposed the testing designated by the ITC in a NPRM that was published on November 12, 1987 (Ref. 14). EPA required the testing designated by the ITC in a final rule published on August 14, 1989 (Ref. 15).

Tributyl phosphate (CAS No. 126–73–8), triisobutyl phosphate (CAS No. 126–

71–6) and tri(2-butoxyethyl) phosphate (CAS No. 78–51–3) were recommended for chemical fate testing and added to the *Priority Testing List* in the 26th ITC Report (Ref. 16). Tributyl phosphate was also recommended for ecological effects testing (plant toxicity testing) in the 26th ITC Report. Tributyl phosphate, triisobutyl phosphate, and tri(2-butoxyethyl) phosphate were added to the September 28, 1990 PAIR and HaSDR rules (Ref. 17). After reviewing reports and studies submitted in response to the September 28, 1990 PAIR and HaSDR rules, tributyl phosphate, triisobutyl phosphate and tri(2-butoxyethyl) phosphate were removed from the *Priority Testing List* in the 33rd ITC Report (Ref. 18). Tributyl phosphate was removed from the *Priority Testing List* because testing was being conducted in response to the August 14, 1989 final rule. Triisobutyl phosphate was removed from the *Priority Testing List* because it was not known to be domestically produced or imported in substantial quantities. Tri (2-butoxyethyl) phosphate was removed from the *Priority Testing List* because it was not a high priority for testing at that time.

Triphenyl phosphate (CAS No. 115–86–6) was added to the *Priority Testing List* in the 2nd ITC Report as one of the chemicals in the aryl phosphates category (Ref. 19). The testing recommendations for the aryl phosphates category included carcinogenicity, mutagenicity, teratogenicity, other chronic effects, environmental effects, and epidemiology. Triphenyl phosphate was added to the June 22, 1982 PAIR rule (Ref. 20) and the September 2, 1982 HaSDR rule (Ref. 21). Triphenyl phosphate was removed from the *Priority Testing List* in the 14th ITC Report (Ref. 22). Triphenyl phosphate was removed from the *Priority Testing List* because the aryl phosphates category was included in a December 29, 1983 Advanced Notice of Proposed Rulemaking (ANPRM) (Ref. 23). Triphenyl phosphate was also included in a January 17, 1992 NPRM (Ref. 24).

Tris(2-chloroethyl) phosphate (CAS No. 115–96–8) was added to the *Priority Testing List* in the 23rd ITC Report (Ref. 25). Tris(2-chloroethyl) phosphate was recommended for chemical fate and ecological effects testing. Tris(2-chloroethyl) phosphate was added to the November 16, 1988 PAIR and HaSDR rules (Ref. 26). After reviewing reports and studies submitted in response to the November 16, 1988 PAIR and HaSDR rules, tris(2-chloroethyl) phosphate was removed from the *Priority Testing List* in the 36th ITC Report (Ref. 27). Tris(2-chloroethyl) phosphate was removed from the *Priority Testing List* because the data or structure activity relationships considered by the ITC did not indicate a need for further testing at that time.

Tris(1,3-dichloro-2-propyl) phosphate (CAS No. 13674–87–8), tris(2-chloro-1-propyl) phosphate (CAS No. 6145–73–9), and tris(1-chloro-2-propyl)phosphate (CAS No. 13674–84–5) were added to the *Priority Testing List* in the 23rd ITC Report (Ref. 25). The 3 phosphate ester flame retardants were recommended for chemical fate, ecological effects, and health effects testing because of extensive human and environmental exposures. The three phosphate ester flame retardants were included in the November 16, 1988 PAIR and HaSDR rules (Ref. 26). Several chemical fate, ecological effects and health effects studies were submitted to EPA under the HaSDR rule. The sunset date for submitting studies under the HaSDR rule was December 16, 1998. The three phosphate ester flame retardants were removed from the *Priority Testing List* in the 36th ITC Report because the data or structure activity relationships considered by the ITC did not indicate a need to designate the chemicals for further testing at that time (Ref. 27). Tris(1,3-dichloro-2-propyl) phosphate has been identified as a probable human carcinogen, and tris(chloropropyl) phosphate (mixture of isomers), see Table 3B, an analog to tris(1,3-dichloro-2-propyl) phosphate, is being tested by the National Toxicology Program (NTP). The phosphate ester flame retardant bis(2-chloropropyl) (l-chloro-2-isopropyl) phosphate (CAS No. 76649–15–5) was added to the *Priority Testing List* in the 30th ITC Report (Ref. 28). Bis(2-chloropropyl) (l-chloro-2-isopropyl) phosphate is a component of tris(chloropropyl) phosphate (mixture of isomers). Bis(2-chloropropyl) (l-chloro-2-isopropyl) phosphate was recommended for chemical fate, ecological effects and health effects testing because of potential human and environmental exposures and included in the May 14, 1993 PAIR and HaSDR rules (Ref. 29). A few studies were submitted to EPA under the HaSDR rule. Bis(2-chloropropyl) (l-chloro-2-isopropyl) phosphate was removed from the *Priority Testing List* in the 36th ITC Report because the data or structure activity relationships considered by the ITC did not indicate a need to designate the chemical for further testing at that time (Ref. 27).

c. *Other flame retardants.* The Brominated Phthalates Panel of the American Chemistry Council submitted its test plan for bis(2-ethyl-1-hexyl) tetrabromophthalate (CAS No. 26040–51–7]) to the EPA's HPV Challenge Program on July 23, 2004 (*http://www.epa.gov/hpv/pubs/summaries/phthacid/c15484.pdf*). Partially as a result of this submission, there are numerous data available for bis(2-ethyl-1-hexyl) tetrabromophthalate (*http://iaspub.epa.gov/oppthpv/quicksearch.display?pChem=102247*). Toxicological data on 2-ethylhexyl-2,3,4,5-tetrabromobenzoate (CAS No.183658–27–7) could not be located by California's Office of Health Hazard Assessment (*http://oehha.ca.gov/multimedia/biomon/pdf/120408flamedoc.pdf*). Bis(2-ethly-1-hexyl) tetrabromophthalate and 2-ethylhexyl-2,3,4,5-tetrabromobenzoate are components of Firemaster®550, a flame-retardant substitute for pentabromodiphenyl ether.

iv. *Information needs.* The CPSC needs biomonitoring data on the identity and quantity of urinary metabolites for the 6 non-phthalate plasticizers, 25 phosphate ester flame retardants and 2 other flame retardants listed in Tables 2, 3A, 3B, and 4 of this unit. Specifically, CPSC is seeking information that would help to estimate human exposure to these compounds. First, CPSC needs studies on the metabolism of these compounds in animals or humans, including the identification of metabolites present in human urine, blood or other fluids. For the citrates and phosphates, urinary metabolites may include diesters; for adipate the metabolites may include the monoester. Second, CPSC needs studies that measure the amount of metabolite present in human urine or other media. Third, CPSC needs quantitative studies of metabolism in animals or humans that would allow one to estimate total exposure from metabolite levels.

TABLE 2—NON-PHTHALATE PLASTICIZERS BEING ADDED TO THE PRIORITY TESTING LIST

CAS No.	Plasticizer
77–90–7	1,2,3–Propanetricarboxylic acid, 2-(acetyloxy)-, tributyl ester; Acetyl tri-*n*-butyl citrate.

TABLE 2—NON-PHTHALATE PLASTICIZERS BEING ADDED TO THE PRIORITY TESTING LIST—Continued

CAS No.	Plasticizer
103–23–1	Hexanedioic acid, 1,6-bis(2-ethylhexyl) ester; Di(2-ethylhexyl) adipate.
6422–86–2	1,4–Benzenedicarboxylic acid, 1,4-bis(2-ethylhexyl) ester; Di(2-ethylhexyl) terephthalate.
6846–50–0	Propanoic acid, 2-methyl-, 1,1′-[2,2-dimethyl-1-(1-methylethyl)-1,3- propanediyl] ester; 2,2,4–Trimethyl-1,3-pentanediol diisobutyrate.
166412–78–8	1,2–Cyclohexanedicarboxylic acid, 1,2-diisononyl ester.
474919–59–0	1,2–Cyclohexanedicarboxylic acid, 1,2-dinonyl ester, branched and linear.

TABLE 3A—PHOSPHATE ESTER FLAME RETARDANTS BEING ADDED TO THE PRIORITY TESTING LIST

CAS No.	Flame retardant
78–40–0	Phosphoric acid, triethyl ester; Triethyl phosphate.
78–51–3	Ethanol, (2-butoxy-), 1,1′,1″-phosphate; Tri(2-butoxyethyl) phosphate.
115–86–6	Phosphoric acid, triphenyl ester; Triphenyl phosphate.
115–96–8	Ethanol, 2-chloro-, phosphate (3:1); Tris-(2-chloroethyl) phosphate.
126–71–6	Phosphoric acid, tris(2-methylpropyl) ester; Triisobutyl phosphate.
126–73–8	Phosphoric acid tributyl ester; Tributyl phosphate.
1241–94–7	Phosphoric acid, 2-ethylhexyl diphenyl ester; 2–Ethylhexyl diphenyl phosphate.
1330–78–5	Phosphoric acid, tris(methylphenyl) ester; Tricresyl phosphate, mixed isomers.
5945–33–5	Phosphoric acid, *P,P′*-[(1-methylethylidene)di-4, 1-phenylene] *P,P,P′P′*-tetraphenyl ester; Tetraphenyl Bisphenol A diphosphate.
6145–73–9	1–Propanol, 2-chloro-, 1,1′,1″-phosphate; Tris(2-chloro-1-propyl)phosphate.
13674–84–5	2–Propanol, 1-chloro-, 2,2′2″-phosphate; Tris(1-chloro-2-propyl) phosphate.
13674–87–8	2–Propanol, 1,3-dichloro-, phosphate (3:1); Tris(1,3-dichloro-2-propyl) phosphate.
25155–23–1	Phenol, dimethyl-, 1,1′,1‘‘-phosphate; Trixylyl phosphate.
26444–49–5	Phosphoric acid, methylphenyl diphenyl ester; Cresyl diphenyl phosphate.
29761–21–5	Phosphoric acid, isodecyl diphenyl ester; Isodecyl diphenyl phosphate.
38051–10–4	Phosphoric acid, *P,P′*-[2,2-bis(chloromethyl)-1,3-propanediyl] *P,P,P′P′*-tetrakis(2-chloroethyl) ester; 2,2–Bis(chloromethyl)-1,3-propanediyl tetrakis(2-chloroethyl) phosphate.
56803–37–3	Phosphoric acid, (1,1-dimethylethyl)phenyl diphenyl ester; tert-Butylphenyl diphenyl phosphate.
65652–41–7	Phosphoric acid, bis[(1,1-dimethylethyl)phenyl] phenyl ester; Bis (tert-butylphenyl) phenyl phosphate.
68937–41–7	Phenol, isopropylated, phosphate (3:1); Isopropylated triphenyl phosphate.
68937–40–6	Phenol, isobutylenated, phosphate (3:1); Isobutylated phenol phosphate.
76025–08–6	Phosphoric acid, bis(2-chloro-1-methylethyl) 2-chloropropyl ester; Bis(1-chloro-2-isopropyl) (2-chloropropyl) phosphate.
76649–15–5	Phosphoric acid, 2-chloro-1-methylethyl bis(2-chloropropyl) ester; Bis(2-chloropropyl) (l-chloro-2-isopropyl) phosphate.
181028–79–5	Phosphoric trichloride, reaction products with bisphenol *A* and phenol; Bisphenol *A* diphosphate.
220352–35–2	Phenol, tert-Bu derivs., phosphates (3:1); Butylated triphenyl phosphate.

TABLE 3B—THE PHOSPHATE ESTER FLAME RETARDANT, TRIS(CHLOROPROPYL) PHOSPHATE (MIXTURE OF ISOMERS), BEING ADDED TO THE PRIORITY TESTING LIST

CAS No.	Tris(Chloropropyl) phosphate isomers
6145–73–9	1–Propanol, 2-chloro-, 1,1′,1″-phosphate.
13674–84–5	2–Propanol, 1-chloro-, 2,2′,2″-phosphate.
76025–08–6	Phosphoric acid, bis(2-chloro-1-methylethyl) 2-chloropropyl ester.
76649–15–5	Phosphoric acid, 2-chloro-1-methylethyl bis(2-chloropropyl) ester.

TABLE 4—OTHER FLAME RETARDANTS BEING ADDED TO THE PRIORITY TESTING LIST

CAS No.	Flame retardant
26040–51–7	1,2–Benzenedicarboxylic acid, 3,4,5,6-tetrabromo-, 1,2-bis(2-ethylhexyl) ester; Bis(2-ethly-1-hexyl) tetrabromophthalate.
183658–27–7	Benzoic acid, 2,3,4,5-tetrabromo-, 2-ethylhexyl ester; 2–Ethylhexyl-2,3,4,5-tetrabromobenzoate.

3. *Chemicals to which children living near hazardous waste sites may be exposed*—i. *Recommendation.* ATSDR requests that the ITC add nine chemicals to which children living near hazardous waste sites may be exposed to the *Priority Testing List* to obtain biomonitoring studies on these chemicals.

ii. *Rationale for recommendation.* ATSDR is requesting nine chemicals to which children living near hazardous waste sites may be exposed be added to the *Priority Testing List* because children constitute a particularly vulnerable population of individuals, who, based upon their increased time outdoors and playtime behaviors, have a potentially higher than normal exposure to these chemicals around hazardous waste sites. For the chemicals in Table 5 of this unit, there is insufficient information available concerning both background levels and possible elevated exposure levels for children.

iii. *Supporting information.* ATSDR works closely with the Center for Disease Control and Prevention's National Center for Environmental Health (NCEH), (*http://www.cdc.gov/nceh*), in their biomonitoring program known as the National Report on Human Exposure to Environmental Chemicals (NHANES), (*http://www.cdc.gov/nchs/nhanes.htm/*). At least three of the chemicals in Table 5 of this unit have been included in past NHANES: 1,1-dichloroethane (CAS No. 75–34–3); 1,1,2,2-tetrachloroethane (CAS No. 79–34–5); and 1,2-dichloroethane (CAS No. 107–06–2). In the NHANES 2003–2004 subsample: 1,1-dichloroethane (CAS No.75–34–3); 1,1,2,2-tetrachloroethane (CAS No. 79–34–3); and 1,2-dichloroethane (CAS No. 107–06–2) were detectable in less than a few percent of the participants. In a non-representative sample of adults in NHANES III (1988–1994), blood levels were also non-detectable or detected in <10% of samples. ATSDR needs to know if children living near hazardous waste sites have elevated blood levels of the chemicals in Table 5 of this unit.

1,1-Dichloroethane was added to the *Priority Testing List* in the 32nd ITC Report because it was recommended for dermal absorption rate testing (Ref. 5). 1,1-Dichloroethane was also added to the *Priority Testing List* in the 55th ITC Report because it was a HPV chemical that was not sponsored for testing (Ref. 30). 1,1-Dichloroethane was removed from the *Priority Testing List* in the 56th ITC Report because it was no longer a HPV chemical (Ref. 31). 1,1-Dichloroethane's toxicity includes effects on the heart, such as irregular heartbeats, which prompted discontinuing its use as a surgical anesthetic. It is also known to cause kidney disease after long-term high exposure and has delayed growth in offspring of experimental animals exposed to high concentrations during pregnancy.

1,1,2,2-Tetrachloroethane has been observed to cause liver damage in experimental animals exposed to lower doses for long periods.

Benzidine (CAS No. 92–87–5), determined by the Department of Health and Human Services (HHS), World Health Organization (WHO) and EPA to be a carcinogen, can increase the risk of urinary bladder cancer in long term occupational exposures.

1,2-Dibromomethane (CAS No. 106–93–4) has been found to cause reproductive effects in some male workers including sperm damage. Experimental animal studies found birth defects in the young of animals exposed while *in utero.*

Acrolein (CAS No. 107–02–8) was added to the *Priority Testing List* in the 27th ITC Report as 1 of 89 aldehydes (Ref. 32). Acrolein was recommended for ecological effects testing because there were insufficient data to reasonably determine or predict the ecological effects of aldehydes that were submitted to the EPA as new chemicals. Acrolein was removed from the *Priority Testing List* in the 45th ITC Report (Ref. 33). Acrolein was removed because it was added to the OECD HPV Chemical Program (*http://webnet.oecd.org/Hpv/UI/SIDS_Details.aspx?id=6E4A94A8-0068-4088-8CF7-C193F61012D0*). Acrolein is a component of tobacco smoke and animal studies have found that inhaling it causes irritation to the nasal cavity and damage to the lining of lungs. Oral exposure through drinking water can cause stomach irritations, ulcers, and bleeding.

1,2-Dichloroethane (a.k.a. ethylene dichloride) was added to the *Priority Testing List* in the 35th ITC Report because it was recommended for dermal absorption rate testing (Ref. 34). 1,2-Dichloroethane was removed from the *Priority Testing List* in the 45th ITC Report (Ref. 33). 1,2-Dichloroethane was removed from the *Priority Testing List* because EPA published a June 9, 1999 NPRM for dermal absorption rate testing (Ref. 35). 1,2-Dichloroethane has been found to cause nervous system disorders, liver, and kidney disease and lung effects in humans ingesting or inhaling large amounts. It has also been found to cause kidney disease in experimental animals that ingested low doses.

Phenol (CAS No. 108–95–2) was added to the *Priority Testing List* in the 27th ITC Report because of its very high production volume, potential for release, and presence in commercial and consumer products (Ref. 32). Phenol was removed from the *Priority Testing List* because EPA proposed the testing designated by the ITC in a test rule that was published on November 22, 1993 (Ref. 36). Phenol, which is used as an antiseptic at low doses, can cause lung irritation, headaches and burnings eyes if inhaled at high doses. Repeated exposures can induce muscle tremors and loss of coordination, and high exposures in air for several weeks can cause paralysis, severe injury to the heart, liver, kidneys, and lungs.

Cresols (CAS No. 1319–77–3) were added to the *Priority Testing List* in the 1st ITC Report because their wide use as industrial solvents caused concerns for substantial occupational exposures (Ref. 37). Cresols were removed from the *Priority Testing List* in the 13th ITC Report (Ref. 7). Cresols were removed from the *Priority Testing List* because EPA proposed the testing designated by the ITC in a test rule that was published on July 11, 1983 (Ref. 38). Cresols were again added to the *Priority Testing List* in the 61st ITC Report to obtain dermal sensitization data (Ref. 39). Cresols were removed from the *Priority Testing List* in the 62nd ITC Report because the Cresols Panel of the American Chemistry Council submitted studies that met the ITC's data needs (Ref. 40). Cresols at high levels for even short exposures can cause irritation of the eyes, nose, and throat. Skin contact with high levels can burn the skin and can damage the kidneys, liver, blood, lungs, and brain. Experimental animal studies found lesions in the nose and thyroid gland via food exposure.

Exposure to large amounts of aluminum (CAS No. 7429–90–5) dust can cause lung problems and decreased performance in some tests that measure functions of the nervous system. Also, some people with kidney disease can store a lot of aluminum in their bodies and sometimes develop bone or brain diseases which may be caused by the excess aluminum.

iv. *Information needs.* For the chemicals listed in Table 5 of this unit, ATSDR needs blood levels in children not living near hazardous waste sites and in children living near hazardous waste sites. ATSDR needs these data to determine if the children living near hazardous waste sites have elevated levels of these chemicals and may be more susceptible to their toxic effects.

TABLE 5—CHEMICALS TO WHICH CHILDREN LIVING NEAR HAZARDOUS WASTE SITES MAY BE EXPOSED

CAS No.	Chemical
75–34–3	Ethane, 1,1-dichloro-; 1,1-Dichloroethane.
79–34–5	Ethane, 1,1,2,2-tetrachloro-; 1,1,2,2-Tetrachloroethane.
92–87–5	[1,1′-Biphenyl]-4,4′diamine; Benzidine.
106–93–4	Ethane, 1,2-dibromo-; 1,2-Dibromoethane.
107–02–8	2-Propenal; Acrolein.
107–06–2	Ethane, 1,2-dichloro-; 1,2-Dichloroethane.
108–95–2	Phenol.
1319–77–3	Phenol, methyl-; Cresol.
7429–90–5	Aluminum.

4. *Diisocyanates and related compounds*—i. *Recommendation.* The EPA requests that the ITC add the category of 69 diisocyanates and related compounds to the *Priority Testing List* to obtain use, fate, and exposure studies on uncured (unreacted) diisocyanates and their related compounds that are used in the manufacture of, and present in, products.

ii. *Rationale for recommendation.* EPA is concerned about diisocyanates and related compounds in the manufacture and use of products that may result in exposures to consumers, children, and the general population. Diisocyanates are well known dermal and inhalation sensitizers in the workplace and have been documented to cause asthma, lung damage, and in severe cases, fatal reactions. EPA is especially concerned about the potential health effects that may result from exposures to the consumer or self-employed worker while using products containing uncured diisocyanates (e.g., spray applied foam insulation (rigid foam), sealants, adhesives, paints, floor finishes, and coatings) and incidental exposures to the children and the general population while such products are used in or around buildings including homes or schools (for example on floors and athletic tracks) before the product has fully reacted and cured.

In April 2011, EPA published Action Plans for toluene diisocyanate (TDI) and 5 related compounds (*http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/tdi.pdf*) and methylene diphenyl diisocyanate (MDI) and 7 related compounds (*http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/mdi.pdf*). These Action Plans outline EPA's screening-level review of available hazard and exposure information on uncured (unreacted) MDI, TDI, and 12 additional related compounds. However, after further review, EPA recognizes that aspects of an exposure scenario to consumers are generally applicable to many diisocyanate compounds. Therefore, in addition to the 14 diisocyanates and related compounds listed in the Action Plans, EPA identified 29 aromatic and 26 aliphatic diisocyanate compounds, such as hexamethylene diisocyanate (HDI). These 29 aromatic and 26 aliphatic diisocyanate compounds are used in sealants, coatings, spray foams, elastomers or adhesives and may be substituted in such products for the 14 diisocyanates and related compounds listed in the Action Plans. The ITC is adding the 14 diisocyanates and related compounds listed in the Action Plans and the 29 aromatic and 26 aliphatic diisocyanate compounds to the *Priority Testing List* to provide a more comprehensive approach to assessing hazard and exposure information for diisocyanates and related compounds. The 14 diisocyanates and related compounds listed in the Action Plans and the 29 aromatic and 26 aliphatic diisocyanate compounds are identified in Table 6 of this unit.

ITC is recommending that the 69 diisocyanates and related compounds be added to the TSCA section 8(d) HaSDR rule to facilitate EPA's ability to obtain existing studies. Studies obtained on these chemicals may provide updated information from prior requests and assist EPA in taking appropriate action(s) to protect consumers, commercial workers, and other affected citizens from exposure to uncured diisocyanate-containing products during their use. In addition, any updated information may assist EPA in taking appropriate action(s) to protect bystanders and building occupants, including children from inadvertent exposure to diisocyanates and related compounds that might be released during and after application of diisocyanate-containing products.

The ITC recommended priority consideration of isocyanates as part of the 26th ITC Report (Ref. 16). EPA subsequently issued a TSCA section 8(d) HaSDR rule for these chemicals on September 28, 1990 (Ref. 17). Given the time elapsed since that reporting rule was issued, the changes in the industry, and the increased use of diisocyanate-containing products, EPA believes issuing another rule that would require reporting of unpublished health and safety studies that were not previously submitted is appropriate.

iii. *Supporting information*—a. *Health.* Most of the data on human health hazards resulting from diisocyanate exposures are based on occupational populations. These data indicate that exposure to diisocyanates can cause contact dermatitis, skin and respiratory tract irritation, immune sensitization, and asthma (Ref. 41). It is well documented that isocyanate exposure is an attributable cause of work-related asthma, and prevalence in the exposed workforce is estimated at 1–20% (Refs. 42 and 43).

Occupational skin exposures in workers exposed to MDI are of concern because isocyanate sensitization and/or asthma has occurred in cases where the potential for skin exposure is substantial, but measured airborne MDI monomer levels are below occupational exposure levels (OELs) or below the limits of detection with the methods used, or where similar MDI levels would be expected but MDI air monitoring data are not available (Refs. 44–48).

The minimum exposure to isocyanates that can elicit sensitization responses or asthma is not known. In addition, immune response and subsequent disease in humans can be quite variable (Ref. 49). Fatalities linked to occupational diisocyanate exposures in sensitized persons have been reported (Refs. 50 and 51).

Cross-sensitization has been observed between MDI, TDI, HDI, and dicyclohexylmethane diisocyanate (HMDI) in mice, and between MDI, TDI, and HDI in humans (Ref. 52).

Animal data indicate that MDI may be carcinogenic; however, a consistent association has not been reported in epidemiologic studies (Refs. 53 and 54). Animal data indicate that TDI may be carcinogenic (Ref. 55). HDI was negative

for carcinogenicity in a 2-year bioassay in rats (Ref. 56).

b. *Exposure.* In contrast to the large amount of exposure data available for professional workers who work with diisocyanates, EPA is hoping to obtain additional exposure data characterizing the use and exposure scenarios of consumer and commercial products containing uncured diisocyanates. In addition, comparing concentrations to which the consumer and general population is or can be exposed with existing workplace exposure limits to determine overexposure is not appropriate because the OSHA permissible exposure limits (PELs) are not intended to protect consumers and the general population (Ref. 49).

Until polyurethane products fully cure, there may be the potential for inhalation and dermal exposure. These exposures may result from direct use of products or from bystander exposure. The use of spray polyurethane foam insulation (rigid foam) products has resulted in personal and area air samples of MDI above the OSHA PEL (Refs. 57–60). Potential bystander exposures to TDI products have been found in the literature, including emissions of TDI from concrete patio sealants (Refs. 61 and 62). Levels of moisture curing polyurethanes, including TDI were found in air hallway samples of an apartment building when the moisture curing polyurethanes were being used (Ref. 63). There were emissions during emergency response of an overturned truck carrying TDI (Ref. 64), and para-occupational exposure for secretaries and janitors who worked in the vicinity of but not directly with TDI (Ref. 65).

Unbound aliphatic isocyanates used in coatings may remain on the surface of curing coating products, like paint, for up to several weeks (Ref. 47). In addition, there is potential for significant exposures to aliphatic isocyanates for direct users and bystanders in the auto refinishing and auto repair industry (Ref. 66).

Children exposed to the same airborne concentrations of MDI as adults may receive a larger dose because children take more breaths per minute and have a higher relative tidal volume. An accidental acute exposure of children to high levels of MDI in a polyurethane sealant used on a school athletic track was associated with asthma-like symptoms, including among children with no prior history of respiratory dysfunction (Ref. 67). Children with asthma are an especially vulnerable population for exposure; they are more susceptible to inflammatory narrowing of the airways, which results in a proportionally greater obstruction of their smaller respiratory system (Refs. 68 and 69).

Additional data characterizing the concentration of diisocyanates and related compounds in the air during and after use of products that may result in dermal, eye, or inhalation exposures to uncured diisocyanates will be helpful to the Agency. It would be helpful to receive additional information on the extent factors such as application techniques, product composition, ambient conditions, and method of measurement that influence the availability of uncured diisocyanates. EPA is also aware that there is uncertainty about the curing time of various products under different situations and that additional data could help address certain concerns, such as re-entry time, which are important for improving communication to prevent exposure.

c. *Ecotoxicity.* Although there is a moderate acute ecotoxicity profile for MDI and TDI, the hazards associated with exposures to these chemicals have centered on human health effects not ecological effects. Experimental ecotoxicological data for MDI and TDI and their degradation products indicate moderate to low toxicity to aquatic organisms (Refs. 57 and 70–73). Other toxicity data suggest low likelihood of effects to terrestrial biota such as plants and earthworms (Refs. 74 and 75).

iv. *Information needs.* Information is needed on diisocyanates and related compounds used to formulate a broad class of polyurethane products (e.g., sealants, adhesives, etc.) that are intended to further react upon end-use. Information is also needed on the percent of diisocyanates remaining, if any, in the final products, and/or studies that assess exposure to uncured (unreacted) diisocyanates. Studies are needed that provide information on the inhalation, dermal, and eye exposure potential and/or exposure levels for various populations; e.g., workers, consumers, bystanders, and building occupants, including children (through characterizing concentrations of diisocyanates in indoor air, outdoor air, blood, or urine) during and after use of products containing uncured diisocyanates. Studies are also needed on induction of sensitization, asthma development, other lung or health effects (irritation to the mucous membranes of the eyes and gastrointestinal and respiratory tracts, chest tightness, cough, nasal congestion, death), biomarkers of recent and long-term exposure to diisocyanates, and the contributory nature of skin exposure to the development of diisocyanate asthma.

Also needed are dermal exposure assessments in terms of dermal exposure potential and extent of exposure to diisocyanates during diisocyanate-containing product use in occupational as well as non-occupational (e.g., consumer use) settings. Although some techniques and methods have been developed to measure human skin exposure to diisocyanates, these techniques and methods have several limitations. Consequently studies that provide improved qualitative and quantitative methods for detecting and quantifying skin exposures to diisocyanates and any associated data on measured exposures are required. Studies investigating associations between dermal exposure to diisocyanates and individual differences in metabolism with biomarkers of exposure would also provide useful information for exposure assessment. Additionally, studies are needed that characterize uncured diisocyanate levels within products over time. Background conditions and information on frequency and duration (use patterns) to diisocyanates are also needed.

EPA is also interested in obtaining studies that contain information on sampling and analytical methods under development for dermal exposures; methods for assessing exposure to total reactive diisocyanates; methods and techniques to determine potential dermal exposure and uptake of diisocyanates through the skin; biological monitoring methods for estimating exposure to diisocyanates through all routes of exposure; and efficacy of currently used personal protective equipment in protecting workers and other populations during product use.

Specifically, EPA is interested in health and safety studies evaluating professional-, commercial-, and consumer-use products containing uncured diisocyanates with special emphasis on the following types of studies:

a. Inhalation monitoring studies characterizing potential worker and consumer exposures including associated airborne levels of total reactive diisocyanates and other chemicals.

b. Inhalation monitoring studies characterizing incidental exposures of bystanders and building occupants including associated airborne levels of total reactive diisocyanates and other chemicals.

c. Industrial hygiene or epidemiological assessments of dermal

exposure to uncured diisocyanate-containing products in occupational settings as well as for consumers, including impact of curing time on such exposures.

d. Studies focusing on the contributory nature of skin exposure to the development of diisocyanate asthma in workers, consumers, and the general population, including modification of skin uptake of polyisocyanates by co-exposure to solvents and other agents or by skin cuts/abrasions.

e. Epidemiological studies that address induction of sensitization and asthma development and other observed health effects in exposed populations including exposure-response relationships. Also of interest is a discussion of factors that impact these processes, physiological or otherwise.

f. Studies on advances in biomonitoring for sensitive biological markers of recent and long-term exposure to diisocyanates including studies that associate dermal exposure and individual differences in metabolism with biomarkers.

g. Studies on recent developments and refinements in specific qualitative and quantitative techniques and methods for dermal exposure assessment including and beyond those currently available (e.g., pads, wipes, and tape stripping methods).

h. Studies that have used emission testing protocols (environmental chambers) for sample testing that provide levels of uncured diisocyanates over time and associated curing rates in accordance with specific humidity and temperature levels and ventilation rates and/or building re-occupancy guidance after installation or use of products.

i. Studies that provide information on new or under development sampling and analytical methods for total reactive diisocyanates in diverse media (vapor, aerosol, dust, hard surfaces) including studies that provide details of industry methods.

j. Studies with information on testing protocols currently in use or in development for air monitoring, products testing, biomonitoring, or dermal exposure.

k. Field studies that report on ventilation rates in existing and new buildings and their relationship to detected airborne levels of chemicals.

l. Efficacy assessments of engineering control strategies such as dilution ventilation, local exhaust ventilation, and containment in reducing worker exposure as well as bystander/occupant exposure.

m. Efficacy assessments of personal protective equipment (PPE) used for exposure reduction, e.g., respirators, chemical protective suits, gloves, aprons, overalls used by workers, and for specific types of PPE that could be used by consumers or bystanders.

EPA needs the information described in Unit IV.A.4. iv.a. through m. on the diisocyanates and related compounds, which are listed in Table 6 of this unit.

TABLE 6—DIISOCYANATES AND RELATED COMPOUNDS

CAS No.	Chemical name	Action
91–08–7	Benzene, 1,3-diisocyanato-2-methyl-	A, B
91–97–4	1,1′-Biphenyl, 4,4′-diisocyanato-3,3′-dimethyl-	A, C
101–68–8	Benzene, 1,1′-methylenebis[4-isocyanato-	A, D
104–49–4	Benzene, 1,4-diisocyanato-	A, C
123–61–5	Benzene, 1,3-diisocyanato-	A, C
139–25–3	Benzene, 1,1′-methylenebis[4-isocyanato-3-methyl-	C
584–84–9	Benzene, 2,4-diisocyanato-1-methyl-	A, B
822–06–0	Hexane, 1,6-diisocyanato-	A, E
2422–91–5	Benzene, 1,1′,1″-methylidynetris[4-isocyanato-	A, C
2536–05–2	Benzene, 1,1′-methylenebis[2-isocyanato-	D
2778–42–9	Benzene, 1,3-bis(1-isocyanato-1-methylethyl)-	C
3173–72–6	Naphthalene, 1,5-diisocyanato-	C
3634–83–1	Benzene, 1,3-bis(isocyanatomethyl)-	C
3779–63–3	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris(6-isocyanatohexyl)-	E
4035–89–6	Imidodicarbonic diamide, N,N′,2-tris(6-isocyanatohexyl)-	A, E
4098–71–9	Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-	A, E
4128–73–8	Benzene, 1,1′-oxybis[4-isocyanato-	C
5124–30–1	Cyclohexane, 1,1′-methylenebis[4-isocyanato-	A, E
5873–54–1	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)methyl]-	A, D
7517–76–2	Cyclohexane, 1,4-diisocyanato-, trans-	E
9016–87–9	Isocyanic acid, polymethylenepolyphenylene ester	D
9017–01–0	Benzene, 1,3-diisocyanatomethyl-, homopolymer; TDI homopolymer	B
9019–85–6	Benzene, 1,3-diisocyanatomethyl-, trimer	C
10347–54–3	Cyclohexane, 1,4-bis(isocyanatomethyl)-	E
13622–90–7	Cyclohexane, 1,1′-methylenebis[4-isocyanato-, (trans,trans)-	E
15646–96–5	Hexane, 1,6-diisocyanato-2,4,4-trimethyl-	A, E
16325–38–5	Benzene, 1,2,4,5-tetrachloro-3,6-bis(isocyanatomethyl)-	C
16938–22–0	Hexane, 1,6-diisocyanato-2,2,4-trimethyl-	A, E
17589–24–1	1,3-Diazetidine-2,4-dione, 1,3-bis[4-[(4-isocyanatophenyl)methyl]phenyl]-	D
23370–68–5	1,3-Diazetidine-2,4-dione, 1,3-bis[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-	E
25686–28–6	Benzene, 1,1′-methylenebis[4-isocyanato-, homopolymer; MDI homopolymer	D
25854–16–4	Benzene, bis(isocyanatomethyl)-	A, C
26447–40–5	Benzene, 1,1′-methylenebis[isocyanato-	A, D
26471–62–5	Benzene, 1,3-diisocyanatomethyl-	A, B
26603–40–7	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris(3-isocyanatomethylphenyl)-	A, B
26747–90–0	1,3-Diazetidine-2,4-dione, 1,3-bis(3-isocyanatomethylphenyl)-	A, B
28182–81–2	Hexane, 1,6-diisocyanato-, homopolymer; hexamethylene diisocyanate (HDI) homopolymer	E
31107–36–5	1,3-Diazetidin-2-one, 1,3-bis[4-[(4-isocyanatophenyl)methyl]phenyl]-4-[[4-[(4-isocyanatophenyl) methyl]phenyl]imino]-.	D
38661–72–2	Cyclohexane, 1,3-bis(isocyanatomethyl)-	E
42170–25–2	Cyclohexane, bis(isocyanatomethyl)-	E
50639–37–7	2H-1,3,5-Oxadiazine-2,4,6(3H,5H)-trione, 3,5-bis(6-isocyanatohexyl)-	E

TABLE 6—DIISOCYANATES AND RELATED COMPOUNDS—Continued

CAS No.	Chemical name	Action
50830–59–6	1,3,4-Thiadiazole, 2-isocyanato-5-(trifluoromethyl)-, dimer	C
51508–06–6	1,3,4-Thiadiazole, 2-(1,1-dimethylethyl)-5-isocyanato-, dimer	C
53880–05–0	Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-, homopolymer; Isophorone diisocyanate homopolymer.	E
55525–54–7	Urea, N,N′-bis[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-	E
60732–52–7	Carbamic acid, *N,N′*-(3-isocyanatomethylphenyl)-, *C,C′*-(oxydi-2,1-ethanediyl) ester	C
65087–21–0	Carbamic acid, *N*-[4-[(4-isocyanatocyclohexyl)methyl]cyclohexyl]-, *C,C′*-(oxydi-2,1-ethanediyl) ester	E
65104–99–6	Imidodicarbonic diamide, 2,2′-[methylenebis(2-chloro-4,1-phenylene)]bis[*N,N′*-bis(3-isocyanato-methylphenyl)-.	C
65105–00–2	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-(1-methyl-1,3-propanediyl) ester	C
65105–02–4	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-(1,4-butanediyl) ester	C
67873–91–0	1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-tris[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-	E
68083–39–6	Benzenamine, *N,N′*-methanetetraylbis[3-isocyanato-2,4,6-tris(1-methylethyl)-	C
68092–73–9	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-(1,2-ethanediyl) ester	C
68092–74–0	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-[oxybis(1-methyl-2,1-ethanediyl)] ester	C
68133–14–2	Carbamic acid, *N*-(3-isocyanatomethylphenyl)-, *C,C′*-[[[(diethoxyphosphinyl) methyl]imino]di-2,1-ethanediyl] ester.	C
68239–06–5	Cyclohexane, 2-heptyl-3,4-bis(9-isocyanatononyl)-1-pentyl-	A, E
68310–46–3	Hexanoic acid, [[2-ethyl-2-[[[[[5-isocyanato-1(or 5)-(methoxycarbonyl)pentyl] amino]carbonyl]oxy] methyl]-1,3-propanediyl]bis(oxycarbonylimino)]bis[isocyanato-, 1,1′-dimethyl ester.	E
68366–14–3	Carbamic acid, *N*-[5-isocyanato-2(or 4)-methylphenyl]-, *C,C′*-(1-methyl-1,3-propanediyl) ester	C
68555–56–6	1,3-Diazetidine-2,4-dione, 1,3-bis(4-isocyanato-3-methylphenyl)-	C
68975–84–8	Carbamic acid, *N*-[(5-isocyanato-1,3,3-trimethylcyclohexyl)methyl]-, *C,C′*-(oxydi-2,1-ethanediyl) ester	E
69878–18–8	Hexanoic acid, 2,6-diisocyanato-, 2-isocyanatoethyl ester	E
70024–76–9	Hexatriacontane, diisocyanato-, branched	E
70198–24–2	Undecane, 1,6,11-triisocyanato-	E
71130–76–2	Urea, *N*-(3-isocyanatomethylphenyl)-*N′*-[[[4-[[[(3-isocyanatomethylphenyl) amino]carbonyl]amino] phenyl]methyl]phenyl]-.	C
71832–70–7	Carbamic acid, *N*-[4-[(4-isocyanatophenyl)methyl]phenyl]-, *C,C′*-(oxydi-2,1-ethanediyl) ester	C
75790–84–0	Benzene, 2-isocyanato-4-[(4-isocyanatophenyl)methyl]-1-methyl-	C
75790–87–3	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)thio]-	C
85702–90–5	2,9,11,13-Tetraazanonadecanethioic acid, 19-isocyanato-11-(6-isocyanatohexyl)-10,12-dioxo-, *S*-[3-(trimethoxysilyl)propyl] ester.	E
106790–31–2	Benzenamine, 4-isocyanato-*N,N*-bis(4-isocyanatophenyl)-2,5-dimethoxy-	C

Notes: A—Previously added to the ITC's *Priority Testing List* in the 26th ITC Report (Ref. 16).
B—In the Toluene Diisocyanate (TDI) Action Plan (*http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/tdi.pdf*).
C—One of the 29 aromatic diisocyanate compounds.
D—In the Methylene Diphenyl Diisocyanate (MDI) Action Plan (*http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/mdi.pdf*).
E—One of the 26 aliphatic diisocyanate compounds.

B. Chemicals Removed From the Priority Testing List

1. *Cadmium compounds.* As a result of EPA's expanding the cadmium compounds category to include any chemical that contains cadmium as part of that chemical's structure, the ITC is removing 103 cadmium compounds, but not cadmium from the *Priority Testing List.* The 103 cadmium compounds were listed in the 68th ITC Report (Ref. 2).

2. *HPV Challenge Program orphan chemicals.* Two hundred seventy HPV Challenge Program orphan chemicals were added to the *Priority Testing List* in the 55th ITC Report (Ref. 30) and 5 were added to the *Priority Testing List* in the 56th ITC Report (Ref. 31).

Thirty HPV Challenge Program orphan chemicals were removed from the *Priority Testing List* in the 56th ITC Report (Ref. 31). Eight HPV Challenge Program orphan chemicals were removed from the *Priority Testing List* in the 58th ITC Report (Ref. 76). Thirty-five HPV Challenge Program orphan chemicals were removed from the *Priority Testing List* in the 61st ITC Report (Ref. 39). One HPV Challenge Program orphan chemical was removed from the *Priority Testing List* in the 63rd ITC Report (Ref. 77). Twenty-nine HPV Challenge Program orphan chemicals were removed from the *Priority Testing List* in the 68th ITC Report (Ref. 2).

Fourteen HPV Challenge Program orphan chemicals are being removed from the *Priority Testing List* because they were included in the EPA's October 21, 2011 TSCA section 4 proposed test rule (Ref. 3). These 14 HPV Challenge Program orphan chemicals are listed in Table 7 of this unit.

TABLE 7—FOURTEEN HPV CHALLENGE PROGRAM ORPHAN CHEMICALS BEING REMOVED FROM THE PRIORITY TESTING LIST

CAS No.	Chemical name
98–16–8	Benzenamine, 3-(trifluoromethyl)-.
124–63–0	Methanesulfonyl chloride.
460–00–4	Benzene, 1-bromo-4-fluoro-.
542–92–7	1,3-Cyclopentadiene.
928–72–3	Glycine, *N*-(carboxymethyl)-, disodium salt.
28106–30–1	Benzene, ethenylethyl-.
35203–06–6	Benzenamine, 2-ethyl-6-methyl-*N*-methylene-.

TABLE 7—FOURTEEN HPV CHALLENGE PROGRAM ORPHAN CHEMICALS BEING REMOVED FROM THE PRIORITY TESTING LIST—Continued

CAS No.	Chemical name
35203–08–8	Benzenamine, 2,6-diethyl-*N*-methylene-.
37734–45–5	Carbonochloridothioic acid, *S*-(phenylmethyl) ester.
37764–25–3	Acetamide, 2,2-dichloro-*N,N*-di-2-propenyl-.
65996–91–0	Distillates (coal tar), upper.
68153–60–6	Fatty acids, tall-oil, reaction products with diethylenetriamine, acetates.
68442–77–3	2-Butenediamide, (2E)-, N1,N4-bis[2-(4,5-dihydro-2-nortall-oil alkyl-1H-imidazol-1-yl)ethyl] derivs.
68909–77–3	Ethanol, 2,2′-oxybis-, reaction products with ammonia, morpholine derivs. Residues.

V. References

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VI. The TSCA Interagency Testing Committee

Statutory Organizations With Representatives

Department of Commerce, National Institute of Standards and Technology

Dianne L. Poster, Alternate.

Environmental Protection Agency

Robert W. Jones, Member.
John E. Schaeffer, Alternate.

National Institute of Environmental Health Sciences

Nigel Walker, Member.
Scott Masten, Alternate.

National Institute for Occupational Safety and Health

Gayle DeBord, Member.
Dennis W. Lynch, Alternate.

Occupational Safety and Health Administration

Thomas Nerad, Member.
Janet Carter, Alternate.

Liaison Organizations With Representatives

Agency for Toxic Substances and Disease Registry

Glenn D. Todd, Member.

Consumer Product Safety Commission

Dominique Johnson, Member.

Department of Agriculture

Clifford P. Rice, Member.

Department of Defense

Laurie E. Roszell, Member.

Department of the Interior

Barnett A. Rattner, Member.

Food and Drug Administration

Kirk Arvidson, Member.
Ronald F. Chanderbhan, Alternate.

ITC Staff

John D. Walker, Director.
Carol Savage, Administrative Assistant (NOWCC Employee).

TSCA Interagency Testing Committee (7401M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; email address: *savage.carol@epa.gov;* url: *http://www.epa.gov/opptintr/itc*.

[FR Doc. 2012–12493 Filed 5–22–12; 8:45 am]

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FEDERAL REGISTER

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No. 100 May 23, 2012

Part VI

The President

Federal Register
Vol. 77, No. 100
Wednesday, May 23, 2012

Presidential Documents

Title 3—

The President

Memorandum of May 17, 2012

Implementing the Prison Rape Elimination Act

Memorandum for the Heads of Executive Departments and Agencies

Sexual violence, against any victim, is an assault on human dignity and an affront to American values. The Prison Rape Elimination Act of 2003 (PREA) was enacted with bipartisan support and established a ''zero-tolerance standard'' for rape in prisons in the United States. 42 U.S.C. 15602(1).

My Administration, with leadership from the Department of Justice, has worked diligently to implement the principles set out in PREA. Today, the Attorney General finalized a rule adopting national standards to prevent, detect, and respond to prison rape. This rule expresses my Administration's conclusion that PREA applies to all Federal confinement facilities, including those operated by executive departments and agencies (agencies) other than the Department of Justice, whether administered by the Federal Government or by a private organization on behalf of the Federal Government.

Each agency is responsible for, and must be accountable for, the operations of its own confinement facilities, and each agency has extensive expertise regarding its own facilities, particularly those housing unique populations. Thus, each agency is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. To advance the goals of PREA, we must ensure that all agencies that operate confinement facilities adopt high standards to prevent, detect, and respond to sexual abuse. In addition to adopting such standards, the success of PREA in combating sexual abuse in confinement facilities will depend on effective agency and facility leadership and the development of an agency culture that prioritizes efforts to combat sexual abuse.

In order to implement PREA comprehensively across the Federal Government, I hereby direct all agencies with Federal confinement facilities that are not already subject to the Department of Justice's final rule to work with the Attorney General to propose, within 120 days of the date of this memorandum, any rules or procedures necessary to satisfy the requirements of PREA and to finalize any such rules or procedures within 240 days of their proposal.

This memorandum shall be implemented consistent with the requirements of Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments).

This memorandum 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 Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, May 17, 2012

[FR Doc. 2012–12743
Filed 5–22–12; 2:15 pm]
Billing code 3110–01–P

Presidential Documents

Proclamation 8823 of May 18, 2012

Armed Forces Day, 2012

By the President of the United States of America

A Proclamation

With every assignment and in every theater, America's men and women in uniform perform their duties with the utmost dignity, honor, and professionalism. Through their dauntless courage and dedication, they live up to our Nation's highest ideals in even the most perilous circumstances. On Armed Forces Day, we pay tribute to the unparalleled service of our Armed Forces and recall the extraordinary feats they accomplish in defense of our Nation.

As individuals, our service members set extraordinary examples of character for those whose freedom they protect. Together, they comprise the greatest force for freedom and security the world has ever known. From their earliest training to the thick of battle, they look to those with whom they stand shoulder-to-shoulder, knowing they rise and fall as one team. United in their love of country, they teach us the true meaning of words like duty, honor, and strength.

Not just leaders and troops, patriots and heroes, the members of our Armed Forces are also parents, spouses, partners, sons, and daughters. Their families are just as vital to their success as their brothers and sisters in arms, and our debt of gratitude extends to them as well. As we celebrate the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen who make our way of life possible, we also pay our deepest respect to their families, our missing, our wounded, and our fallen. Inspired by their service and humbled by their sacrifice, let us recommit to providing all those who have served our Nation the support they deserve.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, and Commander in Chief of the Armed Forces of the United States, continuing the precedent of my predecessors in office, do hereby proclaim the third Saturday of each May as Armed Forces Day.

I direct the Secretary of Defense on behalf of the Army, Navy, Air Force, and Marine Corps, and the Secretary of Homeland Security on behalf of the Coast Guard, to plan for appropriate observances each year, with the Secretary of Defense responsible for encouraging the participation and cooperation of civil authorities and private citizens.

I invite the Governors of the States, the Commonwealth of Puerto Rico, and other areas subject to the jurisdiction of the United States, to provide for the observance of Armed Forces Day within their jurisdiction each year in an appropriate manner designed to increase public understanding and appreciation of the Armed Forces of the United States. I also invite veterans, civic leaders, and organizations to join in the observance of Armed Forces Day.

Finally, I call upon all Americans to display the flag of the United States at their homes on Armed Forces Day, and I urge citizens to learn more about military service by attending and participating in the local observances of the day. I also encourage Americans to volunteer at organizations that provide support to our troops.

Proclamation 8681 of May 20, 2011, is hereby superseded.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of May, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2012–12748
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CFR PARTS AFFECTED DURING MAY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws*.

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H.R. 298/P.L. 112–107

To designate the facility of the United States Postal Service located at 500 East Whitestone Boulevard in Cedar Park, Texas, as the "Army Specialist Matthew Troy Morris Post Office Building". (May 15, 2012; 126 Stat. 328)

H.R. 1423/P.L. 112–108

To designate the facility of the United States Postal Service located at 115 4th Avenue Southwest in Ardmore, Oklahoma, as the "Specialist Michael E. Phillips Post Office". (May 15, 2012; 126 Stat. 329)

H.R. 2079/P.L. 112–109

To designate the facility of the United States Postal Service located at 10 Main Street in East Rockaway, New York, as the "John J. Cook Post Office". (May 15, 2012; 126 Stat. 330)

H.R. 2213/P.L. 112–110

To designate the facility of the United States Postal Service located at 801 West Eastport Street in Iuka, Mississippi, as the "Sergeant Jason W. Vaughn Post Office". (May 15, 2012; 126 Stat. 331)

H.R. 2244/P.L. 112–111

To designate the facility of the United States Postal Service located at 67 Castle Street in Geneva, New York, as the "Corporal Steven Blaine Riccione Post Office". (May 15, 2012; 126 Stat. 332)

H.R. 2660/P.L. 112–112

To designate the facility of the United States Postal Service located at 122 North Holderrieth Boulevard in Tomball, Texas, as the "Tomball Veterans Post Office". (May 15, 2012; 126 Stat. 333)

H.R. 2668/P.L. 112–113

Brian A. Terry Memorial Act (May 15, 2012; 126 Stat. 334)

H.R. 2767/P.L. 112–114

To designate the facility of the United States Postal Service located at 8 West Silver Street in Westfield, Massachusetts, as the "William T. Trant Post Office Building". (May 15, 2012; 126 Stat. 336)

H.R. 3004/P.L. 112–115

To designate the facility of the United States Postal Service located at 260 California Drive in Yountville, California, as the "Private First Class Alejandro R. Ruiz Post Office Building". (May 15, 2012; 126 Stat. 337)

H.R. 3246/P.L. 112–116

To designate the facility of the United States Postal Service located at 15455 Manchester Road in Ballwin, Missouri, as the "Specialist Peter J. Navarro Post Office Building". (May 15, 2012; 126 Stat. 338)

H.R. 3247/P.L. 112–117

To designate the facility of the United States Postal Service located at 1100 Town and Country Commons in Chesterfield, Missouri, as the "Lance Corporal Matthew P. Pathenos Post Office Building". (May 15, 2012; 126 Stat. 339)

H.R. 3248/P.L. 112–118

To designate the facility of the United States Postal Service located at 112 South 5th Street in Saint Charles, Missouri, as the "Lance Corporal Drew W. Weaver Post Office Building". (May 15, 2012; 126 Stat. 340)

S. 1302/P.L. 112–119

To authorize the Administrator of General Services to convey a parcel of real property in Tracy, California, to the City of Tracy. (May 15, 2012; 126 Stat. 341)

Last List April 12, 2012

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